APPENDIX 15

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Attorneys for Defendant
Western Cab Company

DISTRICT COURT

CLARK COUNTY, NEVADA

LAKSIRI PERERA, individually and on behalf of others similarly situated,

Plaintiffs,

v.

WESTERN CAB COMPANY,

Defendant.

Case No.: A-14-707425-C

Dept.: VII

REPLY IN SUPPORT OF MOTION TO DISMISS SECOND AMENDED COMPLAINT AND COUNTERMOTION REGARDING SETTING PERERA'S COUNTERMOTION TO AMEND THE COMPLAINT AND FOR SANCTIONS TO A DATE AFTER SEPTEMBER 3, 2015 WHEN THE OPPOSITION IS DUE

Date of Hearing: 08/27/15

Time of Hearing: 9:00 a.m.

I. INTRODUCTION

Perera's Opposition argues that Western Cab and its counsel have acted improperly, warranting the imposition of sanctions and/or judicial admonitions, as a result of their July 6, 2015, motion to dismiss Perera' June 16, 2015, Second Amended Complaint. Perera argues that since he has offered to withdraw the June 16, 2015, Second Amended Complaint and is seeking leave to file yet another Second Amended Complaint, Western Cab has no grounds to protest the already-filed Second Amended Complaint, and that Western Cab must file an answer. Perera's demands for sanctions and leave to file another Second Amended Complaint are legally and rationally

unsupportable.[1] More importantly, there is simply no good cause to allow amendment of a pleading to restate legally-barred claims, as here, and Perera's filed Second Amended Complaint should be dismissed without leave to file yet another Second Amended Complaint asserting the same claims on the same facts already rejected by the Court.

As demonstrated by Western Cab's motion and further below, Perera's Second Amended Complaint, in either its already-filed form or as proposed, fails to state a viable claim for relief as Perera (1) has no standing to enforce a claim for severance wages under NRS 608.040; (2) the Minimum Wage Amendment is unconstitutionally vague and affects ERISA plans and is preempted by ERISA and the ACA; and (3) punitive damages are unavailable as both of Perera's claims sound in contract. The Court should dismiss the Second Amended Compliant as filed, deny Perera's countermotion for leave to file yet another futile Second Amended Complaint and set the hearing on Perera's countermotion for a date after September 3, 2015, when Western Cab's opposition is due.

II. PERERA IS NOT ENTITLED TO ANY SANCTIONS AGAINST WESTERN CAB OR ITS COUNSEL AS PERERA MISCONSTRUES THE RECORD, THE NEVADA RULES OF CIVIL PROCEDURE AND THE COURT'S JUNE 16, 2015, DECISION AND ORDER AUTHORIZING THE FILING OF A SECOND AMENDED COMPLAINT IN THE FORM PRESENTED WITH ONLY THE CHANGES ORDERED

Perera has filed a Complaint, an Amended Complaint, and a Second Amended Complaint plus two additional proposed Second Amended Complaints, with the latest version attached as Exhibit A to his August 14, 2015, Opposition and Countermotion to Amend, as explained below:

Date	Plaintiff's Document
9/23/14	**Filed Complaint** alleging a class action and two claims, the first for back wages under the Minimum Wage Amendment and the second under NRS 608.040 for severance pay.
10/20/14	**Filed First Amended Complaint**, re-alleging the same two claims.
1/26/15	**Proposed Second Amended Complaint**, Exhibit "G" to Plaintiffs' Response to Defendant's Motion to Dismiss and Counter-Motion To Amend the Complaint and

[1] If anything, Perera would have to be seeking leave to file a Third Amended Complaint, but in the form proposed by Perera, that pleading would still violate the Court's June 16, 2015, Decision and Order.

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	Conduct Discovery under NRCP 56(f). The Proposed Second Amended Complaint named only Mr. Perera as a plaintiff and added new allegations based on fuel costs.
6/16/15	**Filed Second Amended Complaint**, adding yet another new Plaintiff, Irshad Ahmed, who was not identified in the Proposed Second Amended Complaint and was added without notice or the Court's consideration or authorization.
8/14/15	**Re-Proposed Second Amended Complaint**, adding yet a third Plaintiff, Michael Sargeant and Mr. Ahmed.

Consistent with Perera's record of repeatedly ignoring the Nevada Rules of Civil Procedure, the Eighth Judicial District Court Rules and the Court's Order, Perera argues at pp. 3 and 22 of his Opposition and Countermotion that Western Cab and its counsel must be sanctioned (possibly "in the form of a reprimand and warning" to counsel) because Western Cab "has not even answered the complaint in this case" which has now been pending for "almost one year without an answer" and that Defendant "should have answered the First Amended Complaint (it could still have raised its other claims for dismissal by motion simultaneously)". At p. 3 of the Opposition, Perera begins his argument by stating that despite having sought and obtained leave to file the Second Amended Complaint (which he filed in a form other than as presented for court approval and in violation of the Court's Decision and Order), he has now unilaterally withdrawn it and he now claims that the superseded First Amended Complaint is his operative pleading subject to his filing of yet another proposed version of the Second Amended Complaint which adds yet another plaintiff and does not make the changes directed by the Court's June 16, 2015, Decision and Order.

Perera's arguments show a complete misunderstanding and disregard of the Nevada Rules of Civil Procedure and the Court's authority. Perera's practice of filing serial Second Amended Complaints, all in violation of the Court's June 16, 2015, Order and EDCR 2.30, is improper and

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has resulted in unnecessary confusion and burdening of the record.[2] Neither Western Cab nor its counsel have responded improperly to Perera's pleadings and no sanctions, warning or reprimand of them is supported by the law or appropriate under the circumstances.

First, Perera fails to understand or acknowledge the variety of responses available to a defendant responding to a complaint under the Nevada Rules of Civil Procedure, *e.g*, by answer, affirmative defenses and counterclaims or third-party claims (NRCP 7(a)); or with a motion to dismiss for lack of jurisdiction, insufficiency of process or service of process, failure to state a claim, failure to join a necessary party under (NRCP 12(b)); or by a motion for judgment on the pleadings (NRCP 12(c)); or by a motion for more definite statement (NRCP 12(e); or by a motion to strike any redundant, immaterial, impertinent or scandalous matters (NRCP 12(f)); or by a motion for summary judgment by a defending party (NRCP 56(b)). Thus, there is not a sole acceptable response to a complaint under Nevada law, but a variety of responses, including motions

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[2] EDCR 2.30 provides:

Amended pleadings.

(a) A copy of a proposed amended pleading must be attached to any motion to amend the pleading. Unless otherwise permitted by the court, every pleading to which an amendment is submitted as a matter of right, or has been allowed by order of the court, must be re-typed or re-printed and filed so that it will be complete in itself, including exhibits, without reference to the superseded pleading. No pleading will be deemed to be amended until there has been compliance with this rule.

(b) All amended pleadings must contain copies of all exhibits referred to in such amended pleadings. A pleader may, upon ex parte application, obtain an order from the court directing the clerk to remove any exhibit attached to prior pleadings and attach the same to the amended pleading.

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challenging the sufficiency of the pleading form or the facts underlying its claims.[3]

Second, Perera fails to consider his own self-inflicted delays and confusion. Perera did not serve his original Complaint, but filed and served his First Amended Complaint on October 20, 2014, which Western Cab moved to dismiss on December 10, 2014. Even before that motion could be heard, Perera countermoved to amend, with the motion and countermotion to amend continued to March 12, 2015, resulting in the June 16, 2015, Decision and Order. Immediately upon entry of the Court's June 16, 2015, Order allowing amendment, Plaintiff filed another Second Amended Complaint which differed from his proposed pleading, did not conform to what was authorized by the Court's June 16, 2015, Order, and added a new plaintiff who was not the subject of Perera's original motion to amend. It is hardly surprising that Perera's unauthorized Second Amended Complaint prompted Western Cab's pending motion to dismiss. All of the delays and confusion of which Perera complains result from Perera's own failure to comply with the Court's Order and the

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[3] Oddly, Exhibit E to Perera's Response and Opposition is a copy of a September 19, 2011, Order of Affirmance of the Nevada Supreme Court in *Csomos v. Venetian Hotel*, a case in which Mr. Greenberg appeared as counsel for appellant, in which, at pp. 5-6, the Supreme Court explains Mr. Greenberg's failure to comply with the rules governing amended pleadings in that case, stating:

> Csomos did not have leave to amend his first complaint
> Csomos did not amend his complaint until almost four months after the Venetian's answer and did not move to amend. Both NRCP 15(a) and the Eighth Judicial District Court Rule 2.30 (EDCR) required leave from the district court for Csomos to amend the pleadings. The amended complaint fell outside the 20-day window for leave to amend as a matter of right under NRCP 15(a). EDCR 2.30 only allows for amendments as a matter of right or by court order. Csomos maintains he somehow secured telephonic permission from the judge's assistant to file his amended complaint, but the record does not include an order or stipulation to support this. Without an order permitting Csomos to amend the complaint, his unilateral filing of an amended complaint was improper. Therefore, his claims of wrongful interference with prospective economic advantage, conversion, unjust enrichment, fraud, quantum meruit, and relief for damages sustained as a third-party contract beneficiary are not properly before this court.

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Nevada Rules of Civil Procedure, instead filing self-authorized amended pleadings, even duplicating the title "Second Amended Complaint."

Third, Perera seems to believe that because he "advised defendant repeatedly, consents, unconditionally, to the withdrawal and striking of the Second Amended Complaint that was filed and served and agrees that the First Amended Complaint ... is the operative complaint," that Western Cab has been deprived of any right to respond with a motion to dismiss to the actually-filed Second Amended Complaint which does not conform with the Court's June 16, 2015, Decision and Order. Of course, Perera's demand that Western Cab answer the First Amended Complaint makes no sense given the fact that Perera is seeking leave to file yet another Second Amended Complaint.

Fourth, Western Cab's opposition to Perera's countermotion to amend the complaint and for sanctions is not due until September 3, 2015, pursuant to EDCR 2.20(f). When Western Cab's counsel requested that Perera's countermotion be reset to a date after the opposition was due, Perera's counsel refused. Exhibit 5. Therefore, Western Cab moves that this Court set Perera's countermotion for hearing on a date following September 3, 2015, when Western Cab will file its opposition to the countermotion.

Finally, Perera demands "material sanctions" or at least an admonishment or warning to Western Cab's counsel for purported "impropriety" in challenging Perera's filed Second Amended Complaint. Opposition/Countermotion, p. 22. But, Nevada law and the record in this case do not support the imposition of any penalties or sanctions against Western Cab or its counsel as Perera has failed to meet NRCP 11's prerequisites for the imposition of sanctions against counsel. Thus, NRCP 11(c)(1)(A) directs that a request for sanctions for improperly presented writings must be made by motion, not filed or presented to the court unless, within 21 days after service of the motion, the challenged paper, claim, defense, contention, allegation or denial is not withdrawn or properly protected. Perera has followed none of those mandatory prerequisites to an assessment of

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sanctions for a purportedly improper filing. In sum, Perera's counter- and/or cross-motion for sanctions[4] is improperly brought and without merit. Perera is not entitled to sanctions or to file yet another Second Amended Complaint.

III. PERERA LACKS STANDING TO PURSUE A PRIVATE CLAIM UNDER NRS 608.040

As explained in §II of Western Cab's motion, Perera lacks standing to pursue a claim for purported violation of NRS 608.040, as such a claim, in accordance with NRS 608.180, must be "enforced" and "prosecuted" solely by the Labor Commissioner. NRS 608.180 thus provides:

> **Enforcement of NRS 608.005 to 608.195, inclusive; prosecution.** ***The Labor Commissioner or the representative of the Labor Commissioner shall cause the provisions of NRS 608.005 to 608.195, inclusive, to be enforced,*** and upon notice from the Labor Commissioner or the representative:
>
> 1. The district attorney of any county in which a violation of these sections has occurred;
> 2. The Deputy Labor Commissioner, as provided in NRs 607.050;
> 3. The Attorney General, as provided in NRs 607.160 or 607.220; or
> 4. The special counsel, as provided in NRS 607.065,
>
> ***shall prosecute the action*** for enforcement according to law.

(Emphasis added.)

The Nevada Labor Commissioner's website contains a "Frequently Asked Questions" page (Exhibit 6) which describes the process whereby a potentially aggrieved Nevada employee may invoke the Labor Commissioner's processes, *e.g.*, by filing a complaint with the Labor Commissioner, not with a court:

> **Filing a Claim**
>
> I haven't been paid. What should I do?
>
> • First, ask the employer for what you are owed. Then, ***if you do not receive payment, you may file a complaint with the Office of the Labor Commissioner in Las Vegas or Carson City.*** For a copy of the wage claim form, click here.

(Emphasis added.) The Labor Commissioner's 2014 Biennial Report to the Governor and

[4] Plaintiff's response titles his request as a "Counter-Motion to Amend and for Sanctions" and his brief, at p. 22, titles it a "Cross Motion."

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Legislature Pursuant to NRS 607.080, July 1, 2014, Exhibit 7, also explains the functions of the Labor Commissioner's Office as to wage disputes, stating in part:

FUNCTION AND PURPOSE OF THE OFFICE

> .... ***The Office of the Labor Commissioner primarily handles wage and hour matters in private employment*** and on public works projects....
>
> * * *
>
> **Wage Claim Disputes**
> ***Resolution of wage disputes between employers and employees is the primary service provided by the Office of the Labor Commissioner.*** These disputes often relate to claims that an employee was not paid for all time worked, was not paid the appropriate overtime or **was not paid timely.**
>
> Due to the significant financial impact unpaid wages can have on Nevada workforce and their families, this office strives to resolve all claims as quickly as possible. To that end, it is our goal to complete 90% of all wage claim investigations within 90 days of opening the claim. An investigation is completed when money due to the worker is received, the wage claim is dismissed or a final order has been issued.
>
> In 2012 and 2013, the Office of the Labor Commissioner recovered over $4.5 million in wages and penalties for Nevada workers. To date, approximately 850 wage claims have been filed with over $650,000 in wages and penalties recovered in 2014.

(Emphasis added.) The legal process chosen by Perera here -- a private lawsuit brought in District Court alleging violation of purported statutory rights, all without the filing of a claim with the Labor Commissioner – is impermissible under NRS 608.180 and does not promote, but in fact impairs the plain purpose of NRS 608.040, which is to ensure regularity and uniformity in the enforcement of NRS Chapter 608 and secure prompt payment to Nevada workers. The statutory provisions of Chapter 608 are clear and have been enforced by numerous courts sitting in Nevada precisely as written, *e.g.*, dismissing private causes for severance wages under NRS 608.040.

For example, in June 2015, U.S. District Judge Robert C. Jones considered whether a private right of action for wages claimed for pre-clock-in and post-clock-out activities could be prosecuted in court regardless of the provisions of NRS 608.180. *Sheffer v. US Airways, Inc.*, 2015 WL 3458192, *3-4 (D. Nev. 2015), dismisses the claim without leave to amend, explaining:

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> Defendant argues that the second claim under NRS 608.020-050 is not privately actionable because NRS 608.140 does not imply a private right of action to enforce NRS 608.005-608.195. Rather, ***Plaintiff must seek redress from the Labor Commissioner.*** The Court agrees. *See Miranda v. O'Reilly Automotive Stores, Inc.*, No. 2:14-cv-878, 2014 WL 4231372, at *2-6 (D. Nev. Aug. 26, 2014) (Jones, J.); *Dannenbring v. Wynn Las Vegas, LLC*, 907 F.Supp.2d 1214, 1218-19 (D. Nev. 2013) (Mahan, J.); *Descutner v. Newmont USA Ltd.*, No. 3:12-cv-371, 2012 WL 5387703 (D. Nev. Nov. 1, 2012) (Jones, J.).
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> . . . . .
>
> ***First, the Labor Commissioner has the statutory authority and duty to hear and decide Plaintiff's claims administratively regardless of whether she chooses to institute a civil action.*** *See Baldonado v. Wynn Las Vegas, LLC*, 124 Nev. 951, 194 P.3d 96, 103-05 (2008). The fact that the Labor Commissioner would not provide counsel for Plaintiff to pursue her claims in court is therefore irrelevant to the issue of whether Plaintiff has any remedy via the Labor Commissioner. NRS 607.160(6) provides that the Labor Commissioner may 'cumulative[ly]' impose administrative penalties and institute civil actions. NRS 607.160(7) and 607.170(1)—cited by Plaintiff to show that the Labor Commissioner will not prosecute civil actions on behalf of complainants unless they are indigent—does nothing to abrogate the Labor Commissioner's power and duty to determine labor claims administratively and impose 'an administrative penalty or other administrative action' under NRS 607.160(6).
>
> Second, if Plaintiff means to argue that the Labor Commissioner refuses to hear and decide her complaint in his administrative capacity in violation of his statutory duties, her remedy is to seek a writ of mandamus under NRS 34.160 in the state courts. *See id.*, at 104 ('[W]e conclude that the labor statutes, including NRS 607.206 and NRS 607.207, require the Labor Commissioner to hear and decide complaints seeking enforcement of the labor laws.').

(Emphasis added.) *See also,* to the same effect, *Cardoza v. Bloomin' Brands, Inc.*, 2014 WL 3748641, at *2 (D. Nev. 2014) (Judge Jennifer Dorsey) ("NRS 608.140 did not create a private right of action for unpaid wages, it just authorizes the recovery of attorney fees in a suit for the recovery of wages due under the terms of employment"); *McDonagh v. Harrah's Las Vegas, Inc.*, 2014 WL 2742874, at *4 (D. Nev. 2014) (Judge James Mahan) (rejecting application of NRS 608.140 to imply a private right of action, stating, "Notably, NRS 608.180 charges the labor commissioner with enforcement of NRS 608.005-608.195, which this court finds persuasive to imply that no private rights of action exist for the included statutes"); *Gamble v. Boyd Gaming Corp.*, 2014 WL 2573899,

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at *4 (D. Nev. 2014) (Judge James Mahan) ("It is settled law that NRS §608.140 'does not imply a private remedy to enforce labor statutes, which impose external standards for wages and hours,' but only provides private rights of action for contractual claims").

Perera's attempt to distinguish *Baldonado v. Wynn Las Vegas, LLC*, 124 Nev. 951, 959-64, 194 P.3d 96, 101-04 (2008), on the grounds the source of the compensation was tips is completely unavailing as the basic principle remains the same: the worker has no private cause of action to enforce labor statutes in the district court. The Supreme Court's ***unanimous*** decision explains:

> ***In Nevada, the Legislature has entrusted the labor laws' enforcement to the Labor Commissioner, unless otherwise specified. With respect to NRS 608.160, the Legislature has expressly ordered the Labor Commissioner to enforce that statute....*** The Labor Commissioner may direct the district attorney, the Deputy Labor Commissioner, the Attorney General, or special counsel to 'prosecute the action for enforcement according to law.' Violators of NRS Chapter 608 are guilty of a misdemeanor and, '[i]n addition to any other remedy or penalty,' subject to an administrative penalty imposed by the Labor Commissioner.
>
> As other courts have recognized, ***when an administrative official is expressly charged with enforcing a section of laws, a private cause of action generally cannot be implied. Here, the fact that the Legislature has ordered the Labor Commissioner to enforce NRS 608.160 weighs heavily against finding any intent to create a private remedy.***

(Emphasis added.) 124 Nev. at 961, 194 P.3d at 102-103 (fns. omitted).

The Southern Nevada Building and Construction Trades Council tried to get S.B. 189 enacted in 2009. S.B. 189 specifically provided:

> Chapter 608 of NRS is hereby amended by adding thereto a new section to read as follows:
>
> 1. *Notwithstanding any other provision of this chapter or Chapter 607 of NRS, and in addition to any other remedy or penalty provided in this chapter, an employee may bring an action in a court of competent jurisdiction against an employer for a violation of NRS 608.015 to 608.155, inclusive, 608.165 or 608.170.*

The Nevada Legislature **rejected** S.B. 189 and **refused** to enact it.

The Senate Committee on Government Affairs on March 18, 2009, considered S.B. 189. Steve Ross, the Secretary-Treasurer of the Southern Nevada Building and Construction Trades

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Council, testified:

> I come before you today to speak in favor of S.B. 189 and the Southern Nevada Building and Construction Trades Council amendment to S.B. 189. Senate Bill 189 would clarify employees may enforce provisions of the labor laws dealing with wages and hours through private law suits. This clarification is necessary because of the Nevada Supreme Court's decision in *Baldonado v. Wynn Las Vegas,* 124 Nev. Adv. Op. No. 81 (Oct. 9, 2008) which held that the provision in the labor law dealing with tip-sharing could be enforced by the Labor Commissioner. While that part of the Supreme Court's decision was correct, language in the decision has cast doubt on whether employees may enforce other parts of NRS chapter 608. [Exhibit I], page 1.

Exhibit 8, pp. 13-14.

Steve Redlinger of the Southern Nevada Building and Construction Trades Council further testified:

> The *Baldonado* court decision said the Labor Commissioner would be sole finder in these types of decisions. In section 1, we want to clarify that individuals do have the inherent private right to action.

Exhibit 8, p. 18.

Robert A. Ostrovsky of the Nevada Resort Association testified as follows:

> The Nevada Resort Association opposes the changes suggested in section 1 on private rights of action in private employer setting. We have no position or objection on the section addressing prevailing wage. ***We support the existing state of the law, requesting we seek out an administrative remedy to these matters before we start clogging the courts with these cases. These administrative remedies are built into the statute for a purpose. They are the most efficient way of handling and disposing of disputes relating to many issues in the law, including those in NRS 608 which cover pay, uniforms, lunch breaks and the like.*** I was an adjudicator of many grievances with labor unions during my 25 years as a casino executive. Clearly, we understand there are many cases with merit; however, there are many cases without. ***The Labor Commissioner must sort through and decide which cases do have merit. It is best for most employees to seek an administrative remedy up to and including the Labor Commissioner's right to charge a person with a misdemeanor. A lot of appropriate authority is given to the Commissioner.*** If there is confusion over the effects of the Supreme Court issue, I am sure we can find ways to resolve it. It works in everyone's best interest that the employer and employee, who may have a claim, to understand the law and their rights. If this is a muddy picture, this is not good for either party. ***Lawsuits should be the exception, not the rule. Section 1, with language not requiring administrative procedures to be exhausted but only notify the Labor Commissioner, is an invitation to***

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> ***additional litigation for most matters, which can be easily resolved with presented facts. The Labor Commissioner is the correct person.*** If there is not sufficient staff, I will be the first person to address the Senate Committee on Finance or the Assembly Committee on Ways and Means to fund appropriate staffing and argue that ***administrative remedies save employers and employees a lot of money.***

Exhibit 8, pp. 24-25 (emphasis added). Mr. Ostrovsky further testified:

> The Labor Commissioner makes the decision to process the claim. If he does not, he tells the claimant, "Go hire an attorney and take the person to court." ***Where it gets muddy is if a person decides not to go to the Labor Commissioner, does not file a complaint of any kind and then goes to court under the provisions.*** As proposed, they would only have to notify the Commissioner with a copy of the complaint. This is in not in our best interest. If we want to codify the existing law—and I am not clear as to the private right of action—then we ought to clarify that. We are seeking clear water. ***The system has worked well for 20 to 30 years under the statutes in place.*** This is the first time we have faced this issue based on the new Supreme Court decision.

Exhibit 8, p. 25 (emphasis added). The Legislature **did not disavow** the historical practice. Since S.B. 189 did not pass, the interpretation of the existing law, historical practice, remains the law in Nevada today.

Plaintiff's reliance on *Csomos v. Venetian Casino Resort, LLC*, 2011 WL 4378744 (Nev. 2011), is improper under Nevada SCR 123, which states:

> **Rule 123. Citation to unpublished opinions and orders.** ***An unpublished opinion or order of the Nevada Supreme Court shall not be regarded as precedent and shall not be cited as legal authority*** except when the opinion or order is (1) relevant under the doctrines of law of the case, res judicata or collateral estoppel; (2) relevant to a criminal or disciplinary proceeding because it affects the same defendant or respondent in another such proceeding; or (3) relevant to an analysis of whether recommended discipline is consistent with previous discipline orders appear in the state bar publication.

(Emphasis added.) No exception under SCR 123 applies here. Moreover, *Csomos* discusses NRS 608.040, but does not grant relief according to it for lack of proof. *Id.*, at *3. Instead, it affirms District Judge Walsh's dismissal of the plaintiff's proceedings as insufficient. Finally, U.S. District Judge Jones analyzed the superficiality and non-binding nature of *Csomos* in *Miranda v. O'Reilly Automotive Stores, Inc.*, 2014 WL 4231372, *6 (D. Nev. 2014), explaining:

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The Nevada Legislature could easily have amended section 608.140 after the adoption of the wage and overtime laws in such a way as to permit a court to imply a private right of action under those laws, or it could have amended the statutes explicitly to provide for a private right of action, but it has done neither. Also, under appropriate circumstances, a law implying a private right of action could extend to laws not yet written. For example, a law could provide for fee shifting broadly in 'all actions for wages.' Such a statute would fairly apply to future statutory wage claims despite the fact that the authors did not envision such laws. But in this case, where the statute is not so broad, it is not reasonable to imply from section 608.140 a private right of action under yet-to-be-written wage and overtime statutes at a time when no such statutes existed in the State or even nationally, particularly not where the Commissioner was given explicit administrative authority to enforce the laws when they were later adopted. Even if the authors of section 608.140 had subjectively intended, i.e., if a majority of them had so intended, along with the Governor, to provide for a private right of action under yet-to-be-written wage and overtime laws, they simply failed to accomplish that result when they adopted a statute that cannot reasonably be read to provide for this. It does not matter that one might think the Legislature in 1925 would have wanted to include statutory wage claims within the implication had it anticipated such regulations. ***That is not the law the State enacted.*** A ball is not a strike simply because the pitcher meant to throw one (or would have attempted to throw one had he had more information). Batters have to deal with pitches as they arrive at the plate, and umpires must therefore in fairness call pitches as they arrive at the plate. ***The law the Legislature enacted in this case contains the qualifying phrase 'according to the terms of his or her employment,' and the Court must give these words effect if at all possible; it cannot read the language out of the statute based upon its guess as to what the Legislature and Governor would have agreed to had they in fact considered it.***

The Nevada Supreme Court has not yet performed this analysis in a reported case where the result mattered, though it has noted in dicta and in unpublished cases that there is a private right of action (of some scope) under section 608.140. *See, e.g., Baldonado*, 194 P.3d at 104 n. 33; *Csomos v. Venetian Casino Resort, LLC*, No. 55203, 2011 WL 4378744, at *2-3 (Nev. Sept. 9, 2011) (noting in an unpublished opinion that section 608.140 implies a private right of action to recover wages but not addressing the scope of the implied right of action). Although the *Buenaventura* court previously ruled contrary to this Court, another court of this District has since adopted this Court's analysis in a reported decision. *See Dannenbring v. Wynn Las Vegas, LLC*, 907 F.Supp.2d 1214, 1218-19 (D. Nev. 2013) (Mahan, J.). None of the unpublished federal or state cases ruling otherwise to which Plaintiff cites have given significant attention to the critical issue, i.e., the intent of the Legislature. The cases to the contrary typically note that section 608.140 permits a private right of action, and then conclude, without the kind of analysis this Court performed in *Descutner*, that the statute necessarily implies a private right of action to enforce any kind of labor law. That non sequitur is inconsistent with the rule of *Baldonado* as applied to the legislative history. In conclusion, ***because the private right of action that can be implied under 608.140 only reasonably includes pre-wage-and-overtime-law***

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> ***contractual claims, the Court is inclined to dismiss the third through fifth claims under sections 608.015, 608.018, and 608.020-.050***

(Emphasis added.)

The existence of NRS 608.140, enacted in 1925, does not compel any result other than that stated by Western Cab. Perera's claim under NRS 608.040 depends on a statutory remedy and not on a contract right. Simply put, NRS 608.140 does not deny a plaintiff employee the right to enforce a contract and possibly recover attorney fees if successful. That statute states:

> Whenever a mechanic, artisan, miner, laborer, servant or employee shall have cause to bring suit for wages earned and due according to the terms of his or her employment, and shall establish by decision of the court or verdict of the jury that the amount for which he or she has brought suit is justly due, and that a demand has been made, in writing, at least 5 days before the suit was brought for a sum not to exceed the amount so found due, the court before which the case is tried shall allow to the plaintiff a reasonable attorney fee, in addition to the amount found due for wages and penalties, to be taxed as costs of suit.

Resolving precisely the arguments made by Perera in this case, U.S. District Court Judge Mahan, in *Dannenbring v. Wynn Las Vegas, LLC*, 907 F.Supp.2d 1214, 1219 (D. Nev. 2013), *citing* Judge Jones' decision in *Descutner v. Newmont USA Ltd.*, 2012 WL 5387703 (D. Nev. 2012), explained that NRS 608.140 "implies a private right of action to recover in contract only." *Descutner*, *id.*, at *4, focuses on the setting of the "pre-New Deal" NRS 608.140, explaining why it does not make NRS 608.005 to 608.195, subject to private enforcement:

> That pre-New Deal statute not only predates Nevada's overtime laws by fifty years, ...it also predates federal wage and overtime laws by over a decade... ***Section 608.140 cannot have meant to the People of Nevada in 1925 that there was a private right of action under state wage and overtime laws not to be enacted until 1975.*** Overtime laws—and in fact virtually any kind of wage laws—were still a matter of fiction when section 608.140 was adopted. Taking into consideration the 'according to the terms of ... employment' language of section 608.140, and what that language meant objectively when it was written, ***the statute implies only a traditional contractual claim under the common law.***

(Emphasis added.) In conclusion, Perera's protestations to the contrary and reliance on two

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unreported Nevada state court decisions,[5] there is no right to a private right of action for violation of NRS 608.040.

IV. PERERA HAS NOT DISPELLED FEDERAL PREEMPTION OF THE MINIMUM WAGE AMENDMENT BY OPERATION OF ERISA AND THE ACA

Perera argues that Western Cab's analysis of the Minimum Wage Amendment's preemption by operation of ERISA and the ACA is "academic" and "substantially irrelevant" as no one could have possibly intended that the Minimum Wage Amendment would conflict with ERISA, the ACA or due process. But, while Nevada voters might not have known of federal preemption issues, when the Nevada Labor Commissioner enacted parts of the Nevada Administrative Code construing the Minimum Wage Amendment and plainly affecting ERISA health plans, the preemption became clear and it compels the conclusion that the Minimum Wage Amendment is unenforceable.

Perera's claim that Western Cab made no argument that the Minimum Wage Amendment would be unenforceable if it included a single wage rate, irrespective of the employer's provision of "health benefits" or "health insurance" misses the point since the Minimum Wage Amendment actually contains two wage rates dependent on the undefined provision of "health benefits" or "health insurance," without Constitutional explanation.[6] But, to supply meaning where there is none apparent in the Minimum Wage Amendment as to the meaning of "health benefits" or "health insurance," by NAC 608.102, the Labor Commissioner has defined "health care" with specific and

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[5] Exhibit C has one date on the first page and a different date on the last page. Obviously Perera's Exhibits C and D, respectively trial court decisions of District Judges Cory and Barker, were entered in 2011 and 2012 without the benefit of the further analysis of the more recent cases considering the issue. They are not controlling on the point and in view of U.S. District Judge Jones' careful analysis on the issues are less persuasive. Moreover, Plaintiff's Exhibit C, the 2012 Order in *Valdez v. Cox Communications*, was part of a case appealed by Valdez to the Nevada Supreme Court, which appeal was finally dismissed on February 10, 2015, for Valdez's apparent failure to file an opening brief or otherwise communicate with the Court. *See* 2/10/15 Order Granting Motion and Dismissing Appeal, Exhibit 9.

[6] It is noteworthy as to this matter, that the U.S. Department of Labor's current survey of Minimum Wage Laws in the United States (Exhibit 10) shows no state but Nevada with a divergence of applicable minimum wage rates based on the provision of "health ins. benefits").

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implicit reference to ERISA, stating:

> **NAC 608.102 Minimum wage: Qualification to pay lower rate to employee offered health insurance.** (Nev. Const. Art. 15, §16; NRS 607.160, 608.250). To qualify to pay an employee the minimum wage set forth in paragraph (a) of subsection 1 of NAC 608.100 an employer must meet each of the following requirements:
>
> 1. The employer must offer a **health insurance plan** which:
>
> (a) Covers those categories of health care expenses that are generally deductible by an employee on his individual federal income tax return pursuant to 26 U.S.C. § 213 and any federal regulations relating thereto, if such expenses had been borne directly by the employee; or
>
> (b) Provides health benefits pursuant to a Taft-Hartley trust which:
>
> (1) Is formed pursuant to 29 U.S.C. § 186(c)(5); and
>
> (2) Qualifies as an **employee welfare benefit plan:**
>
> (I) Under the guidelines of the Internal Revenue Service; or
>
> (II) Pursuant to the **Employee Retirement Income Security Act** of 1974, 29 U.S.C. § 1001 et seq.
>
> 2. The **health insurance plan** must be made available to the employee and any dependents of the employee. The Labor Commissioner will consider such a **health insurance plan** to be available to the employee and any dependents of the employee when:
>
> (a) An employer contracts for or otherwise maintains the **health insurance plan** for the class of employees of which the employee is a member, subject only to fulfillment of conditions required to complete the coverage which are applicable to all similarly situated employees within the same class; and
>
> (b) The waiting period for the **health insurance plan** is not more than 6 months.
>
> 3. The share of the cost of the premium for the **health insurance plan** paid by the employee must not exceed 10 percent of the gross taxable income of the employee attributable to the employer under the Internal Revenue Code, as determined pursuant to the provisions of NAC 608.104.

(Emphasis added.)

A recent case, *Concerned Home Care Providers, Inc. v. Cuomo*, 979 F.Supp.2d 288 (N.D. N.Y. 2013), addresses ERISA preemption in the context of a wage parity statute and concludes the law's exemption for employers who provided health benefits through a jointly administered labor-management fund on its face related to an ERISA plan and thus was preempted. The critical portion of the legislation, subdivision 4, exempted employers who were part of certain collective bargaining agreements providing health benefits:

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> Any portion of the minimum rate of home care aide total compensation attributable to health benefit costs or payments in lieu of health benefits, and paid time off, as established pursuant to subdivision three of this section shall be superseded by the terms of any employer bona fide collective bargaining agreement in effect as of January first, two thousand eleven, or a successor to such agreement, which provides for home care aides' health benefits through payments to jointly administered labor-management funds.

Id. at 294.

This is the same as NAC 608.102 and *Concerned Home Care* determined that ERISA preempted state law. The Court first explained the vast intended breadth of ERISA preemption as to any laws broadly related to benefit plan regulation:

> ERISA's pre-emption clause states that ERISA 'shall supersede any and all State laws insofar as they may now or hereafter ***relate to*** any [covered] employee benefit plan[.]' ERISA § 514(a), 29 U.S.C. §1144(a) (emphasis added). The 'deliberately expansive' language of the pre-emption clause was 'designed to establish pension plan regulation as exclusively a federal concern.' *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990) (citations and internal quotes omitted). The Supreme Court explains:
>
> The key to § 514(a) is found in the words 'relate to.' Congress used those words in their broad sense, rejecting more limited pre-emption language that would have made the clause applicable only to state laws relating to the specific subjects covered by ERISA. Moreover, to underscore its intent that § 514(a) be expansively applied, Congress used equally broad language in defining the 'State law' that would be pre-empted....
>
> A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or ***reference to*** such a plan. Under this broad common-sense meaning, a state law may "relate to" a benefit plan, and thereby be pre-empted, even if the law is not specifically designed to affect such plans, or the effect is only indirect. Pre-emption is also not precluded simply because a state law is consistent with ERISA's substantive requirements.

979 F.Supp.2d at 301-302, *quoting Ingersoll-Rand*, 498 U.S. at 138-39 (emphasis supplied; citations and internal quotes omitted).

Concerned Home Care, *id.*, continues its analysis of the breadth of ERISA-preemption, again relying on the U.S. Supreme Court's analysis:

> Regarding whether a state law has 'reference to' an ERISA plan, the Supreme Court explains:

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'[W]e have held pre-empted a law that "impos[ed] requirements by reference to [ERISA] covered programs," [*District of Columbia v.] Greater Washington Bd. of Trade*, [506 U.S. 125, 129, 113 S.Ct. 580, 583, 121 L.Ed.2d 513 (1992)]; a law that specifically exempted ERISA plans from an otherwise generally applicable garnishment provision, *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 858, n. 2, 829-830, 108 S.Ct. 2182, 2184, n. 2, 2185-2186, 100 L.Ed.2d 836 (1988), and a common-law cause of action premised on the existence of an ERISA plan, *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 140, 111 S.Ct. 478, 483-484, 112 L.Ed.2d 474 (1990). Where a State's law acts immediately and exclusively upon ERISA plans, as in *Mackey*, or ***where the existence of ERISA plans is essential to the law's operation***, as in *Greater Washington Bd. of Trade* and *Ingersoll–Rand*, ***that 'reference' will result in pre-emption.***'

California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., 519 U.S. 316, 324-25, 117 S.Ct. 832, 136 L.Ed.2d 971 (1997). In *Mackey*, the Supreme Court held that a Georgia anti-garnishment statute 'which singles out ERISA employee welfare benefit plans for different treatment under state garnishment procedures is pre-empted under § 514(a).' 486 U.S. at 830, 108 S.Ct. 2182 (footnote omitted). The *Mackey* court noted that the statute 'expressly refers to—indeed solely applies to—ERISA employee benefit plans' and thus is subject to 'reference' pre-emption. *Id.* at 829, 108 S.Ct. 2182; *see Hattem v. Schwarzenegger*, 449 F.3d 423, 433-34 (2d Cir. 2006) (discussing *Mackey*). [Emphasis added.]

Concerned Home Care, id., then concludes:

> This Court determines that subdivision 4 of the Wage Parity Law has 'reference to' an ERISA plan within the meaning of *Mackey*, because it 'singles out' Taft-Hartley plans for 'different treatment.' 486 U.S. at 830, 108 S.Ct. 2182. As does the statute struck down in *Mackey*, subdivision 4 'expressly refers to – indeed solely applies to – ERISA employee benefit plans.' *Id.* at 829, 108 U.S. 2182. There is no other reasonable reading of subdivision 4; on its face, it provides that the Wage Parity Law's health care benefits requirement is superseded by the terms of any qualifying collective bargaining agreement only where that agreement provides for health care benefits through a Taft-Hartley plan, which is undisputedly, an ERISA plan. All other employers, whether they provide health benefits through another plan or simply pay a wage supplement, are subject to the minimum health care benefit requirement. Indeed, by exempting only those employers providing benefits through a Taft-Hartley plan, subdivision 4 goes farther than the statute struck down in *Mackay;* subdivision 4 does not merely single out ERISA plans in general, but rather 'singles out' – and 'solely applies to' – only one type of ERISA plan. Therefore, subdivision 4 is preempted by section 514(a) on the ground that it 'relates' to an ERISA plan. 29 U.S.C. §1144(a).

To precisely the same effect, in *Cervantes v. Health Plan of Nevada, Inc.*, 127 Nev. Adv. Op. 70, 263 P.3d 261 (2012), the Nevada Supreme Court concluded that a plaintiff's claim for

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negligence against a managed care organization under a state statute was preempted by ERISA, explaining that the breadth of the "reference to" prohibition reaches laws if they have an ***impermissible connection*** with an ERISA plan, ***even if the challenged law does not itself reference ERISA or an ERISA plan***, as where statutes mandate employee benefit structures:

> ***Even when a law does not reference an ERISA plan, it is preempted if it has an impermissible connection with an ERISA plan.*** [*California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A.*, 519 U.S. 316, 325, 117 S.Ct. 832, 136 L.Ed.2d 971 (1997).] ***In cases in which it considered whether a state law has a forbidden connection to ERISA plans, the United States Supreme Court has consistently found statutes that 'mandate[] employee benefit structures or their administration' are preempted by ERISA section 514(a).*** [*New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 657-58,115 S.Ct. 1671, 131 L.Ed.2d 695 (1995)] (holding that ERISA section 514(a) does not preempt a New York statute requiring a surcharge on commercial insurers and health management organizations); *see also FMC Corp. v. Holliday*, 498 U.S. 52, 111 S.Ct. 403, 112 L.Ed.2d 356 (1990) (holding a Pennsylvania statute that precluded reimbursement to an ERISA plan operator from the beneficiary in the event of recovery from a third party to be preempted by ERISA section 514(a)); [*Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 203 (1983)] (holding that ERISA preempts state laws regulating benefit plans that prohibit discrimination based on pregnancy and that require specific benefits be paid); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 101 S.Ct. 1895, 68 L.Ed.2d 402 (1981) (finding that New Jersey could not prohibit plans from setting off workers' compensation payments against employees' retirement benefits or pensions)....

(Emphasis added.) 263 P.3d at 266; *see also, Inland Empire Chapter of Associated General Contractors of America v. Dear*, 77 F.3d 296, 300 (9th Cir. 1996) (a law "relates to" an employee benefit plan if it "has a connection with or reference to such a plan").

Cervantes specifically noted that in applying ERISA section 514(a), the Ninth Circuit in *Operating Engineers Health & Welfare v. J.W.J. Contracting Co.*, 135 F.3d 671, 678 (9th Cir. 1998), read "connection with ERISA plans" broadly, examining, for example, "whether the state law requires the establishment of a separate employee benefit plan to comply with the law," or "whether the state law regulates certain ERISA relationships, including the relationships between an ERISA plan and employer and, to the extent an employee benefit plan is involved, between the employer and the employee." *Id. Accord Utility Contractors Association of New England, Inc. v.*

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City of Fall River, 2011 WL 4710875, at *6 (D. Mass. Oct. 4, 2011) (pension, healthcare and apprenticeship provisions of ordinance are preempted by ERISA); *Retail Industry Leaders Association v. Fielder*, 475 F.3d 180 (4th Cir. 2007) (fair share health care fund act is preempted by ERISA); *Minnesota Chapter of Associated Builders and Contractors, Inc. v. Minnesota Department of Public Safety*, 267 F.3d 807 (8th Cir. 2001) (portions of statute and rules requiring contractors to adopt approved apprenticeship programs were preempted by ERISA).

Without adding the terms of NAC 608.102 to the Minimum Wage Amendment, the Constitutional Amendment has no meaning at all as to "health benefits" or "health insurance." To entitle an employer to pay $1 less per hour as minimum wage,[7] would it suffice to outfit the front desk or break room with a bottle of aspirin and some bandages and anti-bacterial soap? Or, is there more required, as for example health insurance coverage that might provide $2,000 of yoga or meditation classes annually? There is no explanation as to "health benefits" or "health insurance" and with meaning necessarily supplied by NAC's definition of them with reference, express and implied, to ERISA plans, the Minimum Wage Amendment is necessarily preempted. Thus, no "twisted reading" of *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), or any other of the cases cited in Western Cab's motion results. The terms "health benefits" and "health insurance" have no obvious meaning without reference to the NAC and, given the NAC's definition of the terms with reference, express and implied, to ERISA, the result is preemption of the Minimum Wage Amendment.

Perera argues that Western Cab has presented no "intelligible" argument as to how the Minimum Wage Amendment conflicts with the ACA. That question arises because the potential for

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[7] For a 40-hour work week for 52 weeks, that would amount to a total of approximately $2,080.

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the Minimum Wage Amendment's effect on ERISA and the ACA is potentially limitless given the Constitutional Amendment's lack of any definition of what it means by "health benefits" or "health insurance" accompanied by NAC Chapter 608's intrusion into ERISA and potentially the ACA. For example, NAC 608.102(2)(b) requires that the waiting period for the "health insurance plan" is not more than 6 months while the ACA requires coverage after 90 days of employment. Exhibit 11. Moreover, NAC 608.102 requires health "insurance" except for Taft Hartley trusts while ERISA allows self-insured plans and trusts. Clearly, conflicts are present.

As set forth in Western Cab's motion, the Minimum Wage Amendment and the Labor Commissioner's related Regulations (all ignored by Perera), alter or impact health benefits offered by Nevada private employers. To the extent the Minimum Wage Amendment and related Regulations illegally compel employers to change the administration of their ERISA-governed plans and/or create separate and independent plans, they encroach on ERISA's field, create inconsistences with ERISA and the ACA and frustrate the intent of the U.S. Congress to establish uniform national regulation of employee benefit plans and healthcare. The Minimum Wage Amendment is preempted by ERISA and the ACA and Plaintiff has no viable state court claim.

V. NO CUT-AND-PASTE REMEDIES, SUCH AS EXCISING THE TWO-TIER DISTINCTION FOR EMPLOYERS PROVIDING OR NOT PROVIDING "HEALTH BENEFITS" OR "HEALTH INSURANCE," CURE THE CONSTITUTIONAL INFIRMITIES OF THE MINIMUM WAGE AMENDMENT

At p. 4 of his Response, Perera argues that the Court should simply order a cut-and-paste fix of the Minimum Wage Amendment by requiring "that all employers (currently applicable to just the 'non-qualifying health insurance employers') otherwise pay the 'higher tier' $8.25 an hour minimum wage." But, that would result in impermissible judicial imposition of a result never even considered by the Nevada electorate in approving the ballot questions adopting the Minimum Wage Amendment. *See* Exhibits 3 and 4, State of Nevada 2004 and 2006 Ballot

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Questions presenting the Minimum Wage Amendment, providing no definition or meaning to what "health benefits" were required to be provided by employers to entitle them to pay the lower hourly minimum wage.

In considering the constitutionality of an amendment to the Nevada Constitution, Nevada courts are not at liberty to provide a rewrite to cure a vagueness so profound that it renders an essential provision of an addition to the Constitution unintelligible – as here. An addition to the law is unconstitutionally vague where it "fails to provide a person of ordinary intelligence fair notice" of what is intended or is so "standardless that it authorizes or encourages seriously discriminatory enforcement." *Busefink v. State*, 128 Nev. Adv. Op. 49, 286 P.3d 599, 605 (2012) (in the context of a criminal statute prohibiting compensation based on the number of voters registered, and concluding the word "register" has sufficient meaning in the context of voter registration); *Pohlabel v. State*, 128 Nev. Adv. Op. 1, 268 P.3d 1264, 1272 (2012) (construing "citizen" in Article I, Section 11(1) and as used by Legislature and voters, to mean members of the political community and excluding unpardoned felons from those to whom the Nevada Constitution guarantees the right to keep and bear arms).

A plain reading of parts A, B and C of the Minimum Wage Amendment, Art. XV, Sec. 16 of the Constitution, provides no meaning to "health benefits" or "health insurance." Given the complexity of the issue of health insurance, no simple severance fix is available as it would constitute an impermissible rewriting of what the State's voters added to the Constitution. Thus, *Sierra Pacific Power Co. v. State*, 130 Nev. Adv. Op. 93, 338 P.3d 1244, 1247 (2014), concluded that the offending matter had to be stricken in its entirely and could not be remedied by severance, explaining:

> Before language can be severed from a statute, a court must first determine whether the remainder of the statute, standing alone, can be given legal effect, and whether preserving the remaining portion of the statute accords with legislative intent. [Citation omitted.] For the latter reason, voter initiatives and enacted

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> ballot measures undergo additional scrutiny before statutory language may be severed, as the court must consider the effect of severance on the purpose of a voter-enacted statute. *See Flamingo Paradise Gaming, LLC v. Chanos*, 125 Nev. 502, 515-18, 217 P.3d 456, 555-57 (2009) (discussing the severability of a voter-enacted statute and the importance of the components and purpose behind the statute).

Because the legislative history in *Sierra Pacific* clarified the narrowness of the exemption at issue to the purpose of the statute, the Court concluded that the statute was not severable:

> Were the district court to strike only the offending language, the resulting statute would exempt all sales, storage, and use of the proceeds of mines form taxation under Chapter 372, regardless of where the minerals are mined. Because NRS 372.370 was enacted to prevent double taxation of the proceeds of Nevada mines already subject to the net proceeds tax in Chapter 362 – not to exempt entire categories from taxation – such a result would not be in accord with the Legislature's intent in enacting the exemption. Thus, for purposes of resolving this case, the district court did not err in striking NRS 372.270 in its entirety.

Id., 338 P.3d at 1248.

Even considering part D of the Minimum Wage Amendment, requiring that "[i]f 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 and effect, and no such determination shall invalidate the remaining sections or portions of the sections of this section" is not enough to save the enactment as it is meaningless without the distinction of two rates of minimum wage. For example, in *Flamingo Paradise Gaming, LLC v. Chanos*, 125 Nev. 502, 517, 217 P.3d 546, 557 (2009), the challenged criminal penalty of the Nevada Clean Indoor Act (NCIAA), was not a "central component" of the act and the remainder of the NCIAA could meaningfully stand below, with the smoking ban enforced. Here, the distinction in wage rates based on the undefined provision of "health benefits" or "health insurance" is obviously central to the amendment.

Moreover, in *Flamingo Paradise*, using a lower standard of review as the act did not

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contain criminal provisions in its severed state or involve constitutionally protected activity, severance did not leave the NCIAA without meaning:

> [T]he NCIAA is sufficiently clear if, in any application, it does not '(1) fail [] to provide notice sufficient to enable persons of ordinary intelligence to understand what conduct is prohibited' and does not '(2) lack [] specific standards, thereby encouraging, authorizing, or even failing to prevent arbitrary and discriminatory enforcement.' [Citations omitted.]
>
> We conclude that the statute is not vague in all its applications and, therefore, survives a facial challenge for civil enforcement because there are very clear applications of the statute in which no one could reasonably question whether a particular act would violate the statute. For example, smoking is clearly prohibited in certain areas, including bars and restaurants where food is served. This prohibition is unquestionably enforceable against someone who is smoking inside these restricted areas and, thus, illustrates how the statute is not impermissibly vague in all its applications. Another example as to why the statute survives a facial challenge is that the statute is clear that certain businesses cannot allow smoking and must post no-smoking signs. It cannot be reasonably disputed that this portion of the statute clearly outlines the requirements that a business owner prohibit smoking and post no-smoking signs. Once again, this requirement demonstrates that the statute is not unconstitutional in all its applications. Thus, under the lower level test of requiring appellants to show vagueness in all of its applications, the statute is sufficiently clear to provide notice of what conduct is prohibited and adequate guidance to enforcement officials to avoid arbitrary or discriminatory enforcement.
>
> While there may be uncertainty as to what affirmative actions, if any, a business owner must take if someone smokes within his or her business in violation of the statute, there is no question that the business owner is required to make his or her establishment nonsmoking and post signs designating it as such. As the main restrictions of the Act are sufficiently clear to establish specific prohibited conduct that a reasonable person could understand and does not promote arbitrary enforcement, the statute survives a facial vagueness challenge.
>
> Therefore, under a facial challenge the statute is not unconstitutionally vague for civil enforcement because the general restrictions under the statute have clear, constitutional applications. Accordingly, we affirm the district court's ruling upholding civil enforcement of the statute.

Id., 125 Nev. at 519-20, 217 P.3d at 558.

The same result does not hold here. There is no common or plain meaning to what is meant by an employer's provision of "health benefits" or "health insurance" as there is to "smoking" or "not smoking." Thus, *Silvar v. Eighth Judicial District Court*, 122 Nev. 289, 129

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P.3d 682 (2006), held an ordinance prohibiting loitering for the purpose of prostitution unconstitutionally vague, as the ordinance neither supplied adequate notice of prohibited conduct or of enforcement guidelines. Because the ordinance did not provide sufficient detail, it was found to have left too much discretion to police officers – the equivalent here of giving too much discretion to the Labor Commissioner's office:

> By failing to enumerate circumstances for which a person could be arrested for prostitution loitering, CCO 12.08.030 gives officers too much discretion in enforcing its provisions. Other courts have struck similar loitering ordinances for the same reason... [W]e conclude that CCO 12.08.030 unconstitutionally risks arbitrary and discriminatory enforcement.

122 Nev. at 297, 129 P.3d at 687.

The issue of providing "health benefits" or "health insurance" or not providing them is central to the Minimum Wage Amendment, which sets different minimum wages with reference to their provision. Without this element, the Minimum Wage Amendment has no meaning and does not reflect the change the Nevada voters considered and enacted. Simply put, there is no piecemeal remedy to the two-tier Minimum Wage Amendment by creating an entirely different single-tier Minimum Wage Amendment.

VI. PERERA HAS NO VIABLE CLAIM FOR PUNITIVE DAMAGES

Perera's arguments that he has stated a valid claim for punitive damages, §VI of his Opposition, do not defeat well-settled Nevada law that punitive damages are unavailable in actions based on a contract or the rational conclusion that claims demanding recovery of unpaid wages under the Minimum Wage Amendment are essentially contractual and exclusive. *See, Vancheri v. GNLV Corp.*, 105 Nev. 417, 421, 777 P.2d 366, 369 (1989) ("Employment 'at-will' is a contractual relationship and thus governed by contract law"); *Baldonado v. Wynn Las Vegas, LLC*, 124 Nev. 951, 966, 194 P.3d 96, 105-06 (2008) (recognizing employment relationships in terms of contract law).

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Moreover, such a demand for punitive damages as Perera makes here was raised and specifically rejected on these firm grounds by the U.S. District Court for Nevada just weeks ago in *Hanks v. Briad Restaurant Group, LLC*, 2015 WL 4562755 (July 27, 2015, D. Nev. 2015). In that case, District Judge Navarro relied on two theories to dispel a claim for punitive damages in a case such as this, reasoning that a claim for minimum wages under the Minimum Wage Amendment is in essence contractual and barred by NRS 42.010 and also that where a statutory scheme provides a particular remedy for its violation, the remedies provided are exclusive and do not give rise to an implied recovery of punitive damages.

First, as to bar by operation of NRS 42.010, *Hanks* explains:

> Nevada law permits the awarding of punitive damages for tort claims where the defendant 'has been guilty of oppression, fraud or malice,' *see* Nev. Rev. Stat. § 42.005, or where such damages are explicitly provided by statute. *See, e.g.*, Nev. Rev. Stat. §42.010 ('In an action for the breach of an obligation, where the defendant caused an injury by the operation of a motor vehicle ... after willfully consuming or using alcohol or another substance, knowing that the defendant would thereafter operate the motor vehicle, the plaintiff, in addition to the compensatory damages, may recover damages for the sake of example and by way of punishing the defendant.'). However, 'the award of punitive damages cannot be based upon a cause of action sounding solely in contract.' *Ins. Co. of the W. v. Gibson Tile Co.*, 122 Nev. 455, 134 P.3d 698, 703 (Nev. 2006); *see also* Nev. Rev. Stat. §42.005 ('[I]n an action for the breach of an obligation *not arising from contract*, ... the plaintiff ... may recover damages for the sake of example and by way of punishing the defendant.') (emphasis added).
>
> ***Though Plaintiffs' minimum wage claims arise from Defendant's alleged failure to pay a statutory obligation, 'when a statute imposes additional obligations on an underlying contractual relationship, a breach of the statutory obligation is a breach of contract that will not support tort damages beyond those contained in the statute.'*** *See Brewer*, 86 Cal.Rptr.3d at 235; *see also Camino Properties, LLC v. Ins. Co. of the W.*, No. 2:13-CV-02262-APG, 2015 WL 2225945, at *3 (D. Nev. May 12, 2015) ('ICW cannot be right that liabilities arising from a contract, where the contract is required by statute, is a 'liability by statute.' ... Even though insurance contracts exist because a statute requires drivers to buy them, claims for breaches of the insurance policy are governed by the six-year limitations period for contracts.'); *cf. Descutner v. Newmont USA Ltd.*, No. 3:12-CV-00371-RCJ, 2012 WL 5387703, at *2 (D. Nev. Nov. 1, 2012) (stating that the Nevada statute concerning overtime wages, section 608.140, 'does not imply a private right of action to sue under the labor code, but only to sue in contract'). Therefore, ***because claims for violations of the Minimum***

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> ***Wage Amendment arise from an underlying contractual employer-employee relationship, such claims do not entitle a plaintiff to punitive damages. Accordingly, Plaintiffs cannot seek punitive damages based solely on a claim for violations of the Minimum Wage Amendment, and their claims for punitive damages are dismissed.***

Id. at *9 (emphasis added.) Next, as to the bar of punitive damages based on the exclusivity of the remedy provided by the Minimum Wage Amendment and the unavailability of punitive damages for breaches of obligations arising from contract, *Hanks* further explains:

> In *Brewer* [*v. Premier Golf Properties*, 86 Cal.Rptr.3d 225 (Cal.App. 2008),] the court held first that the California Labor Code's minimum wage requirements are new rights created by statute that did not exist under common law; therefore, under the 'new right-exclusive remedy' rule, claims premised on violations of the statutory rights are limited to only those remedies expressly provided under the statute—which did not include punitive damages. *See id.* at 232–34. The court went on to find that notwithstanding the 'new right-exclusive remedy' rule, punitive damages would still be unavailable to the plaintiff 'because punitive damages are ordinarily limited to actions "for the breach of an obligation not arising from contract," and [plaintiff]'s claims for unpaid wages and unprovided meal/rest breaks arise from rights based on her employment contract.' *Id.*, at 235 (citing Cal. Civ. Code § 3294).
>
> The Court finds that both of the rationales for denying punitive damages in *Brewer* are equally applicable to claims arising under Nevada's Minimum Wage Amendment. Like California, Nevada courts have long subscribed to the rule that '[w]here a statute gives a new right and prescribes a particular remedy, such remedy must be strictly pursued, and is exclusive of any other.' *State v. Yellow Jacket Silver Min. Co.*, 14 Nev. 220, 225 (1879); *see also Builders Ass'n of N. Nevada v. City of Reno*, 105 Nev. 368, 776 P.2d 1234, 1235 (Nev. 1989) ('If a statute expressly provides a remedy, courts should be cautious in reading other remedies into the statute.'). ***The right to receive a minimum wage arises from legislative mandate and did not exist under common law.*** *See* Brewer, 86 Cal.Rptr.3d at 232 ('Labor Code statutes regulating pay stubs (§ 226) and minimum wages (§ 1197.1) create new rights and obligations not previously existing in the common law.'); *cf. MGM Grand Hotel-Reno, Inc. v. Insley*, 102 Nev. 513, 728 P.2d 821, 824 (Nev. 1986) (noting that the 'obligation to pay compensation benefits and the right to receive them exists as a matter of statute independent of any right established by contract,' and that such liability is 'created' by statute). ***Accordingly, the remedies available for violating minimum wage laws are limited to those expressly provided by statute and constitutional amendment.***
>
> The Minimum Wage Amendment states: 'An employee claiming violation of this section ... shall be entitled to all remedies available under the law or in equity appropriate to remedy any violation of this section, including but not

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> limited to back pay, damages, reinstatement or injunctive relief.' Nev. Const. art. XV, § 16(B). However, there is no provision for punitive damages or any other type of damages aimed at punishing an employer for noncompliance. *See Siggelkow v. Phoenix Ins. Co.*, 109 Nev. 42, 42, 846 P.2d 303, 304-05 (Nev. 1993) ('Punitive damages are not awarded as a matter of right to an injured litigant, but are awarded in addition to compensatory damages as a means of punishing the tortfeasor and deterring the tortfeasor and others from engaging in similar conduct.'). Instead, the Minimum Wage Amendment's language explicitly provides only for damages 'appropriate to remedy any violation.' Nev. Const. art. XV, § 16(B). Therefore, because damages for violations of the Minimum Wage Amendment are limited to those expressly provided by the amendment and there is no provision in the amendment for punitive damages, Plaintiffs cannot recover punitive damages for their claims.

Id. at *8. Perera's discussion of cases based on tortious termination or theft or conversion do not remedy his punitive damages claim. No such claims are made in Perera's filed Second Amended Complaint.

VII. PERERA'S CLAIMS FOR BACK AND SEVERANCE WAGES ARE ESSENTIALLY CONTRACTUAL IN NATURE AND ARE NOT A CLAIM FOR A "CONSTITUTIONAL TORT" SUPPORTING PUNITIVE DAMAGES

Perera argues that his claims for back or severance wages against his private employer, Western Cab, amount to a "constitutional tort," entitling him to an award of punitive damages. But, the fact that the Nevada Constitution now governs how Nevada's minimum wage is set does not make Perera's claim "constitutional," a "tort" or a "constitutional tort."[8]

Perera misuses the term "constitutional tort" in an effort to support his demand for punitive damages and perhaps thereby believe he meets the District Court's jurisdiction limit of

///

[8] Perera did not even consider his claims to constitute a tort when he filed his original complaint on September 23, 2014, and on his Civil Cover Sheet ignored the "Torts" categories – product liability, intentional misconduct, employment tort, insurance tort, and other tort – and checked off "Other Civil Matters" as the nature of his case. 9/23/14 Civil Cover Sheet, Exhibit 12.

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$10,000.[9] But, "constitutional tort" is a legal term of art limited to cases in which one's constitutional rights are violated by a government officer or one acting under the color of state law. *See Black's Law Dictionary* (9th ed.) defining the term:

> -- **constitutional tort** (1966) A violation of one's constitutional rights by a government officer, redressable by a civil action filed directly against the officer. • A constitutional tort committed under color of state law (such as a civil–rights violation) is actionable under 42 USCA §1983. – Sometimes (informally) shortened to *contort*.

The term "constitutional tort" was coined by Law Professor Marshall Shapo in 1965 to "denote a suit brought against an official, charging a constitutional violation and seeking damages." Michael Wells, Thomas Eaton and Sheldon Nahmod, "Why Constitutional Torts Deserve a Book of Their Own," 22 Seattle Univ. Law Rev. 857, 858 (1999). Because Western Cab is a private company and not a state actor, Perera's claims for back minimum and severance wages are not "constitutional torts" and must not be treated as authorizing his recovery of punitive damages. *Muldrow v. Carabetta Bros.*, 2015 WL 3606344, at *2 (D. Ct. 2015) (dismissing purported "constitutional tort" claim based on purported wrongful discharge against private construction company and one of its managers: "[T]he Constitution does not generally regulate the conduct of private actors, and a constitutional tort that is alleged as a basis for relief under Section 1983 may only be asserted "against state actors or private parties acting 'under the color of state law.'"); *Cunningham v. Bank of New York Mellon, N.A.*, 2015 WL 4104839 (E.D. N.Y. 2015) (dismissing claims for purported wrongful foreclosure as they did not raise

[9] At the time Perera filed his claim, the jurisdictional limit for cases filed in the District Court was $10,000. NRS 4.370(1). The Legislature amended that provision in 2015 to $15,000. Attorneys' fees and costs may not be included in the jurisdictional amount. *Royal Insurance v. Eagle Valley Construction Co.*, 110 Nev. 119, 120, 867 P.2d 1146, 1147 (1994). Moreover, in class actions, individual plaintiff's damages claims generally may not be aggregated to satisfy the jurisdictional amount unless the individual plaintiffs have a common and undivided interest in the claim for damages. *Urbino v. Orkin Services of California, Inc.*, 726 F.3d 1118, 1122 (9th Cir. 2013), *citig Synder v. Harris*, 394 U.S. 332, 335 (1969).

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"constitutional torts" that were "only actionable against state actors or private parties 'acting under the color of' state law," concluding that "Plaintiff's purported constitutional claims are 'so patently without merit [that they] justify... the court's dismissal for want of jurisdiction."). In sum, Perera's misuse of the term "constitutional tort" with regard to his contract terms against his private-company employer should not be tolerated for any purpose whatsoever.

VIII. CONCLUSION

There are no reasonable grounds to grant Perera leave to file another Second Amended Complaint or to sanction Western Cab or its counsel for moving to dismiss Plaintiff's non-complying pleading. Western Cab requests that Perera's countermotion to amend his complaint be set for a date following September 3, 2015, when Western Cab's opposition is due.

As set forth in Western Cab's motion and above, Plaintiff has not complied with the Court's June 16, 2015, Order and (1) lacks standing to pursue other than through the Labor Commissioner a claim for severance wages under NRS 608.040, (2) has no relief available under the Minimum Wage Amendment as it is preempted by ERISA and the ACA; and (3) cannot recover punitive damages as all of his claims and theories are contract-based. In sum, Perera's Second Amendment Complaint as filed June 16, 2015, should be dismissed without leave for further amendment.

Respectfully submitted,

HEJMANOWSKI & McCREA LLC

By: /s/ Malani L. Kotchka
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CERTIFICATE OF SERVICE

Pursuant to Administrative Order 14-2, the undersigned hereby certifies that a true and correct copy of **REPLY IN SUPPORT OF MOTION TO DISMISS SECOND AMENDED COMPLAINT AND COUNTERMOTION REGARDING SETTING PERERA'S COUNTERMOTION TO AMEND THE COMPLAINT AND FOR SANCTIONS TO A DATE AFTER SEPTEMBER 3, 2015 WHEN THE OPPOSITION IS DUE** was electronically served via the Eighth Judicial District Court's ECF System on this 19th day of August, 2015, to the following:

Leon Greenberg, Esq.
2965 S. Jones Blvd.
Suite E4
Las Vegas, NV 89146

Attorney for Plaintiff

An Employee of Hejmanowski & McCrea LLC

HEJMANOWSKI & McCREA LLC
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EXHIBIT 5

EXHIBIT 5

Malani Kotchka

From: Leon Greenberg <wagelaw@hotmail.com>
Sent: Monday, August 17, 2015 1:40 PM
To: Malani Kotchka; 'Dana Sniegocki'
Subject: Re: Perera v. Western Cab - Please be sure the record is clear....

The only reason you do not get cooperation from this office on your request is because of your improper conduct. An answer in this case is well overdue. You object to the filing and service of the Second Amended Complaint and I have agreed, unconditionally,
to the withdrawal of the same, meaning an answer to the First Amended Complaint is needed. Yet you refuse to interpose that answer solely to delay the progress of
this case. That is improper and why I am not agreeing to your request. Please agree to file that answer promptly, as should have already been done, and I will be pleased to
have the Court defer consideration of the complaint amendment request.

On 8/17/2015 12:57 PM, Malani Kotchka wrote:

> Leon and Dana: EDCR 2.20(f) provides, "An opposition to a motion which contains a motion related to the same subject matter will be considered as a counter-motion." Your motion to amend your complaint is not a true counter-motion because it does not relate to the same subject matter as the motion to dismiss. I have until September 3, 2015 to file my opposition pursuant to Rule 2.20(e). I intend to file my opposition on that date which is after the hearing scheduled for August 27. It only makes sense to continue the hearing on the countermotion but if you won't agree, I will bring the issue to the court and point out that I tried to get you to stipulate to the continuance. Malani
>
> **From:** Leon Greenberg [mailto:wagelaw@hotmail.com]
> **Sent:** Monday, August 17, 2015 12:39 PM
> **To:** Malani Kotchka <mlk@hmlawlv.com>; 'Dana Sniegocki' <dana@overtimelaw.com>
> **Subject:** Re: Perera v. Western Cab - Please be sure the record is clear....
>
> I understand you will be seeking relief on an Order Shortening Time from the Court seeking to continue to a date after 8/27/15 plaintiff's countermotion to amend.
> Please be sure you advise the Court in your OST request that plaintiffs counsel requested when you telephoned today that you agree to promptly interpose an answer to the existing First Amended Complaint, which it concedes is the only operative complaint before the Court at this time. If you so agreed plaintiff is pleased to defer a hearing on the countermotion to amend. You have refused to agree to interpose that answer and instead are going to seek relief via an Order Shortening Time.
> Please include a copy of this email with your OST request.
> Thank you.
>
> On 8/15/2015 4:22 PM, Malani Kotchka wrote:
>
> > Dana: When you filed your response to our motion to dismiss yesterday, you included a countermotion to amend the complaint and for sanctions. Under the rules we have until September 3 to file our opposition. Meanwhile, the original motion to dismiss is set for argument on August 27. We can either stipulate to move the hearing date on both to give us time to respond and you to reply or we could keep the motion to dismiss set for

August 27 and move the date on the countermotion to amend the complaint. Please let me know your preference and I will draft the stipulation. Thanks. Malani

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EXHIBIT 6

EXHIBIT 6

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Apprenticeship
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Employer
Forms & Publications
Frequently Asked Questions
Public Works/Prevailing Wages
Reports & Statistics
Statutes & Regulations

Frequently Asked Questions

What does the Office of the Labor Commissioner do? How does it help me?

- The Labor Commissioner enforces certain Nevada Revised Statutes relating to persons required to earn their living in the private sector by their own endeavors. For a complete list of statutes and regulations enforced by the Labor Commissioner, please see Laws & Regulations.

Wage & Hour

What are "wages"?

- "Wages" means the amount which an employer agrees to pay an employee for the time the employee has worked, computed in proportion to time, and commissions owed to the employee.

What is minimum wage in Nevada?

- Minimum wage in Nevada is $7.25 per hour with insurance, and $8.25 per hour without insurance.

I'm a tipped employee. Can my employer pay me less than minimum wage?

- No! In Nevada, tips may not be applied as credit toward the payment of the statutory minimum wage.

How often must I be paid?

- Wages must be paid at least semi-monthly.

What can be deducted from my wages?

- An employer may not withhold, deduct or divert any part of an employee's pay other than benefits and those items required by federal and state law, unless the employee specifically authorizes the deduction in writing.

What deductions is my employer taking out of my wages?

- Deductions should be supplied on your pay stub. An employer must furnish this information within 10 days of your written request.

What kind of breaks do I get?

- Rest periods are based on the total hours worked daily at the rate of 10 minutes for each 4 hours worked. An unpaid meal period of 30 minutes of uninterrupted time shall be authorized for an employee working a continuous period of 8 hours

Can my employer fire me without a reason?

- Yes. Nevada is an "employment-at-will" state, meaning that an employer may terminate the relationship at any time and without any reason. The employer cannot discriminate based on sex, race, color, national origin, age, religion or disability. For information on discrimination claims, please contact the Nevada Equal Rights Commission.

Does my employer to have to give me notice when he/she fires me? Do I have to give notice when I quit?

- No. Notice is not required by either party.

When does my employer have to pay me after I quit or have been fired?

- When you are fired or laid off, wages and compensation earned and unpaid when discharged become due and payable immediately. The employer has three days to get your final payment to you if you have been terminated. If you quit, wages and compensation must be paid no later than the day on which you would have been regularly paid or within seven calendar days, whichever is earlier.

Am I entitled to my unused vacation when I am fired or quit?

- Nevada statutes only require payment for time worked.

Is it legal for the employer to require employees to purchase uniforms?

- All uniforms or accessories distinctive in style, color , or material shall be furnished, without cost to employees.

Who is entitled to overtime?

- Generally, in Nevada, an employer must pay time and one half of an employee's regular wage rate whenever an employee works more than 40 hours in any scheduled workweek. In addition, employees who are paid a base rate of one and one half times the minimum wage or less per hour may be entitled to overtime if they work more than eight hours in any workday. There are a number of exemptions to this rule, and federal wage and hour rules may apply. See NRS 608.018 for more information on exemptions.

Filing a Claim

I haven't been paid. What should I do?

- First, ask the employer for what you are owed. Then, if you do not receive payment, you may file a complaint with the Office of the Labor Commissioner in Las Vegas or Carson City. For a copy of the wage claim form, click here.

What information should I bring?

- Bring copies of check stubs, time records, receipts, the names and addresses of all managers, supervisors, owners, or officers of the employer and any other information that might be helpful in proving your claim, including the names of any witnesses that can testify on your behalf.

When will I receive the wages owed?

- Some claims take longer than others or are set for a hearing to resolve them, assuming they can be resolved. If your employer closes, files bankruptcy, has no liquid assets, or these assets are secured by banks, credit unions, etc., these are factors that may negatively impact your ability to recover wages believed due and owing.

Can I call the Office of the Labor Commissioner about my claim?

- We want to devote our time to trying to recover your wages. If we need information, we will contact you. If you have information vital to your claim, or if you receive payment directly from your employer, please contact our office.

What happens to my claim now?

- In most cases, if the employer pays your claim and the check is made payable to you, the check will be mailed to you. If the check is made payable to the Labor Commissioner's Office, we will deposit that check and issue a check payable to you and mail it to you. We will then close the case.
- If the employer responds to your claim, you will receive a copy of the reply and will have the opportunity to answer the employer's comments. An investigator will review the information with both parties to determine if wages are due. The investigator may assist you and the employer in reaching a compromise settlement.
- If the employer does not pay your claim, or respond to your letters of demand, the case will go to an investigator who will try to resolve the issue. A hearing may be held to determine the outcome of your claim. If your claim is determined not to be valid, you will be notified, and we will close your file.

What can I do to help?

- Your patience and cooperation are requested as the process required by law takes time. Promptly respond to all inquiries received from the Office of the Labor Commissioner. Keep the office advised of any address or telephone number changes. Remember that you are responsible for substantiating the wage claim.
- If you have any additional information which you consider relevant to the claim, please contact the Office of the Labor Commissioner.

Hearings

What is a hearing?

- A hearing is set because of a dispute over unpaid wages,and informal negotiations to obtain payment have not been successful. It offers employers and claimants the opportunity to appear and present evidence to the Labor Commissioner or his designee, who will decide the claim.
- The failure of one party to attend the hearing may result in the Labor Commissioner or his designee deciding the case based only upon the evidence of the attending party.
- Written notice will be sent to both parties of the date, time, and location of the hearing.
- Witnesses may be brought by either party. They may attend voluntarily or may be subpoenaed to appear.
- The decision of the Labor Commissioner or his designee will be mailed to the parties after the close of the hearing. He will set forth the facts found from the evidence, the reasons for his decision, and the decision. Pursuant to NRS 607.215, the decision filed by the Labor Commissioner is binding on all parties and has the force of law. Upon petition for judicial review, the court may order a trial de novo.

EXHIBIT 7

EXHIBIT 7

STATE OF NEVADA

BRIAN SANDOVAL
Governor

BRUCE BRESLOW
Director

THORAN TOWLER
Labor Commissioner

Office of the Labor Commissioner
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Department of Business & Industry
OFFICE OF THE LABOR COMMISSIONER
www.LaborCommissioner.com

Biennial Report to the Governor and the Legislature Pursuant to NRS 607.080
July 1, 2014

MISSION

The Office of the Labor Commissioner is the principal labor and industrial relations regulatory agency for the State of Nevada. As such, it is the mission of this office to enforce all labor and industrial relations laws of the State of Nevada not otherwise assigned to another entity to ensure the fair and lawful conduct of business in the State of Nevada.

The Office of the Labor Commissioner envisions a labor force in which all employees are compensated for all work performed and where all employers are aware of and comply with labor laws, ultimately resulting in an economic benefit for the State of Nevada.

GOALS

As an agency, it is our goal to help the public resolve labor-related problems in an efficient, professional, and effective manner. This includes educating employers and employees regarding their rights and responsibilities under the law in an effort to promote the growth of business in Nevada. Additionally, it includes taking enforcement action, when necessary, to ensure that Nevada's workers are treated fairly and compensated for all time worked.

STATUTORY AND REGULATORY AUTHORITY

NRS 607 – Office of the Labor Commissioner
NRS 608 – Compensation, Wages and Hours
NRS 609 – Employment of Minors
NRS 610 – Apprenticeship
NRS 611 – Private Employment Agencies
NRS 613 – Employment Practices*
NRS 614 – Organized Labor and Labor Disputes
NRS 338 – Public Works

NAC 607 – Rules of Practice
NAC 608 – Compensation, Wages and Hours
NAC 609 – Employment of Minors
NAC 610 – Apprenticeship
NAC 611 – Private Employment Agencies
NAC 613 – Employment Practices
NAC 338 – Public Works

**NRS 613.040-613.070 and NRS 613.310-613.435 are not enforced by the Labor Commissioner.*

FUNCTION AND PURPOSE OF THE OFFICE

While the Office of the Labor Commissioner is the principal labor and industrial relations regulatory agency for the State of Nevada, we do not have jurisdiction over all employment matters. The Office of the Labor Commissioner primarily handles wage and hour matters in private employment and on public works projects. Matters related to discrimination, unemployment, worker's compensation, etc. are handled by other government entities.

The Office of the Labor Commissioner investigates complaints for the non-payment of wages, minimum wage, overtime, and prevailing wage on public works projects. Additionally, the office monitors youth employment practices, apprenticeship programs, and private employment agencies operating in the State of Nevada.

Employment Practices

The Office of the Labor Commissioner ensures that certain safeguards and enforcement mechanisms exist in the workplace with regard to hours of service and working conditions. However, the Labor Commissioner does not have authority over employment practices related to political affiliation or employment discrimination; those duties are vested in other entities.

Minimum Wage Calculation

Pursuant to Article 15, Section 16(A) of the Nevada Constitution, the Governor or the State agency designated by the Governor must calculate the State minimum wage annually and publish a bulletin announcing the adjusted rates, if any, by April 1 of each year. The new rates, if any, go into effect the following July 1.

The Office of the Labor Commissioner is the agency designated by the Governor to make the minimum wage calculation each year and publish the bulletin announcing the rates. This is a duty this office takes very seriously as we understand the impact the determination of minimum wage has on the Nevada economy.

In 2014, the minimum wage rates for the State of Nevada did not increase from the year before. Presently, minimum wage in Nevada is $7.25 for workers offered qualified health insurance and $8.25 for workers without employer-provided health insurance.

Wage Claim Disputes

Resolution of wage disputes between employers and employees is the primary service provided by the Office of the Labor Commissioner. These disputes often relate to claims that an employee was not paid for all time worked, was not paid the appropriate overtime or was not paid timely.

Due to the significant financial impact unpaid wages can have on Nevada workforce and their families, this office strives to resolve all claims as quickly as possible. To that end, it is our goal to complete 90% of all wage claim investigations within 90 days of opening the claim. An investigation is considered completed when money due to the worker is received, the wage claim is dismissed or a final order has been issued.

In 2012 and 2013, the Office of the Labor Commissioner recovered over $4.5 million in wages and penalties for Nevada workers. To date, approximately 850 wage claims have been filed with over $650,000 in wages and penalties recovered in 2014.

Public Works Enforcement and Administration

The Office of the Labor Commissioner oversees the enforcement and administration of public works in Nevada. This includes the survey and determination of the minimum prevailing rate to be paid for each of the 36 job classifications recognized by Nevada law; the assignment of identifying numbers for public works projects and management of project files; and the adjudication of disputes between workers, contractors, and public bodies sponsoring or financing a public works project.

The Office of the Labor Commissioner issued public works project numbers for over 1,200 projects statewide in 2012 and 2013. The amount of these awarded projects totaled over $2.25 billion. Thus far in 2014, the Office of the Labor Commissioner has issued public works project numbers for 431 projects statewide, totaling $1.27 billion.

The Office of the Labor Commissioner's annual survey for 612 wage rate (36 classifications in 17 counties) resulted in approximately 3,500 individual rates being generated. For the first time in 2013, our office accepted these surveys electronically. This resulted in greater participation by contractors statewide. The Office of the Labor Commissioner expects the same for 2014.

Additionally, the Office of the Labor Commissioner oversaw 224 public works complaints in 2013. The resolution of those claims resulted in the recovery of over $1,000,000 for Nevada workers employed on public works projects. To date, 42 public works complaints have been filed with our office in 2014. The total number of complaints is down from prior years due in large part to efforts by our office to educate contractors and public bodies about Nevada's public works law.

Apprenticeship

Apprenticeship, often referred to as the "original 4-year degree," is a system of supervised training leading to certification in a trade, occupation or craft. It combines on-the-job training with classroom-related instruction. There are currently 91 approved apprenticeship programs and 2,714 registered apprentices in the State of Nevada.

With oversight by the Office of the Labor Commissioner, apprenticeship in Nevada is administered by the State Apprenticeship Council. The State Apprenticeship Council is comprised of seven members appointed by the Labor Commissioner, who serves are the State Director of Apprenticeship. Members of the State Apprenticeship Council represent the general public, labor, and management. The State Apprenticeship Council meets quarterly in February, May, August and November.

Any and all matters decided by the Council involving a registered apprentice or apprenticeship program, union or non-union, is subject to review and appeal by the Labor Commissioner. Unless appealed, all decisions rendered by the Labor Commissioner are binding and final.

Private Employment Agencies

The Office of the Labor Commissioner provides licensing and regulatory oversight of all private employment agencies in the State of Nevada. A private employment agency as defined by the Nevada Revised Statutes (NRS) is any person who, for a fee, commission or charge furnishes information to a person seeking employment enabling or tending to enable the person to seek employment; furnishes information to a person seeking employees enabling or tending to enable the person to obtain employees; or maintains a record of persons seeking employment or employees.

In 2013, all application materials to apply for a private employment agency license or to renew a previously issued private employment agency license were made available, for the first time, on the Office of the Labor Commissioner website. A total of 109 private employment agency licenses were issued or renewed in 2013. For 2014, a total of 103 private employment agency licenses were issued or renewed. This number includes 8 new agencies licensed and 16 agencies that closed or failed to renew.

Employment of Minors

The Office of the Labor Commissioner enforces the child labor laws outlined in NRS 609, including providing for the safety of minors in the workplace and ensuring that minors only work certain jobs, certain hours, and at certain ages.

OFFICE OF THE LABOR COMMISSIONER STAFF

The Office of the Labor Commissioner maintains offices in Carson City and Las Vegas with a staff of 19 individuals statewide. This is the same number of staff members the office had in 1991.

Executive Staff

Labor Commissioner

The Labor Commissioner serves as the administrator and primary hearing officer for the Office of the Labor Commissioner. Pursuant to NRS 607.030, the Labor Commissioner devotes his/her entire time and attention to these duties and the business of this office.

In his role as administrator, the Labor Commissioner oversees the day-to-day management and operation of the Carson City and Las Vegas offices. This includes hiring, training, supervising and evaluating administrative and investigative staff; representing the Office of the Labor Commissioner before the State Legislature and Legislative Committees; researching and, if necessary, revising applicable statutes and regulations; and educating Nevada employers and employees on Nevada's labor laws through outreach. Additionally, the Labor Commissioner oversees the preparation and administration of the agency's biennial budget.

In his role as hearing officer, the Labor Commissioner conducts administrative hearings on complaints of alleged violations of NRS 608 and/or NRS 338 in Northern Nevada (all counties except Clark, Esmeralda, Lincoln and Nye). Additionally, the Labor Commissioner serves as hearing officer over complex matters within the jurisdiction of the Las Vegas office.

In addition to his duties as administrator and primary hearing officer, the Labor Commissioner also serves as State Director of Apprenticeship with oversight of the Nevada State Apprenticeship Council.

The Labor Commissioner is based out of the Carson City office.

Deputy Labor Commissioner

The Deputy Labor Commissioner acts under the direction of the Labor Commissioner and assists in the performance of the Labor Commissioner's duties. Pursuant to NRS 607.030, the Deputy Labor Commissioner devotes his/her entire time and attention to these duties and the business of this office.

The Deputy Labor Commissioner acts as supervisor for the administrative staff of the Las Vegas office. Except in complex matters in which the Labor Commissioner serves as hearing officer, the Deputy Labor Commissioner serves as hearing officer for matters arising within the jurisdiction of the Las Vegas office.

Chief Assistant to the Labor Commissioner

The Chief Assistant to the Labor Commissioner serves as the Executive Assistant to the Labor Commissioner with both programmatic and administrative responsibilities as directed by the Labor Commissioner. Specific responsibilities include, but are not limited to: drafting and editing correspondence; managing the Commissioner's calendar, including scheduling travel and speaking engagements; drafting legal pleadings and orders of the Labor Commissioner; serving as Custodian of Records for the Office of the Labor Commissioner; and assisting with general administrative functions including payroll, personnel, budget, and agency finances.

The Chief Assistant to the Labor Commissioner is based out of the Carson City office.

Administrative Staff

Administrative Assistants

The Office of the Labor Commissioner employs an administrative staff of eight individuals statewide, including Administrative Assistant IVs, Administrative Assistant IIIs, and Administrative Assistant IIs.

The administrative staff primarily provides assistance to the public by answering questions and concerns pertaining to Nevada wage and hour laws by telephone, email, and in person. For matters not within the jurisdiction of the Labor Commissioner, administrative staff directs the public to other state and federal government agencies. Administrative staff also assists members of the public with filing wage claims, general employment complaints, and requests for personnel and wage records.

In addition to the duties referenced above, administrative staff members assist investigative staff with preparing case files, researching business information, and preparing letters to claimants and/or respondents. Further, the Administrative Assistant IVs are responsible for the administration of the Apprenticeship and Private Employment Agency programs.

Investigative Staff

Compliance/Audit Investigators

The Office of the Labor Commissioner employs an investigative staff of eight individuals statewide.

Investigators review wage claims to determine the issues and applicable statutes to make a determination as to whether there has been a violation of Nevada wage and hour laws. Investigators are required to exercise independent judgment in determining what actions to take during an investigation and must utilize available search techniques in the investigation of a claim. Investigators are often called upon to explain the claim process and answer questions regarding relevant provisions of Nevada wage and hour law.

The investigative process begins with an initial review of the wage claim to ensure that the claim falls within the jurisdiction of the Office of the Labor Commissioner. Next, the employer is notified that a claim has been filed alleging a violation of Nevada. Many times investigators are able to resolve the claim at this initial stage. If not, the employer must submit a response to the claim. Upon receipt of the employer's response and any relevant documentation, the investigative process begins. During the investigative process, investigators often meet with both parties to negotiate a settlement of the claim. If the parties cannot reach a settlement and the investigator believes the claim is sustainable, a formal written determination will issue. If an objection to the determination is filed, the investigation may move to the formal hearing process in which the matter is present to a hearing officer (usually the Labor Commissioner or Deputy Labor Commissioner). A Final Order of the Labor Commissioner may issue either as a result of the hearing or where no objection to the determination is submitted.

EXHIBIT 8

EXHIBIT 8

MINUTES OF THE
SENATE COMMITTEE ON GOVERNMENT AFFAIRS

Seventy-fifth Session
March 18, 2009

The Senate Committee on Government Affairs was called to order by Chair John J. Lee at 1:30 p.m. on Wednesday, March 18, 2009, in Room 2144 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to the Grant Sawyer State Office Building, Room 4412, 555 East Washington Avenue, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator John J. Lee, Chair
Senator Terry Care, Vice Chair
Senator Steven A. Horsford
Senator William J. Raggio
Senator Randolph Townsend
Senator Mike McGinness

COMMITTEE MEMBERS ABSENT:

Senator Shirley A. Breeden (Excused)

GUEST LEGISLATORS PRESENT:

Senator Joyce Woodhouse, Clark County Senatorial District No. 5
Assemblyman Lynn Stewart, Assembly District No. 22

STAFF MEMBERS PRESENT:

Heidi Chlarson, Committee Counsel
Michael Stewart, Committee Policy Analyst
Cynthia Ross, Committee Secretary

OTHERS PRESENT:

David Slater, Teacher, John R. Beatty Elementary School, Las Vegas
Lexie Arancibia, Student, John R. Beatty Elementary School, Las Vegas

Ryan Underwood, Student, John R. Beatty Elementary School, Las Vegas
Meagan Anders, Student, John R. Beatty Elementary School, Las Vegas
Steve Ross, Secretary-Treasurer, Southern Nevada Building and Construction Trades Council
Steve Redlinger, Southern Nevada Building and Construction Trades Council
David Kersh, Carpenters/Contractors Cooperation Committee, Inc.
Michael Tanchek, Labor Commissioner, Department of Business and Industry
Robert A. Ostrovsky, Nevada Resort Association
Paul J. Enos, CEO, Nevada Motor Transport Association
Veronica Meter, Las Vegas Chamber of Commerce
Clara Andriola, President, Sierra Nevada Chapter, Associated Builders and Contractors, Inc.
Buzz Harris, Nevada Chapter, Associated General Contractors; Nevada Association of Mechanical Contractors
Lea Tauchen, Retail Association of Nevada
Renny Ashleman, State Public Works Board
Peter D. Krueger, Subcontractors Legislative Coalition
Richard Peel, Subcontractors Legislative Coalition
Richard Lisle, Mechanical Contractors Association, Inc.
Greg Esposito, Plumbers, Pipefitters and HVACR Technicians, Local 525
Sherry Vyvyan, Southern Nevada Air Conditioning Refrigeration Service Contractors Association
Jeffery L. Westover, National Electrical Contractors Association
Sherry Hernandez, Administrator, Subcontractors Legislative Coalition
Brian C. Kerzetski, Vice President, Universal Plumbing and Heating Company; Plumbing-Heating-Cooling Contractors of Nevada
Arthur White, Aqua Plumbing and Roadrunner Plumbing
Dave Bold, Done Right Plumbing
Tye Halverson, Southwest Air Conditioning; Sheet Metal and Air Conditioning Contractors National Association
Blake Ballard, Sahara Air Conditioning and Heating, Inc.; President, Southern Nevada Air Conditioning Refrigeration Service Contractors Association.
John Seymour, International Brotherhood of Electrical Workers, Local 401
Randy Canale, Plumbers and Pipefitters of Northern Nevada, Local 350
Gus Nunez, P.E., Manager, State Public Works Board
Don C. Jeppson, Director, Department of Building and Safety, Washoe County
Ronald Lynn, Nevada Organization of Building Officials
Wes Henderson, Government Affairs Coordinator, Nevada Association of Counties

Bjorn Selinder, Churchill County; Eureka County; Elko County

CHAIR LEE:
We are opening this meeting with Senate Bill (S.B.) 166. This bill comes to us by a class in southern Nevada. Senator Joyce Woodhouse and Assemblyman Lynn Stewart have been working with this class closely in the legislative process of selecting the State Insect.

SENATE BILL 166: Designates the official state insect of Nevada. (BDR 19-914)

SENATOR JOYCE WOODHOUSE (Clark County Senatorial District No. 5):

> Good afternoon, Chairman Lee, and members of the Senate Government Affairs Committee. I am Joyce Woodhouse, State Senator for Clark District 5. With me today is Assemblyman Lynn Stewart, representing Assembly District 22. We are both here this afternoon to introduce to you a very special teacher, Mr. David Slater, and three of his outstanding fourth graders from John R. Beatty Elementary School in Las Vegas and also to urge your support for the Vivid Dancer Damselfly as our state insect, as identified in Senate Bill 166. At the Grant Sawyer Building in southern Nevada is the rest of Mr. Slater's class, and we invite them to wave to you one more time. Thank you! Before we turn the time over to Mr. Slater and his students, we would like to share with you the procedures by which Senate Bill 166 came before you.
>
> At the end of a Kids Voting Board of Directors meeting in mid-December, one of our colleagues asked, "Did you know that Nevada does not have a state insect designated, and we do have a state flower, a state bird, a state rock and others? How would one go about naming a state insect?" So Mr. Stewart and I in unison said, "That would take legislation!" And we volunteered to process the bill, as long as students statewide were involved (Exhibit C, page 1).
>
> Thus the planning began. Attached to the packet that you have you will find the flyer announcing the program, the curriculum standards for the fourth grade that are aligned to this project and the rubric (Exhibit D, page 3) by which the judges would score the

Committee's attention. I will read the clarification provided by the State Public Works Board (SPWB) to ensure we get the clarification on record as it relates to the settlement issue (Exhibit H).

> The Public Works Board will not look at the settlement per se but will look at the underlying action in the settlement. For example, if the contractor was fined or disciplined for hiring unlicensed subcontractors but ultimately reached a settlement; the SPWB would still consider the fine and/or discipline imposed against the contractor in evaluating the contractor's application for qualification.

SENATE BILL 43: Revises the criteria that the State Public Works Board is required to adopt to determine the qualification of bidders on contracts for public works. (BDR 28-323)

CHAIR LEE:
We want to ensure the amendment to S.B. 43 is easily understood. Now, moving out of work session, we move into hearing S.B. 189.

SENATE BILL 189: Provides for certain causes of action against employers. (BDR 53-1126)

STEVE ROSS (Secretary-Treasurer, Southern Nevada Building and Construction Trades Council):
I come before you today to speak in favor of S.B. 189 and the Southern Nevada Building and Construction Trades Council amendment to S.B. 189. Senate Bill 189 would clarify employees may enforce provisions of the labor laws dealing with wages and hours through private law suits. This clarification is necessary because of the Nevada Supreme Court's decision in *Baldonado v. Wynn Las Vegas,* 124 Nev. Adv. Op. No. 81 (Oct. 9, 2008) which held that the provision in the labor laws dealing with tip-sharing could be enforced by the Labor Commissioner. While that part of the Supreme Court's decision was correct, language in the decision has cast doubt on whether employees may enforce other parts of NRS chapter 608 (Exhibit I), page 1.

The clarification is necessary to avoid burdening taxpayers and the Labor Commissioner with exclusive responsibility for enforcing Nevada wage and hour law. The Labor Commissioner does not have the staff or resources to enforce all of these actions nor should taxpayers foot the bill to enforce Nevada's wage

and hour law in all cases. Furthermore, the Labor Commissioner's lack of resources will inevitably mean that meritorious claims from underpaid employees fall through the cracks. The Labor Commissioner agrees with this and supports section 1 of this bill, Exhibit I, page 2.

We do not agree with the amendment to section 1 that has been submitted. We would replace the clear language of the original, which states that employees have a private right of action to enforce NRS 608.015 to NRS 608.155 and NRS 608.165 to NRS 608.170, with a vague statement that employees have a private right of action to enforce claims for unpaid wages and compensation earned in the course of employment. Changes to section 1 will simply generate needless litigation over which parts of NRS 608 require employers to pay employee wages immediately on discharge and to pay the employee waiting time penalties if it fails to do so. Using the Labor Commissioner's version of section 1 will lead to needless litigation over whether employees have a private right of action to enforce this requirement. It makes more sense to specifically state the provisions of NRS 608 to which S.B. 189 applies as with the original version of S.B. 189, Exhibit I, page 2.

Although the Commissioner agrees there is a need to allow for private enforcement of claims for unpaid wages in violation of NRS 608, he does not want to allow for effective private enforcement of claims for unpaid prevailing wages. This does not make sense.

Section 4 of S.B. 189 would recognize the right of joint labor-management committees to enforce the prevailing wage laws. Doing so would have the same effect as section 1. It would relieve the Labor Commissioner and taxpayers of the responsibility of enforcing laws. States as varied as Alaska, Delaware, Indiana, Kansas, Missouri, Ohio and Wisconsin have recognized a private right of action to enforce prevailing wage laws. Several states, including California and Hawaii, have laws on the books recognizing the right of joint labor-management committees to enforce prevailing wage laws, Exhibit I, page 2.

Under S.B. 189, unions could not act alone to enforce the prevailing wage law. Rather, joint labor-management committees, which have both labor and contractor representatives, could enforce the prevailing wage law, Exhibit I, page 3.

It makes sense to recognize the right of joint labor-management committees to enforce the prevailing wage laws since the prevailing wage law is designed to protect responsible contractors who stand to lose if unscrupulous contractors underpay their workers on public works projects. Also, in many instances, workers who are not paid the prevailing wage will not complain for fear of termination. The only reason the Labor Commissioner has stated to us why he opposes having this effective and efficient enforcement system for prevailing wages is that it would increase the litigation costs for state and local agencies. But S.B. 189 would have precisely the opposite effect. Under the current system, the Labor Commissioner requires state and local agencies to enforce prevailing wage obligations on their projects. These agencies are required to send their lawyers to the Labor Commissioner hearings. Under S.B. 189, employees and joint labor-management committees could bring suit against the offending contractor, and the state or local agency would not have to be involved at all. This would save the agencies money, Exhibit I, page 3.

I would like to close with an example of how the Commissioner's process for dealing with prevailing wage caused waste for contracting agencies. In this example, Clark County Deputy District Attorney Carolyn Campbell was dragged into a multiday hearing before the Labor Commissioner. She was the prosecuting attorney in a case where laborers were claiming work the International Brotherhood of Electrical Workers had done. During the hearing, the employer realized their error and paid the wage violations, but only after several days of hearings. Had this particular issue gone to court, cooler heads, realizing they could end up liable for the other side's legal fees, would have resolved the matter much sooner without the County involvement. The Commissioner refused to resolve this issue by summary judgment, a procedure utilized by courts all the time instead of holding a full-scale trial. Not only was Ms. Campbell put out of the office for days, but several Water Reclamation District staffers also had to spend days working on this particular administrative hearing at the cost of the taxpayers. For your reference, this particular case is Public Works Case Number PWP CL 2005-141, Exhibit I, page 4.

STEVE REDLINGER (Southern Nevada Building and Construction Trades Council):
We bring before you today an amendment to S.B. 189 (Exhibit J). Section 1 of S.B. 189 would create a private right of action to enforce certain provisions of NRS 608. This is important because the Labor Commissioner's Office does not have the requisite staff and resources to enforce these laws and because the costs of enforcement should not be borne by the taxpayers.

CHAIR LEE:
Are we working off your proposed amendment?

MR. REDLINGER:
Yes.

CHAIR LEE:
We have no amendment in front of us, Mr. Redlinger, you are responsible for providing 25 copies. If you choose, you may proceed without the amendment but it will be more difficult for us to follow along.

MR. REDLINGER:
Section 2, Exhibit J, pages 1 and 2, reads:

> Section 2. NRS 608.180 is hereby amended to read as follows: 608.180 The Labor Commissioner or his representative shall cause the provisions of NRS 608.005 to NRS 608.195, inclusive, and section 1 of this act, to be enforced, and upon notice from the Labor Commissioner or his representative, 1. The district attorney of any county in which a violation of those sections has occurred, 2. The Deputy Labor Commissioner, as proved in NRS 607.050, 3. The Attorney General, as provided in NRS 607.160 or 607.220, or 4. The special counsel, as provided in NRS 607.065, shall prosecute the action for enforcement according to law.

The language emphasized would create confusion. It implies the Labor Commissioner is responsible for enforcing the private right of action set forth in section 1. This would make no sense. The language added in section 2 should be omitted.

Section 3 is also confusing, Exhibit J, page 2. It reads:

> Section 3. NRS 608.195 is hereby amended to read as follows: 608.195 provision 1. Except as otherwise provided in NRS 608.0165, any person who violates any provision of NRS 608.005 to 608.195, inclusive, and section 1 of this act or any regulation adopted pursuant thereto, is guilty of a misdemeanor.

The language emphasized in section 3 also makes no sense. Read literally, it would mean that an employee would be guilty of a misdemeanor for failing to serve a copy of his or her pleadings on the Labor Commissioner. A judge who

did not award attorney fees under section 1, subsection 2 of the bill would be guilty of a misdemeanor. This is not the bill's intention. The added language in section 3 should be omitted.

References to section 4 of this act contained in sections 5, 6 and 7 of the draft bill should also be removed. The references are unnecessary since each of these sections deal with coverage of the substantive provisions of the prevailing wage law, while section 4 deals with who can enforce the substantive provisions.

Our amendment clarifies the confusing parts of S.B. 189 as written.

SENATOR CARE:
We have the bill, and we have had discussion on two amendments. Regarding section 4, are you saying the Committee would have standing to bring a private cause of action as to public works projects?

MR. REDLINGER:
Yes.

SENATOR CARE:
In section 4, there is an award of attorney fees provision. For clarification, if the Committee prevails, there is an award of attorney fees. If the employer prevails, the court must also find that the suit not substantially justified before an award of attorney fees. Is there similar language in NRS 607?

MR. REDLINGER:
I do not know.

SENATOR CARE:
Regarding section 1 of NRS 607, case law already recognized private cause of action, in some instances, as to the assignment of wages and unpaid compensation but maybe not everything under NRS 607. Some of that case law would show a union has standing to bring the action, not necessarily the employee. Does this sound familiar?

MR. REDLINGER:
Individuals already have the right to bring a private right of action.

SENATOR CARE:
This is the *Baldonado* case.

MR. REDLINGER:
The *Baldonado* court decision said the Labor Commissioner would be sole finder in these types of decisions. In section 1, we want to clarify that individuals do have the inherent private right to action.

SENATOR CARE:
The bill is intended to clarify which you believe should be existing practice. The Labor Commissioner would not read that case to say, "I do not have to do this anymore."

MR. REDLINGER:
We do not believe the Labor Commissioner would say that at all.

SENATOR CARE:
I want to qualify my remark. I am not trying to be unfair, as we have not heard from the Labor Commissioner.

MR. REDLINGER:
If you look at the Labor Commissioner's amendment and at our amendment, the provisions in section 1 are similar. He agrees a burden will come to his office. He is ill-equipped to handle these cases on his own, and it would be helpful to have available folks to take a private right of action. In his amendment, we have differences in specific wording. The core of this issue is the same, as a clarifier in response to the Nevada Supreme Court's decision.

HEIDI CHLARSON (Committee Counsel):
From a drafting prospective, sections 1 and 4 of the bill are adding new provisions to the chapter. When the Legislative Counsel Bureau (LCB) adds provisions, we indicate where those sections will be located if the bill is passed. The changes where you delete references to section 1 and section 4 of the act—those are technical provisions—are not substantive, so we would not be able to remove them from the bill.

MR. REDLINGER:
These references in sections 1and 4 are duplicated, creating confusion.

CHAIR LEE:
This is how the LCB writes bills.

SENATOR TOWNSEND:
There are two provisions in this bill. One deals with NRS 608 and the other with NRS 338. We know the latter is Public Works and the former addresses private activity. Is it your intention to have this broadly construed so it covers private activity as well as Public Works?

MR. REDLINGER:
The intent in section 1 is to clarify law that individuals have a right to private action. The way the Supreme Court wrote its decision brought this into question. In section 4, we are looking to expand upon that. In the section 1 provisions, we argue there are certain economic efficiencies to the State by clarifying this right exists.

SENATOR TOWNSEND:
Do you have copies of *Baldonado v. Wynn Las Vegas*? Can you quote the portion that is the premise for this bill so we know why clarification is needed?

MR. REDLINGER:
Absolutely.

SENATOR TOWNSEND:
I listen to your testimony, and I am trying to better understand the challenges causing a need of clarification since individuals already have this right.

DAVID KERSH (Carpenters/Contractors Cooperation Committee, Inc.):
We are here to support S.B. 189 and the amendments from the Nevada Building and Construction Trades Council. Private right of action should exist on both NRS 608 and NRS 338 with the same economic and staffing rationale. In both private projects and public works, many workers are denied wages. This will allow another avenue, in addition to the Labor Commissioner, to deal with these issues.

SENATOR TOWNSEND:
Do employees already have a private right of action, but this is a clarifying bill?

MR. KERSH:
I am of the same position of Mr. Redlinger. In terms of NRS 608 and NRS 338, it is looking to expand.

SENATOR TOWNSEND:
You are now seeing the bill as expanding.

MR. KERSH:
Clarifying the issue with the referred court case, *Baldonado*, and in regard to NRS 338, the bill creates another avenue.

MICHAEL TANCHEK (Labor Commissioner, Department of Business and Industry):
I have held this position of Labor Commissioner for the past four years. Five years prior, I was a deputy labor commissioner. I discussed this proposal several months ago with Mr. Ross and was thinking about a proposal myself because of the *Baldonado* decision by the Supreme Court on the Wynn tip case. I have requested an Attorney General's opinion on this issue as it relates to the *Baldonado* case. I signed in as opposed to the bill as written.

As Labor Commissioner, I asked myself, what do I need? And what I need is clarification. On NRS 608 and reflected in our regulations is a private right of action for a person who believes an employer owes them money for work performed. We consider two things when we receive a claim. Can the person afford to hire an attorney? If so, I will reject the claim and say, hire yourself an attorney and take them to court. This was the practice when I came to the Labor Commissioner's Office, and it continues to be the practice. I also look to see if the claim is sustainable. We get many claims, and we are told many things. My investigators must sort through the information. I must make the decision whether I want to take this person's claim and make it my own. Do I want to say "You no longer owe the person that money," Mr. Employer, "you now owe that money to the State of Nevada?" I will use the full power and authority of the State to collect that money for the individual.

About 60 percent of our claims are found in favor of the employee. It is not an advocacy position. It is about getting to the bottom of an issue and finding a solution. If the employee is owed money, we get him paid.

Nevada Revised Statute 338 is an entirely different animal. In this particular case, I am not sure a private right of action is the correct term as a private right

of action would accrue to that specific employee who might be owed wages, not to a third party who is trying to enforce statutes pursuant to somebody else's contract.

Mr. Ross referred to a hearing we conducted. I ended up directing the parties to settle the matter among themselves. It cost the parties a lot of money, it took up time, and it was almost an irresolvable conflict. Over the past two years, we have handled over 400 investigations in the Labor Commissioner's Office. Out of these 400 investigations, only four went to hearing. One of our goals is to resolve problems to prevent them from going through the time and expense of a hearing. We want to resolve problems properly and to get expeditious results. One fear this bill brings forth is a cost to local governments due to litigation. As it stands, the investigation process involves a complaint, an audit and a review of the audit. We take the compiled information, and we work it back and forth to determine any unresolved issues that then can go to a hearing. If this goes to litigation in the investigation process, the process of audit and the investigation function with discovery first will be replaced and become the norm.

In terms of understaffing, my staff is overworked. I considered hiring more people as part of my budget before the economic difficulties hit and before the *Baldonado* decision. We have always presumed a private right of action in NRS 608. We refer to people to court all the time. If a claim comes to our office, it gets resolved, taking three months or longer because of our workload. My investigators get a new case every four hours. We are doing what we can, but we are over-inundated. We are outnumbered. We get the cases in, resolved and out the door as quickly as possible. This is in regard to NRS 608. This is 85 percent of our workload. I have a staff of 17 people, and 12 are dedicated to the NRS 608 side.

In terms of investigation and resolution, we hold our own because we have people in departments throughout the State who assist us, such as individuals at the Nevada Department of Transportation and Clark County School District. These people handle investigations locally on the NRS 338 side. They complete their investigations or audits, they make their findings, and then they forward them to us to handle objections and, if necessary, for us to judicate. This side works well. The side of NRS 608 is difficult.

SENATOR CARE:
In your proposed amendment (Exhibit K), section 1 on NRS 608, you want to delete "a violation of NRS 608.015 to 608.155, inclusive, 608.165 or 608.170" and substitute that with "unpaid wages and compensation earned in the course of employment." This will be 95 percent of the claims. What other violations under NRS 608 can an employee, conceivably, bring a private cause of action to?

MR. TANCHEK:
There are many. There are break and lunch requirements.

SENATOR CARE:
How about the issue of uniforms?

MR. TANCHEK:
Uniforms are a wage issue. My employers are to provide uniforms free of charge to an employee. If they charge, it is a money issue. If there is a money issue and one wants to collect their money, I say, go for it. I will use my staff elsewhere. This can be expensive. The average recovery is $700 to $1,000.

SENATOR CARE:
Is there anything in NRS 608 or case law that stems from NRS 608 that has a provision similar to what has been proposed in section 4 about the award of attorney fees?

MR. TANCHEK:
A provision allows a court to award attorney fees to wage claimants. The attorney fees can be awarded to the attorney who represents the prevailing party. If I am the only one who can do that, of course, the prevailing party is the Attorney General because that is who represents me. Why is the language in there if there is not an assumption or implication a person can go to court with a private right of action? Other provisions determine whether I take a claim. One of the points I consider is whether a party can afford an attorney. If I have to take the case and provide the representation, what is the purpose of having the language? Cases throughout NRS 607 and NRS 608 lead to an underlining assumption that there is an embedded private right to action. Our agency has always proceeded on that assumption.

In regard to the *Baldonado* case, the way the court drafted it, they left open the idea that administrative remedies must be exhausted before going to court. This has caused confusion. I have had judges call my office and ask, "What am I suppose to do with this?" I give them a note stating I will not take the claim. On that basis, judges will then hear the case. There is confusion, and this is why I have asked for an Attorney General's opinion on this issue.

SENATOR CARE:
Let me address section 4, the public works provisions. A committee, recognized under federal law would be the one to bring a cause of action in State court.

MR. TANCHEK:
Yes.

SENATOR CARE:
You mentioned the audit and the investigations. This is the current remedy an employee has on a public works project. I understand your concern that if you go beyond what you are doing now, there would be the cost to litigation and the burden on your office, but is there anything that addresses this in statute? You have the audit and the investigation, but there is no statutory recognized private cause of action.

MR. TANCHEK:
There is not in NRS 338. What needs to be recognized is the requirement to pay prevailing wage is in statute. If you read the statute, that requirement is required to be embedded in the construction contract between the public body and the construction contractor. There is a contractual obligation to pay prevailing wage between the contractor and the awarding body.

SENATOR CARE:
If an employer does not get the money to pay the employee, is this a breech of contract action and the Labor Commissioner is out of it?

MR. TANCHEK:
It can be both. We have an issue going on with star bonds. There were problems with the statutes in that case. My decision in this case was: a contractual remedy exists that can be enforced in contract. In this case, there was an obligation on the part of the awarding body to investigate and resolve the problems. For instance, let us presume one is a worker on a prevailing wage

project. The process is to file a complaint either with the Labor Commissioner's Office or directly with the awarding body that has the contract. This kicks in the requirement for them to review the payment, payroll and everything the contractor or subcontractor has done on the project to determine whether he was paid correctly. Once the public body makes the determination, they notify the involved parties and forward the determination to my office for final action. If the contractor or employee wants to disagree with the findings, they bring their objections to me. We will work through it and try to get to the bottom of it. If we can resolve it, we resolve it and everybody gets paid or not paid as the case may be. If the issue cannot be resolved, we take it to a hearing and resolve it there.

ROBERT A. OSTROVSKY (Nevada Resort Association):
The Nevada Resort Association opposes the changes suggested in section 1 on private rights of action in private employer setting. We have no position or objection on the section addressing prevailing wage. We support the existing state of the law, requesting we seek out an administrative remedy to these matters before we start clogging the courts with these cases. These administrative remedies are built into the statute for a purpose. They are the most efficient way of handling and disposing of disputes relating to many issues in the law, including those in NRS 608 which cover pay, uniforms, lunch breaks and the like. I was an adjudicator of many grievances with labor unions during my 25 years as a casino executive. Clearly, we understand there are many cases with merit; however, there are many cases without. The Labor Commissioner must sort through and decide which cases do have merit. It is best for most employees to seek an administrative remedy up to and including the Labor Commissioner's right to charge a person with a misdemeanor. A lot of appropriate authority is given to the Commissioner. If there is confusion over the effects of the Supreme Court issue, I am sure we can find ways to resolve it. It works in everyone's best interest that the employer and employee, who may have a claim, to understand the law and their rights. If this is a muddy picture, this is not good for either party. Lawsuits should be the exception, not the rule. Section 1, with language not requiring administrative procedures to be exhausted but only notify the Labor Commissioner, is an invitation to additional litigation for most matters, which can be easily resolved with presented facts. The Labor Commissioner is the correct person. If there is not sufficient staff, I will be the first person to address the Senate Committee on Finance or the Assembly Committee on Ways and Means to fund appropriate staffing and

argue that administrative remedies save employers and employees a lot of money.

SENATOR CARE:
I am getting further confused. I thought testimony on NRS 608 stated a private right to action, but the Supreme Court decision has muddied the waters. You seem to be saying that one must go through administrative remedies offered under NRS 607 or NRS 608, and whatever the Labor Commissioner decides will stand, but I have heard testimony saying there is an existing private right of action. In some instances, case law under NRS 608 provides private right to action. Not just the employee but, in some cases, even a union can be a party that brings the action.

MR. OSTROVSKY:
The Labor Commissioner makes the decision to process the claim. If he does not, he tells the claimant, "Go hire an attorney and take the person to court." Where it gets muddy is if a person decides not to go to the Labor Commissioner, does not file a complaint of any kind and then goes to court under the provisions. As proposed, they would only have to notify the Commissioner with a copy of the complaint. This is in not in our best interest. If we want to codify the existing law—and I am not clear as to the private right of action—then we ought to clarify that. We are seeking clear water. The system has worked well for 20 to 30 years under the statutes in place. This is the first time we have faced this issue based on the new Supreme Court decision.

PAUL J. ENOS (CEO, Nevada Motor Transport Association):
I am here in opposition of S.B. 189 as written. I concur with the comments of Mr. Ostrovsky. We are bumping up against the issue of uniforms. We do not want to have to go to court or have that potential for a private right of action on the issue of uniforms. We prefer to go to the Labor Commissioner. We do take umbrance with that.

VERONICA METER (Las Vegas Chamber of Commerce):
We are in opposition of this bill. The system is working. The Labor Commissioner is doing a good job handling the wage and hour complaints that are presented. We are concerned this bill invites a way of litigation when situations can already be handled as is without turning every disagreement into costly litigation and clogging the courts. The Labor Commissioner has direct

understanding of these issues and is best equipped and experienced to handle them.

CLARA ANDRIOLA (President, Sierra Nevada Chapter, Associated Builders and Contractors, Inc.):
We are opposed to this bill as written. The best course of action is to look at the pending Attorney General's decision. There already is a private right of action in NRS 608. In addition, NRS 338 is a cause of concern with the processes in place. Essentially, a third party could create a bias, and we do not want that on any issue. The Labor Commissioner's Office should continue to provide the enforcement as the law is written, and we ask for it not to be changed.

BUZZ HARRIS (Nevada Chapter, Associated General Contractors):
We also are opposed to S.B. 189. We are opposed to both the amendment and the original bill. The administrative process should be the first course of action; administrative remedies can be taken care of most effectively on this level, instead of clogging up the courts and adding costs and burdens upon our court system.

LEA TAUCHEN (Retail Association of Nevada):
I echo previous comments and state our opposition for S.B. 189.

RENNY ASHLEMAN (State Public Works Board):
I am not in opposition of this bill. In section 4, when talking about the actions of NRS 338, we process complaints about payment on the SPWB level. We work with contractors, make decisions and sometimes refer them to the Labor Commissioner for decision. People ought to opt whether they sue the employer outside the system or get inside the system so we are not withholding funds and investigating matters that also go through the court system with possible contradictory results. Certainly, at a minimum, if they notify the Labor Commissioner, they should notify us as well as to what is happening on our jobs and the problems. We are not in opposition to this bill, but we want clarification on those issues.

CHAIR LEE:
Let us try and make this bill better. The hearing on S.B. 189 is closed, and we will open the hearing on SB. 191 brought forth by Peter Krueger.

Testimony by Steve Redlinger on SB 189
Southern Nevada Building & Construction Trades Council
Senate Committee on Government Affairs
Wednesday, March 18, 2009

Mr. Chairman, distinguished members of the committee, for the record my name is Steve Redlinger, and I'm here representing the Southern Nevada Building & Construction Trades Council. We bring before you today, an amendment to SB 189, for a couple reasons.

Section 1 of SB 189 would create a private right of action to enforce certain provisions of NRS chapter 608. This is important because the Labor Commissioner's office does not have the requisite staff and resources to enforce all of these laws and because the costs of enforcement should not be borne by the tax payers.

However, Section 2 of the draft bill now provides some confusing language. Section 2 currently reads as follows:

Sec. 2. NRS 608.180 is hereby amended to read as follows:

608.180 The Labor Commissioner or his representative shall cause the provisions of NRS 608.005 to 608.195, inclusive, and section 1 of this act to be enforced, and upon notice from the Labor

EXHIBIT I Senate Committee on Government Affairs
Date: 03/18 Page 1 of 3

Commissioner or his representative:
1. The district attorney of any county in which a violation of those sections has occurred;
2. The Deputy Labor Commissioner, as provided in NRS 607.050;
3. The Attorney General, as provided in NRS 607.160 or 607.220; or
4. The special counsel, as provided in NRS 607.065,
_ shall prosecute the action for enforcement according to law.

The language emphasized would create serious confusion, since it seems to say that the Labor Commissioner is responsible for "enforcing" the private right of action set forth in Section 1. This would make no sense. The language added in Section 2 should be omitted.

Similarly, Section 3 of the draft bill now reads:

Sec. 3. NRS 608.195 is hereby amended to read as follows:
608.195 1. Except as otherwise provided in NRS 608.0165, any person who violates any provision of NRS 608.005 to 608.195, inclusive, and section 1 of this act or any regulation adopted pursuant thereto, is guilty of a misdemeanor.

The language emphasized in Section 3 also makes no sense. Read literally, it would mean that an employee would be guilty of a misdemeanor for failing to serve a copy of his or her pleadings on the Labor Commissioner.

It would mean that a judge who did not award attorneys fees under Section 1(2) of the bill would be guilty of a misdemeanor. This is obviously not what is intended. The language added in Section 3 should be omitted.

The references to "section 4 of this act" contained in Sections 5-7 of the draft bill should also be removed. The references are unnecessary, since each of those Sections deals with the coverage of the substantive provisions of the prevailing wage law, while Section 4 deals with who can enforce those substantive provisions.

Thank you for time, and your consideration of this amendment. We feel this amendment clarifies some of the confusing parts of SB 189 as written. We would be happy to answer any of your questions.

EXHIBIT 9

EXHIBIT 9

An unpublished order shall not be regarded as precedent and shall not be cited as legal authority. SCR 123.

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOE VALDEZ, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Appellant,
vs.
COX COMMUNICATIONS LAS VEGAS, INC,
Respondent.

No. 65383

FILED

FEB 10 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER GRANTING MOTION AND DISMISSING APPEAL

On November 12, 2014, this court entered an order reinstating briefing and directing appellant to file the opening brief and appendix within 60 days. *See* NRAP 31(a)(1)(B). Appellant did not file his brief within the time allowed. Additionally, respondent has filed a motion to dismiss on the grounds that appellant has failed to file an opening brief. To date, appellant has failed to file the opening brief, oppose the motion, or otherwise communicate with this court. We conclude that appellant has abandoned this appeal, and we grant respondent's motion and dismiss the appeal. *See* NRAP 31(d).

It is so ORDERED.

Parraguirre, J.

Douglas, J.

Cherry, J.

cc: Hon. Kenneth C. Cory, District Judge
Leon Greenberg Professional Corporation
Chamberlain Hrdicka
Duane Morris LLP/Las Vegas
Eighth District Court Clerk

EXHIBIT 10

EXHIBIT 10

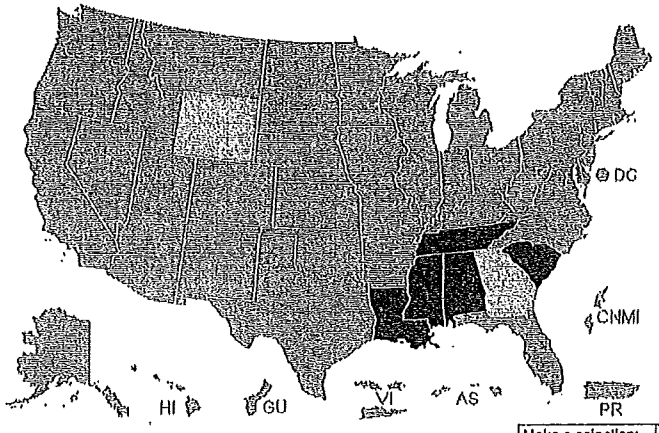
United States Department of Labor
Wage and Hour Division
Wage and Hour Division (WHD)

Minimum Wage Laws in the States - January 1, 2015 (en español)

Historical Table

Click on any state or jurisdiction to find out about applicable minimum wage laws.

Note: Where federal and state law have different minimum wage rates, the higher standard applies.



Make a selection:

States with minimum wage rates higher than the federal

States with no minimum wage law (federal minimum wage rate applies)

States with minimum wage rates the same as the federal

States with minimum wage rates lower than the federal (federal minimum wage rate applies)

American Samoa and the Commonwealth of the Northern Mariana Islands have special minimum wage rates.

Minimum Wage and Overtime Premium Pay Standards Applicable to Nonsupervisory NONFARM *Private Sector* Employment Under State and Federal Laws January 1, 2015[1]

Consolidated State Minimum Wage Update Table

Alabama Minimum Wage Rates

ALABAMA	Basic Minimum Rate (per hour)	Premium Pay After Designated Hours[2]	
		Daily	Weekly
No state minimum wage law.			

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Alaska Minimum Wage Rates

ALASKA	Basic Minimum Rate (per hour)	Premium Pay After Designated Hours[2]	
		Daily	Weekly
		8	40
	$8.75		

Under a voluntary flexible work hour plan approved by the Alaska Department of Labor, a 10 hour day, 40 hour workweek may be instituted with premium pay after 10 hours a day instead of after 8 hours.

The premium overtime pay requirement on either a daily or weekly basis is not applicable to employers of fewer than 4 employees.

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AMERICAN SAMOA

American Samoa has special minimum wage rates.

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Arizona Minimum Wage Rates

ARIZONA	Basic Minimum Rate (per hour)	Premium Pay After Designated Hours [2]	
		Daily	Weekly
	$8.05		

Rate is increased annually based upon a cost of living formula.

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Arkansas Minimum Wage Rates

ARKANSAS	Basic Minimum Rate (per hour)	Premium Pay After Designated Hours [2]	
		Daily	Weekly
(Applicable to employers of 4 or more employees)	$7.50		40

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California Minimum Wage Rates

CALIFORNIA	Basic Minimum Rate (per hour)	Premium Pay After Designated Hours [2]	
		Daily	Weekly
	$9.00	8 *Over 12 (double time)*	40; on *7th day: First 8 hours (time and half)* *Over 8 hours on 7th day (double time)*

Any work in excess of eight hours in one workday, in excess of 40 hours in one workweek, or in the first eight hours worked on the seventh day of work in any one workweek shall be at the rate of one and one-half times the regular rate of pay. Any work in excess of 12 hours in one day or in excess of eight hours on any seventh day of a workweek shall be paid no less than twice the regular rate of pay. California Labor Code section 510. Exceptions apply to an employee working pursuant to an alternative workweek adopted pursuant to applicable Labor Code sections and for time spent commuting. (See Labor Code section 510 for exceptions).

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Colorado Minimum Wage Rates

COLORADO	Basic Minimum Rate (per hour)	Premium Pay After Designated Hours [2]	
		Daily	Weekly
	$8.23	12	40

Minimum wage rate and overtime provisions applicable to retail and service, commercial support service, food and beverage, and health and medical industries.

Rate is increased or decreased annually based upon a cost of living formula.

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Commonwealth of the Northern Mariana Islands Minimum Wage Rates

Commonwealth of the Northern Mariana Islands	Basic Minimum Rate (per hour)	Premium Pay After Designated Hours [2]

		Daily	Weekly
	$6.05		

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Connecticut Minimum Wage Rates

CONNECTICUT	Basic Minimum Rate (per hour)	Premium Pay After Designated Hours [2]	
		Daily	Weekly
	$9.15		40

In restaurants and hotel restaurants, for the 7th consecutive day of work, premium pay is required at time and one half the minimum rate.

The Connecticut minimum wage rate automatically increases to 0.5 percent above the rate set in the Fair Labor Standards Act if the federal minimum wage rate equals or becomes higher than the State minimum.

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Delaware Minimum Wage Rates

DELAWARE	Basic Minimum Rate (per hour)	Premium Pay After Designated Hours [2]	
		Daily	Weekly
	$8.25		

The State adopts the federal minimum wage rate by reference if the federal rate is greater than the State rate.

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District of Columbia Minimum Wage Rates

DISTRICT OF COLUMBIA	Basic Minimum Rate(per hour)	Premium Pay After Designated Hours [2]	
		Daily	Weekly
	$10.50		40

The District of Columbia minimum wage equals the federal minimum wage plus $1.00 if it is set below the federal rate.

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Florida Minimum Wage Rates

FLORIDA	Basic Minimum Rate(per hour)	Premium Pay After Designated Hours [2]	
		Daily	Weekly
	$8.05		

Rate is increased annually based upon a cost of living formula.

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Georgia Minimum Wage Rates

GEORGIA	Basic Minimum Rate (per hour)	Premium Pay After Designated Hours [2]	
		Daily	Weekly
(Applicable to employers of 6 or more employees)	$5.15		

The State law excludes from coverage any employment that is subject to the federal Fair Labor Standards Act when the federal rate is greater than the State rate.

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Guam Minimum Wage Rates

GUAM	Basic Minimum Rate (per hour)	Premium Pay After Designated Hours [2]	
		Daily	Weekly
	$8.25		40

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Hawaii Minimum Wage Rates

HAWAII	Basic Minimum Rate(per hour)	Premium Pay After Designated Hours [2]	
		Daily	Weekly
	$7.75		40

An employee earning a guaranteed monthly compensation of $2,000 or more is exempt from the State minimum wage and overtime law.

Domestic service workers are subject to Hawaii's minimum wage and overtime requirements. Act 248, Regular Session 2013.

The State law excludes from coverage any employment that is subject to the federal Fair Labor Standards Act unless the State wage rate is higher than the federal rate.

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Idaho Minimum Wage Rates

IDAHO	Basic Minimum Rate (per hour)	Premium Pay After Designated Hours [2]	
		Daily	Weekly
	$7.25		

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Illinois Minimum Wage Rates

ILLINOIS	Basic Minimum Rate (per hour)	Premium Pay After Designated Hours [2]	
		Daily	Weekly
(Applicable to employers of 4 or more employees, excluding family members)	$8.25		40

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Indiana Minimum Wage Rates

INDIANA	Basic Minimum Rate(per hour)	Premium Pay After Designated Hours [2]	
		Daily	Weekly
(Applicable to employers of 2 or more employees)	$7.25		40

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Iowa Minimum Wage Rates

IOWA	Basic Minimum Rate (per hour)	Premium Pay After Designated Hours [2]	
		Daily	Weekly
	$7.25		

The Iowa minimum wage equals the federal minimum wage rate if it is set below the federal rate.

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Kansas Minimum Wage Rates

KANSAS	Basic Minimum Rate(per hour)	Premium Pay After Designated Hours [2]	
		Daily	Weekly
	$7.25		46

The State law excludes from coverage any employment that is subject to the federal Fair Labor Standards Act.

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Kentucky Minimum Wage Rates

KENTUCKY	Basic Minimum Rate(per hour)	Premium Pay After Designated Hours [2]	
		Daily	Weekly
	$7.25		40 *7th day*

The 7th day overtime law, which is separate from the minimum wage law, requires premium pay on the seventh day for employees who work seven days in any one workweek.

The state adopts the federal minimum wage rate by reference if the federal rate is greater than the State rate.

Compensating time in lieu of overtime is allowed upon written request by an employee of any county, charter county, consolidated local government, or urban-county government, including an employee of a county-elected official.

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Louisiana Minimum Wage Rates

LOUISIANA	Basic Minimum Rate(per hour)	Premium Pay After Designated Hours [2]	
		Daily	Weekly
There is no state minimum wage law.	N/A		N/A

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Maine Minimum Wage Rates

MAINE	Basic Minimum Rate(per hour)	Premium Pay After Designated Hours [2]	
		Daily	Weekly
	$7.50		40

The Maine minimum wage equals the federal minimum wage when it is set below the federal rate, with the exception that any such increase is limited to no more than $1.00 per hour above the current legislated State rate.

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Maryland Minimum Wage Rates

MARYLAND	Basic Minimum Rate(per hour)	Premium Pay After Designated Hours [2]	
		Daily	Weekly
	$8.25		40

The Maryland minimum wage equals the federal minimum wage when set below the federal rate.

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Massachusetts Minimum Wage Rates

MASSACHUSETTS	Basic Minimum Rate (per hour)	Premium Pay After Designated Hours [2]	
		Daily	Weekly

		40

The Massachusetts minimum wage rate automatically increases to 10 cents above the federal rate if the federal rate equals or becomes higher than the State rate.

In no case shall the Massachusetts minimum wage rate be less than $0.50 higher than the effective federal minimum rate.

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Michigan Minimum Wage Rates

MICHIGAN	Basic Minimum Rate (per hour)	Premium Pay After Designated Hours [2]	
		Daily	Weekly
(Applicable to employers of 2 or more employees)	$8.15		40

The State law excludes from coverage any employment that is subject to the federal Fair Labor Standards Act unless the State wage rate is higher than the federal rate.

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Minnesota Minimum Wage Rates

MINNESOTA	Basic Minimum Rate(per hour)	Premium Pay After Designated Hours [2]	
		Daily	Weekly
Large employer (enterprise with annual receipts of $500,000 or more)	$9.00		48
Small employer (enterprise with annual receipts of less than $500,000)	$7.25		48

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Mississippi Minimum Wage Rates

MISSISSIPPI	Basic Minimum Rate (per hour)	Premium Pay After Designated Hours [2]	
		Daily	Weekly
No state minimum wage law.	N/A		N/A

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Missouri Minimum Wage Rates

MISSOURI	Basic Minimum Rate (per hour)	Premium Pay After Designated Hours [2]	
		Daily	Weekly
	$7.65		40

In addition to the exemption for federally covered employment, the law exempts, among others, employees of a retail or service business with gross annual sales or business done of less than $500,000.

Premium pay required after 52 hours in seasonal amusement or recreation businesses.

Minimum wage is to be increased or decreased by a cost of living factor starting January 1, 2008 and every January 1 thereafter.

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Montana Minimum Wage Rates

MONTANA	Basic Minimum Rate(per hour)	Premium Pay After Designated Hours [2]	
		Daily	Weekly

		40

A business not covered by the federal Fair Labor Standards Act whose gross annual sales are $110,000 or less may pay $4.00 per hour, however, if an individual employee is producing or moving goods between states or otherwise covered by the federal Fair Labor Standards Act, that employee must be paid the greater of either the federal minimum wage or Montana's minimum wage.

Minimum wage is subject to a cost of living adjustment done by September 30 of each year and effective on January 1 of the following year.

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Nebraska Minimum Wage Rates

NEBRASKA	Basic Minimum Rate(per hour)	Premium Pay After Designated Hours [2]	
		Daily	Weekly
(Applicable to employers of 4 or more employees)	$8.00		

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Nevada Minimum Wage Rates

NEVADA	Basic Minimum Rate (per hour)	Premium Pay After Designated Hours [2]	
		Daily	Weekly
	$8.25 (with no health ins. benefits provided by employer)	8	40
	$7.25 (with health ins. benefits provided by employer and received by employee)		

The premium overtime pay requirement on either a daily or weekly basis is not applicable to employees who are compensated at not less than one and one-half times the minimum rate or to employees of enterprises having a gross annual sales volume of less than $250,000.

The minimum wage rate may be increased annually based upon changes in the cost of living index increase.

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New Hampshire Minimum Wage Rates

NEW HAMPSHIRE	Basic Minimum Rate(per hour)	Premium Pay After Designated Hours [2]	
		Daily	Weekly
	$7.25		40

The New Hampshire minimum wage equals the federal minimum wage when set below the federal rate.

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New Jersey Minimum Wage Rates

NEW JERSEY	Basic Minimum Rate(per hour)	Premium Pay After Designated Hours [2]	
		Daily	Weekly
	$8.38		40

The minimum wage rate is to be increased on an annual basis, on or about September 30 based on any percentage increase during the one-year period of August of the prior year through August of the current year of the consumer price index (CPI) for all urban wage earners and clerical workers (CPI-W, U.S. City Average), as released by the United States Department of Labor, Bureau of Labor Statistics.

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New Mexico Minimum Wage Rates

NEW MEXICO	Basic Minimum Rate(per hour)	Premium Pay After Designated Hours [2]	
		Daily	Weekly
	$7.50		40

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New York Minimum Wage Rates

NEW YORK	Basic Minimum Rate(per hour)	Premium Pay After Designated Hours [2]	
		Daily	Weekly
	$8.75, effective December 31, 2014		40

The New York minimum wage equals the federal minimum wage when set below the federal rate.

For residential employees, the overtime rate applies after 44 hours.

Employers operating a factory, mercantile establishment, hotel, restaurant, freight/passenger elevator, or theater; or a building employing security guards, janitors, superintendents, managers, engineers, or firemen must provide 24 hours of consecutive rest each week. Domestic workers are entitled to 24 hours of consecutive rest each week, and receive premium pay if they work during such period.

Employees receive 1 hour's pay at minimum wage rate in addition to owed wages when spread of hours exceeds 10 hours, there is a split shift, or both.

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North Carolina Minimum Wage Rates

NORTH CAROLINA	Basic Minimum Rate (per hour)	Premium Pay After Designated Hours [2]	
		Daily	Weekly
	$7.25		40

Premium pay is required after 45 hours a week in seasonal amusements or recreational establishments.

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North Dakota Minimum Wage Rates

NORTH DAKOTA	Basic Minimum Rate(per hour)	Premium Pay After Designated Hours [2]	
		Daily	Weekly
	$7.25		40

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Ohio Minimum Wage Rates

OHIO	Basic Minimum Rate(per hour)	Premium Pay After Designated Hours [2]	
		Daily	Weekly
Employers with annual gross receipts of $297,000 or more.	$8.10		40
Employers with annual gross receipts under $297,000	$7.25		40

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Oklahoma Minimum Wage Rates

OKLAHOMA	Basic Minimum Rate(per hour)	Premium Pay After Designated Hours [2]	
		Daily	Weekly
Employers of ten or more full time employees at any one location and employers with annual gross sales over $100,000 irrespective of number of full time employees.	$7.25		

All other employers.	$2.00		

The Oklahoma state minimum wage law does not contain current dollar minimums. Instead the state adopts the federal minimum wage rate by reference.

The State law excludes from coverage any employment that is subject to the federal Fair Labor Standards Act.

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Oregon Minimum Wage Rates

OREGON	Basic Minimum Rate (per hour)	Premium Pay After Designated Hours [2]	
		Daily	Weekly
	$9.25		40

Premium pay required after 10 hours a day in nonfarm canneries, driers, or packing plants and in mills, factories or manufacturing establishments (excluding sawmills, planning mills, shingle mills, and logging camps).

Beginning January 1, 2004, and annually thereafter, the rate will be adjusted for inflation by a calculation using the U.S. City Average Consumer Price Index for All Urban Consumers for All Items. The wage amount established will be rounded to the nearest five cents.

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Pennsylvania Minimum Wage Rates

PENNSYLVANIA	Basic Minimum Rate (per hour)	Premium Pay After Designated Hours [2]	
		Daily	Weekly
	$7.25		40

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Puerto Rico Minimum Wage Rates

PUERTO RICO	Basic Minimum Rate(per hour)	Premium Pay After Designated Hours [2]	
		Daily	Weekly
	$7.25/hour for employees covered by the FLSA $5.08/hour for employees not covered by the FLSA	8 *And on statutory rest day (double time)*	40 *(double time)*

Employers covered by the federal Fair Labor Standards Act (FLSA) are subject only to the federal minimum wage and all applicable regulations. Employers not covered by the FLSA will be subject to a minimum wage that is at least 70 percent of the federal minimum wage or the applicable mandatory decree rate, whichever is higher. The Secretary of Labor and Human Resources may authorize a rate based on a lower percentage for any employer who can show that implementation of the 70 percent rate would substantially curtail employment in that business.

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Rhode Island Minimum Wage Rates

RHODE ISLAND	Basic Minimum Rate(per hour)	Premium Pay After Designated Hours [2]	
		Daily	Weekly
	$9.00		40

Time and one-half premium pay for work on Sundays and holidays in retail and certain other businesses is required under two laws that are separate from the minimum wage law.

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South Carolina Minimum Wage Rates

SOUTH CAROLINA	Basic Minimum Rate(per hour)	Premium Pay After Designated Hours [2]	
		Daily	Weekly
No state minimum wage law.	N/A		N/A

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South Dakota Minimum Wage Rates

SOUTH DAKOTA	Basic Minimum Rate(per hour)	Premium Pay After Designated Hours [2]	
		Daily	Weekly
	$8.50		

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Tennessee Minimum Wage Rates

TENNESSEE	Basic Minimum Rate (per hour)	Premium Pay After Designated Hours [2]	
		Daily	Weekly
No state minimum wage law.	N/A		N/A

The state does have a promised wage law whereby the employers are responsible for paying to the employees the wages promised by the employer.

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Texas Minimum Wage Rates

TEXAS	Basic Minimum Rate(per hour)	Premium Pay After Designated Hours [2]	
		Daily	Weekly
	$7.25		

The State law excludes from coverage any employment that is subject to the federal Fair Labor Standards Act.

The Texas State minimum wage law does not contain current dollar minimums. Instead the State adopts the federal minimum wage rate by reference.

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Utah Minimum Wage Rates

UTAH	Basic Minimum Rate (per hour)	Premium Pay After Designated Hours [2]	
		Daily	Weekly
	$7.25		

The Utah state minimum wage law does not contain current dollar minimums. Instead the state law authorizes the adoption of the federal minimum wage rate via administrative action.

The State law excludes from coverage any employment that is subject to the federal Fair Labor Standards Act.

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Vermont Minimum Wage Rates

VERMONT	Basic Minimum Rate(per hour)	Premium Pay After Designated Hours [2]	
		Daily	Weekly
(Applicable to employers of two or more employees)	$9.15		40

The State overtime pay provision has very limited application because it exempts numerous types of establishments, such as retail and service; seasonal amusement/recreation; hotels, motels, restaurants; and transportation employees to whom the federal (FLSA) overtime provision does not apply.

The Vermont minimum wage is automatically replaced with the federal minimum wage rate if it is higher than the State minimum.

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Virgin Islands Minimum Wage Rates

VIRGIN ISLANDS	Basic Minimum Rate(per hour)	Premium Pay After Designated Hours [2]	
		Daily	Weekly
State law	$7.25	8	40 *On 6th and 7th consecutive days.*
Except businesses with gross annual receipts of less than $150,000.	$4.30		

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Virginia Minimum Wage Rates

VIRGINIA	Basic Minimum Rate(per hour)	Premium Pay After Designated Hours [2]	
		Daily	Weekly
(Applicable to employers of 4 or more employees)	$7.25		

The Virginia state minimum wage law does not contain current dollar minimums. Instead the state adopts the federal minimum wage rate by reference.

The State law excludes from coverage any employment that is subject to the federal Fair Labor Standards Act.

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Washington Minimum Wage Rates

WASHINGTON	Basic Minimum Rate(per hour)	Premium Pay After Designated Hours [2]	
		Daily	Weekly
	$9.47		40

Premium pay not applicable to employees who request compensating time off in lieu of premium pay.

Beginning January 1, 2001, and annually thereafter, the rate will be adjusted for inflation by a calculation using the consumer price index for urban wage earners and clerical workers for the prior year.

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West Virginia Minimum Wage Rates

WEST VIRGINIA	Basic Minimum Rate(per hour)	Premium Pay After Designated Hours [2]	
		Daily	Weekly
(Applicable to employers of 6 or more employees at one location)	$8.00, effective December 31, 2014		40

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Wisconsin Minimum Wage Rates

WISCONSIN	Basic Minimum Rate(per hour)	Premium Pay After Designated Hours [2]	
		Daily	Weekly
	$7.25		40

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Wyoming Minimum Wage Rates

WYOMING	Basic Minimum Rate(per hour)	Premium Pay After Designated Hours [2]	
		Daily	Weekly

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[1] Like the federal wage and hour law, State law often exempts particular occupations or industries from the minimum labor standard generally applied to covered employment. Particular exemptions are not identified in this table. Users are encouraged to consult the laws of particular States in determining whether the State's minimum wage applies to a particular employment. This information often may be found at the websites maintained by State labor departments. Links to these websites are available at www.dol.gov/whd/contacts/state_of.htm.

[2] The overtime premium rate is one and one-half times the employee's regular rate, unless otherwise specified.

This document was last revised in December 2014.

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Consolidated State Minimum Wage Update Table
(Effective Date: 02/24/2015)

Greater than federal MW	*Equals federal MW of $7.25*	*Less than federal MW*	*No MW Required*
AK - $8.75	IA	GA - $5.15	AL
AR - $7.50	ID	WY - $5.15	LA
AZ - $8.05	IN		MS
CA - $9.00	KS		SC
CO - $8.23	KY		TN
CT - $9.15	NC		
DC - $9.50	ND		
DE - $7.75	NH		
FL - $8.05	OK		
HI – $7.75	PA		
IL - $8.25	TX		
MA - $9.00	UT		
MD - $8.00	VA		
ME - $7.50	WI		
MI - $8.15			
MN - $8.00			
MO - $7.65			
MT - $8.05			
NE - $8.00			
NJ - $8.38			
NM - $7.50			
NY - $8.75			
NV - $8.25			
OH - $8.10			
OR - $9.25			
RI - $9.00			
SD - $8.50			
VT - $9.15			
WA - $9.47			

WV - $8.00			
29 States + DC	**14 States**	**2 States**	**5 States**

- The state minimum wage rate requirements, or lack thereof, are generally controlled by legislative activities within the individual states.
- Four states - Alaska, Arkansas, Nebraska and South Dakota - approved minimum wage increases through ballot measures in the 2014 election.
- Federal minimum wage law supersedes state minimum wage laws where the federal minimum wage is greater than the state minimum wage. In those states where the state minimum wage is greater than the federal minimum wage, the state minimum wage prevails.
- There are 2 states than have a minimum wage set lower than the federal minimum wage. There are 29 states plus DC with minimum wage rates set higher than the federal minimum wage. There are 14 states that have a minimum wage requirement that is the same as the federal minimum wage requirement. The remaining 5 states do not have an established minimum wage requirement.
- The District of Columbia has the highest minimum wage at $9.50/hour. The states of Georgia and Wyoming have the lowest minimum wage ($5.15/hour) of the 45 states that have a minimum wage requirement.
- Note: There are 10 states (AZ, CO, FL, MO, MT, NJ, NV, OH, OR, and WA) that have minimum wages that are linked to a consumer price index. As a result of this linkage, the minimum wages in these states are normally increased each year, generally around January 1st. The exception is Nevada which adjusts in the month of July each year. Effective January 1, 2015, 9 of the 10 states increased their respective minimum wages. The exception was Nevada.

Prepared By:

Division of Communications
Wage and Hour Division
U.S. Department of Labor

This document was last revised in February 24, 2015.

The Wage and Hour Division tries to ensure that the information on this page is accurate but individuals should consult the relevant state labor office for official information.

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EXHIBIT 11

EXHIBIT 11

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The Federal Register

The Daily Journal of the United States Government

Rule

Ninety-Day Waiting Period Limitation

A Rule by the Internal Revenue Service, the Employee Benefits Security Administration, and the Health and Human Services Department on 06/25/2014

Action

Final Rules.

Summary

These final regulations clarify the maximum allowed length of any reasonable and bona fide employment-based orientation period, consistent with the 90-day waiting period limitation set forth in section 2708 of the Public Health Service Act, as added by the Patient Protection and Affordable Care Act (Affordable Care Act), as amended, and incorporated into the Employee Retirement Income Security Act of 1974 and the Internal Revenue Code.

Unified Agenda

Ninety-Day Waiting Period Limitation and Technical Amendments to Certain Health Coverage Requirements Under the Affordable Care Act (CMS-9952-F)

3 actions from March 21st, 2013 to December 2013

Ninety-Day Waiting Period Limitation Under the Affordable Care Act

3 actions from February 24th, 2014 to May 2014

- February 24th, 2014
  - NPRM
  - 79 FR 10320
- April 25th, 2014
  - NPRM Comment Period End
- May 2014
  - Analyze Comments

Ninety-Day Waiting Period Limitation

3 actions from February 24th, 2014 to December 2014

- February 24th, 2014
  - NPRM

- 79 FR 10320
- April 25th, 2014
  - NPRM Comment Period End
- December 2014
  - Final Action

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DATES:

Effective date. These final regulations are effective on August 25, 2014.

Applicability date. These final regulations apply to group health plans and group health insurance issuers for plan years beginning on or after January 1, 2015.

FOR FURTHER INFORMATION CONTACT:

Amy Turner or Elizabeth Schumacher, Employee Benefits Security Administration, Department of Labor, at (202) 693-8335; Karen Levin, Internal Revenue Service, Department of the Treasury, at (202) 317-6846; or Cam Moultrie Clemmons, Centers for Medicare & Medicaid Services, Department of Health and Human Services, at (410) 786-1565.

Customer service information: Individuals interested in obtaining information from the Department of Labor concerning employment-based health coverage laws may call the EBSA Toll-Free Hotline at 1-866-444-EBSA (3272) or visit the Department of Labor's Web site (*www.dol.gov/ebsa*). In addition, information from HHS on private health insurance for consumers can be found on the Centers for Medicare & Medicaid Services (CMS) Web site (*www.cciio.cms.gov/*) and information on health reform can be found at *www.HealthCare.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

The Patient Protection and Affordable Care Act, Public Law 111-148, was enacted on March 23, 2010, and the Health Care and Education Reconciliation Act, Public Law 111-152, was enacted on March 30, 2010. (They are collectively known as the "Affordable Care Act".) The Affordable Care Act reorganizes, amends, and adds to the provisions of part A of title XXVII of the Public Health Service Act (PHS Act) relating to group health plans and health insurance issuers in the group and individual markets. The term "group health plan" includes both insured and self-insured group health plans.[1] The Affordable Care Act adds section 715(a)(1) to the Employee Retirement Income Security Act (ERISA) and section 9815(a)(1) to the Internal Revenue Code (the Code) to incorporate the provisions of part A of title XXVII of the PHS Act into ERISA and the Code, and to make them applicable to group health plans and health insurance issuers providing health insurance coverage in connection with group health plans. The PHS Act sections incorporated by these references are sections 2701 through 2728.

PHS Act section 2708, as added by the Affordable Care Act and incorporated into ERISA and the Code, provides that a group health plan or health insurance issuer offering group health insurance coverage shall not apply any waiting period (as defined in PHS Act section 2704(b)(4)) that exceeds 90 days. PHS Act section 2704(b)(4), ERISA section 701(b)(4), and Code section 9801(b)(4) define a waiting period to be the period that must pass with respect to an individual before the individual is eligible to be covered for benefits under the terms of the plan. In 2004 regulations implementing the Health Insurance Portability and Accountability Act of 1996 (HIPAA) portability provisions (2004 HIPAA regulations), the Departments of Labor, Health and Human Services (HHS), and the Treasury (the Departments[2]) defined a waiting period to mean the period that must pass before coverage for an employee or dependent who is otherwise eligible to enroll under the terms of a group health plan can become effective.[3] PHS Act section 2708 does not require an employer to offer coverage to any particular individual or class of individuals, including part-time employees. PHS Act section 2708 prevents an otherwise eligible individual from being required to wait more than 90 days before coverage becomes effective. PHS Act section 2708 applies to both grandfathered and non-grandfathered group health plans and group health insurance coverage for plan years beginning on or after January 1, 2014.

On February 9, 2012, the Departments issued guidance[4] outlining various approaches under consideration with respect to both the 90-day waiting period limitation and the employer shared responsibility provisions under Code section 4980H (February 2012 guidance) and requested public comment. On August 31, 2012, following their review of the comments on the February 2012 guidance, the Departments provided temporary guidance,[5] to remain in effect at least through the end of 2014, regarding the 90-day waiting period limitation, and described the approach they intended to propose in future rulemaking (August 2012 guidance). After consideration of all of the comments received in response to the February 2012 guidance and August 2012 guidance, the Departments issued proposed regulations on March 21, 2013 (78 FR 17313). After consideration of comments on the proposed regulations, the Departments published final regulations on February 24, 2014 (79 FR 10295).

Under the final regulations, a group health plan and a health insurance issuer offering group health insurance coverage may not apply any waiting period that exceeds 90 days. The regulations define "waiting period" as the period that must pass before coverage for an employee or dependent who is otherwise eligible to enroll under the terms of a group health plan can become effective. Being otherwise eligible to enroll in a plan means having met the plan's substantive eligibility conditions (such as, for example, being in an eligible job classification, achieving job-related licensure requirements specified in the plan's terms, or satisfying a reasonable and bona fide employment-based orientation period).

Contemporaneous with the publication of the final regulations, the Departments published proposed regulations (79 FR 10319) to address orientation periods under the 90-day waiting period limitation of PHS Act section 2708 and solicit comment before promulgation of final regulations on this specific issue. The proposed regulations provided that one month would be the maximum allowed length of any reasonable and bona fide employment-based orientation period. The Departments stated that, during an orientation period, they envisioned that an employer and employee could evaluate whether the employment situation was satisfactory for each party, and standard orientation and training processes would begin. Under the proposed regulations, if a group health plan conditions eligibility on an employee's having completed a reasonable and bona fide employment-based orientation period, the eligibility condition would not be considered to be designed to avoid compliance with the 90-day waiting period limitation if the orientation period did not exceed one month and the maximum 90-day waiting period would begin on the first day after the orientation period.

Many commenters were generally supportive of the proposed rule. Commenters agreed that a limitation on the length of an orientation period of one month was appropriate and also agreed with the proposal that determining whether an orientation period is "reasonable" and "bona fide" should be a facts and circumstances analysis. Some commenters urged the Departments to clarify the interplay between the 90-day waiting period provision and the employer shared responsibility provisions.

After consideration of the comments and feedback received from stakeholders, the Departments are publishing these final regulations that incorporate the proposed regulations without any substantive changes.

II. Overview of the Final Regulations

The final regulations implementing PHS Act section 2708 set forth rules governing the relationship between a plan's eligibility criteria and the 90-day waiting period limitation. Specifically, the final regulations provide that being otherwise eligible to enroll in a plan means having met the plan's substantive eligibility conditions (for example, being in an eligible job classification, achieving job-related licensure requirements specified in the plan's terms, or satisfying a reasonable and bona fide employment-based orientation period). Under the final regulations, after an individual is determined to be otherwise eligible for coverage under the terms of the plan, any waiting period may not extend beyond 90 days, and all calendar days are counted beginning on the enrollment date, including weekends and holidays.[6]

Orientation periods are commonplace and the Departments do not intend to call into question the reasonableness of short, bona fide orientation periods. The danger of abuse increases, however, as the length of the period expands. Accordingly, the final regulations provide that one month is the maximum allowed length of an employment-based orientation period. The creation of a clear maximum prevents abuse and facilitates compliance.

During an orientation period, the Departments envision that an employer and employee will evaluate whether the employment situation is satisfactory for each party, and standard orientation and training processes will begin. For any period longer than one month that precedes a waiting period, the Departments refer back to the general rule, which provides that the 90-day period begins after an individual is otherwise eligible to enroll under the terms of a group health plan. While a plan may impose substantive eligibility criteria, such as requiring the worker to fit within an eligible job classification or to achieve job-related licensure requirements, it may not

impose conditions that are mere subterfuges for the passage of time.

Under these final regulations, one month would be determined by adding one calendar month and subtracting one calendar day, measured from an employee's start date in a position that is otherwise eligible for coverage. For example, if an employee's start date in an otherwise eligible position is May 3, the last permitted day of the orientation period is June 2. Similarly, if an employee's start date in an otherwise eligible position is October 1, the last permitted day of the orientation period is October 31. If there is not a corresponding date in the next calendar month upon adding a calendar month, the last permitted day of the orientation period is the last day of the next calendar month. For example, if the employee's start date is January 30, the last permitted day of the orientation period is February 28 (or February 29 in a leap year). Similarly, if the employee's start date is August 31, the last permitted day of the orientation period is September 30. If a group health plan conditions eligibility on an employee's having completed a reasonable and bona fide employment-based orientation period, the eligibility condition is not considered to be designed to avoid compliance with the 90-day waiting period limitation if the orientation period does not exceed one month and the maximum 90-day waiting period begins on the first day after the orientation period.

Compliance with these final regulations is not determinative of compliance with section 4980H of the Code, under which an applicable large employer may be subject to an assessable payment if it fails to offer affordable minimum value coverage to certain newly-hired full-time employees by the first day of the fourth full calendar month of employment. For example, an applicable large employer that has a one-month orientation period may comply with both PHS Act section 2708 and Code section 4980H by offering coverage no later than the first day of the fourth full calendar month of employment. However, an applicable large employer plan may not be able to impose the full one-month orientation period and the full 90-day waiting period without potentially becoming subject to an assessable payment under Code section 4980H. For example, if an employee is hired as a full-time employee on January 6, a plan may offer coverage May 1 and comply with both provisions. However, if the employer is an applicable large employer and starts coverage May 6, which is one month plus 90 days after date of hire, the employer may be subject to an assessable payment under Code section 4980H.

These final regulations apply to group health plans and health insurance issuers for plan years beginning on or after January 1, 2015. Until these final rules are applicable, as stated in the preamble to the proposed rules, the Departments will consider compliance with the proposed regulations to constitute compliance with PHS Act section 2708. *See* 79 FR 10320, 10321 (February 24, 2014).

III. Economic Impact and Paperwork Burden

A. Executive Order 12866 and 13563—Department of Labor and Department of Health and Human Services

Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing and streamlining rules, and of promoting flexibility. It also requires Federal agencies to develop a plan under which the agencies will periodically review their existing significant regulations to make the agencies' regulatory programs more effective or less burdensome in achieving their regulatory objectives.

Under Executive Order 12866, a regulatory action deemed "significant" is subject to the requirements of the Executive Order and review by the Office of Management and Budget (OMB). Section 3(f) of the Executive Order defines a "significant regulatory action" as an action that is likely to result in a rule (1) having an annual effect on the economy of $100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as "economically significant"); (2) creating serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

These final regulations are not economically significant within the meaning of section 3(f)(1) of the Executive Order. However, OMB has determined that the actions are significant within the meaning of section 3(f)(4) of the Executive Order. Therefore, OMB has reviewed these final regulations, and the Departments[7] have provided the following assessment of their impact.

1. Summary

As stated earlier in this preamble, these final regulations provide that one month is the maximum allowed length of any reasonable and bona fide employment-based orientation period. The final regulations generally apply to group health plans and group health insurance issuers for plan years beginning on or after January 1, 2015.

The Departments have crafted these final regulations to secure the protections intended by Congress in an economically efficient manner. The Departments lack sufficient data to quantify the regulations' economic cost or benefits. The preamble to the proposed rules implementing PHS Act section 2708, published[8] in the Federal Register on February 24, 2014 provided a qualitative discussion of economic impacts of clarifying the maximum allowed length of any reasonable and bona fide orientation period and requested detailed comment and data that would allow for quantification of the costs, benefits, and transfers associated with the term. The Departments received no comments providing additional data that would help it estimate the economic impacts of the final regulations.

2. Estimated Number of Affected Entities

The Departments estimate that 4.1 million new employees receive group health insurance coverage through private sector employers and 1.0 million new employees receive group health insurance coverage through public sector employers annually.[9] The 2013 Kaiser Family Foundation and Health Research and Education Trust Employer Health Benefits Annual Survey (the "2013 Kaiser Survey") finds that 30 percent of covered workers were subject to waiting periods of three months or more.[10] If 30 percent of new employees receiving health care coverage from their employers are subject to a waiting period of three months or more, then 1.5 million new employees (5.1 million × 0.30) would potentially be affected by these regulations.[11] However, it is unlikely that the survey defines the term "waiting period" in the same manner as the final regulations. For example, the term "waiting period" may have been defined by reference to an employee's start date, not matching the definition in the final regulations.

3. Benefits

The final regulations implementing PHS Act section 2708.[12] set forth rules governing the relationship between a plan's eligibility criteria and the 90-day waiting period limitation. Specifically, the final regulations provide that being otherwise eligible to enroll in a plan means having met the plan's substantive eligibility conditions (such as, for example, being in an eligible job classification, achieving job-related licensure requirements specified in the plan's terms, or satisfying a reasonable and bona fide employment-based orientation period). These final regulations provide that one month is the maximum allowed length of any reasonable and bona fide employment-based orientation period. This period of no longer than one month is intended to provide plan sponsors with flexibility to continue the common practice of utilizing a probationary or trial period to determine whether a new employee will be able to handle the duties and challenges of the job, while providing protections against excessive waiting periods for such employees. Under these final regulations, the plan's waiting period must begin once the new employee satisfies the maximum one month orientation period requirement and the waiting period may not exceed 90 days.

4. Costs

These final regulations extend the maximum amount of time between an employee beginning work and obtaining health care coverage relative to the time before the issuance of the final regulations implementing PHS Act section 2708 and these final regulations. If employees delay health care treatment until the expiration of the orientation period and waiting period, detrimental health effects could result, especially for low-wage employees and their dependents and those requiring higher levels of health care, such as those with chronic conditions. This could lead to lower work productivity and missed school days. However, the Departments anticipate that such effects may be limited because few employees are likely to be affected and it is anticipated that the inclusion of an orientation period will not result in most employees facing a full additional month between being hired and obtaining coverage.

5. Transfers

The possible transfers associated with these final regulations would arise when employers begin to pay their portion of premiums or contributions later than they did before the issuance of these final regulations. Recipients of the transfer would be employers who implement an orientation period in addition to the 90-day waiting period, thus delaying having to pay premiums. The source of the transfers would be covered employees who, after these final regulations become applicable, would have to wait longer between being employed and obtaining health coverage. During this period, affected employees might obtain an individual health insurance policy, purchase COBRA continuation coverage, or forgo health coverage—which could, depending on the policy, have higher out-of-pocket costs for their healthcare expenditures.

The Departments expect these transfers to be minimal because under these final regulations, only a small number of employers would further effectively extend start date for coverage to their employees. That is because a relatively small fraction of workers have waiting periods that exceed three months; this rule does not create an incentive that is not in the system already.

B. Regulatory Flexibility Act—Department of Labor and Department of Health and Human Services

The Regulatory Flexibility Act (5 U.S.C. 601 et seq.) (RFA) applies to mostFederal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C. 551 et seq.). Unless an agency certifies that such a rule will not have a significant economic impact on a substantial number of small entities, section 603 of the RFA requires the agency to present an initial regulatory flexibility analysis at the time of the publication of the notice of proposed rulemaking describing the impact of the rule on small entities. Small entities include small businesses, organizations and governmental jurisdictions. In accordance with the RFA, the Departments prepared an initial regulatory flexibility analysis at the proposed rule stage and requested comments on the analysis. No comments were received. Below is the Department's final regulatory flexibility analysis and its certification that these final regulations do not have a significant economic impact on a substantial number of small entities.

The Departments carefully considered the likely impact of the rule on small entities in connection with their assessment under Executive Order 12866. The Departments lack data to focus only on the impacts on small business. However, the Departments believe that by providing small businesses with flexibility to design reasonable and bona fide employment-based orientation periods, consistent with the 90-day waiting period limitation set forth in PHS Act section 2708, the final regulations reduce the burden on such businesses to comply with the provision. Based on the foregoing, the Departments hereby certify that these final regulations will not have a significant economic impact on a substantial number of small entities.

C. Special Analyses—Department of the Treasury

For purposes of the Department of the Treasury, it has been determined that this final rule is not a significant regulatory action as defined in Executive Order 12866, as supplemented by Executive Order 13563. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these final regulations, and, because these final regulations do not impose a collection of information requirement on small entities, a regulatory flexibility analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to Code section 7805(f), the proposed rule was submitted to the Small Business Administration for comment on its impact on small business.

D. Paperwork Reduction Act

This final rule is not subject to the requirements of the Paperwork Reduction Act of 1995 (PRA 95) (44 U.S.C. 3501 et seq.), because it does not contain a collection of information as defined in 44 U.S.C. 3502(3).

E. Congressional Review Act

These final regulations are subject to the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 et seq.) and will be transmitted to the Congress and the Comptroller General for review.

F. *Unfunded Mandates Reform Act*

For purposes of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4), as well as Executive Order 12875, these final regulations do not include any Federal mandate that may result in expenditures by State, local, or tribal governments, or by the private sector, of $100 million or more adjusted for inflation.

G. Federalism Statement—Department of Labor and Department of Health and Human Services

Executive Order 13132 outlines fundamental principles of federalism, and requires the adherence to specific criteria by Federal agencies in the process of their formulation and implementation of policies that have "substantial direct effects" on the States, the relationship between the national government and States, or on the distribution of power and responsibilities among the various levels of government. Federal agencies promulgating regulations that have these federalism implications must consult with State and local officials, and describe the extent of their consultation and the nature of the concerns of State and local officials in the preamble to the regulation.

In the Departments' view, these final regulations have federalism implications, because they have direct effects on the States, the relationship between the national government and States, or on the distribution of power and responsibilities among various levels of government. In general, through section 514, ERISA supersedes State laws to the extent that they relate to any covered employee benefit plan, and preserves State laws that regulate insurance, banking, or securities. While ERISA prohibits States from regulating a plan as an insurance or investment company or bank, the preemption provisions of ERISA section 731 and PHS Act section 2724 (implemented in 29 CFR 2590.731(a) and 45 CFR 146.143(a)) apply so that the HIPAA requirements (including those of the Affordable Care Act) are not to be "construed to supersede any provision of State law which establishes, implements, or continues in effect any standard or requirement solely relating to health insurance issuers in connection with group health insurance coverage except to the extent that such standard or requirement prevents the application of a requirement" of a Federal standard. The conference report accompanying HIPAA indicates that this is intended to be the "narrowest" preemption of State laws. (See House Conf. Rep. No. 104-736, at 205, reprinted in 1996 U.S. Code Cong. Admin. News 2018.)

States may continue to apply State law requirements except to the extent that such requirements prevent the application of the Affordable Care Act requirements that are the subject of this rulemaking. State insurance laws that are more stringent than the Federal requirements are unlikely to "prevent the application of" the Affordable Care Act, and be preempted. Accordingly, States have significant latitude to impose requirements on health insurance issuers that are more restrictive than the Federal law.

Guidance conveying this interpretation was published in the Federal Register on April 8, 1997 (62 FR 16904), and December 30, 2004 (69 FR 78720), and these final rules would clarify and implement the statute's minimum standards and would not significantly reduce the discretion given the States by the statute.

In compliance with the requirement of Executive Order 13132 that agencies examine closely any policies that may have federalism implications or limit the policy making discretion of the States, the Departments have engaged in efforts to consult with and work cooperatively with affected State and local officials, including attending conferences of the National Association of Insurance Commissioners and consulting with State insurance officials on an individual basis.

Throughout the process of developing these final regulations, to the extent feasible within the specific preemption provisions of HIPAA as it applies to the Affordable Care Act, the Departments have attempted to balance the States' interests in regulating health insurance issuers, and Congress' intent to provide uniform minimum protections to consumers in every State. By doing so, it is the Departments' view that they have complied with the requirements of Executive Order 13132.

IV. Statutory Authority

The Department of the Treasury regulations are adopted pursuant to the authority contained in sections 7805 and 9833 of the Code.

The Department of Labor regulations are adopted pursuant to the authority contained in 29 U.S.C. 1027, 1059, 1135, 1161-1168, 1169, 1181-1183, 1181 note, 1185, 1185a, 1185b, 1185d, 1191, 1191a, 1191b, and 1191c; sec. 101(g), Public Law 104-191, 110 Stat. 1936; sec. 401(b), Public Law 105-200, 112 Stat. 645 (42 U.S.C. 651 note); sec. 512(d), Public Law 110-343, 122 Stat. 3881; sec. 1001, 1201, and 1562(e), Public Law 111-148, 124 Stat. 119, as amended by Public Law 111-152, 124 Stat. 1029; Secretary of Labor's Order 3-2010, 75 FR 55354 (September 10, 2010).

The Department of Health and Human Services regulations are adopted pursuant to the authority contained in sections 2701 through 2763, 2791, and 2792 of the PHS Act (42 U.S.C. 300gg through 300gg-63, 300gg-91, and 300gg-92), as amended.

List of Subjects

26 CFR Part 54

- Excise taxes
- Health care
- Health insurance
- Pensions
- Reporting and recordkeeping requirements

29 CFR Part 2590

- Continuation coverage
- Disclosure
- Employee benefit plans
- Group health plans
- Health care

- Health insurance
- Medical child support
- Reporting and recordkeeping requirements

45 CFR Part 147

- Health care
- Health insurance
- Reporting and recordkeeping requirements
- and State regulation of health insurance

John Dalrymple,

Deputy Commissioner for Services and Enforcement, Internal Revenue Service.

Approved: June 18, 2014.

Mark J. Mazur,

Assistant Secretary of the Treasury (Tax Policy).

Signed this 18th day of June, 2014.

Phyllis C. Borzi,

Assistant Secretary, Employee Benefits Security Administration, Department of Labor.

Dated: June 19, 2014.

Marilyn Tavenner,

Administrator, Centers for Medicare & Medicaid Services.

Dated: June 19, 2014.

Sylvia Burwell,

Secretary, Department of Health and Human Services.

Department of the Treasury

Internal Revenue Service

26 CFR Chapter I

Accordingly, 26 CFR part 54 is amended as follows:

begin regulatory text

PART 54—PENSION EXCISE TAXES

Paragraph 1. The authority citation for Part 54 continues to read in part as follows:

Authority:

26 U.S.C. 7805. * * *

Section 54.9815-2708 is also issued under 26 U.S.C. 9833.

* * * * *

Par. 2. Section 54.9815-2708 is amended by adding paragraph (c)(3)(iii) and a new Example 11 in paragraph (f) to read as follows:

§ 54.9815-2708 Prohibition on waiting periods that exceed 90 days.

* * * * *

(c) * * *

(3) * * *

(iii) *Limitation on orientation periods.* To ensure that an orientation period is not used as a subterfuge for the passage of time, or designed to avoid compliance with the 90-day waiting period limitation, an orientation period is permitted only if it does not exceed one month. For this purpose, one month is determined by adding one calendar month and subtracting one calendar day, measured from an employee's start date in a position that is otherwise eligible for coverage. For example, if an employee's start date in an otherwise eligible position is May 3, the last permitted day of the orientation period is June 2. Similarly, if an employee's start date in an otherwise eligible position is October 1, the last permitted day of the orientation period is October 31. If there is not a corresponding date in the next calendar month upon adding a calendar month, the last permitted day of the orientation period is the last day of the next calendar month. For example, if the employee's start date is January 30, the last permitted day of the orientation period is February 28 (or February 29 in a leap year). Similarly, if the employee's start date is August 31, the last permitted day of the orientation period is September 30.

* * * * *

(f) * * *

Example 11.

(i) *Facts.* Employee *H* begins working full time for Employer *Z* on October 16. *Z* sponsors a group health plan, under which full time employees are eligible for coverage after they have successfully completed a bona fide one-month orientation period. *H* completes the orientation period on November 15.

(ii) *Conclusion.* In this *Example 11*, the orientation period is not considered a subterfuge for the passage of time and is not considered to be designed to avoid compliance with the 90-day waiting period limitation. Accordingly, plan coverage for *H* must begin no later than February 14, which is the 91st day after *H* completes the orientation period. (If the orientation period was longer than one month, it would be considered to be a subterfuge for the passage of time and designed to avoid compliance with the 90-day waiting period limitation. Accordingly it would violate the rules of this section.)

* * * * *

end regulatory text

Department of Labor

Employee Benefits Security Administration

29 CFR Chapter XXV

For the reasons stated in the preamble, the Department of Labor amends 29 CFR part 2590 as follows:

begin regulatory text

PART 2590—RULES AND REGULATIONS FOR GROUP HEALTH PLANS

3.The authority citation for part 2590 continues to read as follows:

Authority:

29 U.S.C. 1027, 1059, 1135, 1161-1168, 1169, 1181-1183, 1181 note, 1185, 1185a, 1185b, 1185c, 1185d, 1191, 1191a, 1191b, and 1191c; sec. 101(g), Pub. L. 104-191, 110 Stat. 1936; sec. 401(b), Pub. L. 105-200, 112 Stat. 645 (42 U.S.C. 651 note); sec. 512(d), Pub. L. 110-343, 122 Stat. 3881; sec. 1001, 1201, and 1562(e), Pub. L. 111-148, 124 Stat. 119, as amended by Pub. L. 111-152, 124 Stat. 1029; Secretary of Labor's Order 3-2010, 75 FR 55354 (September 10, 2010).

4.Section 2590.715-2708 is amended by adding paragraph (c)(3)(iii) and a new Example 11 in paragraph (f) to read as follows:

§ 2590.715-2708 Prohibition on waiting periods that exceed 90 days.

* * * * *

(c) * * *

(3) * * *

(iii) *Limitation on orientation periods.* To ensure that an orientation period is not used as a subterfuge for the passage of time, or designed to avoid compliance with the 90-day waiting period limitation, an orientation period is permitted only if it does not exceed one month. For this purpose, one month is determined by adding one calendar month and subtracting one calendar day, measured from an employee's start date in a position that is otherwise eligible for coverage. For example, if an employee's start date in an otherwise eligible position is May 3, the last permitted day of the orientation period is June 2. Similarly, if an employee's start date in an otherwise eligible position is October 1, the last permitted day of the orientation period is October 31. If there is not a corresponding date in the next calendar month upon adding a calendar month, the last permitted day of the orientation period is the last day of the next calendar month. For example, if the employee's start date is January 30, the last permitted day of the orientation period is February 28 (or February 29 in a leap year). Similarly, if the employee's start date is August 31, the last permitted day of the orientation period is September 30.

* * * * *

(f) * * *

Example 11.

(i) *Facts.* Employee *H* begins working full time for Employer *Z* on October 16. *Z* sponsors a group health plan, under which full time employees are eligible for coverage after they have successfully completed a bona fide one-month orientation period. *H* completes the orientation period on November 15.

(ii) *Conclusion.* In this *Example 11*, the orientation period is not considered a subterfuge for the passage of time and is not considered to be designed to avoid compliance with the 90-day waiting period limitation. Accordingly, plan coverage for *H* must begin no later than February 14, which is the 91st day after *H* completes the orientation period. (If the orientation period was longer than one month, it would be considered to be a subterfuge for the passage of time and designed to avoid compliance with the 90-day waiting period limitation. Accordingly it would violate the rules of this section.)

* * * * *

end regulatory text

Department of Health and Human Services

45 CFR Subtitle A

For the reasons set forth in the preamble, the Department of Health and Human Services amends 45 CFR part 147 as set forth below:

begin regulatory text

PART 147—HEALTH INSURANCE REFORM REQUIREMENTS FOR THE GROUP AND INDIVIDUAL HEALTH INSURANCE MARKETS

5.The authority citation for part 147 continues to read as follows:

Authority:

Secs. 2701 through 2763, 2791, and 2792 of the Public Health Service Act (42 U.S.C. 300gg through 300gg-63, 300gg-91, and 300gg-92).

6.Section 147.116 is amended by adding paragraph (c)(3)(iii) and a new Example 11 in paragraph (f) to read as follows:

§ 147.116 Prohibition on waiting periods that exceed 90 days.

* * * * *

(c) * * *

(3) * * *

(iii) *Limitation on orientation periods.* To ensure that an orientation period is not used as a subterfuge for the passage of time, or designed to avoid compliance with the 90-day waiting period limitation, an orientation period is permitted only if it does not exceed one month. For this purpose, one month is determined by adding one calendar month and subtracting one calendar day, measured from an employee's start date in a position that is otherwise eligible for coverage. For example, if an employee's start date in an otherwise eligible position is May 3, the last permitted day of the orientation period is June 2. Similarly, if an employee's start date in an otherwise eligible position is October 1, the last permitted day of the orientation period is October 31. If there is not a corresponding date in the next calendar month upon adding a calendar month, the last permitted day of the orientation period is the last day of the next calendar month. For example, if the employee's start date is January 30, the last permitted day of the orientation period is February 28 (or February 29 in a leap year). Similarly, if the employee's start date is August 31, the last permitted day of the orientation period is September 30.

* * * * *

(f) * * *

Example 11.

(i) *Facts.* Employee *H* begins working full time for Employer *Z* on October 16. *Z* sponsors a group health plan, under which full time employees are eligible for coverage after they have successfully completed a bona fide one-month orientation period. *H* completes the orientation period on November 15.

(ii) *Conclusion.* In this *Example 11*, the orientation period is not considered a subterfuge for the passage of time and is not considered to be designed to avoid compliance with the 90-day waiting period limitation. Accordingly, plan coverage for *H* must begin no later than February 14, which is the 91st day after *H* completes the orientation period. (If the orientation period was longer than one month, it would be considered to be a subterfuge for the passage of time and designed to avoid compliance with the 90-day waiting period limitation. Accordingly it would violate the rules of this section.)

* * * * *

end regulatory text

[FR Doc. 2014-14795 Filed 6-20-14; 4:15 pm]

BILLING CODE 4830-01-P; 4510-29-P; 4120-01-P; 6325-64-P

Footnotes

1. The term "group health plan" is used in title XXVII of the PHS Act, part 7 of ERISA, and chapter 100 of the Code, and is distinct from the term "health plan," as used in other provisions of title I of the Affordable Care Act. The term "health plan" does not include self-insured group health plans.

Back to Context

2. Note, however, that in the Economic Analysis and Paperwork Burden section of this preamble, in sections under headings listing only two of the three Departments, the term "Departments" generally refers only to the two Departments listed in the heading.

Back to Context

3. 26 CFR 54.9801-3(a)(3)(iii), 29 CFR 2590.701-3(a)(3)(iii), and 45 CFR 146.111(a)(3)(iii).

Back to Context

4. Department of Labor Technical Release 2012-01, IRS Notice 2012-17, and HHS FAQs issued February 9, 2012.

Back to Context

5. Department of Labor Technical Release 2012-02, IRS Notice 2012-59, and HHS FAQs issued August 31, 2012.

Back to Context

6. The final regulations also note that a plan or issuer that imposes a 90-day waiting period may, for administrative convenience, choose to permit coverage to become effective earlier than the 91st day if the 91st day is a weekend or holiday.

Back to Context

7. In section III of this preamble, some subsections have a heading listing one or two of the three Departments. In those subsections, the term "Departments" generally refers only to the Departments listed in the heading.

Back to Context

8. 79 FR 10321.

Back to Context

9. This estimate is based upon internal Department of Labor calculations derived from the 2009 Medical Expenditure Panel Survey.

Back to Context

10. *See e.g.*, Kaiser Family Foundation and Health Research and Education Trust, *Employer Health Benefits 2013 Annual Survey* (2013) available at *http://ehbs.kff.org/pdf/2013/8345.pdf*.

Back to Context

11. Approximately 1.2 million private sector employees and 287,000 State and local public sector employees.

Back to Context

12. 79 FR 10295 (February 24, 2014).

Back to Context

EXHIBIT 12

EXHIBIT 12

DISTRICT COURT CIVIL COVER SHEET

Clark County, Nevada

Case No. A-14-707425-C Dept V

(Assigned by Clerk's Office)

I. Party Information *(provide both home and mailing addresses if different)*

Plaintiff(s) (name/address/phone):	Defendant(s) (name/address/phone):
Lakshi Perera	Western Cab Company
6500 Pearcrest Road	630 S. Fourth Street
Las Vegas, NV 89108	Las Vegas, NV 89101
Attorney (name/address/phone):	**Attorney (name/address/phone):**
Leon Greenberg, Esq. Dana Sniegocki, Esq.	Unknown
2965 S. Jones Blvd., Suite E-3	
Las Vegas, NV 89146	
702-383-6085	

II. Nature of Controversy *(please select the one most applicable filing type below)*

Civil Case Filing Types

Real Property	Torts	
Landlord/Tenant	**Negligence**	**Other Torts**
☐ Unlawful Detainer	☐ Auto	☐ Product Liability
☐ Other Landlord/Tenant	☐ Premises Liability	☐ Intentional Misconduct
Title to Property	☐ Other Negligence	☐ Employment Tort
☐ Judicial Foreclosure	**Malpractice**	☐ Insurance Tort
☐ Other Title to Property	☐ Medical/Dental	☐ Other Tort
Other Real Property	☐ Legal	
☐ Condemnation/Eminent Domain	☐ Accounting	
☐ Other Real Property	☐ Other Malpractice	

Probate	Construction Defect & Contract	Judicial Review/Appeal
Probate *(select case type and estate value)*	**Construction Defect**	**Judicial Review**
☐ Summary Administration	☐ Chapter 40	☐ Foreclosure Mediation Case
☐ General Administration	☐ Other Construction Defect	☐ Petition to Seal Records
☐ Special Administration	**Contract Case**	☐ Mental Competency
☐ Set Aside	☐ Uniform Commercial Code	**Nevada State Agency Appeal**
☐ Trust/Conservatorship	☐ Building and Construction	☐ Department of Motor Vehicle
☐ Other Probate	☐ Insurance Carrier	☐ Worker's Compensation
Estate Value	☐ Commercial Instrument	☐ Other Nevada State Agency
☐ Over $200,000	☐ Collection of Accounts	**Appeal Other**
☐ Between $100,000 and $200,000	☐ Employment Contract	☐ Appeal from Lower Court
☐ Under $100,000 or Unknown	☐ Other Contract	☐ Other Judicial Review/Appeal
☐ Under $2,500		

Civil Writ		Other Civil Filing
Civil Writ		**Other Civil Filing**
☐ Writ of Habeas Corpus	☐ Writ of Prohibition	☐ Compromise of Minor's Claim
☐ Writ of Mandamus	☐ Other Civil Writ	☐ Foreign Judgment
☐ Writ of Quo Warrant		■ Other Civil Matters

Business Court filings should be filed using the Business Court civil coversheet.

9-23-2014

Date

Signature of initiating party or representative

See other side for family-related case filings.

Nevada AOC - Research Statistics Unit
Pursuant to NRS 3.275

Form PA 201
Rev 3.1

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CLERK OF THE COURT

COMP
LEON GREENBERG, ESQ., NSB 8094
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2965 South Jones Blvd- Suite E4
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Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

LAKSIRI PERERA, Individually and on behalf of others similarly situated, Plaintiff, vs. WESTERN CAB COMPANY, Defendant.	Case No.: A-14-707425-C Dept.: V **COMPLAINT** **ARBITRATION EXEMPTION CLAIMED BECAUSE THIS IS A CLASS ACTION CASE**

LAKSIRI PERERA, individually and on behalf of others similarly situated, by and through his attorney, Leon Greenberg Professional Corporation, as and for a Complaint against the defendant, states and alleges, as follows:

JURISDICTION, PARTIES AND PRELIMINARY STATEMENT

1. The plaintiff, LAKSIRI PERERA, (the "individual plaintiff" or the "named plaintiff") is a resident of Clark County in the State of Nevada and is a former employee of the defendant.

2. The defendant, WESTERN CAB COMPANY, (hereinafter referred to as "Western Cab" or "defendant") is a corporation existing and established pursuant to the laws of the State of Nevada with its principal place of business in the County of

Clark, State of Nevada and conducts business in Nevada.

CLASS ACTION ALLEGATIONS

3. The plaintiff brings this action as a class action pursuant to Nev. R. Civ. P. §23 on behalf of himself and a class of all similarly situated persons employed by the defendant in the State of Nevada.

4. The class of similarly situated persons consists of all persons employed by defendant in the State of Nevada during the applicable statute of limitations periods prior to the filing of this Complaint continuing until date of judgment, such persons being employed as taxi cab drivers (hereinafter referred to as "cab drivers" or "drivers") such employment involving the driving of taxi cabs for the defendant in the State of Nevada.

5. The common circumstance of the cab drivers giving rise to this suit is that while they were employed by defendant they were not paid the minimum wage required by Nevada's Constitution, Article 15, Section 16 for many or most of the days that they worked in that their hourly compensation, when calculated pursuant to the requirements of said Nevada Constitutional Provision, did not equal at least the minimum hourly wage provided for therein.

6. The named plaintiff is informed and believes, and based thereon alleges that there are at least 100 putative class action members. The actual number of class members is readily ascertainable by a review of the defendant's records through appropriate discovery.

7. There is a well-defined community of interest in the questions of law and fact affecting the class as a whole.

8. Proof of a common or single set of facts will establish the right of each member of the class to recover. These common questions of law and fact predominate over questions that affect only individual class members. The individual plaintiff's claims are typical of those of the class.

9. A class action is superior to other available methods for the fair and

efficient adjudication of the controversy. Due to the typicality of the class members' claims, the interests of judicial economy will be best served by adjudication of this lawsuit as a class action. This type of case is uniquely well-suited for class treatment since the employer's practices were uniform and the burden is on the employer to establish that its method for compensating the class members complies with the requirements of Nevada law.

10. The individual plaintiff will fairly and adequately represent the interests of the class and has no interests that conflict with or are antagonistic to the interests of the class and has retained to represent him competent counsel experienced in the prosecution of class action cases and will thus be able to appropriately prosecute this case on behalf of the class.

11. The individual plaintiff and his counsel are aware of their fiduciary responsibilities to the members of the proposed class and are determined to diligently discharge those duties by vigorously seeking the maximum possible recovery for all members of the proposed class.

12. There is no plain, speedy, or adequate remedy other than by maintenance of this class action. The prosecution of individual remedies by members of the class will tend to establish inconsistent standards of conduct for the defendant and result in the impairment of class members' rights and the disposition of their interests through actions to which they were not parties. In addition, the class members' individual claims are small in amount and they have no substantial ability to vindicate their rights, and secure the assistance of competent counsel to do so, except by the prosecution of a class action case.

AS AND FOR A FIRST CLAIM FOR RELIEF ON BEHALF OF THE NAMED PLAINTIFF AND ALL PERSONS SIMILARLY SITUATED PURSUANT TO NEVADA'S CONSTITUTION

13. The named plaintiff repeats all of the allegations previously made and brings this First Claim for Relief pursuant to Article 15, Section 16, of the Nevada Constitution.

14. Pursuant to Article 15, Section 16, of the Nevada Constitution the named plaintiff and the class members were entitled to an hourly minimum wage for every hour that they worked and the named plaintiff and the class members were often not paid such required minimum wages.

15. The named plaintiff seeks all relief available to him and the alleged class under Nevada's Constitution, Article 15, Section 16 including appropriate injunctive and equitable relief to make the defendant cease its violations of Nevada's Constitution and a suitable award of punitive damages.

16. The named plaintiff on behalf of himself and the proposed plaintiff class members, seeks, on this First Claim for Relief, a judgment against the defendant for minimum wages, such sums to be determined based upon an accounting of the hours worked by, and wages actually paid to, the plaintiff and the class members, a suitable injunction and other equitable relief barring the defendant from continuing to violate Nevada's Constitution, a suitable award of punitive damages, and an award of attorneys' fees, interest and costs, as provided for by Nevada's Constitution and other applicable laws.

AS AND FOR A SECOND CLAIM FOR RELIEF PURSUANT TO NEVADA REVISED STATUTES § 608.040 ON BEHALF OF THE NAMED PLAINTIFF AND THE PUTATIVE CLASS

17. Plaintiff repeats and reiterates each and every allegation previously made herein.

18. The named plaintiff brings this Second Claim for Relief against the defendant pursuant to Nevada Revised Statutes § 608.040 on behalf of himself and the alleged class of all similarly situated employees of the defendant.

19. The named plaintiff has been separated from his employment with the defendant and at the time of such separation was owed unpaid wages by the defendant.

20. The defendant has failed and refused to pay the named plaintiff and numerous members of the putative plaintiff class who are the defendant's former employees their earned but unpaid wages, such conduct by such defendant constituting

a violation of Nevada Revised Statutes § 608.020, or § 608.030 and giving such named plaintiff and similarly situated members of the putative class of plaintiffs a claim against the defendant for a continuation after the termination of their employment with the defendant of the normal daily wages defendant would pay them, until such earned but unpaid wages are actually paid or for 30 days, whichever is less, pursuant to Nevada Revised Statutes § 608.040.

21. As a result of the foregoing, the named plaintiff seeks on behalf of himself and the similarly situated putative plaintiff class members a judgment against the defendant for the wages owed to him and such class members as prescribed by Nevada Revised Statutes § 608.040, to wit, for a sum equal to up to thirty days wages, along with interest, costs and attorneys' fees.

WHEREFORE, plaintiff demands the relief on each cause of action as alleged aforesaid.

Plaintiff demands a trial by jury on all issues so triable.

Dated this 23rd day of September, 2014.

Leon Greenberg Professional Corporation

By: */s/ Leon Greenberg*

LEON GREENBERG, Esq.
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2965 South Jones Blvd- Suite E4
Las Vegas, Nevada 89146
Tel (702) 383-6085
Fax (702) 385-1827

Attorney for Plaintiff

IAFD

DISTRICT COURT

CLARK COUNTY, NEVADA

Laksiri Perera

Plaintiff(s),

-vs-

Western Cab Company

Defendant(s).

A-14-707425-C

CASE NO. ____

DEPT. NO. V

INITIAL APPEARANCE FEE DISCLOSURE (NRS CHAPTER 19)

Pursuant to NRS Chapter 19, as amended by Senate Bill 106, filing fees are submitted for parties appearing in the above entitled action as indicated below:

New Complaint Fee	1st Appearance Fee
☐ $1530 ☐ $520 ☐ $299 ☒ $270.00	☐ $1483.00 ☐ $473.00 ☐ $223.00

Name:Laksiri Perera	
	☐ $30
	☐ $30
	☐ $30
	☐ $30
☐ Total of Continuation Sheet Attached	☐ $____
TOTAL REMITTED: (Required) Total Paid	$ 270.00

DATED this 23rd day of September, 2014.

Leon Greenberg, Esq.

Initial Appearance Fee Disclosure/9/23/2014

APPENDIX 14

APPENDIX 14

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CLERK OF THE COURT

OMD
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Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

LAKSIRI PERERA, Individually and on behalf of others similarly situated, Plaintiff, vs. WESTERN CAB COMPANY, Defendant.	Case No.: A-14-707425-C Dept.: XIV PLAINTIFF'S RESPONSE IN PARTIAL OPPOSITION TO DEFENDANT'S MOTION TO DISMISS SECOND AMENDED COMPLAINT AND COUNTER-MOTION TO AMEND THE COMPLAINT AND FOR SANCTIONS Date of Hearing: Aug. 26, 2015 Time of Hearing: 9:00 a.m.

Plaintiff, by and through their attorney, Leon Greenberg Professional Corporation, submits this memorandum of points and authorities in response in partial opposition to defendant's motion dismiss the second amended complaint and in support of plaintiff's counter-motion to amend the complaint and for sanctions.

MEMORANDUM OF POINTS AND AUTHORITIES

SUMMARY

In Response to Defendant's Motion

The branch of defendant's motion seeking to dismiss the Second Amended Complaint, on the basis that pleading was not authorized or properly served and filed, is moot, as defendant was advised plaintiff was withdrawing that pleading without any conditions. As discussed, *infra*, defendant refused to acknowledge that, and interpose an answer to the existing First Amended Complaint, so it could make

improper serial motions to dismiss and delay any such answer and this litigation.

The branch of defendant's motion seeking to dismiss plaintiff's claim under NRS 608.040 for lack of standing relies upon a incorrect interpretation of *Baldonado v. Wynn Las Vegas*, 194 P.3d 96 (Nev. 2008) which has been repeatedly rejected in the reasoned opinions of Nevada state and federal judges, including Judges Cory and Barker of this Court who have expressly held such standing exists.

The branch of defendant's motion alleging the plaintiff's claim under the Nevada Constitution's Minimum Wage Amendment is preempted by ERISA or the ACA, or violates the due process rights conferred by the Nevada and United States Constitutions, ignores both the facts before the Court and the controlling case law. The argument is also academic, as if it was successful, for the spurious reasons alleged by defendant, it would result in the dismantling of the "lower tier" ($7.25 an hour) "health insurance" minimum wage rate and require all Nevada employers to pay the "higher tier" ($8.25 an hour) minimum wage. Such an ironic result, removing a means for defendant and other Nevada employers to reduce their minimum wage obligation, can hardly be intended by defendant.

The branch of defendant's motion seeking to dismiss plaintiff's punitive damages claim rests solely upon the assertion (made in all of four sentences) that no such claim can arise because this action is "based upon contract." That is untrue as plaintiff makes no contract claims and this claim arises directly under Nevada's Constitution. Both Nevada precedents, and the precedents from every other jurisdiction that has analyzed the issue, support the conclusion that punitive damages are available on claims arising directly from Nevada's Constitution, if the other traditional prerequisites for their award (malicious conduct, etc.) are established.

In Support of the Counter-Motion

Plaintiff seeks to serve a Second Amended Complaint in the form annexed hereto as Ex. "A" which will add Irshad Ahmed and Michael Sargeant as additional

named plaintiffs and putative class representatives. No basis exists to deny such an amendment given the embryonic stage of this litigation.

The Court should sanction (which can be in the form of a reprimand and warning) defendant's counsel's conduct in failing to recognize plaintiff's acquiescence to the withdrawal of the Second Amended Complaint. Under such circumstances defendant should have answered the First Amended Complaint (it could still have raised its other claims for dismissal by motion simultaneously). Defendant's counsel well knows its conduct was improper and serves no purpose except to delay an answer in this case and the progress of this case. Such conduct is abusive and this Court should voice its disapproval of the same.

ARGUMENT

I. THE "ACTIVE PLEADING" STATUS OF THE SECOND AMENDED COMPLAINT IS MOOT BUT THE COURT SHOULD ADDRESS THE OTHER CLAIMS FOR DISMISSAL RAISED IN DEFENDANT'S MOTION

A. The Court should not examine defendant's arguments about the invalidity of the Second Amended Complaint's filing and service as the same is moot and irrelevant.

Plaintiff, as it advised defendant repeatedly, consents, unconditionally, to the withdrawal and striking of the Second Amended Complaint that was filed and served and agrees that the First Amended Complaint (Ex. "B") is the operative complaint in this case at this time. Accordingly, defendant's arguments about the invalidity of the Second Amended Complaint's service and filing are moot and irrelevant and plaintiff declines to respond to them in substance.

B. The Court should reach the merits of the defendant's other claims for dismissal as they are equally applicable to the First Amended Complaint.

The First Amended Complaint raises the exact same claims that defendant seeks to dismiss in its motion based upon its claims of preemption, plaintiff's lack of standing, and so forth. No purpose would be served by the Court declining to reach the merits of those assertions at this time, it would merely have to do so at a later date.

II. DEFENDANT'S PREEMPTION CLAIM RESTS UPON FALSE STATEMENTS ABOUT ERISA AND ACA PREEMPTION AND IS SUBSTANTIVELY IRRELEVANT

A. Defendant's preemption argument, even if accepted, would only eliminate Nevada's "lower tier" minimum wage and could not result in the dismissal of this case.

Article 15, Section 16, subpart (D) of Nevada's Constitution states:

> 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.

The entirety of defendant's preemption, and due process, argument rests upon the incorrect assertions, discussed *infra*, that Article 15, Section 16, by incorporating a different, and lower, minimum wage rate for employers providing qualifying "health insurance" has run afoul of ERISA, the ACA and due process standards. Defendant makes no argument that Article 15, Section 16, would be unenforceable if it mandated a *single* minimum wage rate (of whatever amount) *irrespective* of whether an employer provides health insurance to employees. It makes no such argument because it is beyond question Nevada, through Article 15, Section 16, can command the payment of a specific minimum hourly wage. *Cf.*, 29 U.S.C. § 218 (Federal minimum wage law, the Fair Labor Standards Act, does not preclude states from enacting higher minimum wage laws).

The foregoing language of Article 15, Section 16, subpart (D) commands this Court, if it were to grant this branch of defendant's motion, to only strike out such Section's provisions allowing the payment of a lower minimum wage by employers providing certain health insurance benefits. Such a decision could not dismiss this lawsuit, as it would leave the remainder of the Section intact, including the requirement that all employers (currently applicable to just the "non-qualifying health insurance employers") otherwise pay the "higher tier" $8.25 an hour minimum wage.

B. ERISA preemption only arises when a State regulates the *content* of employee insurance or benefits, such as by *mandating* that insurance include particular provisions; such circumstances are not present in this case as Nevada's Constitution imposes no mandates or regulations on the employee insurance or other benefits employers provide.

The heart of defendant's preemption argument rest upon a twisted distortion of the holding in, and language of, *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983). In doing so it asserts that ERISA preemption exists in this case because "[t]he U.S. Supreme Court has suggested that a state law 'relates to' an ERISA plan 'if it has a ***connection with or reference to*** such a plan.'" (emphasis by defendant). Under this reasoning, *ipso facto*, because the Nevada Constitution has language "referencing" employer provided health insurance, which is in turn an ERISA "plan," it is preempted

Defendant spins the concept of "connection with" or "reference to" on its head. It seeks to create an absurd reverse "Midas Touch" whereby ERISA preempts any regulation, of any State, that ***merely confers some other wholly collateral and independent benefit on an employer whose ERISA plan meets certain standards.*** Such State laws do not "relate" to any ERISA plan, but the contrary, it is the ERISA plan ***that relates to the state law as the ERISA plan triggers the independent benefit the state law provides.*** This Midas Touch preemption urged by defendant would void all state laws that simply mention employee benefits but never regulate, constrict, expand, modify, or concern anything an ERISA plan, or an employer, may or may not choose to do in respect to employee benefits.

The actual language of the Supreme Court's decision in *Shaw*, free from defendant's distortions, makes clear the speciousness of defendant's argument:

> A law "relates to" an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan. Employing this definition, the Human Rights Law, which prohibits employers from structuring their employee benefit plans in a manner that discriminates on the basis of pregnancy, and the Disability Benefits Law, which requires employers to pay employees specific benefits, clearly "relate to" benefit

plans. *Id.*

As *Shaw* makes clear, from the language defendant cites but never correctly quotes and instead misrepresents, "relates to" for ERISA preemption purposes means, of course, a State law or regulation that prohibits, limits, requires or in any fashion controls what an ERISA plan may or may not do. This need to apply *Shaw's* holding within such a framework, and the incorrectness of defendant's reading of *Shaw* and other ERISA preemption cases, was discussed in detail in *New York State Conference of Blue Cross & Blue Shield Plans v. Traveler's Ins. Co.*, 514 U.S. 645, 655 (1995):

> If "relate to" were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for "[r]eally, universally, relations stop nowhere," *H. James, Roderick Hudson xli* (New York ed., World's Classics 1980). But that, of course, would be to read Congress's words of limitation as mere sham, and to read the presumption against pre-emption out of the law whenever Congress speaks to the matter with generality.

Traveler's **rejected** an assertion of ERISA preemption for a state law that imposed certain surcharges on hospital bills paid by non-Blue Cross/Blue Shield providers. The argument such state law "related to" ERISA plans was far greater in *Traveler's* than in this case, as the ERISA plans were predominate purchasers of insurance. *Traveler's* held such state law, despite its presumably substantial "indirect economic influence" on the insurance such ERISA plans would purchase, was not subject to ERISA preemption as it did not "bind plan administrators to any particular choice and thus function as a regulation of the ERISA plan itself. 514 U.S. at 659.

If the holding of *Traveler's* was not sufficient to resolve defendant's specious assertions about ERISA preemption, the subsequent decision in *California Div. Of Labor Standards Enforcement v. Dillingham Construction*, 519 U.S. 316, 332-33 (1997) (*"Dillingham")* unquestionably uncovers their barrenness. *Dillingham* concerned California's public works laws that provided, among other things, that certain apprentices in "approved apprenticeship programs," who received

ERISA plan benefits, could be paid lower wages on public works projects. 519 U.S. at 319. Apprentices enrolled in "unapproved" programs could not be paid that lower wage. *Id.* The Supreme Court unanimously rejected a claim of ERISA preemption of that California statutory scheme. *Id.*

In its analysis, the Supreme Court initially observed that the California statute "does not make reference to ERISA plans." 519 U.S. at 328. It so held because while the statute created a minimum wage scheme for public works apprentices that is dependent upon a properly funded "apprentice program," such program itself need not be an ERISA plan. 519 U.S. at 327-28. This is because such a program could be funded entirely from an employer's assets and the California statute imposed no requirement it be funded by an ERISA plan. *Id.*

Nevada's Constitution, in its provision allowing employers to pay a lower minimum wage, functions in entirely the same fashion as in *Dillingham*. While employers providing health insurance benefits may pay a lower minimum wage, there is no requirement such health insurance be provided through an ERISA plan. It could, as in *Dillingham*, be provided entirely from an employer's general funds and *not* from an ERISA plan.

In respect to the alternative argument in *Dillingham* that California's apprenticeship law was "connected with" an ERISA plan, because it had some sort of indirect economic effect on ERISA plans, *Dillingham*, as in *Traveler's* squarely rejected that argument:

> The prevailing wage statute alters the incentives, but does not dictate the choices, facing ERISA plans. In this regard, it is "no different from myriad state laws in areas traditionally subject to local regulation, which Congress could not possibly have intended to eliminate." *Travelers*, 514 U.S., at 668, 115 S.Ct., at 1683. We could not hold pre-empted a state law in an area of traditional state regulation based on so tenuous a relation without doing grave violence to our presumption that Congress intended nothing of the sort. We thus conclude that California's prevailing wage laws and apprenticeship standards do not have a "connection with," and therefore do not "relate to," ERISA plans. 519 U.S. at 334.

Defendant's ERISA preemption argument is identical to the one made, and rejected, *Dillingham*. While Nevada's Constitution may "alter the incentives" to

employers and their ERISA plans, in respect to the employee benefits they choose to provide, they do not "dictate the choices" those plans may make. Defendant's claim of ERISA preemption is without merit and contrary to law.

C. Defendant's ACA preemption argument is incomprehensible.

While it is true the ACA imposes certain health insurance requirements on certain employers, in respect to certain employees, and certain potential penalties on employers as well, defendant offers no intelligible argument about how the Nevada Constitution conflicts with the ACA. All it offers is the purely speculative assertion that "Thus, the Minimum Wage Amendment and related Regulations may prevent application of the provisions of the ACA and the uncertainty created by the Amendment and related Regulations requires application of federal preemption." Moving papers, p. 17, l. 10-12.

As discussed, and as its plain language makes clear, Nevada's Constitution *requires nothing* from employers in respect to their decision to provide, or not provide, health benefits, and comply, or not comply, with the provisions of the ACA. Employers who comply with the Nevada Constitution's health insurance provisions receive a benefit in Nevada, by being able to pay a lower minimum hourly wage. Compliance or non-compliance with that provision of Nevada's Constitution, or what that provision means, its clarity or lack of clarity, has no impact whatsoever on an employer's status under the ACA. Defendant's claim there is some sort inherent, or even possible, conflict between the Nevada Constitution and the ACA is ludicrous.

III. DEFENDANT'S DUE PROCESS ARGUMENTS ARE SPECIOUS AND SUBSTANTIVELY IRRELEVANT

As discussed, *supra*, defendant's due process attack on the Nevada

Constitution's health insurance provision as being unconstitutionally vague, if granted, must result in the imposition of the "higher tier" minimum wage rate to all Nevada employees. Accordingly, such argument is substantively irrelevant.

The defendant cites wholly inapplicable law, dealing with the burden of the State to adequately define criminal offenses, or its regulation of constitutionally protected conduct, *Sheriff, Washoe County v. Burdg*, 59 P.3d 484, 486-87 (Nev. 2002). Defendant is not subject to any criminal prosecution in this case. Nor does it have any constitutionally protected right to pay its employees whatever it wishes.

A constitutional challenge to a statute being so vague as to violate due process protections requires a showing that the obligations it imposes are "so vague that men of common intelligence must guess at its meaning and differ as to its application." *Sheriff v. Martin*, 662 P.2d 634, 637 (Nev. 1983). While defendant cites *Martin* with *Burdg* it offers no explanation of how the Nevada Constitution is too "vague" for it to understand its health insurance obligation. It similarly attacks the NAC provisions issued to detail that obligation as too "vague."

Employers provide health insurance to employees. This is a traditional and known benefit which is now encouraged or required for many employers and employees by the ACA. Indeed, defendant itself did provide health insurance benefits to at least some of its taxi drivers, although the premiums it charged did not comply with Nevada's Constitution. The health insurance provision of Article 15, Section 16, of Nevada's Constitution refers to a known, and commonly understood, benefit. It certainly is not any more "vague" or constitutionally infirm than the concept of "due process" itself. Indeed, it is far less so. Defendant does not even purport to meet the very high burden it most overcome in showing the presumption Article 15, Section 16's health insurance provision is valid. *See, Douglas Disposal Inc. v. Wee Haul, LLC*, 170 P.3d 508, 512 (Nev. 2007).

IV. PLAINTIFF HAS STANDING TO ASSERT CLAIMS UNDER NRS 608.040 AND HIS MERE RECEIPT OF A "FINAL PAYCHECK," NO MATTER HOW DEFICIENT, DOES NOT DEFEAT THAT CLAIM

A. Defendant's Claim that Employees Lack Standing to Sue For Wages or Other Compensation Owed by an Employer Under NRS Chapter 608 Has Been Rejected by Two Judges of This Court and is Contrary to Nevada Supreme Court Precedent

According to defendant, an employee has no right to initiate a lawsuit to collect *any* of the monies an employer was required to pay her under NRS Chapter 608 but failed to pay to him. Defendant seeks dismissal of plaintiff's NRS 608.040 (late payment of wages to terminated employee, 30 days of wages penalty) claim on that basis. Yet, defendant concedes standing exists to enforce those same claims when a plaintiff also seeks attorney's fees in such a lawsuit pursuant to the procedures of NRS 608.140. What defendant fails to explain is an examination of NRS 608.140 actually *supports* a finding that standing exists for employees to bring claims under NRS 608.040.

The defendant's analysis of NRS 608.140 is manifestly illogical. That statute sets forth an optional written wage demand that an employee can serve on the employer, which if left unpaid by the employer requires "....the court before which the case shall be tried shall allow to the plaintiff a reasonable attorney fee, in addition to the amount found due for wages ***and penalties***..." (emphasis added). Such language refers to awarding in "the case" such attorney's fees "in addition" to the "wages ***and penalties"*** that such employee would *otherwise* collect in that "case." The only "penalties" that an employee is entitled to in an unpaid wages action are those collectable pursuant to NRS 608.040. The purpose of NRS 608.140 was not to create a right to collect those penalties but to allow the collection of attorney's fees *in addition* to those penalties. The language of NRS 608.140 assumes, quite properly of course, that the employee would *already* be able to collect those penalties in "the case" it was discussing, just not with the attorney's fees NRS 608.140 express provides.

Defendant cites to no language of any of the involved statutes in support of its "no private right of action" claim. Indeed, there is no text in any part of the NRS Chapter 608 provisions discussed by defendant that limits any private lawsuit to enforce such rights, or that states such rights can only be so enforced if attorney's fees are sought under NRS 608.140. Instead, defendant relies upon Judge Bare's clearly erroneous decision in *Landers v. Quality Communications* that Nevada employees **can never bring any wage claims of any sort in Court against their employer without *first* presenting those claims to the Labor Commissioner for administrative adjudication by that office.** No statute provides for such a limitation on employee rights, which Judge Bare also found to extend to common law claims by employees for breach of contract and claims for unpaid minimum wages arising under Nevada's Constitution! *See*, moving papers, Ex. "1", finding of fact #2, recognizing *Landers* included claim arising directly under Nevada's Constitution for minimum wages, and then still dismissing that claim for failure to first allow its resolution by the Nevada Labor Commissioner. The *Landers* decision is completely indefensible, and could not be more erroneous, given the express authority Nevada Constitution confers to bring claims for its minimum violations directly in this Court.

Defendant also relies upon various unpublished decisions of the federal district court, including *Miranda v. O'Reilly Automotive Stores, Inc.*, 2014 U.S. Dist. LEXIS 118931 (D. Nev. August 26, 2014), *Descutner v. Newmont USA Ltd.* 2012 U.S. Dist. LEXIS 156656 (D. Nev. Nov. 1, 2012) 2012 WL 5387703 (D. Nev. Nov. 1, 2012, and others. In doing so defendant either willfully ignores or downplays the salient, and controlling finding in *Baldonado v. Wynn Las Vegas LLC*, 194 P.3d 96 (2008) on the standing issue, the federal district court decisions upon which it relies clearly erroneous understanding of *Baldonado,* and the four contrary decisions, two in this Court by District Judges Cory and Barker in *Valdez v. Cox Communications*, A-09-597433-C (Ex. "C") and *Phelps v. MC Communications*, A-11-634965-C (Ex.

"D"), and two in the federal district court by District Judges Hunt and George in *Buenaventura v. Champion Drywall, Inc.*, 803 F. Supp 2nd 1215 (Nev. Dist. Ct. 2011) and *Busk v. Integrity Staffing Solutions, Inc.*, 2011 U.S. Dist. LEXIS 79773. Defendant's argument is also in conflict with the Nevada Supreme Court's post-*Baldonado* commentary on employee standing under Chapter 608 in the unpublished decision of *Csomos v. Venetian,* No. 55203, Sept. 19, 2011 (Ex. "E")[1]

In *Baldonado* the Nevada Supreme Court considered whether employees had standing to bring a civil lawsuit over an employer's tip distribution policy that was alleged to violate certain Nevada labor statutes. Those statutes were N.R.S. § 613.120, § 608.100 and § 608.160. None of the *Baldonado* plaintiffs' claims concerned the payment of wages or other compensation owed to them *from their employer* and customer tips are not within the Nevada labor law's definition of "wages." *See*, N.R.S. § 608.012. In its decision finding the *Baldonado* plaintiffs lacked standing to civilly pursue their claims for customer tips, the Nevada Supreme Court, in a lengthy footnote, explicitly recognized that its decision was limited to customer tips, not wages an employer is obligated to pay, and claims for unpaid wages can be sued upon civilly:

> ...For instance, no statute even implicitly provides a judicial remedy specifically for NRS 608.160 violations. In contrast, two other statutes in NRS Chapter 608, otherwise enforceable by the Labor Commissioner, expressly recognize a civil enforcement action to recoup unpaid wages: NRS 608.140 (civil actions by employees to recoup unpaid wages) and NRS 608.150 (civil actions by the district attorney to recoup unpaid wages from general contractors). The existence of express civil remedies within the statutory framework of a given set of laws indicates that the Legislature will expressly provide for private civil remedies when it intends that such remedies exist; thus, if the Legislature fails to expressly provide a private remedy, no such remedy should be implied. See Hamm v. Carson City Nugget, Inc., 85 Nev. 99, 450 P.2d 358 (1969), cited in Moen v. Las Vegas International Hotel, Inc., 402 F. Supp. 157, 161 (D. Nev. 1975). Moreover, a federal district court in California has determined that no private cause of action can be implied under a similar provision in the California Labor Code, § 351. Matoff v. Brinker Restaurant Corp.,

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[1] Plaintiffs do not cite the unpublished *Csomos* opinion as legal authority and acknowledges this Court is free to wholly disregard its analysis.

> 439 F. Supp. 2d 1035, 1037 (C.D. Cal. 2006) (explaining that the allegations could be brought under a different statute generally allowing claims based on unfair business practices).
>
> Thus, although we have considered appellants' arguments that our holding in U.S. Design & Construction v. I.B.E.W. Local 357, 118 Nev. 458, 50 P.3d 170 (2002), and the Labor Commissioner's general authority to pursue civil remedies for "other demands" under NRS 607.160(7) and NRS 607.170(1), as well as other considerations, compel a different conclusion, we disagree. In U.S. Design, we interpreted NRS 608.150 as including a private right of action to maintain consistency with NRS 11.209(1), which sets limitations on the rights of employees to sue general contractors for wages, and the legislative history, which reflected a desire to expand the option employees had to recover wages, not to limit them. 118 Nev. at 462, 50 P.3d at 172. Further, a private cause of action to recover unpaid wages is entirely consistent with the express authority under NRS 608.140 to bring private actions for wages unpaid and due... 194 P.3d at 104 n. 33.

As *Baldonado* makes clear, the significance of N.R.S. § 608.140, a statutory mechanism to collect attorney's fees as part of a civil lawsuit for the recovery of wages, is that it recognizes employees can bring such a civil lawsuit to recover unpaid wages owed pursuant to Chapter 608, as in *U.S. Design*. The idea promulgated by defendant, that NRS 608.140 *only* allows such a lawsuit when the attorneys fees available under such statute are *also* sought is illogical and unsupported. Indeed, the Nevada Supreme Court, after issuing its decision in *Baldonado*, decided *Boucher v. Shaw,* 196 P.3d 959 (2008) wherein employees were making various wage claims in a civil proceeding, including claims under N.R.S. § 608.018 for overtime pay. The Nevada Supreme Court, although mentioning the plaintiffs were making a claim for overtime wages required under N.R.S. § 608.018, raised no issue about whether such plaintiffs had standing to make such claim in light of its decision in *Baldonado* and the Court, by doing so, assumed that such a right existed. *See, Boucher* at p. 960.

This Court should be guided by the clear, succinct, and logical reasoning of Judges Cory and Barker of this Court that a private right of action does exist to enforce NRS 608.040 and there is no rationale reason to hold otherwise. Ex. "C" and "D."

B. The "narrow" application of NRS 608.040 urged by defendant has no support in prior decisions or the statute's language.

Judge Cory of this Court in *Valdez v. Cox Communications*, A-12-657617-C (Ex. "F") rejected the sort of "narrow" application of NRS 608.040 urged by defendant, *i.e.,* Judge Cory rejected the idea that simply because a final paycheck had been given in a timely fashion there could be no liability under NRS 608.040. Liability is not avoided because an employer, as defendant did in this case, tenders a prompt final paycheck. That final paycheck must be for *all* earned and unpaid wages of the terminated employee or an NRS 608.040 liability arises. The situation in *Valdez*, in respect to the application of NRS 608.040, is identical as in this case. The plaintiff in *Valdez* was established to have been owed at the time of his employment separation certain unpaid wages (in that case overtime pay). Ex. "F," p. 2-3. Because he was owed those unpaid wages, which were subsequently paid to him long after he received his final paycheck as a result of litigation, he was also entitled to an additional award of 30 days unpaid wages as a penalty under NRS 608.040. *Id.*

The approach taken by Judge Cory in *Valdez* is correct and should be applied in this case. That approach is also consistent with *Doolittle v. Eighth Judicial Dist. Court*, 15 P.2d 684 (Nev. Sup Ct. 1932), the only reported decision on NRS 608.040 and which took an expansive view of its scope. It imposed liability on an individual homeowner who had not paid a hired laborer for certain construction work. In doing so it expressly rejected the argument that NRS 608.040 only applied to business operators finding such claim was without merit as "the language of the statute is clear, plain, and simple and not open to construction." 15 P.2d at 685.

In addition to taking a broad view of the application of NRS 608.040, *Doolittle* also characterized the statute as "penal," *i.e.,* punitive and not compensatory, in nature. 15 P.2d at 684. The conclusion NRS 608.040 should be applied to impose a penalty pursuant to its clear language whenever a discharged

employee is owed unpaid compensation is supported by the decisions on Cal. Lab. Code § 203 which, as does NRS 608.040, grants a 30 day "continuing wage" penalty to terminated and unpaid employees. Much of its language is the same as NRS 608.040. California's courts have held such penalty can be collected whenever a terminated employee is owed unpaid wages or compensation. *See, Road Sprinkler Fitters Local Union No. 669 v. G & G Fire Sprinklers*, 102 Cal. App. 4th 765, 780 (Cal. Ct. App. 2002) (granting penalties to former workers not paid full required public works prevailing wages, finding the purpose of such statute is to "compel the prompt payment of earned wages"). *See, also, Barnhill v. Robert Saunders & Co.* (Cal. Ct. App. 1981) 125 Cal. App. 3d 1, 7 and *Mamika v. Barca* 68 Cal. App. 4th 487, 492 (Cal. Ct. App. 1998). Those cases also found the California statute was to be given a "reasonable but strict construction" to further society's goal of encouraging and compelling the prompt payment of wages through the force of its penalties. Such cases, in turn, cite to numerous decisions interpreting the statute in that fashion from as far back as 1919. *See, Manford v. Singh*, 40 Cal. App. 700, 702-703 (Cal Ct. App. 1919); *Oppenheimer v. Sunkist Growers, Inc.*, 153 Cal. App. 2d Supp. 897, 898-99 (Cal. Superior Ct., App. Dept. 1957); *Davis v. Morris* 37 Cal. App.2d 269, 274 (Cal. Ct. App. 1940); *Pressler v. Donald L. Bren Co.* 32 Cal. 3d 831, 837 (Cal. Ct. App. 1982); *Gould v. Maryland Sound Industries, Inc.*, 31 Cal. App. 4th 1137, 1147 (Cal. Ct. App. 1995) and *Triad Data Services, Inc. v. Jackson*, 153 Cal. App. 3d Supp. 1, 11 (Cal. Superior Ct., App. Dept. 1984).

The penalty provided by NRS 608.040 is triggered by a failure to pay the discharged or resigning employee within the time limits specified in NRS 608.020 and 608.030. Those statutes specify when the employer has to pay the separated employee's "wages and compensation earned and unpaid." They do not say only the employee's "agreed wages" are due, or only the employees "final pay period" wages are due, but all "compensation earned and unpaid" are due. Minimum hourly wages guaranteed by Nevada's Constitution, even if not a "wage" that the employer has

expressly agreed to pay, is "compensation" that has been "earned" by the employee.

Nor does any support exists for the argument that 608.040 only applies to the missed and agreed upon "regular paycheck." *Road Sprinkler* and the other California cases discussed, *supra*, reject that approach, awarding penalties even when the employer never told the employee it was agreeing to pay the compensation found to be owed. *See, also, Coast Hotels and Casinos, Inc. v. Nevada State Labor Commissioner,* 117 Nev. 835 (Nev. 2001) (plaintiff's claim for 30 days' continuing wages under NRS 608.040 was derived from alleged improper deductions by the employer from various of the employee's paychecks throughout her employment, but reversing and finding that such deductions were authorized and not improper).

VI. PLAINTIFF HAS STATED A VALID CLAIM FOR PUNITIVE DAMAGES

A. The plaintiffs' claims are not contractual, they are constitutional as they arise from specific rights grantedby the Nevada Constitution.

Defendant's entire argument that plaintiff is not entitled to punitive damages rests upon its proclamation that plaintiff was under a "contract for hire" and therefore his claims are contractual." *See*, defendants' moving papers at p. 19. While plaintiff was an employee of defendant, and presumably *could* make claims based upon a violation of a contract of employment, he makes *no* such claims in this case. Plaintiff's claims in this case are not contractual; they are constitutional and arise from a *violation of Nevada's Constitution* and the minimum wage protections afforded to Nevada's workers under such Constitution.

B. The plaintiff's claims are of a "tort like" nature for which punitive damages are available, either because of their constitutional origins or because they involve "intentional public policy" torts.

As discussed, *infra*, the universally recognized view is that a violation of a constitutional right is a "constitutional tort."[2] Nevada also recognizes that

[2] The statement in *Sprouse v. Wentz*, 781 P.2d 1136, 1138 (Nev. Sup. Ct. 1989), that punitive damages awards require a tort claim does not comply with NRS

employees possess "intentional public policy" tort rights against their employers with an attendant right to punitive damages. They possess such rights in Nevada against their employers even though they are "at will" employees whose rights vis a vie their employers are otherwise governed by the law of contracts. *See, D'Angelo v. Gardner*, 819 P.2d 206, 215-16 (Nev. Sup. Ct. 1980) , involving wrongful employment termination and holding that the "intentional public policy" tort claim it was recognizing "...stands by itself; and although it arises out of the employer-employee relationship, it is not dependent on a contract..." As a result, punitive damages are awardable on such a claim, if the requisite punitive damages proof is established at trial. *See, also, Hester v. Vision Airlines, Inc.*, 687 F.3d 1162, 1172-73 (9th Cir. 2012) (Nevada law allows for punitive damages award to class of employees on, among other things, claims that wages owed and unpaid by employer were converted by employer through oppression, fraud or malice).

Punitive damages can be awarded for a violation of a constitutional right. *See, Carlson v. Green*, 446 U.S. 14, 22 (1980). Punitive damages can also be awarded for violations of Nevada's statutes when those violations abridge strong public policies and the relevant facts support an award of punitive damages. *See, D'Angelo,* 819 P.2d at 218-19 and other cases. Those holdings bar any blanket rule forbidding punitive damages awards for violations of the document setting forth Nevada's most important public policies, the Nevada Constitution. Nor does the defendants' alleged good faith belief that they were exempt from Nevada's constitutional minimum wage requirements, based upon their historical practices, prevent any punitive damages award in this case as a matter of law. That supposed good faith is for a jury to weigh, if sufficient evidence exists to submit the punitive damages issue to the jury, and discovery must be conducted to develop such

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42.005 which authorizes punitive damages "for breach of an obligation not arising from contract." That language does not require such breach of obligation be a tort, just that it be *other* than contractual.

evidence for the Court's consideration before any claims for punitive damages may be stricken.

1. There is no *per se* bar on awarding punitive damages for violations of constitutional rights and the prevailing, if not unanimous, view is that they can be awarded.

Article 15, Section 16, Paragraph "B," of the Nevada Constitution confers a private right of action upon the plaintiff with the broadest conceivable right to relief:

> 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.

This Court must grant the plaintiff "all remedies available under law or in equity" that are "appropriate" including, without limitation, "damages." Such conferral of a right to "damages" is *not* limited, by its language, to just compensatory damages. There is no basis to adopt, from the language of Article 15, Section 16, any *per se* rule that the plaintiff has no right to seek punitive damages. If any such limitation of a "damages" remedy was intended by Article 15, Section 16 it would use the term "compensatory damages" and not "damages." *Cf., Secretary of State v. Burk*, 188 P.3d 1112, 1120 (2008) ("[W]hen a constitutional provision's language is clear on its face, we will not go beyond that language in determining the voters' intent.").

The availability of punitive and compensatory damages as remedies for a constitutional violation was recognized in *Carlson*, 446 U.S. at 21-22, for the "constitutional tort claims" arising under the United States Constitution and first recognized by *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 396-97 (1971). It found public policy strongly supported the availability of a punitive damages award against private parties (in that case employees of the federal government) who violated the constitutional rights of others, as the possibility of a punitive damages award strongly deters such private parties from committing those constitutional violations. *Id.* In *Smith v. Wade*, 461 U.S. 30, 50-51 (1983) the Supreme Court adopted a common law tort standard for the award of such punitive

damages, requiring proof of the "reckless or callous disregard for the plaintiff's rights," or an intentional violation of those rights, by the defendant.[3]

Diligent research by plaintiff's counsel indicates that state courts reaching the issue have accepted the reasoning of *Carlson* and allowed punitive damages to be awarded on claims arising directly under a state's constitution, under the common law tort standard of *Smith v. Wade*. *See, Widgeon v. Eastern Shore Hospital,* 479 A.2d 520, 535-36 (Maryland Court of Appeals 1984) and *Davis v. DiPino,* 708 A.2d 357, 379 (Maryland Court of Special Appeals 1998) (Recognizing direct damages action to enforce rights granted by Maryland Constitution and confirming availability of punitive damages with the "presence or absence of malice" being pertinent to whether such an award is proper); *Rolon v. Murray*, 2002 Westlaw 31819065 (Superior Court of Connecticut 2002) *citing Binette v. Sabo*, 710 A.2d 688 (Connecticut Supreme Court 1998) (*Binette* created *Bivens* type action against individuals for violations of Connecticut Constitution, declining to dismiss complaint seeking punitive damages for such violations); *Jackson v. Consolidated Rail Corp.*, 538 A.2d 1310, 1319 (Superior Court of New Jersey, Appellate Division, 1988) (Punitive damages available on wrongful discharge from employment claim arising directly under New Jersey Constitution); and *In re Town Highway No. 20*, 45 A.3d 54, 78-80 (Sup. Ct. Vermont 2012) (Claim can be brought directly under Vermont's Constitution, citing *Bivens*, and barring punitive damages against government but not otherwise questioning propriety of a punitive damages award). The only case found by plaintiff's counsel that arguably varies from these decisions is the ambiguous holding of *Moran v. Shotgun Willies, Inc.*, 889 P.2d 1185, 1188 (Sup. Court Montana 1995). It held that a statute dealing with employment

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[3] Although *Smith v. Wade* was a 42 U.S.C. § 1983 claim, not a *Bivens* action directly under the United States Constitution, 42 U.S.C. § 1983 claims arise from the violation of a federal constitutional right and as *Carlson* makes clear the *Bivens* direct constitutional claim is afforded the same damages remedies.

discrimination and barring punitive damages did not contravene the Montana Constitution's protection of those same rights, meaning the legislature had the power to proscribe remedies for violations of those constitutional rights. It did not opine on whether punitive damages would have been available directly under the Montana Constitution in the absence of such an express statute.

2. Nevada allows punitive damages awards against employers who violate "important" public policies and there are no public policies more "important" than those set forth in Nevada's Constitution, the supreme law of Nevada.

Punitive damages are properly awarded for violations of Nevada's constitutional minimum wage requirements not just under the "constitutional tort" theory of *Carlson, Bivens,* and their state law progeny, but also under Nevada's existing "public policy tort" law. *See, Hansen v. Harrah's*, 675 P.2d 394 (Nev. Sup. Ct. 1984) and *D'Angelo*, where the Nevada Supreme Court recognized claims under Nevada law for the wrongful, or tortious, discharge of at will employees in violation of public policy. *D'Angelo*, in affirming an award of punitive damages on such a claim, characterized the defendant in that case of being "guilty of the intentional public policy tort, tortious discharge." 819 P.2d at 219.

In *D'Angelo* the existence of a "public policy tort" rested upon Nevada statutes protecting employees from harm in the workplace, NRS 618.375 and 618.385(1). *Hansen* based its finding not on any express statutory prohibition, since none existed, but upon Nevada's strong and clear public policy of protecting employees from retaliation for utilizing Nevada's workmen's compensation system. 675 P.2d at 397.

There are no more important public policies in Nevada than those enshrined in the Nevada Constitution, the paramount law of the State. Defendant offers no explanation of how the public policy set forth in Article 15, Section 16 of the Nevada Constitution is unworthy of the same sort of "public policy" protections found in *D'Angelo* and *Hansen*. Nor can it if plaintiff, as declared in *Hansen*, can otherwise meet the punitive damages standards of NRS 42.010 by showing

"malicious, oppressive or fraudulent" conduct by the defendant.

3. Employers would be encouraged to violate the Nevada Constitution's minimum wage requirements if they faced no punitive damages liability for those violations.

Holding that an employer who violates Article 15, Section 16, of the Nevada Constitution by failing to pay minimum wages is only responsible for paying those minimum wages (along with interest and an employee's attorney's fee), and nothing else, would encourage widespread violations of Nevada's Constitution. From a pragmatic and economic perspective, employers would be far better off *not* paying minimum wages under such circumstances. In many instances, the employee will never pursue such claims, or, such liabilities will expire or diminish (as defendant in this case is claiming) by the operation of the statute of limitations. In the event the employer is not so fortunate, and is actually sued for committing such minimum wage violations, they would just make the same minimum wage payment they should have *already made anyway*, plus some small additional statutory interest (essentially a low-cost loan to the employer of the money represented by the minimum wages they did not pay timely). While an award of attorney's fees assists the employee in bringing such a claim, that poses only a nominal cost to the employer who tenders the full unpaid minimum wages promptly once a lawsuit is commenced.

Meaningful compliance with minimum wage standards is only achieved by incentivizing employers to voluntarily pay the minimum wage. Simply making employers "caught" not paying minimum wages "pay what they should have paid anyway" encourages employers to *not* pay minimum wages since they may never get "caught." The federal minimum wage law, the Fair Labor Standards Act, accomplishes the goal of creating a "real world" incentive for employers to pay those minimum wages by mandating "double damages" (liquidated damages) awards against employers who fail to do so. *See*, 29 U.S.C. § 216(b). This "double damages" enforcement model is followed by many state minimum wage laws. *See*,

Cal. Lab. Code § 1194.2; N.Y. Lab. Law § 198; Ind. Code Ann. § 22-2-29 and others. The Nevada Constitution, through the use of a punitive damages remedy, accomplishes the same goal of encouraging compliance with Article 15, Section 16.

IN SUPPORT OF THE CROSS MOTION

A. No basis exists to deny the proposed amended complaint.

Defendant has not even answered the complaint in this case. The proposed Second Amended Complaint will add two additional plaintiffs to this action and otherwise recite certain additional allegations authorized by this Court's Order resolving defendant's motion to dismiss the First Amended Complaint. There is no basis to deny leave to serve and file the same.

B. Defendant's counsel should be sanctioned or at least admonished.

This case was commenced on September 23, 2014. It is now pending almost one year without an answer. Defendant filed a motion to dismiss the First Amended Complaint on December 8, 2014, with an extension of time from plaintiff's counsel. As set forth in the email exchanges between counsel (Ex. "G") defendant's counsel willfully refused to answer the First Amended Complaint after plaintiff's counsel agreed to withdraw, without condition, the Second Amended Complaint that defendant insists was improperly filed and served. It did so to make the current "serial" motion to dismiss and further delay an answer in this case.

Defendant's counsel's conduct is abusive of the Court and conducted for no purpose but delay. If the Court declines to show its disapproval of that conduct through the imposition of some form of material sanctions it should at least admonish such counsel on the record about the impropriety of such conduct.

CONCLUSION

Wherefore, for all the foregoing reasons, the defendant's motion should be

denied in its entirety.

Dated: August 14, 2015

Respectfully submitted,

/s/ Leon Greenberg
Leon Greenberg, Esq. (Bar # 8094)
A Professional Corporation
2965 S. Jones Blvd., Suite E-3
Las Vegas, Nevada 89146
(702) 383-6085
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned certifies that on August 14, 2015, she served the within:

PLAINTIFF'S RESPONSE IN PARTIAL OPPOSITION TO DEFENDANT'S MOTION TO DISMISS SECOND AMENDED COMPLAINT AND COUNTER-MOTION TO AMEND THE COMPLAINT AND FOR SANCTIONS

by court electronic service:

TO:
Malani Kotchka
HEJMANOWSKI & MCCREA LLC
520 S. 4th St., Suite 320
Las Vegas, NV 89101

/s/ Dana Sniegocki
Dana Sniegocki

EXHIBIT "A"

ACOM
LEON GREENBERG, ESQ., NSB 8094
DANA SNIEGOCKI, ESQ., NSB 11715
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Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

LAKSIRI PERERA, IRSHAD AHMED, and MICHAEL SARGEANT Individually and on behalf of others similarly situated, Plaintiffs, vs. WESTERN CAB COMPANY, Defendant.	Case No.: A-14-707425-C Dept.: V **SECOND AMENDED COMPLAINT** **ARBITRATION EXEMPTION CLAIMED BECAUSE THIS IS A CLASS ACTION CASE**

LAKSIRI PERERA, IRSHAD AHMED and MICHAEL SARGEANT, individually and on behalf of others similarly situated, by and through their attorney, Leon Greenberg Professional Corporation, as and for a Second Amended Complaint against the defendant, state and allege, as follows:

JURISDICTION, PARTIES AND PRELIMINARY STATEMENT

1. The plaintiffs, LAKSIRI PERERA, IRSHAD AHMED, and MICHAEL SARGEANT (collectively the "individual plaintiffs" or the "named plaintiffs") are residents of Clark County in the State of Nevada and are former employees of the defendant.

2. The defendant, WESTERN CAB COMPANY, (hereinafter referred to as

"Western Cab" or "defendant") is a corporation existing and established pursuant to the laws of the State of Nevada with its principal place of business in the County of Clark, State of Nevada and conducts business in Nevada.

CLASS ACTION ALLEGATIONS

3. The plaintiffs bring this action as a class action pursuant to Nev. R. Civ. P. §23 on behalf of themselves and a class of all similarly situated persons employed by the defendant in the State of Nevada.

4. The class of similarly situated persons consists of all persons employed by defendant in the State of Nevada during the applicable statute of limitations periods prior to the filing of this Complaint continuing until date of judgment, such persons being employed as taxi cab drivers (hereinafter referred to as "cab drivers" or "drivers") such employment involving the driving of taxi cabs for the defendant in the State of Nevada.

5. The common circumstance of the cab drivers giving rise to this suit is that while they were employed by defendant they were not paid the minimum wage required by Nevada's Constitution, Article 15, Section 16 for many or most of the days that they worked in that their hourly compensation, when calculated pursuant to the requirements of said Nevada Constitutional Provision, did not equal at least the minimum hourly wage provided for therein.

6. The named plaintiffs are informed and believe, and based thereon allege that there are at least 100 putative class action members. The actual number of class members is readily ascertainable by a review of the defendant's records through appropriate discovery.

7. There is a well-defined community of interest in the questions of law and fact affecting the class as a whole.

8. Proof of a common or single set of facts will establish the right of each member of the class to recover. These common questions of law and fact predominate over questions that affect only individual class members. The individual plaintiff's

claims are typical of those of the class.

9. A class action is superior to other available methods for the fair and efficient adjudication of the controversy. Due to the typicality of the class members' claims, the interests of judicial economy will be best served by adjudication of this lawsuit as a class action. This type of case is uniquely well-suited for class treatment since the employer's practices were uniform and the burden is on the employer to establish that its method for compensating the class members complies with the requirements of Nevada law.

10. The individual plaintiffs will fairly and adequately represent the interests of the class and have no interests that conflict with or are antagonistic to the interests of the class and have retained to represent them competent counsel experienced in the prosecution of class action cases and will thus be able to appropriately prosecute this case on behalf of the class.

11. The individual plaintiffs and their counsel are aware of their fiduciary responsibilities to the members of the proposed class and are determined to diligently discharge those duties by vigorously seeking the maximum possible recovery for all members of the proposed class.

12. There is no plain, speedy, or adequate remedy other than by maintenance of this class action. The prosecution of individual remedies by members of the class will tend to establish inconsistent standards of conduct for the defendant and result in the impairment of class members' rights and the disposition of their interests through actions to which they were not parties. In addition, the class members' individual claims are small in amount and they have no substantial ability to vindicate their rights, and secure the assistance of competent counsel to do so, except by the prosecution of a class action case.

AS AND FOR A FIRST CLAIM FOR RELIEF ON BEHALF OF THE NAMED PLAINTIFFS AND ALL PERSONS SIMILARLY SITUATED PURSUANT TO NEVADA'S CONSTITUTION

13. The named plaintiffs repeat all of the allegations previously made and bring this First Claim for Relief pursuant to Article 15, Section 16, of the Nevada Constitution.

14. Pursuant to Article 15, Section 16, of the Nevada Constitution the named plaintiffs and the class members were entitled to an hourly minimum wage for every hour that they worked for defendant and the named plaintiffs and the class members were often not paid such required minimum wages.

15. The defendant's violation of Article 15, Section 16, of the Nevada Constitution involved malicious and/or dishonest and/or oppressive conduct by the defendant sufficient to warrant an award of punitive damages for the following, amongst other reasons:

(a) Defendant despite having, and being aware of, an express obligation under Article 15, Section 16, of the Nevada Constitution, such obligation commencing no later than July 1, 2007, to advise the plaintiffs and the class members, in writing, of their entitlement to the minimum hourly wage specified in such constitutional provision, failed to provide such written advisement;

(b) Defendant was aware that the highest law enforcement officer of the State of Nevada, the Nevada Attorney General, had issued a public opinion in 2005 that Article 15, Section 16, of the Nevada Constitution, upon its effective date, would require defendant and other employers of taxi cab drivers to compensate such employees with the minimum hourly wage specified in such constitutional provision. Defendant consciously elected to ignore that opinion and not pay the minimum wage required by Article 15, Section 16, of the Nevada Constitution to its taxi driver

employees in the hope that it would be successful, if legal action was brought against it, in avoiding paying some or all of such minimum wages;

(c) Defendant, to the extent it believed it had a colorable basis to legitimately contest the applicability of Article 15, Section 16, of the Nevada Constitution to its taxi driver employees, made no effort to seek any judicial declaration of its obligation, or lack of obligation, under such constitutional provision and to pay into an escrow fund any amounts it disputed were so owed under that constitutional provision until such a final judicial determination was made.

16. Defendant also engaged in the following malicious, illegal, dishonest and bad faith conduct which was intended to conceal its violations Article 15, Section 16, of the Nevada Constitution and caused additional injury to the plaintiffs for which they seek redress:

In or about January of 2012, defendant started requiring the plaintiffs and the class members to pay from such plaintiffs' and class members' own, personal funds, 100% of the cost of the fuel consumed in the operation of the taxicabs they drove for the defendant. That fuel was essential for the operation of defendant's taxi cab business and plaintiffs could not work for defendants unless they agreed to pay for that fuel from their personal funds. By requiring the plaintiff and the class members to personally pay for the cost of such fuel the defendant was reducing the wages it actually paid the plaintiff and the class members to an amount below the minimum hourly wage required by Article 15, Section 16, of the Nevada Constitution. That was because after deducting from the "on the payroll records" wages paid by the defendant to the plaintiffs and the class members the cost of the taxi cab fuel they were forced by the defendant to

pay, the resulting "true" wage paid to such persons by the defendant was below the minimum hourly wage required by Article 15, Section 16, of the Nevada Constitution. Defendant willfully and maliciously engaged in this conduct to make it appear to any otherwise uninformed person who was examining its payroll records that it was paying the minimum wage required by Article 15, Section 16, of the Nevada Constitution when it was not. Defendant instituted this policy specifically to deceive certain government agencies, including but not necessarily limited to, the United States Department of Labor which had previously found the defendant in violation of the minimum wage law enforced by such agency. Such conduct by the defendant also resulted in the defendant issuing knowingly false and inaccurate statements of the plaintiff's and the class members' income to the United States Internal Revenue Service and the Social Security Administration, such statements inflating and exaggerating the actual income earned by such persons and resulting in them being required to pay additional taxes that they did not actually owe.

17. Defendant engaged in the acts and/or omissions detailed in paragraphs 15 and 16 in an intentional scheme to maliciously, oppressively and dishonestly deprive its taxi driver employees of the hourly minimum wages that were guaranteed to those employees by Article 15, Section 16, of the Nevada Constitution. Defendant so acted in the hope that by the passage of time whatever rights such taxi driver employees had to such minimum hourly wages owed to them by the defendant would expire, in whole or in part, by operation of law. Defendant so acted consciously, willfully, and intentionally to deprive such taxi driver employees of any knowledge that they might be entitled to such minimum hourly wages, despite the defendant's obligation under Article 15, Section 16, of the Nevada Constitution to advise such taxi driver employees of their right to those minimum hourly wages. Defendant's malicious, oppressive and dishonest conduct is also demonstrated by its failure to make any allowance to pay

such minimum hourly wages if they were found to be due, such as through an escrow account, while seeking any judicial determination of its obligation to make those payments.

18. The named plaintiffs seek all relief available to them and the alleged class under Nevada's Constitution, Article 15, Section 16 including appropriate injunctive and equitable relief to make the defendant cease its violations of Nevada's Constitution and a suitable award of punitive damages.

19. The named plaintiffs on behalf of themselves and the proposed plaintiff class members, seek, on this First Claim for Relief, a judgment against the defendant for minimum wages owed since November 28, 2006 and continuing into the future, such sums to be determined based upon an accounting of the hours worked by, and wages actually paid to, the plaintiff and the class members along with an award of damages for the increased, and false, tax liability the defendant has caused the plaintiffs and the class members to sustain, a suitable injunction and other equitable relief barring the defendant from continuing to violate Nevada's Constitution and requiring the defendant to remedy at its expense the injury to the class members it has caused by falsely reporting to the United States Internal Revenue Service and the Social Security Administration the income of the class members, a suitable award of punitive damages, and an award of attorneys' fees, interest and costs, as provided for by Nevada's Constitution and other applicable laws.

AS AND FOR A SECOND CLAIM FOR RELIEF PURSUANT TO NEVADA REVISED STATUTES § 608.040 ON BEHALF OF THE NAMED PLAINTIFFS AND THE PUTATIVE CLASS

20. Plaintiffs repeat and reiterate each and every allegation previously made herein.

21. The named plaintiffs bring this Second Claim for Relief against the defendant pursuant to Nevada Revised Statutes § 608.040 on behalf of themselves and the alleged class of all similarly situated employees of the defendant.

22. The named plaintiffs have been separated from their employment with the

defendant and at the time of such separation were owed unpaid wages by the defendant.

23. The defendant has failed and refused to pay the named plaintiffs and numerous members of the putative plaintiff class who are the defendant's former employees their earned but unpaid wages, such conduct by such defendant constituting a violation of Nevada Revised Statutes § 608.020, or § 608.030 and giving such named plaintiffs and similarly situated members of the putative class of plaintiffs a claim against the defendant for a continuation after the termination of their employment with the defendant of the normal daily wages defendant would pay them, until such earned but unpaid wages are actually paid or for 30 days, whichever is less, pursuant to Nevada Revised Statutes § 608.040.

24. As a result of the foregoing, the named plaintiffs seek, on behalf of themselves and the similarly situated putative plaintiff class members, a judgment against the defendant for the wages owed to them and such class members as prescribed by Nevada Revised Statutes § 608.040, to wit, for a sum equal to up to thirty days wages, along with interest, costs and attorneys' fees.

WHEREFORE, plaintiffs demand the relief on each cause of action as alleged aforesaid.

Plaintiffs demand a trial by jury on all issues so triable.

Dated this 15th day of July, 2015.

Leon Greenberg Professional Corporation

By: */s/ Leon Greenberg*

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Attorney for Plaintiff

EXHIBIT "B"

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CLERK OF THE COURT

ACOM

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Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

LAKSIRI PERERA, Individually and on behalf of others similarly situated,

Plaintiff,

vs.

WESTERN CAB COMPANY,

Defendant.

Case No.: A-14-707425-C

Dept.: V

FIRST AMENDED COMPLAINT

ARBITRATION EXEMPTION CLAIMED BECAUSE THIS IS A CLASS ACTION CASE

LAKSIRI PERERA, individually and on behalf of others similarly situated, by and through his attorney, Leon Greenberg Professional Corporation, as and for a First Amended Complaint against the defendant, states and alleges, as follows:

JURISDICTION, PARTIES AND PRELIMINARY STATEMENT

1. The plaintiff, LAKSIRI PERERA, (the "individual plaintiff" or the "named plaintiff") is a resident of Clark County in the State of Nevada and is a former employee of the defendant.

2. The defendant, WESTERN CAB COMPANY, (hereinafter referred to as "Western Cab" or "defendant") is a corporation existing and established pursuant to

the laws of the State of Nevada with its principal place of business in the County of Clark, State of Nevada and conducts business in Nevada.

CLASS ACTION ALLEGATIONS

3. The plaintiff brings this action as a class action pursuant to Nev. R. Civ. P. §23 on behalf of himself and a class of all similarly situated persons employed by the defendant in the State of Nevada.

4. The class of similarly situated persons consists of all persons employed by defendant in the State of Nevada during the applicable statute of limitations periods prior to the filing of this Complaint continuing until date of judgment, such persons being employed as taxi cab drivers (hereinafter referred to as "cab drivers" or "drivers") such employment involving the driving of taxi cabs for the defendant in the State of Nevada.

5. The common circumstance of the cab drivers giving rise to this suit is that while they were employed by defendant they were not paid the minimum wage required by Nevada's Constitution, Article 15, Section 16 for many or most of the days that they worked in that their hourly compensation, when calculated pursuant to the requirements of said Nevada Constitutional Provision, did not equal at least the minimum hourly wage provided for therein.

6. The named plaintiff is informed and believes, and based thereon alleges that there are at least 100 putative class action members. The actual number of class members is readily ascertainable by a review of the defendant's records through appropriate discovery.

7. There is a well-defined community of interest in the questions of law and fact affecting the class as a whole.

8. Proof of a common or single set of facts will establish the right of each member of the class to recover. These common questions of law and fact predominate over questions that affect only individual class members. The individual plaintiff's claims are typical of those of the class.

9. A class action is superior to other available methods for the fair and efficient adjudication of the controversy. Due to the typicality of the class members' claims, the interests of judicial economy will be best served by adjudication of this lawsuit as a class action. This type of case is uniquely well-suited for class treatment since the employer's practices were uniform and the burden is on the employer to establish that its method for compensating the class members complies with the requirements of Nevada law.

10. The individual plaintiff will fairly and adequately represent the interests of the class and has no interests that conflict with or are antagonistic to the interests of the class and has retained to represent him competent counsel experienced in the prosecution of class action cases and will thus be able to appropriately prosecute this case on behalf of the class.

11. The individual plaintiff and his counsel are aware of their fiduciary responsibilities to the members of the proposed class and are determined to diligently discharge those duties by vigorously seeking the maximum possible recovery for all members of the proposed class.

12. There is no plain, speedy, or adequate remedy other than by maintenance of this class action. The prosecution of individual remedies by members of the class will tend to establish inconsistent standards of conduct for the defendant and result in the impairment of class members' rights and the disposition of their interests through actions to which they were not parties. In addition, the class members' individual claims are small in amount and they have no substantial ability to vindicate their rights, and secure the assistance of competent counsel to do so, except by the prosecution of a class action case.

AS AND FOR A FIRST CLAIM FOR RELIEF ON BEHALF OF THE NAMED PLAINTIFF AND ALL PERSONS SIMILARLY SITUATED PURSUANT TO NEVADA'S CONSTITUTION

13. The named plaintiff repeats all of the allegations previously made and brings this First Claim for Relief pursuant to Article 15, Section 16, of the Nevada

Constitution.

14. Pursuant to Article 15, Section 16, of the Nevada Constitution the named plaintiff and the class members were entitled to an hourly minimum wage for every hour that they worked for defendant and the named plaintiff and the class members were often not paid such required minimum wages.

15. The defendant's violation of Article 15, Section 16, of the Nevada Constitution involved malicious and/or fraudulent and/or oppressive conduct by the defendant sufficient to warrant an award of punitive damages for the following, amongst other reasons:

(a) Defendant despite having, and being aware of, an express obligation under Article 15, Section 16, of the Nevada Constitution, such obligation commencing no later than July 1, 2007, to advise the plaintiff and the class members, in writing, of their entitlement to the minimum hourly wage specified in such constitutional provision, failed to provide such written advisement;

(b) Defendant was aware that the highest law enforcement officer of the State of Nevada, the Nevada Attorney General, had issued a public opinion in 2005 that Article 15, Section 16, of the Nevada Constitution, upon its effective date, would require defendant and other employers of taxi cab drivers to compensate such employees with the minimum hourly wage specified in such constitutional provision. Defendant consciously elected to ignore that opinion and not pay the minimum wage required by Article 15, Section 16, of the Nevada Constitution to its taxi driver employees in the hope that it would be successful, if legal action was brought against it, in avoiding paying some or all of such minimum wages;

(c) Defendant, to the extent it believed it had a colorable basis to legitimately contest the applicability of Article 15, Section 16, of the Nevada Constitution to its taxi driver employees, made no effort to seek any judicial declaration of its obligation, or lack of obligation, under such constitutional provision and to pay into an escrow fund any amounts it disputed were so owed under that constitutional provision until such a final judicial determination was made.

16. Defendant engaged in the acts and/or omissions detailed in paragraph 15 in an intentional scheme to maliciously, oppressively and fraudulently deprive its taxi driver employees of the hourly minimum wages that were guaranteed to those employees by Article 15, Section 16, of the Nevada Constitution. Defendant so acted in the hope that by the passage of time whatever rights such taxi driver employees had to such minimum hourly wages owed to them by the defendant would expire, in whole or in part, by operation of law. Defendant so acted consciously, willfully, and intentionally to deprive such taxi driver employees of any knowledge that they might be entitled to such minimum hourly wages, despite the defendant's obligation under Article 15, Section 16, of the Nevada Constitution to advise such taxi driver employees of their right to those minimum hourly wages. Defendant's malicious, oppressive and fraudulent conduct is also demonstrated by its failure to make any allowance to pay such minimum hourly wages if they were found to be due, such as through an escrow account, while seeking any judicial determination of its obligation to make those payments.

17. The named plaintiff seeks all relief available to him and the alleged class under Nevada's Constitution, Article 15, Section 16 including appropriate injunctive and equitable relief to make the defendant cease its violations of Nevada's Constitution and a suitable award of punitive damages.

18. The named plaintiff on behalf of himself and the proposed plaintiff class members, seeks, on this First Claim for Relief, a judgment against the defendant for

minimum wages owed since November 28, 2006 and continuing into the future, such sums to be determined based upon an accounting of the hours worked by, and wages actually paid to, the plaintiff and the class members, a suitable injunction and other equitable relief barring the defendant from continuing to violate Nevada's Constitution, a suitable award of punitive damages, and an award of attorneys' fees, interest and costs, as provided for by Nevada's Constitution and other applicable laws.

AS AND FOR A SECOND CLAIM FOR RELIEF PURSUANT TO NEVADA REVISED STATUTES § 608.040 ON BEHALF OF THE NAMED PLAINTIFF AND THE PUTATIVE CLASS

19. Plaintiff repeats and reiterates each and every allegation previously made herein.

20. The named plaintiff brings this Second Claim for Relief against the defendant pursuant to Nevada Revised Statutes § 608.040 on behalf of himself and the alleged class of all similarly situated employees of the defendant.

21. The named plaintiff has been separated from his employment with the defendant and at the time of such separation was owed unpaid wages by the defendant.

22. The defendant has failed and refused to pay the named plaintiff and numerous members of the putative plaintiff class who are the defendant's former employees their earned but unpaid wages, such conduct by such defendant constituting a violation of Nevada Revised Statutes § 608.020, or § 608.030 and giving such named plaintiff and similarly situated members of the putative class of plaintiffs a claim against the defendant for a continuation after the termination of their employment with the defendant of the normal daily wages defendant would pay them, until such earned but unpaid wages are actually paid or for 30 days, whichever is less, pursuant to Nevada Revised Statutes § 608.040.

23. As a result of the foregoing, the named plaintiff seeks on behalf of himself and the similarly situated putative plaintiff class members a judgment against the defendant for the wages owed to him and such class members as prescribed by Nevada Revised Statutes § 608.040, to wit, for a sum equal to up to thirty days wages, along

with interest, costs and attorneys' fees.

WHEREFORE, plaintiff demands the relief on each cause of action as alleged aforesaid.

Plaintiff demands a trial by jury on all issues so triable.

Dated this 20th day of October, 2014.

Leon Greenberg Professional Corporation

By: /s/ *Leon Greenberg*

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Attorney for Plaintiff

EXHIBIT "C"

ORD

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Attorneys for Plaintiffs

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CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

JOSEPH VALDEZ, individually and on behalf of all others similarly situated,

Plaintiff,

v.

COX COMMUNICATIONS LAS VEGAS, INC., VIDEO INTERNET PHONE INSTALLS, INC., QUALITY COMMUNICATIONS, INC., and SIERRA COMMUNICATIONS, CO.,

Defendants.

Case No.: A-09-597433-C
Dept. No. I

ORDER DENYING DEFENDANTS' MOTION TO DISMISS

This matter having come before the Court on the defendant Sierra Communications Services, Inc.'s ("Sierra's") motion to dismiss under Nev. R. Civ. P. 12(c) for a failure by the plaintiff to have a private cause of action to enforce his claim for unpaid overtime wages alleged to be owed to him pursuant to N.R.S. § 608.018, and additional damages pursuant

to N.R.S. § 608.040, such motion having come before the Court for oral argument on July 11, 2012, with Howard E. Cole, Esq., arguing on behalf of defendant Sierra in support of such motion, and Leon Greenberg, Esq., arguing on behalf of plaintiff in opposition to such motion, and after due consideration of the arguments, briefs and papers submitted by counsel for the parties, and the record of these proceedings;

THE COURT FINDS:

~~Sierra's motion is predicated upon the argument that~~ neither of the statutory claims made by the plaintiff in this case, under N.R.S. § 608.018 for unpaid overtime compensation, and under N.R.S. § 608.040 for damages arising from a failure to pay all wages due to a discharged or quitting employee, are enforceable by a private lawsuit in this Court. Sierra argues no private right of action exists to enforce such claims and they can only be heard and determined by the Nevada Labor Commissioner.

The Court finds that it agrees with the reasoning of Judge George in *Buenaventura v. Champion Drywall, Inc. of Nevada, et al.*, No. 2:10-cv-00377-LDG (RJJ), 2011 WL 1071760, at *3 (D. Nev. March 21, 2011) and Judge Barker in *Phelps v. MC Communications, et al*, A-11-634965-C (Dec. 13, 2011). The provisions of N.R.S. § 608.140 providing for the recovery of attorney's fees in certain actions brought to recover unpaid wages make no sense to the Court if there is no private right of action under the circumstances presented in this case. Although plaintiff argues that *Baldonado v. Wynn Las Vegas, LLC*, 124 Nev. 951(2008) should be read to expressly resolve

average earnings while employed by defendant, which the Court finds to be at a rate of $115.20 per day for a total award of $3,456.00 for a period of 30 days.

In respect to plaintiffs' request for prejudgment interest on his unpaid overtime wages, the Court finds that such prejudgment interest was satisfied and foreclosed as a result of the parties' Settlement and Release in the companion federal district court case in March 2013. The Court concludes that nothing in the settlement could be read to have parceled out, or excluded out, some later consideration by this Court as to prejudgment interest.

Conclusion

Based on the foregoing, it is hereby ORDERED that plaintiffs' Motion for Summary Judgment is **GRANTED** in part and **DENIED** in part. Plaintiff is entitled to thirty days of continuing wages under N.R.S. 608.040. Summary judgment on such claim is **GRANTED** and plaintiff is entitled to a judgment in the amount of $3,456.00. Plaintiff's Motion for Summary Judgment under N.R.S. 99.040 for prejudgment interest is **DENIED** for the reasons stated above.

It is hereby further ORDERED that defendant's Counter Motion for Summary Judgment is **GRANTED** in part and **DENIED** in part. Defendant's Motion for Summary Judgment on plaintiff's claim under N.R.S. 99.040 for prejudgment interest is **GRANTED** pursuant to the parties' Settlement and Release satisfied in the companion federal district court litigations. Defendant's Motion for Summary Judgment on plaintiff's claim under N.R.S. 608.040 is **DENIED** for the reasons stated above.

Dated this 16 day of Oct, 2013.

DISTRICT COURT JUDGE
THE HONORABLE KENNETH CORY

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EXHIBIT "D"

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CLERK OF THE COURT

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(702) 259-7704 (fax)

Attorneys for Plaintiffs

DISTRICT COURT
CLARK COUNTY, NEVADA

MICHAEL PHELPS, individually and on behalf of others similarly situated,

Plaintiffs,

vs.

MC COMMUNICATIONS, INC., JOHN WEHRMAN and ROBERT HAYES,

Defendants.

Case No.: A-11-634965-C

Dept No.: 18

ORDER

This matter having come before the Court on the defendants' motion to dismiss for a failure by the plaintiff to have a private cause of action to enforce his claim for unpaid overtime wages alleged to be owed to him pursuant to N.R.S. § 608.018, such motion having come before the Court for oral argument on October 27, 2011, with Anthony Hall, Esq., arguing on behalf of defendants in support of such motion, and Leon Greenberg, Esq., arguing on behalf of plaintiff in opposition to such motion, and after due consideration of the arguments, briefs and papers submitted by counsel for the parties, and the record of these proceedings;

THE COURT FINDS:

Defendants' motion is predicated upon the argument that neither of the statutory claims made by the plaintiff in this case, under N.R.S. § 608.018 for unpaid overtime compensation, and under N.R.S. § 608.040 for damages arising from a failure to pay all wages due to a discharged or quitting employee, are enforceable by a private lawsuit in this Court. Defendants argue no private right of action exists to enforce such claims and they can only be heard and determined by the Nevada Labor Commissioner.

The Court holds that the Nevada Supreme Court, in *Baldonado v. Wynn Las Vegas, LLC*, 124 Nev. 951, 964 (FN33)(2008), held that NRS 608.140 expressly recognizes a civil enforcement action to recoup unpaid wages. Defendants' argument that overtime compensation under NRS 608.018 is not a component of wages and is not otherwise recoverable under the *Baldonado* determination on NRS 608.140 is unpersuasive and currently unsupported by Nevada precedential authority. The Court does not believe Nevada's Labor Laws, or *Baldonado*, are appropriately read to make the plaintiff's claims in this case involve something other than a claim for wages as discussed in *Baldonado*. Additionally, neither *Baldonado* nor NRS 608.140 require that a civil enforcement action to recoup unpaid wages must include a claim for attorney fees pursuant to NRS 608.140 or be brought pursuant to NRS 608.140.

This Court has determined that a private cause of action does exist under both NRS 608.018 and 608.040 for the recovery of unpaid overtime compensation. Recognizing all factual allegations in the plaintiff's complaint as true and drawing all inferences in plaintiff's favor for the purpose of deciding this motion, it is hereby

ORDERED, that defendants' motion to dismiss is denied.

IT IS SO ORDERED this day of DEC 09 2011, 2011

HONORABLE JUDGE DAVID BARKER
DISTRICT COURT, CLARK COUNTY

Submitted by:

LEON GREENBERG PROFESSIONAL CORP.

Leon Greenberg, Esq.
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Attorney for the Plaintiff

Approved as to Form:

Anthony L. Hall, Esq.
/s/ Anthony Hall by Leon Greenberg with approval
Holland & Hart LLP
9555 Hillwood Drive, Second Floor
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Tel (702) 669-4600
Attorney for Defendants

EXHIBIT "E"

IN THE SUPREME COURT OF THE STATE OF NEVADA

STEVEN CSOMOS, INDIVIDUALLY AND ON BEHALF OF A CLASS OF ALL SIMILARLY SITUATED PERSONS,
Appellant,
vs.
VENETIAN CASINO RESORT, LLC,
Respondent.

No. 55203

FILED

SEP 19 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court judgment in an employment action. Eighth Judicial District Court, Clark County; Jessie Elizabeth Walsh, Judge.

Appellant Steven Csomos complains that while he was employed as a server at the Venetian Casino Resort, his employer improperly kept a portion of the service charges assessed as a required gratuity on room service customers. In his first amended complaint, Csomos asserted eight claims for relief labeled: 1) breach of contract; 2) unpaid wages after termination of employment under NRS 608.040, 3) wrongful interference with prospective economic advantage, 4) conversion, 5) unjust enrichment, 6) fraud, 7) quantum meruit, and 8) relief for damages sustained as a third-party contract beneficiary.

The district court granted summary judgment to the Venetian on the first two claims and dismissed the remaining claims asserted in the amended complaint as insufficient. Csomos timely appeals, and we affirm.

I. Facts and proceedings below

Csomos worked for the Venetian as an In Suite Dining (ISD) server, providing room service to guests at the Venetian hotel. The

Venetian hired Csomos, and similar employees, as at-will employees. As an ISD server, Csomos would deliver a bill with the room service order. The bill included a 17%-18% service charge and advised that gratuity was included. However, the bill included a line allowing customers to enter an additional gratuity, if they wished.

The Venetian distributes ISD service charges to Venetian employees. It divides the charges among various employees, including servers, assistant servers, bartenders, and sales agents. Although Csomos received service charge monies every pay period, he did not know the exact percentage that ISD servers received.

Csomos sued the Venetian after leaving its employ. He originally filed a two-count class action complaint, alleging breach of contract and a claim under NRS 608.040 for unpaid wages due after termination of employment. Both claims alleged that the Venetian kept a portion of the service charge that Csomos and others were entitled to receive under contract or as wages. Csomos then served the Venetian with a request for production of documents, requesting all documents relating to Csomos's employment and the distribution of service fees. Months later, Csomos filed an amended complaint, adding six more causes of action including wrongful interference with prospective economic advantage, conversion, unjust enrichment, fraud, quantum meruit, and relief for damages sustained as a third-party contract beneficiary. He filed the amended complaint without moving for leave to amend.

In response to Csomos's amended complaint, the Venetian filed a combined motion to strike or dismiss with prejudice, and for summary judgment (combined motion). In its motion, the Venetian first argued that the amended complaint should be stricken because Csomos

needed, but lacked, leave to amend under NRCP 15(a). Next, the Venetian argued that the six new claims failed to state claims upon which relief could be granted under NRCP 12(b)(5). Finally, the Venetian moved for summary judgment on Csomos's two original claims of breach of contract and violation of NRS 608.040, asserting that Csomos had no contractual or statutory entitlement to service fees, and that Csomos failed to exhaust his administrative remedies before the Labor Commission.

Csomos opposed the Venetian's combined motion, claiming he properly filed the amended complaint. In addition, Csomos argued in his opposition that he sufficiently pleaded all claims and needed discovery to develop them more fully.

The district court granted the Venetian's combined motion. In doing so, the district court did not specifically address Csomos's filing of an amended pleading without formal leave of court. However, it granted summary judgment to the Venetian on Csomos's two original claims, finding that there was no contract or legal duty to provide Csomos with service charges. It further concluded that the new claims sought to be added by the amended complaint did not identify independent facts beyond the first complaint, meriting their dismissal. This appeal followed.

II. Discussion

Breach of contract claim

Summary judgment is appropriate if, after viewing the record before the district court in the light most favorable to the nonmoving party, "'no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law.'" Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (quoting NRCP 56(c)). This court

applies de novo review to a district court's summary judgment determination. Id.

This court held in Baldonado v. Wynn Las Vegas, 124 Nev. 951, 194 P.3d 96 (2008), that at-will employees do not have contractual rights to continued employment and that an employer of an at-will employee can prospectively change the terms and conditions of employment, with the employee's assent to those changes being implicit in his or her continuing to work for the employer. Further, an implied contract cannot be formed if there is an appropriate disclaimer. Id. at 966, 194 P.3d at 106.

Csomos was an at-will employee and the Venetian requires employees to sign documents acknowledging this and disavowing any implied contracts. The Venetian never agreed to give Csomos or other employees a specific percentage of the service charges. Csomos received at least some service charges during each pay period, along with his hourly pay. Therefore, the district court correctly granted summary judgment on the basis that there can be no breach of contract claim when there was no evidence of a contract, express or implied, between Csomos and the Venetian, or its breach. At most, the Venetian promised to pay Csomos an unspecified share of the room service charges, which his affidavit admits it did; further, as an at-will employee, this arrangement was not fixed but changeable at will.

NRS 608.040 claim

The Venetian contends that there is no private cause of action under NRS 608.040 to recover service fees, citing Baldonado. However, Baldonado only applies to NRS 608.160. 124 Nev. at 961, 194 P.3d at 102. Some labor laws expressly create private rights of action to obtain unpaid

wages or other benefits. Id. at 964 n.33, 194 P.3d at 104 n.33. Although NRS 608.040, which assesses penalties for failure to pay a discharged employee, does not have explicit language authorizing a private cause of action, NRS 608.140 allows for assessment of attorney fees in a private cause of action for recovery of wages. It is doubtful that the Legislature intended a private cause of action to obtain attorney fees for an unpaid wages suit but no private cause of action to bring the suit itself. See Fierle v. Perez, 125 Nev. ___, ___, 219 P.3d 906, 915-16 (2009) (statutes should be interpreted in a manner to avoid conflict with other related statutes). The legislative scheme is consistent with a private cause of action for employees and the Legislature enacted the statute to protect employees, supporting a private cause of action under NRS 608.040.

However, viewing the record in the light most favorable to Csomos, there is nothing in the record to support Csomos's argument that the Venetian is keeping any of the service charges. The Venetian provided affidavits confirming that 100% of the service charges are paid to employees and that the hourly pay rate of ISD servers is not reduced based on service charges received. Csomos and his former co-worker, Mary Montag, both admit they were never told by anyone that the Venetian withheld any portion of the service charge. Csomos did not provide any paystubs or other evidence to show a genuine issue of material fact regarding the alleged withholding of wages by the Venetian. Therefore, the district court correctly granted summary judgment on this claim as well.

Csomos did not have leave to amend his first complaint

Csomos did not amend his complaint until almost four months after the Venetian's answer and did not move to amend. Both NRCP 15(a)

and the Eighth Judicial District Court Rule 2.30 (EDCR) required leave from the district court for Csomos to amend the pleadings. The amended complaint fell outside the 20-day window for leave to amend as a matter of right under NRCP 15(a); EDCR 2.30 only allows for amendments as a matter of right or by court order. Csomos maintains he somehow secured telephonic permission from the judge's assistant to file his amended complaint, but the record does not include an order or stipulation to support this. Without an order permitting Csomos to amend the complaint, his unilateral filing of an amended complaint was improper. Therefore, his claims of wrongful interference with prospective economic advantage, conversion, unjust enrichment, fraud, quantum meruit, and relief for damages sustained as a third-party contract beneficiary are not properly before this court.

Even accepting arguendo that Csomos properly relied on telephonic permission, amendment is not appropriate when the amendment would be futile. Reddy v. Litton Industries, Inc., 912 F.2d 291, 296-97 (9th Cir. 1990); see Allum v. Valley Bank of Nevada, 109 Nev. 280, 287, 849 P.2d 297, 302 (1993) (adopting Reddy, 912 F.2d 291, regarding leave to amend and futile claims). Csomos acknowledged in his sworn affidavit that the Venetian did not promise him a specified percentage of ISD fees and that he always received some of those fees. Csomos could not allege conversion, unjust enrichment, fraud, or quantum meruit without a disappointed contract or other right to the fees, which his sworn affidavit contradicts. See Aldabe v. Adams, 81 Nev. 280, 285, 402 P.2d 34, 37 (1965), overruled on other grounds by Siragusa v. Brown,

114 Nev. 1384, 1393, 971 P.2d 801, 807 (1998). Therefore, any leave to amend for those claims would be futile. For these reasons, we

ORDER the judgment of the district court AFFIRMED.

Cherry, J.
Cherry

Gibbons, J.
Gibbons

Pickering, J.
Pickering

cc: Hon. Jessie Elizabeth Walsh, District Judge
William F. Buchanan, Settlement Judge
Leon M. Greenberg
Fox Rothschild, LLP
Eighth District Court Clerk

EXHIBIT "F"

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CLERK OF THE COURT

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Attorney for Plaintiffs

DISTRICT COURT

CLARK COUNTY, NEVADA

JOE VALDEZ, individually and on behalf of all others similarly situated,

Plaintiff,

v.

VIDEO INTERNET PHONE INSTALLS, INC.,

Defendant.

Case No. A-09-597433-C

Dept. No. I

ORDER

THIS MATTER having come before the Court for hearing on September 3, 2013 on plaintiff's Motion for Summary Judgment and defendant's Countermotion for Summary Judgment, after due consideration of all supporting and opposing briefs submitted by counsel

for the parties, the oral argument by counsel, and the record of these proceedings, and good cause appearing, now therefore:

THE COURT FINDS:

Plaintiff sought an Order granting summary judgment on his remaining claim for 30 days of continuing wages under N.R.S. 608.040 for defendant's failure to pay him all wages owed and due at the time of his separation from employment and for his claim under N.R.S. 99.040 for prejudgment interest. Plaintiff's unpaid wages for purposes of his N.R.S. 608.040 claim concerned defendant's failure to pay him overtime wages calculated at time and one-half his "regular rate" of pay. The parties do not dispute that Plaintiff received no waiting-time penalties under NRS 608.040 at the time of his separation from the Defendant.

In the parties' companion federal litigation, the parties entered into a Settlement and Release of Claims in March 2013. Through such Settlement and Release, defendant satisfied a payment of $20,000.00 to plaintiff, which was inclusive of all "taxable costs, attorneys' fees, and prejudgment interest" in the companion federal litigation. Prior to such Settlement and Release, the plaintiff had also accepted an Offer of Judgment in the amount of $4194.20 which was entered on November 14, 2012 in the federal litigation. Thus, plaintiff's only remaining claims concerned his entitlement to damages under N.R.S. 608.040 and prejudgment interest on his unpaid wages claims.

Conclusions of Law

The Court accepts both parties' position that no triable issues of material fact exist and only questions of law remain before the Court. The Court finds that it is undisputed that plaintiff has accepted an offer of judgment for the unpaid overtime wages owed to him at the time of his separation of employment from the defendant and that such offer of judgment

acceptance establishes, for the purposes of NRS 608.040, that the plaintiff was owed unpaid overtime at the time of his employment termination. Thus, plaintiff's entitlement to the requested 30 days of continuing wages as a penalty under N.R.S. 608.040 rests on a pure issues of law concerning whether unpaid overtime wages, due under a piece rate payment system, constitute the unpaid "compensation" or "wages" contemplated by the legislature under N.R.S. 608.040 and whether N.R.S. 608.040 contains a private right of action. The Court finds that in both instances it does.

In so finding, the Court disagrees with the federal district court decisions that the later complications by statute obliterate the earlier meaning. The Court reaches its conclusion regardless of whether the Court would construe this statute the way the Supreme Court has indicated in *General Motors v. Jackson*, saying that giving meaning to their parts and language read each sentence, phrase and word to render it meaningful within the context of the purpose of the legislation. *General Motors v. Jackson*, 99 Nev. 739, 670 P.2d 102 (Nev. 1983). Thus, the Court would arrive at the same conclusion it arrived at if it did go to the secondary method, which is where the statutory language does not speak to the issue before the Court, the Court should construe it according to that which reason and public policy would indicate the legislature intended, and the Court finds they intended employees to be paid the agreed-upon contractual rate, which was, in this case, the average of the piecemeal rate.

The Court further finds that plaintiff is entitled to thirty days of continuing wages under N.R.S. 608.040 for defendant's failure to pay plaintiff all overtime wages owed and due at the time of his separation from employment. Because plaintiff was employed under a piecework payment system, such "continuing wages" are to be calculated based upon his

average earnings while employed by defendant, which the Court finds to be at a rate of $115.20 per day for a total award of $3,456.00 for a period of 30 days.

In respect to plaintiffs' request for prejudgment interest on his unpaid overtime wages, the Court finds that such prejudgment interest was satisfied and foreclosed as a result of the parties' Settlement and Release in the companion federal district court case in March 2013. The Court concludes that nothing in the settlement could be read to have parceled out, or excluded out, some later consideration by this Court as to prejudgment interest.

Conclusion

Based on the foregoing, it is hereby ORDERED that plaintiffs' Motion for Summary Judgment is **GRANTED** in part and **DENIED** in part. Plaintiff is entitled to thirty days of continuing wages under N.R.S. 608.040. Summary judgment on such claim is **GRANTED** and plaintiff is entitled to a judgment in the amount of $3,456.00. Plaintiff's Motion for Summary Judgment under N.R.S. 99.040 for prejudgment interest is **DENIED** for the reasons stated above.

It is hereby further ORDERED that defendant's Counter Motion for Summary Judgment is **GRANTED** in part and **DENIED** in part. Defendant's Motion for Summary Judgment on plaintiff's claim under N.R.S. 99.040 for prejudgment interest is **GRANTED** pursuant to the parties' Settlement and Release satisfied in the companion federal district court litigations. Defendant's Motion for Summary Judgment on plaintiff's claim under N.R.S. 608.040 is **DENIED** for the reasons stated above.

Dated this 16 day of Oct, 2013.

DISTRICT COURT JUDGE
THE HONORABLE KENNETH CORY

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Submitted:

By: _____

Leon Greenberg, Esq.
Dana Sniegocki, Esq.
LEON GREENBERG PROF. CORP.
2965 s. Jones Blvd., Ste. E-4
Las Vegas, NV 89146

Attorney for Plaintiffs

Approved as to form and content:

By: _____

Rick Roskelley
Montgomery Paek
Littler Mendelson
3960 Howard Hughes Parkway
Suite 300
Las Vegas, NV 89169-5937

Attorney for Defendant
VIP Installs

Submitted:

By: _____

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Dana Sniegocki, Esq.
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Las Vegas, NV 89146

Attorney for Plaintiffs

Approved as to form and content:

By: _____

Rick Roskelley
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Suite 300
Las Vegas, NV 89169-5937

Attorney for Defendant
VIP Installs

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10/11/13 1:34 PM

EXHIBIT "/"

Subject: Re: Perera v. Western Cab
From: Leon Greenberg <wagelaw@hotmail.com>
Date: 8/6/2015 3:54 PM
To: Malani Kotchka <mlk@hmlawlv.com>, 'Dana Sniegocki' <dana@overtimelaw.com>

Just because the Court gave me *leave* to file a further amended complaint does not *require* I file and serve any such thing. I am content to rest on the existing First Amended Complaint for the time being.
I am not asking you to agree to my filing of any further amended complaint. All I was asking for was #1 below which you should have already done if you were acting properly. #2 and #3 below are completely optional on your part.
Having me file a Second Amended Complaint that conforms with what you view as the correct leave granted by the Court in its motion is something I would consider doing (though by requiring that you are simply making more needless work for all of us). My concern is you once again refer to a "response" to the same, as well as a "responsive pleading" to the First Amended Complaint but you insist will not "answer" that complaint either.
A"responsive pleading" to a complaint is an answer (or in another jurisdiction a demurrer) not a motion seeking to dismiss the complaint. But you appear to be giving that term a different meaning. I will not quibble over your terminology, it is apparent you will not agree to file an answer.
Unless you will agree to ANSWER and not improperly delay an answer by making another motion to dismiss the complaint (you can certainly ANSWER AND MAKE THAT MOTION) we cannot agree. And I will object to the Court to your conduct. You moved to dismiss the first amended complaint. That motion was denied. An answer is due (and now overdue) to the First Amended Complaint since you object to the Second Amended Complaint as not complying with the Court's Order and I have agreed to withdraw the same that I served. You cannot make serial motions to dismiss and delay an answer by doing so. I would be properly within my rights to seek a default judgment against your client right now owing to their failure to answer. I may serve a notice to do so.
Again, we can move things forward properly. Or not. It is your choice.

On 8/6/2015 3:12 PM, Malani Kotchka wrote:

> I will not agree to answer the First Amended Complaint. I will agree to file a responsive pleading to it. I will not stipulate to your filing an amended complaint in any form other than what the Court already said you could file. You litigated that issue in your countermotion and the Court granted your countermotion. The Court struck all of the supplements. If you file an amended complaint which complies with the Court's order, I will respond to that complaint. Perhaps that is what we should stipulate to and then you can file another motion to amend which I will be able to oppose.
>
> ---
>
> **From:** Leon Greenberg [mailto:wagelaw@hotmail.com]
> **Sent:** Thursday, August 06, 2015 2:54 PM
> **To:** Malani Kotchka <mlk@hmlawlv.com>; 'Dana Sniegocki' <dana@overtimelaw.com>
> **Subject:** Re: Perera v. Western Cab
>
> I do not understand why this was not agreed to you by you previously, but let us not waste effort pondering that.

While such an agreement is acceptable, there are 3 things we need to be clear upon and/or options we might agree upon:

1. You must agree in the stipulation to ANSWER the First Amended Complaint (you can also make any motion you wish as well towards it, but I need an answer made, not a motion that will further delay an answer)

2. We would have the option to allow your pending motion on the "ERISA Preemption" issue to proceed on the merits to hearing as currently scheduled, but apply to the First Amended Complaint (that makes no difference). Or you can withdraw that motion entirely or just for now, up to you.

3. We also have the option of stipulating to the proposed Second Amended Complaint I sent you that names an additional plaintiff not identified in the to be withdrawn Second Amended Complaint. If you decline to do so I will proceed by motion to secure leave to so amend, something I am sure you understand that the Court is going to grant.

Let me know and let us move forward appropriately. I really do want to have this litigation conducted in an economical fashion, we all have enough to do and it certainly does not serve my client's interests to see you (and I) burdened with putting lots of unnecessary time (and attend fee claims) into this case.

Thank you.

On 8/6/2015 2:24 PM, Malani Kotchka wrote:

> Leon: I will stipulate that you are withdrawing your Second Amended Complaint and that when it is withdrawn, we will have 10 days to file a responsive pleading to your First Amended Complaint. That is the complaint which was pending before you filed your countermotion. Malani
>
> ---
>
> **From:** Leon Greenberg [mailto:wagelaw@hotmail.com]
> **Sent:** Thursday, August 06, 2015 1:58 PM
> **To:** Malani Kotchka <mlk@hmlawlv.com>; 'Dana Sniegocki' <dana@overtimelaw.com>
> **Subject:** Re: Perera v. Western Cab
>
> You are ignoring a fact we both agree upon, in respect to the current status of this case: The Second Amended Complaint that was served is not before the Court, I have conceded that, but you persist with a motion to strike the same instead of answering the First Amended Complaint. We can even have an Order entered confirming that status if you wish.
> It is improper for you to proceed with your motion when I am consenting to the relief you seek by such motion.
> You well know you are doing so to delay an answer in this case. You have no legitimate reason for your conduct or burdening the Court in such fashion. So let the record be clear on that issue. I will address this to the Judge in my response to your motion and it will be up to the Court to take action if it wishes to do so in respect to your conduct.
> And as regards your client, well, it is their foolish decision to incur significant financial liabilities (for your time and fees and my time and fees) by directing you to engage in such conduct. Let the record reflect that well.
> But I do thank you for your response.

On 8/1/2015 1:41 PM, Malani Kotchka wrote:

> Leon: I have returned from vacation and have conferred with my client regarding your July 15 email set forth below. In response to our motion to dismiss your amended complaint, you filed an opposition and a countermotion to amend the complaint. Your Exhibit G is captioned "Second Amended Complaint" and lists only Perera as a plaintiff. The only difference between your First Amended Complaint and your proposed Second Amended Complaint was paragraph 16 concerning the fuel. Judge Bell said on page 5 of the transcript of the March 12, 2015 hearing that all of the supplements were untimely under 2.20 and she was striking them all. Again, on page 15, Judge Bell said she would consider your countermotion but not the supplement to the motion where you attempted to add Ahmed as a plaintiff. Rather than comply with Judge Bell's order, you served us with a Second Amended Complaint naming Ahmed as a party. You can only amend a pleading by leave of court or by written consent of the adverse party pursuant to NRCP 15. You had neither for adding Ahmed as a party.
>
> Furthermore, Rule 12 allows us to make certain defenses by motion. That is what we did in response to your Second Amended Complaint which was different from Exhibit G to your Countermotion. There is no authority for you to file a different amended complaint from the one you moved to file. Also, you gave me no authority for the proposition that we have to answer your First Amended Complaint. The Court granted your countermotion to file your Second Amended Complaint. You did not comply with the Court's order but you served us with a different Second Amended Complaint to which we had to respond. We filed a motion to dismiss based on NRCP 12(b)(1) and (5). I believe we have the right to do that and I invited you to give me some authority for your position. You cited no rule and no case. You just told me I have to file an answer.
>
> Finally, your refusal to conform your complaint to the Court's ruling on the statute of limitations is in contempt of the Court's ruling. I trust we have responded to every point you raised in your email. Malani

---

From: Leon Greenberg [mailto:wagelaw@hotmail.com]
Sent: Wednesday, July 15, 2015 3:08 PM
To: Malani Kotchka <mlk@hmlawlv.com>; 'Dana Sniegocki' <dana@overtimelaw.com>
Subject: Re: Perera v. Western Cab

I have reviewed this further and advise as follows:

1. In respect to the Second Amended Complaint I do want to serve one, but in the form attached to this email, which is different than the one filed. You can consent to letting me file the attached or I will proceed by further motion to the Court to secure its formal approval of the same. If you refuse to consent to such filing the Court, as you well know, will allow it (such refusal will only increase the amount of fees your client must pay you and provide a basis for an increased award of fees to me in the future).

2. In light of #1, you are obligated to answer the First Amended Complaint.

Indeed, you were obligated to do so even if you are correct in your belief the Second Amended Complaint currently on file was filed without proper authorization from the Court (essentially rendering it a nullity). You filed your motion to dismiss the First Amended which was denied. While you insist you have a good basis to strike the Second Amended Complaint currently on file you still need TO ANSWER THE FIRST AMENDED COMPLAINT. The "nullity" that you allege about the Second Amended complaint that is on file does not excuse an answer to the First Amended Complaint.

3. As per the above, I will agree that the Second Amended Complaint currently on file with the Court is withdrawn. You will either consent to the filing of the attached and to answering it or I will have it authorized by motion to the Court (and an answer compelled). Your consent to the same, of course, is not a consent to such complaint's sufficiency. If you decline to consent to such filing then you need to answer the First Amended Complaint (which you should have already done). Let's keep your current motion to dismiss (which raises an ERISA preemption issue) before the Court (unless you agree to withdraw it and not resubmit it) since the argument you marshal there is going to apply to any version of the complaint.

4. Statute of limitations is an affirmative defense. You can raise it in your answer and litigate it accordingly. I am not conforming any version of the complaint to meet your desires on that.

The bottom line here is that an answer needs to be filed expeditiously to whichever version of the complaint you elect to have "on record" at this point (either the First Amended or the attached). You can also proceed with whatever motions you want against the complaint, but you cannot continue to delay an answer through serial motions to dismiss. If you refuse to file an answer as I am requesting I will ask the Court to grant appropriate relief (which, in the Court's judgment, may include some form of sanctions) - something that I have no desire to do and we should not burden the Court with. So let's cooperate to move this litigation forward expeditiously and economically.
Thank you.

On 7/10/2015 10:16 PM, Malani Kotchka wrote:

> Leon: I am out of the country on vacation. It will be difficult to confer in person or by phone but I can certainly confer by email. I am confused by your assertion that an answer is due. You served me with a Second Amended Complaint. Under the rules of civil procedure, I believe that I had to respond to that. There cannot be two complaints operating simultaneously. If you have authority that I need to respond to the First Amended Complaint after you have filed a Second Amended Complaint, please send it to me and I will take a look at it. If you are willing to drop Ahmed and put in

the 4-year statute of limitations, that will resolve those issues. I am happy to discuss and confer with you on the other issues. Please respond to me on Monday if you have time. Thanks. Malani

Sent from my iPad

On Jul 11, 2015, at 6:42 AM, Leon Greenberg <wagelaw@hotmail.com> wrote:

> Malani:
>
> I am in receipt of your motion to dismiss filed on 7/7/15. I have not had the time to fully dwell into the issues you raise as Dana is away this week. But I am concerned about the following issue which I hope we can (and we should) cooperatively resolve.
>
> One portion of your motion is based upon your assertion that the second amended complaint (with Mr. Ahmed as plaintiff) exceeds the Court's grant of leave to amend. I am not sure about that merits of that position, but it would have been far better to just confer with me about that rather than address that by motion. Indeed, it would seem as though you are required to do that (and would it not benefit your client to cooperatively resolve that issue with me rather than pay you to engage in motion practice over the same)? My point is assuming, *arguendo*, you are correct on that point you still need to answer the first amended complaint, which you have not done (or perhaps plaintiff will serve a second amended complaint we can agree is proper).
>
> The other portion of your motion raises a wholly new basis for dismissal. While I respect your right to bring whatever issues you believe merit dismissal before the Court by motion, you cannot make "serial dismissal" motions pre-answer and by doing so avoid (or delay) an answer to the complaint. I am sure you understand my point, which as above, I want to see an answer filed in this case, and clearly one is compelled at this point (if only to the first amended complaint). Let us confer next week, hopefully on Monday, on a plan to get this issue resolved and an answer on file promptly. We can then proceed with this case including having the Court address your newly asserted basis for dismissal.

APPENDIX 13

APPENDIX 13

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CLERK OF THE COURT

MDSM
MALANI L. KOTCHKA
Nevada Bar No. 283
HEJMANOWSKI & McCREA LLC
520 South Fourth Street, Suite 320
Las Vegas, NV 89101
Telephone: (702) 834-8777
Facsimile: (702) 834-5262

Attorneys for Defendant
Western Cab Company

DISTRICT COURT

CLARK COUNTY, NEVADA

LAKSIRI PERERA and IRSHAD AHMED, individually and on behalf of others similarly situated Plaintiffs, v. WESTERN CAB COMPANY, Defendant.	**Case No.:** A-14-707425-C **Dept.:** VII **MOTION TO DISMISS SECOND AMENDED COMPLAINT** **Date of Hearing:** 8/6/15 **Time of Hearing:** 9:00am

Pursuant to NRCP 12(b)(1) and (5), defendant Western Cab Company ("Western Cab") moves this Court to dismiss plaintiffs Laksiri Perera's and Irshad Ahmed's Second Amended Complaint on the basis that this Court lacks subject matter jurisdiction and it fails to state a claim

///

///

///

for relief. This motion is based upon the memorandum of points and authorities and exhibits attached hereto and incorporated herein.

Respectfully submitted,

HEJMANOWSKI & McCREA LLC

By: /s/ Malani L. Kotchka
Malani L. Kotchka
Nevada Bar No. 283
520 South Fourth Street, Suite 320
Las Vegas, NV 89101

Attorneys for Defendant

NOTICE OF HEARING

TO: Plaintiffs Laksiri Perera and Irshad Ahmed, and their attorney of record, Leon Greenberg.

PLEASE TAKE NOTICE that the hearing on **MOTION TO DISMISS SECOND AMENDED COMPLAINT** will be brought before Department VII of the Eighth Judicial District Court of the State of Nevada in and for the County of Clark, on the 6 day of August, 2015, at 9:00 a.m.~~p.m.~~

Respectfully submitted,

HEJMANOWSKI & McCREA LLC

By: /s/ Malani L. Kotchka
Malani L. Kotchka
Nevada Bar No. 283
520 South Fourth Street, Suite 320
Las Vegas, NV 89101

Attorneys for Defendant

Hejmanowski & McCrea LLC
520 SOUTH FOURTH ST.
Suite 320
LAS VEGAS,
NEVADA 89101
(702) 834-8777

MEMORANDUM OF POINTS AND AUTHORITIES

I. Perera's Non-Compliance with this Court's June 16, 2015 Decision and Order

In this Court's June 16, 2015 Decision and Order, this Court held:

> The Court therefore denies defendant Western Cab Company's Motion to Dismiss First Amended Complaint in its entirety, and grants plaintiff Laksiri Perera's Countermotion **only** as to his request for leave to amend his complaint to add a claim related to cab drivers being required to pay for fuel costs.

Decision and Order, p. 2 (emphasis added). Plaintiff Perera immediately filed a Second Amended Complaint ignoring this Court's decision and added Irshad Ahmed as a named plaintiff when this Court did not grant him permission to do so. Ahmed should be dismissed as a named plaintiff.

Furthermore, this Court found that Perera brought his claims under the provisions of the Minimum Wage Amendment and as such, his claims are subject to the four-year statute of limitations period provided in NRS §11.220. Decision and Order, p. 9. Despite this Court's ruling, in paragraph 19 of the Second Amended Complaint, Perera seeks "a judgment against the defendant for minimum wages owed since November 28, 2006 . . . ." Second Amended Complaint, p. 7. The original Complaint was filed on September 23, 2014. Therefore, according to this Court's Decision and Order, Perera and any class members can seek minimum wage only since September 23, 2010. Paragraph 19 should be dismissed.

II. No NRS 608.040 Claim

Perera's Second Claim for Relief seeks a remedy under NRS 608.040. NRS 608.040 provides that if an employer fails to pay on the day the wages or compensation are due to an employee who resigns or quits, the wages or compensation of the employee continues at the

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same rate from the day the employee resigned or quit until paid or for 30 days, whichever is less. This statute does not apply to the Minimum Wage Amendment or to minimum wage.

NRS 608.012 defines wages as:

> 1. The amount which an employer agrees to pay an employee for the time the employee has worked, computed in proportion to time; and
>
> 2. Commissions owed the employee,
>
> but excludes any bonus or arrangement to share profits.

Perera was paid the amount Western Cab agreed to pay him computed in proportion to time and the commissions owed him. Perera was paid when he quit.

NAC 608.155(1) provides:

> Before an employee may file a claim for wages unpaid when due, the employee shall make a good faith attempt to collect any wages due the employee from an employer at the normal place and in the normal method that payment is made to employees of the employer.

Perera never made such a good faith attempt.

Moreover, in paragraph 24, in addition to the default 30-day penalty, Perera seeks costs and attorney's fees. However, NRS 608.140 provides that before attorney's fees may be recovered, Perera had to make a written demand "at least 5 days before suit was brought, for a sum not to exceed the amount so found due . . . ." Perera never served Western Cab with a written demand.

This Court lacks subject matter jurisdiction over Perera's NRS 608.040 claim. NRS 608.180 provides that the Labor Commissioner "shall cause the provisions of NRS 608.005 to 608.195, inclusive, to be enforced . . . ." Therefore, the enforcement of NRS 608.040 is within the jurisdiction of the Labor Commissioner, not this Court. This Court agrees. In its Decision and Order of June 16, 2015, this Court said "Therefore, Mr. Perera does not have a private right of action under the provisions of Chapter 608." Decision and Order, p. 9.

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In *Baldonado v. Wynn Las Vegas LLC*, 124 Nev. 951, 194 P.3d 96, 104-05 (Nev. 2008), the Nevada Supreme Court held:

> Specifically, the Labor Commissioner is charged with knowing and enforcing the labor laws; these responsibilities acknowledge a special expertise as to those laws. Implicit in the Labor Commissioner's obligation to know and enforce the labor laws is the duty to hear and resolve labor law complaints. As noted, within 30 days from the hearing's conclusion, the Labor Commissioner must render a written decision resolving the complaint at issue, based on the facts and legal conclusion "developed at the hearing." Indeed, resolving labor law complaints is perhaps one of the Labor Commissioner's most significant enforcement mechanisms. In this manner, the Labor Commissioner's expertise is optimized, and the parties then have an opportunity to petition the district court for judicial review and, ultimately, appeal to this court. Accordingly, the Labor Commissioner's duty to hear and resolve enforcement complaints is not discretionary, and appellants had access to an adequate *964 administrative enforcement mechanism, precluding a finding of legislative intent to create a parallel private remedy.

NRS 607.160(1) provides that the Labor Commissioner shall enforce "all labor laws of the State of Nevada" as long as the enforcement is "not specifically and exclusively vested in any other officer, board or commission." NRS 607.205 grants the Labor Commissioner the power to conduct hearings and issue decisions. NAC 606.075 provides that if a person makes a claim for wages, the Labor Commissioner reviews the claim to determine whether to take jurisdiction of the claim. Finally, NAC 607.105 provides:

> Except as otherwise provided by a specific statute, the Commissioner will not accept any claim or complaint based on an act or omission that occurred more than 24 months before the date on which the claim or complaint is filed with the Commissioner.

Thus, any alleged violation of NRS 608.040 would have to be filed with the Labor Commissioner within 24 months of the failure to pay the wages when due. This time period has passed for Perera.

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In *Landers v. Quality Communications, Inc.*, Exhibit 1, Landers alleged that pursuant to NRS 608.040 he was not paid all of his earned wages at the time he separated from his employment in 2011. Landers did not file a claim for wages with the Nevada Labor Commissioner prior to filing his minimum wage and overtime wage complaint with the court. Judge Bare found that the law clearly required Landers to first pursue his wage claim with the Labor Commissioner before pursuing his private cause of action with the court. Exhibit 1, Order, p. 3. The court held that it had no subject matter jurisdiction over Landers' wage claim and said that failure to exhaust all available administrative remedies before initiating a lawsuit renders a controversy nonjusticiable. Exhibit 1, Order, p. 3. *See Mesagate Homeowners' Assn. v. City of Fernly*, 124 Nev. 1092, 1098-99, 194 P.3d 1248, 1252-53 (2008). The court found, "The Nevada statutes and regulations clearly give an employee an opportunity to correct any mistakes made before a civil lawsuit is filed. Because Landers did not comply with NAC 607.075 or NAC 608.155, Quality never had an opportunity to resolve Landers' alleged wage claim." Similarly here, because Perera never made a good faith attempt to collect any wages which were due or filed a claim for an NRS 608.040 violation with the Labor Commissioner, Western Cab never had an opportunity to resolve Perera's alleged wage claim.

In *Miranda v. O'Reilly Automotive Stores, Inc.*, No. 2:14-cv-878, 2014 WL 4231372, at *2-6 (D. Nev. Aug. 26, 2014), the court held that NRS 608.140 does not imply a private right of action to sue under the labor code but just to sue in contract. The court relied on *Baldonado* and went through an extensive analysis of the statutes in NRS 608 and addressed the intent of the Legislature. In *Dannenbring v. Wynn Las Vegas, LLC*, 907 F. Supp. 2d 1214, 1218-19 (D. Nev. 2013), the court relied on *Descutner v. Newmont USA Ltd.*, 2012 WL 5387703, at *2 (D. Nev. Nov. 1, 2012), and found that NRS 608.140 did not imply a private right of action to enforce the labor statutes. The court dismissed the NRS 608.040 claim. *Id.* at 1219. In Exhibit 2, p. 5,

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Judge Ellsworth found that NRS 608.040 is not similar to NRS 608.140 and said, "There is no indication that the legislature intended to create a private right of action for the collection of the late payment penalties . . . ." Similarly here, Perera does not have a private right of action to sue under the labor code pursuant to NRS 608.040 and NRS 608.140. He must pursue any remedy for a late payment penalty he seeks from the Labor Commissioner.

III. Preemption of Minimum Wage Amendment By Federal Law

A. Introduction

Generally, the law of preemption is "grounded in the Constitution's command that federal law 'shall be the supreme Law of the Land.'" *St. Louis Effort for Aids v. Huff*, 782 F.3d 1016, 1021 (8th Cir. 2015), *quoting In re Aurora Dairy Corp. Organic Milk Mktg. & Sales Practices Litig.*, 621 F.3d 781, 791 (8th Cir. 2010) (*quoting* U.S. Const. Art. VI, cl. 2). The U.S. Constitution's Supremacy Clause invalidates state laws that "interfere with, or are contrary to federal law." *Missouri Ins. Coalition v. Huff*, 947 F.Supp.2d 1014, 1019 (E.D. Mo. 2013), *quoting Qwest Corp. v. Minn. Pub. Utils. Comm'n*, 684 F.3d 721, 726 (8th Cir. 2012). The Supremacy Clause applies where, among other situations, "there is an actual conflict between state and federal law" such that "compliance with both federal and state regulations is a physical impossibility... or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* (citations omitted). Preemption can either be express or implied. *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372 n. 6 (2000).

Perera's claim arises from Nevada's Minimum Wage Amendment, added to Nevada's Constitution, effective November 28, 2006, by popular vote in the general elections of 2004 and 2006. The ballot questions asked: "Shall the Nevada Constitution be amended to raise the minimum wage paid to employees?" and explained:

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> The proposed amendment, if passed, would create a new section to Article 15 of the Nevada Constitution. The amendment would require employers to pay Nevada employees $5.15 per hour worked if the employer provides health benefits, or $6.15 per hour worked if the employer does not provide health benefits. The rates shall be adjusted by the amount of increases in the federal minimum wage over $5.15 per hour, or, if greater, by the cumulative increase in the cost of living measured by the Consumer Price Index (CPI), with no CPI adjustment for any one-year period greater than 3%.[1]

However, Question 6 went far beyond simply raising the minimum wage and altering the manner in which it is calculated. "Health benefits," without meaningful definition under the Constitutional Amendment, are now a component of the calculation of "minimum wage" in Nevada. By introducing into the calculation of minimum wage based on the provision of "health benefits," a term virtually undefined by the Constitutional Amendment, the Minimum Wage Amendment stands in conflict with ERISA and the Affordable Care Act ("ACA"), both comprehensive federal statutory regimes governing employee benefits and health benefits.

ERISA's objective is to maintain a uniform regulatory scheme over employer sponsored pension and health benefit plans. Thus, ERISA expressly preempts any and all state laws that "relate to" any employee benefit plan. 29 U.S.C. §1144(a). The U.S. Supreme Court has determined this language to preempt state laws that have a "connection with" or "a reference to" employee benefits plans. *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995); *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*, 519 U.S. 316 (1997). In considering the nature and impact of state laws on ERISA plans, courts often find that the state laws have an impermissible "connection with" ERISA if they require employers to have health plans, dictate the specific benefits that must

[1] Copies of the State Nevada Secretary of State's Statewide Ballot Questions for 2004 and 2006 relating to the Minimum Wage Amendment are attached respectively as Exhibits 3 and 4.

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be provided through those plans and/or impose certain reporting requirements that differ from ERISA's requirements. *Golden Gate Restaurant Ass'n v. City and County of San Francisco*, 546 F.3d 639, 655-56 (9th Cir. 2008). As explained further below, Nevada's Minimum Wage Amendment and its related Regulations have a "connection with" or "a reference to" employee benefit plans and are thus preempted by ERISA.

Under the ACA, federal law does not "preempt any State law that does not prevent the application of the provisions of" the ACA. 42 U.S.C. §18041(d). Under this provision, conflict preemption occurs when compliance with both federal and state laws is impossible and when a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *St. Louis Effort for Aids v. Huff*, 996 F.Supp.2d 798, 802 (W.D. Mo. 2014), *aff'd in part*, 782 F.3d 1016 (8th Cir. 2015), *quoting Keller v. City of Fremont*, 719 F.3d 931, 940 (8th Cir. 2013) (*quoting Arizona v. U.S.*, __ U.S. __, 132 S.Ct. 2492, 2501, 183 L.Ed.2d 351 (2012)). Nevada's Minimum Wage Amendment confuses the issue of what an employer must provide in "health benefits" to qualify for the lower hourly rate and thus poses an obstacle to the ACA's purposes and objectives.

As explained further below, Congress's enactment of the comprehensive statutory schemes of ERISA and the ACA addressing employee benefit plans and healthcare preempts the field. This means that Nevada's Minimum Wage Amendment, with different wages dependent on the employer's provision or offer of undefined "health benefits," interferes with the federal acts and is preempted by them. In addition, the Minimum Wage Amendment is so vague as to violate minimum fundamental due process under the U.S. and Nevada Constitutions. The unauthorized elaboration of the Minimum Wage Amendment through the Nevada Labor Commissioner does not remedy, but only exacerbates the confusion raised by the Minimum Wage Amendment's reference to "health benefits." As a result of all of these infirmities of Constitutional breadth, Perera has

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failed to state any viable claims based on Nevada's Minimum Wage Amendment and his Second Amended Complaint must be dismissed.

B. ERISA Preempts Nevada's Minimum Wage Amendment

By Constitutional Amendment ("Payment of minimum compensation to employees"), Nevada endeavored to establish a two-level minimum wage law, with rates determined solely by whether or not the employer provides or offers largely undefined "health benefits." The relevant portions of the Minimum Wage Amendment, Art. 15, Sec. 16(A), state:

> 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.

Other than the last sentence quoted above, the Minimum Wage Amendment provides no further definition or direction as to what is meant by "health benefits" or "health insurance." Moreover, the Minimum Wage Amendment does not authorize Nevada's Labor Commissioner to regulate or enforce its health benefit provisions, merely stating that "The Governor or the State agency designated by the Governor shall publish a bulletin by April 1 of each year announcing the adjusted rates," and that the "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...." Art. 15, Sec. 16(A).

Although the Constitutional Amendment did not authorize the Governor, Labor Commissioner, or any other agency or officer to establish or create health benefits regulations, the Nevada Labor Commissioner nevertheless undertook that task, establishing regulations at NAC 608.100-.108, each with reference to Art. 15, Sec. 16. For example, by NAC 608.102, the Labor

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Commissioner added a regulation to Nevada law dictating the type of health care an employer must offer to "qualify to pay an employee" the lower minimum wage rate, stating:

> **NAC 608.102 Minimum wage: Qualification to pay lower rate to employee offered health insurance.** (Nev. Const. Art. 15, §16; NRS 607.160, 608.250). To qualify to pay an employee the minimum wage set forth in paragraph (a) of subsection 1 of NAC 608.100 an employer must meet each of the following requirements:
>
> 1. The employer must offer a health insurance plan which:
>
> (a) Covers those categories of health care expenses that are generally deductible by an employee on his individual federal income tax return pursuant to 26 U.S.C. § 213 and any federal regulations relating thereto, if such expenses had been borne directly by the employee; or
>
> (b) Provides health benefits pursuant to a Taft-Hartley trust which:
>
> (1) Is formed pursuant to 29 U.S.C. § 186(c)(5); and
>
> (2) Qualifies as an employee welfare benefit plan:
>
> (I) Under the guidelines of the Internal Revenue Service; or
>
> (II) Pursuant to the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq.
>
> 2. The health insurance plan must be made available to the employee and any dependents of the employee. The Labor Commissioner will consider such a health insurance plan to be available to the employee and any dependents of the employee when:
>
> (a) An employer contracts for or otherwise maintains the health insurance plan for the class of employees of which the employee is a member, subject only to fulfillment of conditions required to complete the coverage which are applicable to all similarly situated employees within the same class; and
>
> (b) The waiting period for the health insurance plan is not more than 6 months.
>
> 3. The share of the cost of the premium for the health insurance plan paid by the employee must not exceed 10 percent of the gross taxable income of the employee attributable to the employer under the Internal Revenue Code, as determined pursuant to the provisions of NAC 608.104.

Then, by NAC 608.104, the Labor Commissioner set out a definition for "qualified health insurance," another concept without a basis in the Minimum Wage Amendment as approved by the

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public. This addition to NAC dictates how the 10 percent figure of NAC 608.102 and Article 15, Sec. 16(A) is to be calculated, stating:

> **NAC 608.104 Minimum wage: Determination of whether employee share of premium of qualified health insurance exceeds 10 percent of gross taxable income.** (Nev. Const. Art. 15, §16; NRS 607.160, 608.250).
>
> 1. To determine whether the share of the cost of the premium of the qualified health insurance paid by the employee does not exceed 10 percent of the gross taxable income of the employee attributable to the employer, an employer may:
>
> (a) For an employee for whom the employer has issued a Form W-2 for the immediately preceding year, divide the gross taxable income of the employee paid by the employer into the projected share of the premiums to be paid by the employee for the health insurance plan for the current year;
>
> (b) For an employee for whom the employer has not issued a Form W-2, but for whom the employer has payroll information for the four previous quarters, divide the combined total of gross taxable income normally calculated from the payroll information from the four previous quarters into the projected share of the premiums to be paid by the employee for qualified health insurance for the current year;
>
> (c) For an employee for whom there is less than 1 aggregate year of payroll information:
>
> (1) Determine the combined total gross taxable income normally calculated from the total payroll information available for the employee and divide that number by the number of weeks the total payroll information represents;
>
> (2) Multiply the amount determined pursuant to subparagraph (1) by 52; and
>
> (3) Divide the amount calculated pursuant to subparagraph (2) into the projected share of the premiums to be paid by the employee for qualified health insurance for the current year; and
>
> (d) For a new employee, promoted employee or an employee who turns 18 years of age during employment, use the payroll information for the first two normal payroll periods completed by the employee and calculate the gross taxable income using the formula set forth in paragraph (c).
>
> 2. As used in this section, "gross taxable income of the employee attributable to the employer" means the amount specified on the Form W-2 issued by the employer to the employee and includes, without limitation, tips, bonuses or other compensation as required for purposes of federal individual income tax.

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Next, NAC 608.106 references the Minimum Wage Amendment and states that "[i]f an employee declines coverage under a health insurance plan that meets the requirements of NAC 608.102 and which is offered by the employer, the employer must maintain documentation that the employee has declined coverage," adding that "[d]eclining coverage may not be a term or condition of employment."

Finally, NAC 608.108 addresses the employer's requirement to pay wages at the higher rate, adding burdens and benefits beyond the language of the 2006 Constitutional amendment:

> **NAC 608.108. Minimum wage: Requirements for payment at higher rate; modification of term of waiting period.** (Nev. Const. Art. 15, §16; NRS 607.160, 608.250). If an employer does not offer a health insurance plan, or the health insurance plan is not available or is not provided within 6 months of employment, the employee must be paid at least the minimum wage set forth in paragraph (b) of subsection 1 of NAC 608.100 until such time as the employee becomes eligible for and is offered coverage under a health insurance plan that meets the requirements of NAC 608.102 or until such a health insurance plan becomes effective. The term of the waiting period may be modified in a bona fide collective bargaining agreement if the modification is explicitly set forth in such agreement in clear and unambiguous terms.

The Minimum Wage Amendment and Labor Commissioner's embellishments to it in NAC Chapter 608 are all preempted by ERISA. ERISA is a comprehensive federal regulatory regime concerning private employer sponsored pension and health plans. 29 U.S.C. §1144(a). In fact, ERISA regulates most non-wage benefits provided to employees, from retirement savings to welfare benefits, including health insurance. 29 U.S.C. §§ 1002, 1003. The term "employee welfare benefit plans" is defined broadly to include the "vast majority of healthcare benefits that an employer extends to its employees." *Retail Industry Leaders Ass'n v. Fielder*, 475 F.3d 180, 190 (4th Cir. 2007) (*citing* 29 U.S.C. §1002(1)). ERISA does not mandate employers to provide employees with any specific benefits, but creates "various uniform standards, including rules

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concerning reporting, disclosure, and fiduciary responsibility" that apply to the benefit plans selected. *Shaw v. Delta Air Lines*, 463 U.S. 85, 91 (1983).

ERISA's primary purpose is to "provide a uniform regulatory regime over employee benefit plans." *Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004). Congress broadly preempts State legislation to accomplish this purpose: ERISA preempts ['a]ny and all State laws insofar as they may now or hereafter *relate* to any 'employee benefit plan'" covered by ERISA. 29 U.S.C. §1144(a), ERISA §514(a) (emphasis added). In fact, ERISA's preemption is one of the broadest in the law:

> ***ERISA's preemption clause is 'deliberately expansive,'*** *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45-46, 107 S.Ct. 1549, 1551-52, 95 L.Ed.2d 39 (1987), and 'contains ***one of the broadest preemption clauses ever enacted by Congress.***' *Greaney* [*v. Western Farm Bureau Life. Ins. Co.*], 973 F.2d [812], at 817 [(9th Cir. 1992)] (citations omitted). The preemption clause states that the provisions provided by ERISA 'shall supersede any and all State laws insofar as they may now or hereinafter relate to any employee benefit plan...' 29 U.S.C. § 1144(a). Interpreting ERISA's preemption clause, the Supreme Court has instructed that 'relates to' is to be given its broad common-sense meaning,' *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739, 105 S.Ct. 2380, 2389, 85 L.Ed.2d 728 (1985). Therefore, a state cause of action relates to an ERISA benefit plan if operation of the law impinges on the function of an ERISA plan. *Id.* [Emphasis added.]

Spain v. Aetna Life Ins. Co., 11 F.3d 129, 131 (9th Cir. 1993) (per curiam), *cert. denied*, 62 U.S.L.W. 3705 (U.S. Apr. 25, 1994) (No. 93-1390); *see also, Tawse v. DHL Airways*, 2005 WL 1563208, at *1 (N.D. Ill. 2005), *quoting Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990) ("Because neither of these [state law] claims can be decided without 'reference to' the plan, they are clearly superseded by ERISA"). By preempting state employee benefit laws, ERISA is intended "to minimize the administrative and financial burden of complying with conflicting directives from States or between States and the Federal Government" and to reduce "the tailoring of plans and employer conduct to the peculiarities of each jurisdiction." *Ingersoll-Rand, id.* Thus,

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the scope of ERISA's "relates to" preemption language is to be read as broadly as possible. The U.S. Supreme Court has suggested that a state law "relates to" an ERISA plan "if it has a ***connection with or reference to*** such a plan." *Shaw*, 463 U.S. at 97 (emphasis added). Nevada's Minimum Wage Amendment has created precisely the conflict ERISA's preemption language was meant to avoid.

Another preemption test is to ask whether Congress would have anticipated that a type of state law would be preempted. *Fielder*, 475 F.3d at 191. This congressional intent is to be inferred by "look[ing] 'to the objectives of the ERISA statute' as well as 'to the nature and effect of the state law on ERISA plans.'". *Id.* (*quoting California Div. of Labor Standards Enforcement v. Dillingham Constr.*, 519 U.S. 316, 325 (1997)). State laws that "mandate employee benefit structures or their administration" are preempted by ERISA. *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 658 (1995). State regulations of employer provision of employee benefits conflict with Congress' intent that ERISA establish uniform, national regulation of employee benefit plans. *Id.* at 657-58.

Thus, a state statutory scheme will not be saved from ERISA preemption if its underlying purpose is a preempted one. For example, in *American Med. Sec., Inc. v. Bartlett*, 111 F.3d 358 (4th Cir. 1997), the Maryland Insurance Commissioner had established a minimum attachment point for stop-loss insurance policies. *Id.* at 630. While the Fourth Circuit recognized that the insurance regulation was "superficially" within a field traditionally regulated by the State, the court looked beyond the "carefully drafted" regulation to find that the "purpose and effect" was to force insurance companies to provide health benefits. *Id.*, at 363. Thus, the insurance regulations were preempted. *Id.*, at 363-65. Similarly, in *Retail Industry Leaders Ass'n v. Fielder*, 475 F.3d 180, 185 (4th Cir. 2007), the Fourth Circuit looked beyond a statute's language to find a preempted purpose (quoting the State Senate President's comments in floor debate that the legislation would "require

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... [certain] employers to provide [health insurance'"]; *Id.* at 194 (describing the legislative fiscal service's note that the legislative intent was to "require[e] Wal-Mart to increase healthcare spending"). Similarly, Nevada's Minimum Wage Amendment and related NAC Regulations authorizing employers to pay lower wages when they offer "health benefits," is intended to encourage employers to offer "health benefits," the specific purposes of Congress in enacting ERISA and the ACA.

The Minimum Wage Amendment and the Labor Commissioner's related Regulations affect, alter or impact the health benefits offered by Nevada private employers, such as Western Cab. The Minimum Wage Amendment and NAC Regulations illegally compel employers to change the administration of their ERISA-governed plans and/or create separate and independent plans and they thereby encroach on ERISA's purview, subjecting employers to uncertainty and cost, substantively changing health benefits, reporting and administration requirements, creating inconsistencies with ERISA and the ACA (as discussed further below), and frustrate the intent of the U.S. Congress to establish uniform national regulation of employee benefit plans and healthcare. In conclusion, the Minimum Wage Amendment and Regulations related to it, as discussed above, are preempted by ERISA and Perera has no viable state court claim.

C. **The ACA Preempts Perera's Claims**

The ACA was enacted on March 23, 2010, and amended ERISA to establish new requirements for group health plans and insurers. Among other things, the ACA requires employers with 50 or more full-time employees to offer employee health-care plans which provide certain additional minimum levels of coverage to plan participants and beneficiaries. *Christian and Missionary Alliance Foundation, Inc. v. Burwell*, 2015 WL 437631, at *1 (M.D. Fla. 2015); 26 U.S.C. §§4980H(a) & (c)(2), 5000A(f)(2). In many instances, Congress authorized the Department of Health and Human Services to supply further detail as to what was required. *Id.*

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The ACA greatly expanded federal involvement in health insurance oversight and regulation, introducing a variety of new federal minimum standards. The Supremacy Clause of the U.S. Constitution, Art. VI, explicitly provides that "the Laws of the United States... shall be the supreme law of the land." Preemption can occur expressly, as where Congress states that a law preempts state laws, or by implication, where logical deduction based on the text of the federal law precludes enforcement of a state law. Under the ACA, federal law does not "preempt any State law that does not prevent application of the provisions of" the ACA. 42 U.S.C. §18041(d). However, Nevada's Minimum Wage Act does not define "health benefits" and NAC Chapter 608 does not address "health insurance" in terms of the ACA. Thus, the Minimum Wage Amendment and related Regulations may prevent application of the provisions of the ACA and the uncertainty created by the Amendment and related Regulations requires application of federal preemption.

It was the objective of Congress in enacting the ACA to "expand minimum essential health coverage nationwide through the individual mandate." *Coons v. Lew*, 762 F.3d 891, 901 (9th Cir. 2014) (declaring Arizona's Health Care Freedom Act preempted by ACA based on its express exemption of the individual mandate, an issue specifically covered by the ACA). Here, Nevada's Minimum Wage Amendment draws a distinction in hourly wages based on whether or not an employer provides "health benefits." Then, without authorization, the Nevada Labor Commissioner has tried to give meaning to "health benefits," without reference to ERISA or ACA requirements and thereby interfering with ERISA and the ACA. *See Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 503 U.S. 88, 96, 103 ("The question of whether a certain state action is pre-empted by federal law is one of congressional intent. The purpose of Congress is the ultimate touchstone..... A state law... is preempted if it interferes with the methods by which the federal statute was designed to reach [its] goal." (internal quotation marks omitted)).

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Conflict preemption occurs when compliance with both federal and state laws is impossible or when a state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *St. Louis Effort*, 996 F.Supp.2d at 802-03; *see also*, *St Louis Effort*, 782 F.3d at 1024-25 (concluding that the plaintiffs were likely to succeed on merits of their claim that state law provisions regulating advice and information that organizations could provide were preempted by the ACA). Where the state's law makes the operation of the federal statutory scheme "more difficult or onerous" and thus "run afoul of the ACA's purpose," the state law is subject to preemption. *Id.* at 803. Here, Nevada's Minimum Wage Amendment is so vague and uncertain that it is literally impossible for an employer to understand what is meant by "health benefits" and the unauthorized provisions of the Administrative Code do not remedy the matter other than to clarify that they are addressing precisely the same matters addressed by Congress in ERISA and ACA. As a result, the Minimum Wage Amendment and related regulations are preempted by the ACA.

D. The Due Process Clauses of the U.S. and Nevada Constitutions Preempt Perera's Minimum Wage Amendment Claim

In addition to preemption by ERISA and the ACA, Nevada's Minimum Wage Amendment and related Regulations are barred by the Due Process Clauses of the Fourteenth Amendment of the U.S. Constitution and Art. I, Sec.8(5) of the Nevada Constitution, both of which establish that there shall be no deprivation of life, liberty or property without due process of law. Nevada's Minimum Wage Amendment and related NAC additions all amount to violations of fundamental due process because they do not give fair notice of what is required or prohibited under them or provide reasonable standards for compliance, thereby encouraging arbitrary and discriminatory enforcement. *Sheriff, Washoe County v. Burdg*, 118 Nev. 853, 857, 59 P.3d 484, 486-87 (2002), *citing Sheriff v. Martin*, 99 Nev. 336, 340, 662 P.2d 634, 637 (1983). ("A statute is void for vagueness if it fails to define the criminal offense with sufficient definiteness that a person of

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ordinary intelligence cannot understand what conduct is prohibited and if it lacks specific standards, encouraging arbitrary and discriminatory enforcement. The Supreme Court has also held that a facial-vagueness challenge is appropriate when the statute implicates constitutionally protected conduct or if the statute 'is impermissibly vague in all of its applications.'").

Finally, the Minimum Wage Amendment does not authorize any person, board, entity or division of the State government to enforce, administer, or regulate what is meant by "health benefits." Neither the voters, the Legislature nor the Governor delegated power to the Labor Commissioner to enforce or regulate the Minimum Wage Amendment's "health benefits" provisions. Thus, to the extent that the Labor Commissioner has done so, the Labor Commissioner has denied due process to those burdened or benefitted by the Minimum Wage Amendment.

IV. Punitive Damages

Throughout his First Claim for Relief, Perera alleges that Western Cab maliciously, fraudulently or oppressively deprived its taxicab drivers of minimum wage. NRS 42.005 provides for punitive damages only "in an action for the breach of an obligation not arising from contract . . . ." Neither of Perera's causes of action sound in tort. Both are based on a contract theory. *See* NRS 608.010 where "Employee" is defined as a person in the service of an employer under a "contract of hire." Therefore, all allegations of malicious, fraudulent or oppressive conduct should be stricken from the Second Amended Complaint or dismissed with prejudice.

V. Conclusion

This Court did not grant Irshad Ahmed's motion to be added as a named plaintiff to the Second Amended Complaint. Therefore, this Court should grant Western Cab's Motion to Dismiss Irshad Ahmed as a named plaintiff.

Second, this Court has already held that a four-year statute of limitations applies. Therefore any claim for minimum wage prior to September 23, 2010 should be dismissed with prejudice.

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NRS 608.040 which provides for a 30-day wage penalty does not create a private cause of action and can be enforced only by filing a claim with the Labor Commissioner. Here, Perera did not comply with NAC 608.155(1) which provides that before filing a claim for wages unpaid when due, an employee shall make a good faith attempt to collect any wages due from an employer at the normal place and in the normal method that payment is made to employees of the employer. Furthermore, Perera never served Western Cab with a written demand for attorney's fees and therefore has no right to fees pursuant to NRS 608.140. Since more than twenty-four months have passed after Perera quit and was paid his wages at the time of his quitting, the Labor Commissioner will not accept a claim for a violation of NRS 608.040.

Nevada's Minimum Wage Amendment is unconstitutional because it is preempted by ERISA and the ACA. The Minimum Wage Amendment also violates the due process clauses of the United States and Nevada Constitutions.

Finally, Perera's first claim for relief does not state a cause of action sounding in tort. Therefore, all references to malicious, fraudulent or oppressive conduct and request for punitive damages should be dismissed pursuant to NRS 42.005. For these reasons, Western Cab respectfully requests that this Court dismiss Perera's Second Amended Complaint.

Respectfully submitted,

HEJMANOWSKI & McCREA LLC

By: /s/ Malani L. Kotchka
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EXHIBIT 1

EXHIBIT 1

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Attorneys for Defendant
Quality Communications, Inc.

DISTRICT COURT

CLARK COUNTY, NEVADA

GREG LANDERS, individually and on behalf of others similarly situated, Plaintiffs, v. QUALITY COMMUNICATIONS, INC., Defendant.	Case No.: A-12-657452-C Dept. No.: XXXII NOTICE OF ENTRY OF ORDER GRANTING QUALITY'S MOTION FOR SUMMARY JUDGMENT

PLEASE TAKE NOTICE that on October 31, 2012, the Court entered an Order Granting Quality's Motion for Summary Judgment. A copy of said order is attached hereto.

Respectfully submitted,

LIONEL SAWYER & COLLINS

By: /s/ Malani L. Kotchka
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Attorneys for Defendant
Quality Communications, Inc.

CERTIFICATE OF MAILING

I hereby certify that pursuant to NRCP 5, service of NOTICE OF ENTRY OF ORDER GRANTING QUALITY'S MOTION FOR SUMMARY JUDGMENT was made on this 2nd day of November, 2012, by depositing a copy for mailing, first-class mail, postage paid, to the following:

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Attorneys for Defendant
Quality Communications, Inc.

DISTRICT COURT

CLARK COUNTY, NEVADA

GREG LANDERS, individually and on behalf of others similarly situated,	Case No.: A-12-657452-C
Plaintiffs,	Dept. No.: XXXII
v.	
QUALITY COMMUNICATIONS, INC.,	
Defendant.	

ORDER GRANTING QUALITY'S MOTION FOR SUMMARY JUDGMENT

Defendant Quality Communications, Inc.'s Motion to Dismiss Complaint or Alternatively, For Summary Judgment and Plaintiff's Motion to Strike Defendant's Reply Memorandum of Points and Authorities Served on September 21, 2012 on Exhaustion of Administrative Remedies having come on for hearing before this Court on October 19, 2012, and Leon Greenberg appearing for the plaintiff Greg Landers and Malani L. Kotchka appearing on behalf of Quality Communications, Inc., and this Court having read all of the briefs, including supplemental briefs, and having heard oral argument, hereby denies Landers' motion to strike Quality's reply brief and denies Quality's countermotion for sanctions. The Court further decides that since there is no genuine issue of any material fact,

Quality Communications, Inc.'s motion for summary judgment is granted as a matter of law. Pursuant to NRCP 56(c), the Court determines as follows:

UNDISPUTED MATERIAL FACTS

1. On March 1, 2012, plaintiff Gregory Landers filed a Class Action Complaint for Violations of State Statutes Governing the Payment of Wages against his former employer Quality Communications, Inc.

2. In his Complaint, Landers specifically alleged a violation of NRS 608.018 and claimed he was entitled to overtime wages. He specifically alleged a violation of "NRS § 608.016, Nevada's Constitution, Article 15, Section 16, and for breach of contract" and claimed he was entitled to unpaid wages or minimum wages. He also alleged that pursuant to NRS 608.040, he was not paid all of his earned wages at the time he separated from his employment in 2011.

3. Landers did not file a claim for wages with the Nevada Labor Commissioner prior to filing his March 1, 2012 Complaint with this Court.

LEGAL DETERMINATIONS AND CONCLUSIONS OF LAW

1. NRS 608.180 provides that the Labor Commissioner or his representative shall cause the provisions of NRS 608.005 to 608.195, inclusive, to be enforced.

2. The three statutory bases of Landers' Complaint are included within NRS 608.005 to 608.195.

3. NRS 607.160 grants the Labor Commissioner the power to adopt regulations. NAC 608.155 provides that before an employee may file a claim for wages unpaid when due, the employee shall make a good faith attempt to collect any wages due the employee from an employer at the normal place and in the normal method that payment is made to employees of the employer.

4. NAC 607.075 provides that upon the filing with the Labor Commissioner of a claim for wages, the Commissioner will review the claim to determine whether to take jurisdiction of the claim.

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5. Landers admits that he never submitted a claim for wages at any time to the Labor Commissioner before filing his lawsuit in this Court.

6. The law clearly required Landers to first pursue his wage claim with the Labor Commissioner before pursuing his private cause of action with this Court.

7. The Court finds that it has no subject matter jurisdiction over Landers' wage claim. Failure to exhaust all available administrative remedies before initiating a lawsuit renders a controversy nonjusticiable. Mesagate Homeowners' Assn. v. City of Fernley, 124 Nev. 1092, 1098-99, 194 P.3d 1248, 1252-53 (2008).

8. Landers was required to exhaust his administrative remedies by first filing a claim with the Labor Commissioner before filing his action in court. The Nevada statutes and regulations clearly give an employer an opportunity to correct any mistakes made before a civil lawsuit is filed. Because Landers did not comply with NAC 607.075 or NAC 608.155, Quality never had an opportunity to resolve Landers' alleged wage claim.

9. The Nevada Legislature clearly intended to have the Labor Commissioner, the agency with expertise, review all wage claims prior to involving the courts. By requiring an employee to first file a claim with the Labor Commissioner, the Legislature was promoting efficiency and conserving judicial resources.

10. Since there is no genuine issue of any material facts, Quality is entitled to judgment as a matter of law.

...

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...

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IT IS HEREBY ORDERED that judgment is granted in favor of Quality Communications, Inc. and against plaintiff Greg Landers.

Dated this 30 day of October, 2012.

THE HONORABLE JUDGE ROB BARE

ROB BARE
JUDGE, DISTRICT COURT, DEPARTMENT 32

Approved as to form and content:

By: /s/ Leon Greenberg
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CLERK OF THE COURT

COMP

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DISTRICT COURT

CLARK COUNTY, NEVADA

GREGORY LANDERS, individually and on behalf of others similarly situated,	Case No. A-12-657452-C Dept. No.: XXXII
Plaintiffs,	THIS CASE IS EXEMPT FROM ARBITRATION BECAUSE IT IS A CLASS ACTION
-against-	
QUALITY COMMUNICATIONS, INC.	
Defendant.	

CLASS ACTION COMPLAINT FOR VIOLATIONS
OF STATE STATUTES GOVERNING THE PAYMENT OF WAGES

The Plaintiff, by his attorneys, Leon Greenberg Professional Corporation, as and for a Complaint against the defendant, states and alleges, as follows:

1. The plaintiff, GREGORY LANDERS (the "plaintiff" or "named plaintiff"), is a resident of Clark County and the State of Nevada

and an employee of the defendant.

2. The defendant, Quality Communications, Inc., ("Quality") is a corporation formed and existing pursuant to the Laws of the State of Nevada and has its principal place of business in Clark County Nevada or its main place of business in the State of Nevada in Clark County Nevada.

3. The plaintiff was an employee of the defendant during the time period pertinent to this complaint, to wit, during at least a portion of the three years immediately preceding the initiation of this action. The plaintiff has performed labor in defendant's cable television, phone, and internet service installation business.

4. That all of the various violations of law that are alleged herein were committed intentionally and/or willfully by the defendant.

CLASS ACTION ALLEGATIONS

5. The individual plaintiff brings this Complaint as a class action under Nevada Rules of Civil Procedure Rule 23 on behalf of himself and all persons similarly situated, to wit a putative class of cable telephone, television, and internet service installation technicians employed by the defendant in the State of Nevada within three (3) years of the filing of this Complaint until entry of judgment after trial.

6. Plaintiff is informed and believes, and based thereon alleges that there are at least 100 putative class action members. The actual number of class action members is readily ascertainable by a review of the defendant's records through appropriate discovery.

7. The number of class members is so numerous that joinder is impracticable and would involve many individual litigations. Disposition of these claims in a class action rather than in individual actions will benefit the parties and the Court.

8. There is a well-defined community of interest in the questions of law and fact affecting the class as a whole.

9. Proof of a common or single set of facts will establish the right of each member of the class to recover. These common questions of law and fact predominate over questions that affect only individual class members. The individual plaintiff's claims are typical of those of the class.

10. A class action is superior to other available methods for the fair and efficient adjudication of the controversy. Due to the typicality of the class members' claims, the interests of judicial economy will be best served by adjudication of this lawsuit as a class action. This type of case is uniquely well-suited for class treatment since the employer's practices were uniform and the burden is on the employer to establish that its method for compensating the class members complies with the requirements of Nevada law.

11. The individual plaintiff will fairly and adequately represent the interests of the class and has no interests that conflict with or are antagonistic to the interests of the class.

12. The individual plaintiff and his counsel are aware of their fiduciary responsibilities to the class members and are determined to diligently discharge those duties by vigorously seeking the maximum possible recovery for the class, plaintiff's counsel also being highly experienced in the prosecution of class actions and competent to represent the class.

13. There is no plain, speedy, or adequate remedy other than by maintenance of this class action. The prosecution of individual remedies by members of the class will tend to establish inconsistent standards of conduct for the defendants and result in the impairment of class members' rights and the disposition of their interests through actions to which they were not parties.

FACTUAL ALLEGATIONS UNDERLYING THE CLAIMS

14. The defendant is in the business of providing electrical contracting services to the cable television industry, *e.g.*, installing, constructing, maintaining, modifying, various electrical installations, including, if they are so engaged to do so, those involving cable television service, computer internet (DSL) service and telephone service, the defendant also employing the plaintiff and the class members in connection with its providing of such services to its customers, such persons employed by the defendant typically being called "cable service installers" or "service technicians."

15. The compensation system used by the defendant for the plaintiff and those similarly situated was a *de facto* "piecework no overtime" system, meaning such employees were being paid a certain amount for each "piece" of work they performed pursuant to a schedule, the plaintiffs not being paid time and one-half their "regular hourly rate" for work in excess of 40 hours a week as required by the Nevada law based upon the hours they actually worked each week and the total basic "piece rate" they were paid, such *de facto* compensation system existing even though defendants would produce certain false and misleading payroll records indicating that either proper overtime or some measure of overtime was being paid to

the plaintiff and those similarly situated when, in fact, no such overtime was being paid whatsoever, or, alternatively, defendants utilized a compensation system that did pay some measure of overtime wages upon a designated hourly rate but failed to pay any overtime wages on the additional and substantial portion of the earnings of the plaintiff and those similarly situated that were paid by the defendants solely on a piece rate basis.

16. Alternatively, if defendant did not engage in a "piecework no overtime" pay scheme, and paid the plaintiff and those similarly situated to the plaintiff a facially proper overtime wage demonstrated on their payroll records as time and one-half their regular hourly rate including all piecework earnings, the defendant failed to pay such persons for all overtime hours that they worked, the defendant furthering such scheme by requiring the plaintiff and those similarly situated to the plaintiff to record or otherwise certify that they were not working during periods of time that the defendant required and commanded them to work and when the defendant had actual knowledge they were so working.

17. Defendant, in furtherance of its scheme to deny the plaintiff and those similarly situated proper overtime pay as required by the Nevada law would falsely list certain "overtime hours" and "regular hours" and "overtime compensation" on the plaintiff's and the putative class member's pay stubs, such listings being inaccurate in terms of hours actually worked and not reflecting any attempt to pay time and one-half the employees' true "regular rate" as required by the FLSA such purported "overtime" payments being based upon completely fictitious and knowingly false "regular rates" and "hours worked" that were concocted by the

defendants.

AS AND FOR A FIRST CLAIM FOR RELIEF PURSUANT TO NEVADA REVISED STATUTES § 608.018 AGAINST THE DEFENDANT ON BEHALF OF THE NAMED PLAINTIFF AND ALL OTHERS SIMILARLY SITUATED

18. The individual plaintiff brings this First Claim for Relief against the defendant pursuant to NRS § 608.018 on behalf of himself and a class of all similarly situated employees of the defendant.

19. Pursuant to NRS § 608.018, the plaintiff and the putative class members were entitled to the payment of wages at time and one-half their normal hourly rate when they worked in excess of 8 hours a day or 40 hours a week, and the plaintiff and the putative class members were not paid such required wages.

20. The individual plaintiff on behalf of himself and the class members, seeks, on this First Claim for Relief, a judgment against the defendant for unpaid overtime wages, such sums to be determined based upon an accounting of the hours worked by, and wages actually paid to, the plaintiff and the class members, and also seeks an award of attorney's fees, interest and costs, as provided for by Nevada law.

AS AND FOR A SECOND CLAIM FOR RELIEF PURSUANT TO NEVADA REVISED STATUTES § 608.016, THE NEVADA CONSTITUTION AND FOR BREACH OF CONTRACT AGAINST THE DEFENDANT ON BEHALF OF THE NAMED PLAINTIFF AND ALL OTHERS SIMILARLY SITUATED

21. Plaintiff repeats each and every allegation previously made herein and incorporates the same into this claim for relief.

22. The individual plaintiff brings this Second Claim for Relief against the defendant pursuant to NRS § 608.016, Nevada's Constitution, Article 15, Section 16, and for breach of contract, on behalf of himself and a class of all similarly situated employees of

the defendant.

23. As alleged in paragraph 15, the plaintiff and other class members worked for certain periods of time that they were paid no wages whatsoever, defendant's failure to compensate such persons at all for such periods of time also constituting a violation of N.R.S. § 608.016, requiring payment to employees for all hours worked, Nevada's Constitution, Article 15, Section 16, requiring payment of a minimum wage, and such persons' contracts of employment with defendant, if such unpaid periods of time worked do not otherwise constitute overtime under N.R.S. § 608.018.

24. The individual plaintiff on behalf of himself and the class members, seeks, on this Second Claim for Relief, a judgment against the defendant for unpaid wages or minimum wages, such sums to be determined based upon an accounting of the hours worked by, and wages actually paid to, the plaintiff and the class members, and also seeks an award of attorney's fees, interest and costs, as provided for by Nevada Law.

AS AND FOR A THIRD CLAIM FOR RELIEF PURSUANT TO NEVADA REVISED STATUTES § 608.040 ON BEHALF OF THE NAMED PLAINTIFF AND THE PUTATIVE CLASS

25. The named plaintiff brings this Third Claim for Relief against Quality pursuant to Nevada Revised Statutes § 608.040 on behalf of himself and a class of all similarly situated employees of the corporate defendant.

26. In or about 2011, the named plaintiff was separated from his employment with Quality and at the time of such discharge the named plaintiff was owed unpaid wages by Quality.

27. Quality has failed and refused to pay the named plaintiff

and numerous members of the putative plaintiff class their earned but unpaid wages, such conduct by such defendant constituting a violation of Nevada Revised Statutes § 608.020, or § 608.030 and giving the named plaintiff and similarly situated members of the putative class of plaintiffs a claim against the corporate defendant for a continuation of their normal wages for another 30 days under Nevada Revised Statutes § 608.040.

28. As a result of the foregoing, the plaintiff seeks a judgment against Quality for the wages owed to them as prescribed by Nevada Revised Statutes § 608.040, to wit, for a sum equal to up to thirty days wages, along with interest, costs and attorney's fees, on behalf of himself and the members of the putative plaintiff class.

Wherefore, the plaintiff demands a judgment on all claims for relief as alleged aforesaid.

Plaintiff demands a trial by jury on all issues so triable.

Dated: Clark County, Nevada
March 1, 2012

Yours, etc.,

/s/Leon Greenberg

Leon Greenberg, Esq.
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EXHIBIT 2

EXHIBIT 2

REGISTER OF ACTIONS

CASE NO. A-13-678109-C

Neal Golden, Plaintiff(s) vs. Sun Cab Inc, Defendant(s)

Case Type:	Other Civil Filing
Subtype:	Other Civil Matters
Date Filed:	03/11/2013
Location:	Department 6
Cross-Reference Case Number:	A678109

PARTY INFORMATION

		Lead Attorneys
Defendant	Sun Cab Inc *Doing Business As* Nellis Cab Co	Rick D. Roskelley *Retained* 7028828800(W)
Plaintiff	Golden, Neal	Leon Greenberg *Retained* 7023836085(W)
Plaintiff	Hassan, Abaikarim	Leon Greenberg *Retained* 7023836085(W)

EVENTS & ORDERS OF THE COURT

12/05/2014 | All Pending Motions (9:00 AM) (Judicial Officer Ellsworth, Carolyn)
All Pending Motions: 12/5/14

Minutes
12/05/2014 9:00 AM
- DEFT'S MOTION FOR PARTIAL SUMMARY JUDGMENT & MOTION TO DISMISS,... PLTF'S OPPOSITION AND COUNTERMOTION FOR DISCOVERY AS PER NROP RULE 56(f),... PLTF'S COMPLAINT UNDER NROP RULE 12 Prior to hearing, counsel provided with tentative ruling as follows: This is a class action lawsuit brought by cabdrivers of Deft. for failure to pay the minimum wage. The matter had been stayed for a lengthy period of time pending the Supreme Court s decision on the question of whether the exception for taxicab drivers to the minimum wage requirement, which is contained in NRS 608.250(2), applies to deprive taxicab drivers of the minimum wage in the face of Article 15, Section 16 of the Nevada Constitution which was an amendment to the constitution by way of initiative petition and ratification. The Supreme Court has now decided that matter in Thomas v. Yellow Cab Corp., 130 Nev. Adv. Op. 62 (June 26, 2014)and held that the Constitutional Amendment does indeed supplant the exceptions listed in NRS 608.250(2). This leaves Deft. with two further arguments: (1) that the two year limit on filing an action under NRS 608.260 to recover the difference between the wage paid and the amount of the minimum wage bars the first claim for relief by Deft. Golden (and all others so similarly situated) who was not employed within two years of the filing of the suit; and (2)that Plff s third claim for waiting-time penalties under NRS 608.040 must be dismissed because Plff s did not bring a cause of action for Attorneys fees under NRS 608.140, or because the section does not apply where an employee is paid upon separation, but subsequently disputes the amount paid. The Statute of Limitations Argument: Article 15, Section 16(B) provides in relevant part: The provisions of this section may not be waived by agreement between an individual employee and an employer. All of the provisions of this section, or any part hereof, may be waived in a bona fide collective bargaining agreement . 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. NRS 608.260 provides in pertinent part if any employer pays any employee a less amount than the minimum wage prescribed by regulation of the Labor Commissioner pursuant to the provisions of NRS 608.250, 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. A contract between the employer and the employee or any acceptance of a lesser wage by the employee is not a bar to the action. (emphasis added) Thus, the Constitutional Amendment is more expansive than NRS 608.260. While NRS 608.260 provides for a limited remedy of recovery of the difference in the wage paid, the Constitution provides for all remedies available in law or in equity appropriate to remedy any violation, including, but not limited to, recovery of back pay, damages and injunctive relief. Additionally, the minimum wage is no longer prescribed by regulation of the Labor Commissioner, but rather by the very terms of the Nevada Constitution which prescribe how the wage shall be determined. Previously, under NRS 608.250, the Labor Commissioner was presumably free to decline a match of the federal minimum wage if she determined that those increases are contrary to the public interest. In opposition to Deft s statute of limitations argument, Plf s argue that there is no statute of limitations for an action to enforce the Constitutional Provision because no limitation is set forth in the section and subsection B prohibits a waiver of the minimum wage requirement by an individual employee, so that should be interpreted to be a bar to any limitation. Alternatively, Plf s argue that applying a statute of limitations would be inequitable; that Deft should be equitably estopped from invoking the statute of limitations because they failed to advise Plf s of their minimum wage rights as required by the Nevada Constitution , or that the statute should be equitably tolled until the date of the decision in Thomas v. Yellow Cab, Supra. Finally, Plf s argue that if there is a limitation on the time to bring an action under the Constitutional amendment, it is either a 6, 4 or 3 year limitation period. The Court finds Plf s first argument (i.e. that there is no period of limitations for an action claiming a violation of Article 15, Section 16) and second argument (i.e. that the provision within subsection B of Section 16 prohibiting a waiver of the minimum wage requirements by agreement between and individual employee and an employer amount to a prohibition against any period of limitation) unpersuasive. NRS 11.010 provides that Civil actions can only be commenced within the periods prescribed in this chapter, after the cause of action shall have accrued, except where a different limitation is prescribed by statute. Article 15, Section 16 contemplates a civil action, but does not prescribe a limitation on the action, and so a statutory limitation period must apply. The anti-contractual waiver provision does not amount to an exception to NRS 11.010. A statute of limitations applies to all civil actions, legal and equitable, and if the cause of action is not particularly specified elsewhere in a statute, it is included in the catchall statute, NRS 11.220 providing for a 4 year period. Deft. argues that a two year period has been prescribed by NRS 608.260 and cites to two federal cases for the proposition that the two year statute of limitations in NRS 608.260 was not impliedly repealed by Nevada s Constitutional amendment. Specifically, Deft. cites to Rivera v. Peri & Sons Farms, Inc., 735 F.3d 892 (9th Cir. 2013) and McDonagh v. Harrah s Las Vegas, Inc, 2014 WL 2742074, 2014 U.S. Dist. LEXIS 82260 (D. Nev. June 17, 2014). Actually, River v. Peri & Sons did not so hold. Instead, the court held that because the appellant farmworkers failed to raise the argument in the lower court it was deemed waived. While the court in McDonagh v. Harrah, Supra, did make a finding that the constitutional provision was not intended to change the two-year statute of limitations, it did so without any analysis beyond noting that the provision was silent on whether it changed the two-year statute. Plf s have also argued that other limitation periods

should apply NRS 11.190(1)(b) because compensation was paid pursuant to a written agreement; NRS 11.190(2)(c) because if there was not a written agreement, there was an unwritten contract; and NRS 11.220 because there is no other period provided; NRS 11.190(3)(a) because it is an action for a liability created by statute; or NRS 11.190(3)(c) because it is an action for the taking of personal property. The Nevada Supreme Court has determined that the term action as used in NRS 11.190 refers to the nature or subject matter of the claim and not to what the pleader says it is, and it is the nature or subject matter of the claim that will determine what limitation period applies. Hartford Insurance Group v. Statewide Appliances, Inc., 87 Nev. 195, 484 P.2d 569 (1971). In the Hartford Insurance case, the insurance company, as the subrogee of its insured, filed an action for breach of express and implied warranties which were extended by the Defs. upon the sale of a water heater which subsequently exploded causing damage to the insured's home. The insurance carrier argued that NRS 11.190(2)(c) applied (an action upon a contract, obligation or liability not founded upon an instrument in writing). The court, focusing on the nature of the action found that NRS 11.190(3)(c) (an action for injuring personal property) applied because the Plff. sought recovery for injuries to personal property which NRS 11.190(3)(c) specifically governs. In Blotzke v. Christmas Tree, Inc. 88 Nev. 449, 499 P.2d 647 (1972), Plff. sued his employers for personal injuries alleging that they had not provided a safe place to work. The court's focus was the Plff's attempt to assert a contract claim with a longer statute of limitations. The court, finding that the action sounded in tort rather than contract, applied the shorter limitation period which barred the claim. State Farm v. Wharton, 88 Nev. 163, 495 P.2d 359 (1972) involved an automobile accident and State Farm sued as subrogee of its insured, thereby stepping into the shoes of its insured. The carrier insisted that since it paid the insured under its insurance contract, a 6 year statute of limitations should apply. Again, the nature of the action was for personal injuries presumably caused by the wrongful act or neglect of the adverse, so that the 6 year limitation period would not apply. Thus, the Court is to look to the real purpose of the cause of action in determining the applicable provision of the limitation statute. Here, it is clear that the purpose of the first cause of action is to collect the difference between the wages paid and the minimum wage required, assuming that the former was less than the latter. The Constitutional provision does not set forth a limitation period and the two year period set in NRS 608.260 is not irreconcilable with the Constitutional provision. Thomas v. Nevada Yellow Cab Corp., Supra, did not implicitly repeal the entire statutory framework of NRS Chapter 608 concerning minimum wage (i.e NRS 608.250 through 608.200. Since the nature of the action here is the same as the nature of the action described in NRS 608.260, the two year limitation period should apply. Tolling of the period: Plff's argue that even if the two year limitation period applies, it should be tolled because Defs. failed to advise Plff's of their minimum wage rights. Specifically, Plff's cite to Article 15, Section (16)(A) which requires an employer to provide written notification of rate adjustments to each of its employees. Firstly, this provision does not require an employer to notify employees of their right to a minimum wage. Thus, Plff's may not rest on this argument alone to toll the statute, but it may be a factor when considering whether the doctrine of equitable tolling should be applied to the 2 year limitation period found in Nevada's wage and hour statutes. Equitable tolling is defined as [t]he doctrine that the statute of limitations will not bar a claim if the Plff., despite diligent efforts, did not discover the injury until after the limitations period had expired. City of North Las Vegas v. State Local Government Employee-Management Relations Bd., 127 Nev. Adv. Op. 57, 261 P.3d 1071 (2011) quoting Black's Law Dictionary 618 (9th ed. 2009). The doctrine has been adopted in Nevada in discrimination claims addressed to the Nevada Equal Rights Commission under Chapter 613 because procedural technicalities that would bar claims of discrimination will be looked upon with disfavor. Copeland v. Desert Inn Hotel,

99 Nev. 823, 826, 673 P.2d 490, 492 (1983). Nonetheless, even in the situations where equitable tolling may be considered, certain factors should be analyzed when determining whether the doctrine will apply. Among these are the claimant s diligence, knowledge of the relevant facts, reliance on misleading authoritative agency statements and/or misleading employer conduct, and any prejudice to the employer, Id. Nevada has also applied equitable tolling to time limits for filing claims for the refund of tax overpayments, See State Dept. of Taxation v. Masco Builder Cabinet Group, 127 Nev. Adv. Op. 67, 265 P.3d 666 (2011), but emphasized that Even when the claim s untimeliness is due to a procedural technicality, application of the doctrine is appropriate only when the danger of prejudice to the Defi. is absent and the interests of justice so require. Id. quoting Saino v. Employers Ins. Co of Nevada, 121 Nev. 140, 152, 111 P.3d 1107, 1112 (2005). Masco told the Tax Department s auditor that it was requesting a refund, stated its basis for said request, and this was communicated by the auditor in writing to his supervisors in the Tax Department. The only flaw was that Masco had not sent its own refund request letter to the Tax Department. The court in applying the doctrine of equitable tolling, considered this a mere procedural technicality. Similarly, in Copeland v. Desert Inn Hotel, Supra, the claimant did not file a Charge of Discrimination with NERC although she did go to the Commission offices and tell the relevant facts to a NERC representative who promised to get back to her. The Copeland court found those facts, asserted in a declaration by the Plff, , were sufficient to preclude summary judgment in light of the doctrine. Here, Plff. Golden has submitted a declaration stating that in August of 2010, he filed a written claim with the Labor Commissioner asserting that he had not been paid the minimum wage. It appears that thereafter, he never followed up on his claim, but that is not entirely clear from the declaration. He does admit that the Labor Commissioner never advised him that he did not have a valid claim for violation of the minimum wage provision. Clearly, the Labor Commissioner was aware of the Constitutional Amendment. See NAC 608.100 added to NAC by the Labor Commissioner by R055-07 in 2007. The civil action herein was filed on March 11, 2013-- 32 months later, but there is no explanation as to why it was not filed earlier or how and when Golden apparently became aware of his right to file a civil action. Golden s affidavit does demonstrate that he was aware of his right to a minimum wage that was apparently the basis of his complaint to the Labor Commissioner. Because Golden has acknowledged in his declaration that he knew of the of his minimum wage rights, the Nevada cases involving tolling under the delayed discovery rule are inapposite. Plff s have requested that they be permitted to conduct discovery on issues concerning the factors bearing upon equitable tolling and have submitted a declaration of counsel. The Court would like Plff, s counsel to elaborate further in oral argument as to what he believes may be revealed in discovery that would support an equitable tolling argument. The Equitable Estoppel argument: Plff s argue that Deft s should be equitably estopped from asserting a statute of limitations but provide no clear analysis of why equitable estoppel should apply. Equitable estoppel works to prevent someone from asserting legal rights that in equity and good conscience should not be available due to that person s conduct. The four elements of equitable estoppel are: (1) the party to be estopped must be apprised of the true facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting estoppel has the right to believe it was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; (4) he must have relied to his detriment on the conduct of the party to be estopped. In re Harrison Living Trust, 121 Nev. 217, 223, 112 P.3d 1068, 1062 (2005). The Plff s have made no arguments that demonstrate equitable estoppel applies here. Counsel may wish to address this in oral argument. The Third Cause of Action pursuant to NRS 608.040: Plff. s third cause of action claims that they are entitled to the statutory penalty for a late payment of wages owed an employee at the time the employee resigns or quits his employment. NRS

608.040 which provides: If an employer fails to pay: (a) Within 3 days after the wages or compensation of a discharged employee becomes due; or (b) On the day the wages or compensation is due to an employee who resigns or quits, the wages or compensation of the employee continues at the same rate from the day the employee resigned, quit or was discharged until paid or for 30 days, whichever is less. NRS 608.160 charges the Labor Commissioner with enforcement of NRS 608.005 through 608.195. Deft s argue that Plff s have no private right of action to collect the penalty provided for under the statute. Whether a private cause of action can be implied is a question of legislative intent. Baldonado v. Wynn Las Vegas, LLC, 124 Nev. 951, 960, 194 P.3d 96, 100 (2008) Baldonado addressed NRS 608.160 and held that the statute contained no express provision for a private action and that there was no evidence that the legislature intended to create one where there is an adequate administrative process in place via the Labor Commissioner. Like NRS 608.160, NRS 608.040 does not contain an express provision for private action. Plff s argue that NRS 608.140 allows for assessment of attorney fees in a private cause of action so that this is an indication that the legislature intended to a private cause of action for the collection of the penalties provided for in NRS 608.040. While NRS 608.140 does indeed provide for the recovery of attorney s fees in a suit for wages under a contract of employment (i.e, according to the terms of his or her employment) it does so in connection with a common law cause of action for the recovery of wages (i.e. Breach of contract). NRS 608.160 merely creates an exception from the American Rule, and allows for an award of attorney s fees by a court in a common law action for breach of contract involving wages in an employment contract. NRS 608.040 is not similar to 608.140 in this way. There is no indication that the legislature intended to create a private right of action for the collection of the late payment penalties which is all Plff. seek in their third claim from relief. (The Court was unable to read the federal unpublished opinions which were cited but not attached as exhibits, because only LEXIS cites were provided and the Court only has access to Westlaw. Therefore, the arguments regarding the necessity of pleading a cause of action under NRS 608.140 in order to obtain the penalties under 608.040 are unclear to the Court.) Thus, Deft s Motion for Judgment on the pleading as to that claim should be GRANTED. Arguments by counsel. Colloquy between Court and counsel regarding equitably tolling. Further arguments by Mr. Greenberg. COURT advised is will allow Discovery on the issue of statute of limitations should be equitably tolled. Mr. Peek objected as he believes there will be prejudice to his client as they don't have records. Further arguments by counsel. COURT stated findings and ORDERED, Discovery is opened for the limited purpose regarding statute of limitations being equitably tolled. Further arguments by counsel. Court advised counsel used Lexis Nexus while citing their positions, but Court only has access to Westlaw. Court directed counsel to submit courtesy copies of the Federal cases so Court can look at legislative intent, and will take this issue, for 3rd claim of relief under advisement. COURT ORDERED, Motion for Partial Summary Judgment is DENIED WITHOUT PREJUDICE and counsel can renew motion at the close of discovery, and countermotion is GRANTED as to equitable tolling.

Parties Present
Return to Register of Actions

EXHIBIT 3

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State of Nevada

Statewide Ballot Questions

2004

To Appear on the November 2, 2004
General Election Ballot

Issued by
Dean Heller
Secretary of State

DEAN HELLER
Secretary of State

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STATE OF NEVADA

OFFICE OF THE
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Dear Fellow Nevadan:

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

With that in mind, the Secretary of State's office has prepared this booklet detailing the statewide questions that will appear on the 2004 General Election Ballot. The booklet contains "Notes to Voters," a complete listing of the exact wording of each question, along with a summary, arguments for and against each question's passage, and, where applicable, a fiscal note. Any fiscal note included in this booklet explains only adverse impacts and does not note any possible cost savings.

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

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

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

Respectfully,

DEAN HELLER
Secretary of State

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2004
STATEWIDE BALLOT QUESTIONS
SUMMARY

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

QUESTION NO. 6
Amendment to the Nevada Constitution

CONDENSATION (ballot question)

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

Yes.....☐
No.....☐

EXPLANATION (ballot question)

The proposed amendment, if passed, would create a new section to Article 15 of the Nevada Constitution. The amendment would require employers to pay Nevada employees $5.15 per hour worked if the employer provides health benefits, or $6.15 per hour worked if the employer does not provide health benefits. The rates shall be adjusted by the amount of increases in the federal minimum wage over $5.15 per hour, or, if greater, by the cumulative increase in the cost of living measured by the Consumer Price Index (CPI), with no CPI adjustment for any one-year period greater than 3%.

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

ARGUMENT IN SUPPORT OF QUESTION NO. 6

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

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

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

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

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

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

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

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

REBUTTAL TO ARGUMENT IN SUPPORT OF QUESTION NO. 6

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

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

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

ARGUMENT AGAINST QUESTION NO. 6

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

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

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

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

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

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

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

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

This proposed constitutional amendment should be rejected.

Fiscal Impact: Negative.

Environmental Impact: Neutral.

Public health, safety and welfare impact: Negative.

REBUTTAL TO ARGUMENT AGAINST QUESTION NO. 6

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

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

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

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

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

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

FISCAL NOTE

Financial Impact – Cannot be determined.

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

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

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

FULL TEXT OF THE MEASURE

RAISE THE MINIMUM WAGE FOR WORKING NEVADANS

Explanation – Matter in *bolded italics* is new; matter between brackets [deleted material] is material being deleted.

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

Section 1. Title.

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

Section 2. Findings and Purpose

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

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

Section 3.

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

Sec. 16. Payment of minimum compensation to employees.

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

B. The provisions of this section may not be waived by agreement between an individual employee and an employer. All of the provisions of this section, or any part hereof, may be waived in a bona fide collective bargaining agreement, but only if the waiver is explicitly set forth in such agreement in clear and unambiguous terms. Unilateral implementation of terms and conditions of employment by either party to a collective bargaining relationship shall not constitute, or be permitted, as a waiver of all or any part of the provisions of this section. An employer shall not discharge, reduce the compensation of or otherwise discriminate against any employee for using any civil remedies to enforce this section or otherwise asserting his or her rights under this section. An employee claiming violation of this section may bring an action against his or her employer in the courts of this State to

enforce the provisions of this section and shall be entitled to all remedies available under the law or in equity appropriate to remedy any violation of this section, including but not limited to back pay, damages, reinstatement or injunctive relief. An employee who prevails in any action to enforce this section shall be awarded his or her reasonable attorney's fees and costs.

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

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

EXHIBIT 4

EXHIBIT 4

State of Nevada

Statewide Ballot Questions

2006

To Appear on the November 7, 2006
General Election Ballot

Issued by
Dean Heller
Secretary of State

DEAN HELLER
Secretary of State

KIM A. HUYS
Chief Deputy Secretary of State

PAMELA A. RUCKEL
Deputy Secretary for Southern Nevada

STATE OF NEVADA

OFFICE OF THE
SECRETARY OF STATE

CHARLES E. MOORE
Securities Administrator

SCOTT W. ANDERSON
Deputy Secretary for Commercial Recordings

ELLICK C. HSU
Deputy Secretary for Elections

STACY M. WOODBURY
Deputy Secretary for Operations

Dear Fellow Nevadan:

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

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

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

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

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

Respectfully,

Dean Heller

DEAN HELLER
Secretary of State

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2006 STATEWIDE BALLOT QUESTIONS SUMMARY

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

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

QUESTION NO. 6

Amendment to the Nevada Constitution

CONDENSATION (Ballot Question)

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

Yes.....☐
No.....☐

EXPLANATION (Ballot Question)

The proposed amendment, if passed, would create a new section to Article 15 of the Nevada Constitution. The amendment would require employers to pay Nevada employees $5.15 per hour worked if the employer provides health benefits, or $6.15 per hour worked if the employer does not provide health benefits. The rates shall be adjusted by the amount of increases in the federal minimum wage over $5.15 per hour, or, if greater, by the cumulative increase in the cost of living measured by the Consumer Price Index (CPI), with no CPI adjustment for any one-year period greater than 3%.

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

ARGUMENT IN SUPPORT OF QUESTION NO. 6

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

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

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

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

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

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

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

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

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

REBUTTAL TO ARGUMENT IN SUPPORT OF QUESTION NO. 6

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

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

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

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

ARGUMENT AGAINST QUESTION NO. 6

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

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

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

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

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

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

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

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

This proposed constitutional amendment should be rejected.

Fiscal impact: Negative.

Environmental impact: Neutral.

Public health, safety and welfare impact: Negative.

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

REBUTTAL TO ARGUMENT AGAINST QUESTION NO. 6

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

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

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

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

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

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

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

FISCAL NOTE

FINANCIAL IMPACT – CANNOT BE DETERMINED

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

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

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

FULL TEXT OF THE MEASURE

RAISE THE MINIMUM WAGE FOR WORKING NEVADANS

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

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

Section 1. Title.

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

Section 2. Findings and Purpose

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

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

Section 3.

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

Sec. 16. Payment of minimum compensation to employees.

A. Each employer shall pay a wage to each employee of not less than the hourly rates set forth in this section. The rate shall be five dollars and fifteen cents ($5.15) per hour worked, if the employer provides health benefits as described herein, or six dollars and fifteen cents ($6.15) per hour if the employer does not provide such

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

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

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

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

IN THE SUPREME COURT OF THE STATE OF NEVADA

WESTERN CAB COMPANY,

Petitioner,

vs.

EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for the COUNTY OF CLARK; and THE HONORABLE LINDA MARIE BELL, District Judge,

Respondents,

and

LAKSIRI PERERA, IRSHAD AHMED, MICHAEL SARGEANT Individually and on behalf of others similarly situated,

Real Parties in Interest.

Case No.: _____

District Court Case No. A-14-707425-C

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Dec 18 2015 03:06 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

PETITIONER'S APPENDIX IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

Volume 2 of 3

Malani L. Kotchka
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Attorneys for Petitioner
Western Cab Company

APPENDIX #	DOCUMENT DESCRIPTION	PAGES
9	Perera's 3/6/15 Third Supplement to His Response to Defendant's Motion to Dismiss and Countermotion to Amend the Complaint and Conduct Discovery under NRCP Rule 56(f)	313-321
10	Western Cab's 3/9/15 First Supplement to Reply to Plaintiff's Response and Supplement to His Response to Defendant's Motion to Dismiss and Opposition to Plaintiff's Countermotion and Conduct Discovery under NRCP Rule 56(f)	322-327
11	Reporter's Transcript of 3/12/15 Hearing of All Pending Motions	328-365
12	Perera's 6/16/15 Second Amended Complaint	366-373
13	Western Cab's 7/6/15 Motion to Dismiss Second Amended Complaint	374-437
14	Perera's 8/14/15 Response in Partial Opposition to Defendant's Motion to Dismiss Second Amended Complaint and Countermotion to Amend the Complaint and for Sanctions	438-507
15	Western Cab's 8/19/15 Reply in Support of Motion to Dismiss Second Amended Complaint And Countermotion Regarding Setting Perera's Countermotion to Amend the Complaint And for Sanctions to a Date After September 3, 2015 When the Opposition is Due	508-609

APPENDIX 9

APPENDIX 9

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CLERK OF THE COURT

SUPPL
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Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

LAKSIRI PERERA, Individually and on behalf of others similarly situated, Plaintiff, vs. WESTERN CAB COMPANY, Defendant.	Case No.: A-14-707425-C Dept.: XIV PLAINTIFF'S THIRD SUPPLEMENT TO HIS RESPONSE TO DEFENDANT'S MOTION TO DISMISS AND COUNTER-MOTION TO AMEND THE COMPLAINT AND CONDUCT DISCOVERY UNDER NRCP RULE 56(f). Day of Hearing: March 12, 2015 Time of Hearing: 9:00 a.m.

Plaintiff, by and through his attorney, Leon Greenberg Professional Corporation, submits this third supplement to his response to defendant's motion to dismiss and in support of plaintiff's counter-motion to amend the complaint and to conduct discovery under NRCP Rule 56(f). The purpose of this supplement is to advise the Court of a newly issued decision by Judge Williams in Department 16 of this Court holding that a four year statute of limitations applies to claims for unpaid minimum wages under Nevada's Constitution.

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MEMORANDUM OF POINTS AND AUTHORITIES

SUPPLEMENTATION SOUGHT

I. This Court should take notice of Judge Williams' February 23, 2015 Order finding that a four year statute of limitations applies to all claims arising under Article 15, Section 16 of the Nevada Constitution.

Attached at Ex. "A" is a copy of the February 23, 2015 order of Judge Williams of Department 16 in the case of *Diaz et al. v. MDC Restaurants, LLC et al.*, Case No. A701633.

The Ex. "A" order denied, with prejudice, the defendants' motion for judgment on the pleadings with respect to their argument that claims under Article 15, Section 16 of the Nevada Constitution are subject to a two-year statute of limitations. The order granted the plaintiffs' countermotion for summary judgment regarding the statute of limitations, finding that the four-year catch-all limitations period for civil actions under NRS 11.220 applies to such claims. Judge Williams specifically noted that it is "of paramount importance to distinguish the limited remedy of back pay available to Nevada employees under NRS 608.260 versus the Constitutional rights, claims, and remedies available to Nevada employees under the Nevada Constitutional Amendment, which could include, but are not limited to, back pay, damages, and injunctive relief." Judge Williams further found, in paragraph 10 of the Ex. "A" order, that the claims for relief and prayer for relief in the plaintiffs' complaint, including declaratory relief, unpaid wages, damages, interest, attorneys' fees and costs, and equitable relief, was largely determinative of the applicable statute of limitations to apply.

The plaintiff in this case alleges nearly identical claims and prayer for relief as in *Diaz*, including unpaid minimum wages, injunctive relief, punitive damages, attorneys' fees, interest, and costs. *See*, First Amended Complaint at ¶ 18. Plaintiff submits such decision by Judge Williams should be considered by this court as sound and persuasive.

CONCLUSION

Wherefore, for all the foregoing reasons, the defendant's motion should be denied in its entirety and plaintiff's counter-motion granted it its entirety.

Dated: March 6, 2015

Respectfully submitted,

/s/ Leon Greenberg
Leon Greenberg, Esq. (Bar # 8094)
A Professional Corporation
2965 S. Jones Blvd., Suite E-3
Las Vegas, Nevada 89146
(702) 383-6085
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned certifies that on March 6, 2015, she served the within:

PLAINTIFF'S THIRD SUPPLEMENT TO HIS RESPONSE TO DEFENDANT'S MOTION TO DISMISS AND COUNTER-MOTION TO AMEND THE COMPLAINT AND CONDUCT DISCOVERY UNDER NRCP RULE 56(f).

by court electronic service:

TO:
Malani Kotchka
HEJMANOWSKI & MCCREA LLC
520 S. 4th St., Suite 320
Las Vegas, NV 89101

/s/ Dana Sniegocki
Dana Sniegocki

EXHIBIT "A"

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Attorneys for Plaintiffs

EIGHTH JUDICIAL DISTRICT COURT

IN AND FOR CLARK COUNTY, STATE OF NEVADA

PAULETTE DIAZ, an individual; AWANDA GAIL WILBANKS, an individual; SHANNON OLSZYNSKI, an individual; and CHARITY FITZLAFF, an individual, on behalf of themselves and all similarly-situated individuals,

Plaintiffs,

vs.

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

Defendants.

Case No: A701633
Dept. No.: XVI

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

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

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

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

FINDINGS OF FACT

The District Court FINDS as follows:

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

2. Pursuant to NRS 608.260, an 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 minimum wage amount. Thus, under the Nevada statutory scheme, the employee is solely limited to back pay, i.e., the difference between the amount paid and the amount of the minimum wage. *See* NRS 608.260.

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

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

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

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

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

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

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

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

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

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

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

CONCLUSIONS OF LAW

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

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

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

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

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

DISTRICT COURT JUDGE

Submitted by:

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP
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APPENDIX 10

APPENDIX 10

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CLERK OF THE COURT

SUPP
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Attorneys for Defendant

DISTRICT COURT

CLARK COUNTY, NEVADA

LAKSIRI PERERA,

Plaintiff,

v.

WESTERN CAB COMPANY,

Defendant.

Case No.: A-14-707425-C

Dept.: VII

DEFENDANT'S FIRST SUPPLEMENT TO REPLY TO PLAINTIFF'S RESPONSE AND SUPPLEMENT TO HIS RESPONSE TO DEFENDANT'S MOTION TO DISMISS

AND

OPPOSITION TO PLAINTIFF'S COUNTER-MOTION TO AMEND COMPLAINT AND CONDUCT DISCOVERY UNDER NRCP RULE 56(f)

Date of Hearing: 03/12/15
Time of Hearing: 9:00 a.m.

Defendant Western Cab Company hereby submits its First Supplement to advise the Court of a newly issued decision by Judge Bare in Department 32 holding that a two-year statute of limitations applies to claims for unpaid minimum wages under Nevada's Constitution. Contrary to Judge Williams' decision of February 23, 2015, Judge Bare's decision of March 5, 2015, held that the two-year statute of limitations in NRS 608.260 "was the applicable statute of limitations relevant to actions by employees to recover the difference between the minimum wage and the amount paid." Exhibit 14.

To date, Judge Tao, Judge Ellsworth and Judge Bare have held that the two-year statute of limitations applies. Only Judge Williams has held that a four-year statute of limitations applies.

HEJMANOWSKI & McCREA LLC

By: /s/ Malani L. Kotchka
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CERTIFICATE OF SERVICE

Pursuant to Administrative Order 14-2, the undersigned hereby certifies that a true and correct copy of **DEFENDANT'S FIRST SUPPLEMENT TO REPLY TO PLAINTIFF'S RESPONSE AND SUPPLEMENT TO HIS RESPONSE TO DEFENDANT'S MOTION TO DISMISS AND OPPOSITION TO PLAINTIFF'S COUNTER-MOTION TO AMEND COMPLAINT AND CONDUCT DISCOVERY UNDER NRCP RULE 56(f)** was electronically served via the Eighth Judicial District Court's ECF System on this 9th day of March, 2015, to the following:

Leon Greenberg, Esq.
2965 S. Jones Blvd.
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Las Vegas, NV 89146

Attorney for Plaintiff

An Employee of Hejmanowski & McCrea LLC

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EXHIBIT 14

EXHIBIT 14

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CLERK OF THE COURT

ORDR
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Attorneys for Defendant
TERRIBLE HERBST, INC.

DISTRICT COURT

CLARK COUNTY, NEVADA

DEBORAH PERRY, an individual, on behalf of herself and all similarly-situated individuals,

Plaintiff,

vs.

TERRIBLE HERBST, INC., a Nevada corporation, d/b/a TERRIBLE HERBST; and DOES 1 through 100, inclusive,

Defendant.

Case No. A-14-704428-C

Dept. No. XXXII

ORDER GRANTING DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS PURSUANT TO NRCP 12(C) WITH RESPECT TO ALL CLAIMS FOR DAMAGES OUTSIDE THE TWO-YEAR STATUTE OF LIMITATIONS AND ALL CLAIMS BY PLAINTIFF PERRY AND DENYING PLAINTIFFS' COUNTERMOTION FOR SUMMARY JUDGEMNT

On September 26, 2014, Defendant TERRIBLE HERBST, INC.'S ("Terrible Herbst" or "Defendant"), filed its Motion for Judgment on the Pleadings Pursuant to NRCP 12(c) with Respect to All Claims for Damages Outside the Two-Year Statute of Limitations and All Claims by Plaintiff Perry. In response, on October 13, 2014, Plaintiffs filed their Opposition to Defendant's Motion For Judgment On The Pleadings Re Claims Prior To Two Years Before Filing and Plaintiffs' Countermotion For Partial Summary Judgment Re Limitation Of The Action. On December 16, 2014, at 10:30 a.m. the Court heard oral arguments on the competing motions and determined that the two year statute of limitation in NRS 608.260 was the applicable statute of limitations.

After colloquy regarding whether there was a discovery allowance applicable to each party individually, the Court continued the matter and allowed supplemental briefing. On January 9, 2015, Plaintiffs filed their supplemental briefing. Defendant responded on January 23, 2015 and Plaintiffs replied on January 30, 2015. The Court heard oral arguments regarding the supplemental briefing on February 10, 2015, and based on the pleadings and papers filed therein, the Court maintained its prior decision that the two year statute of limitation in NRS 608.260 was the applicable statute of limitations relevant to actions by employees to recover the difference between the minimum wage and the amount paid.

IT IS THEREFORE ORDERED that Defendant's Motion for Judgment on the Pleadings Pursuant to NRCP 12(c) with Respect to All Claims for Damages Outside the Two-Year Statute of Limitations and All Claims by Plaintiff Perry is GRANTED.

IT IS FURTHER ORDERED that all claims for back pay outside the two-year statute of limitations, including the sole claim asserted by Plaintiff Deborah Perry, in Plaintiffs' First Amended Class Action Complaint, are DISMISSED.

IT IS FURTHER ORDERED that Plaintiffs' Countermotion For Partial Summary Judgment Re Limitation Of The Action is DENIED.

DATED this 3 day of Mar, 2015.

HON. ROB BARE
DISTRICT COURT JUDGE

ROB BARE
JUDGE, DISTRICT COURT, DEPARTMENT 32

Respectfully submitted by:

By:
RICK D. ROSKELLEY, ESQ.
ROGER L. GRANDGENETT II, ESQ.
MONTGOMERY Y. PAEK, ESQ.
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Attorneys for Defendant

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APPENDIX 11

APPENDIX 11

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CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

LAKSIRI PERERA,

Plaintiff,

vs.

WESTERN CAB COMPANY,

Defendant.

CASE NO: A14-707425-C

DEPT. VII

BEFORE THE HONORABLE LINDA M. BELL, DISTRICT COURT JUDGE

THURSDAY, MARCH 12, 2015

RECORDER'S TRANSCRIPT OF ALL PENDING MOTIONS

APPEARANCES:

For the Plaintiff: LEE GREENBERG, ESQ.
DANA SNIEGOCKI, ESQ.

For the Defendant: MALANI L. KOTCHKA
JOHN MORAN, JR.

RECORDED BY: RENEE VINCENT, COURT RECORDER

Thursday, March 12, 2015 10:17 a.m.

THE COURT: Good morning.

MS. KOTCHKA: Your Honor, Malani Kotchka on behalf of Western Cab, and with me I have John Moran, Jr. --

MR. MORAN: Good morning, Your Honor.

MS. KOTCHKA: -- general counsel for Western Cab. It is a family-owned business, and I have some of the owners of the company also in court with us today.

THE COURT: All right. Yes, you looked like a group, but there were extras behind, so --

MR. GREENBERG: Good morning, Your Honor. Leon Greenberg and Dana Sniegocki for Plaintiffs.

THE COURT: Good morning, Mr. Greenberg.

MS. SNIEGOCKI: Good morning.

THE COURT: All right. This is on for a motion to dismiss, and then there's a countermotion to amend the complaint. Let's go ahead and start with the motion to dismiss.

MS. KOTCHKA: Yes, Your Honor. This is a minimum wage action filed by a Mr. Perera, and Mr. Perera was a former cab driver for Western Cab. I guess the very first issue that we've raised is whether the *Thomas* decision, which eliminated the exemption, the minimum wage exemption for cab companies, whether it applies prospectively from the date that *Thomas* was decided.

And we have quoted to you in our briefs that *Vartelas v. Holder*

case out of the Supreme Court, 132 Supreme Court 1479, in which the United States Supreme Court held that there was a presumption against retroactivity of the law where the application would create a new obligation in respect to transactions already passed.

THE COURT: Let me ask you a question about that. There's a new constitutional rule, like *Gideon*, the one that comes to mind, where the U.S. Supreme Court made a judicial rule that under the United States Constitution, defendants are entitled to have counsel, right?

MS. KOTCHKA: Right.

THE COURT: That's the big one that I can think of. Under those circumstances then, it applies prospectively, but when you're talking about retroactivity, isn't the triggering event here the passage of the Minimum Wage Act?

MS. KOTCHKA: Yes. The Minimum Wage Act was passed --

THE COURT: In 2006, right?

MS. KOTCHKA: -- 2006, yes, but the problem was that the labor commissioner in the State of Nevada believed that the minimum wage exceptions of NRS 608.250 still apply, and you can see that in their regulation, NAC 608.115(2). So all the cab companies were complying with the labor commissioner's regulation up until *Thomas* when for the first time our Nevada Supreme Court found a direct conflict between the exemption and the Minimum Wage Amendment. It's a 4-3 decision, which means that there was at least some debate about whether these exemptions still applied or whether the Minimum Wage Amendment basically overruled them.

I think that after *Thomas*, it became crystal clear that the

Minimum Wage Amendment was now going to apply to cab companies. The exemption they previously had is no longer applicable law, but I think that they had a good faith belief when the labor commissioner of the State of Nevada, who is charged with enforcing wage and hour laws, thought that the exemptions were still in existence.

THE COURT: But I don't think that's the test for deciding whether a statute is retroactive. Or if there's retroactive application or prospective application of the *Thomas* decision, did the Minimum Wage Act in 2006, from that time were the cab companies required to pay the minimum wage or no, but I don't know that they're reasonable or unreasonable to me, is what the test is.

MS. KOTCHKA: Okay. Well, I think that we raised the issue initially because Mr. Greenberg, who represented the Thomas plaintiffs, had raised with the Nevada Supreme Court, he had asked to change some language from present tense to past tense, and he said it was to foreclosure this issue, and the Nevada Supreme Court denied the motion to change the language. And so I think that the cab companies at least believe that that was -- that was an issue and that we could raise that issue.

But we've also alternatively argued that if a statute of limitations is going to be applied and it's not going to be prospective, that this Court should adopt the two-year statute of limitations contained in NRS 608.260. We've done a lot of briefing on this issue. We've brought to your attention the decisions of Judge --

THE COURT: Oh, that reminds me, there were three supplements filed. They were all filed untimely, and they all have to do with other cases in this

jurisdiction that are maybe interesting, but not particularly helpful to me. So I'm going to strike all three of the supplements. There was -- there were two filed by -- I believe by Mr. Greenberg. One of them said it was the third, but I only have two, and then there was one filed by this side. Under 2.20, they were untimely, so I'm just going to strike them all. All right. Go ahead.

MS. KOTCHKA: Okay. Well, anyway, the issue, the two-year statute of limitations issue --

THE COURT: Right.

MS. KOTCHKA: -- has been addressed, and we did represent in our original motion and in our reply brief to the Court the decisions of Judge Tao and Judge Ellsworth --

THE COURT: Right. I mean, all I -- really all that tells me that there's decisions all over the board on this issue, so what I need to know is what your legal argument is on this.

MS. KOTCHKA: Yes.

THE COURT: All right.

MS. KOTCHKA: Okay. Our legal argument on the two-year statute of limitations is that on its face, NRS 608.260 provides for a two-year statute when on a minimum wage claim, and our argument is that that's the statute; that this is a minimum wage claim regardless of whether it's brought under a constitutional provision or a statutory provision, it's still a minimum wage claim. We have a statute on point. It provides a statute of limitations. The Minimum Wage Amendment itself has no statute of limitations in it, so there can't possibly be a conflict between it and a statute like there was in *Thomas* because it's completely blank about the statute of limitations. So it's our

belief that the statute in 260 still applies.

Under the Minimum Wage Amendment, the duty of setting the minimum wage, the actual amount is given to the governor or his designee. In our state that is the labor commissioner. So the labor commissioner still sets the rates for the minimum wage. So the statute that says that a minimum wage action, when you sue for the difference between what you're paid and the minimum you were owed is two years, is the applicable statute to the Minimum Wage Amendment.

And so if we start with the two years, our argument is, we went back and we showed the court that Mr. Perera, who filed the original action, is not owed minimum wage for the time period within that two-year statute. We showed you the wages he actually made without including his tips, and he clearly made $7.25 an hour.

Now, in the opposition, the opposing counsel says, wait a minute, he was due $8.25 an hour because his health insurance premiums would've been higher than ten percent of his gross taxable income. In response to that, we have given Your Honor the labor commissioner claim that Mr. Carrera filed in which he asked the labor commissioner for $8.25 up until March 2011, and after that date, he asked for $7.25. We believe this is because he knew that his gross taxable income was high enough that the premium for his dependent coverage was less than ten percent of his gross taxable income.

And the -- there are two bases. One is the labor commissioner already had this claim, and the labor commissioner said they found no merit to his claim. They told him that the payroll records Western Cab had submitted showed he'd been paid correctly, and they asked him if he had any additional

information, to get back to them by a certain date, and he never responded. So we believe the fact that he chose his remedy, he went to the labor commissioner, who found he didn't have a claim, that that precludes his claim altogether.

But, secondly, on the gross taxable income issue, NAC 608.147(2) provides a gross taxable income includes tips, bonuses or other compensation is required for purposes of federal individual income tax. Then you go to the federal individual income tax section of 26 USC Section 61(a)(1), and that provides an income, includes fees, commissioners, fringe benefits and similar items.

So it's our belief that his declared and undeclared tips and health insurance premiums paid by Western Cab and all fees and tickets paid by vendors has to be included in his gross taxable income, and only he has possession of that. But since he asked for the 7.25 from March 2011 on, we believe that he has conceded that his gross taxable income was high enough to cover his dependent coverage. And in the affidavit he submitted in opposition, he never states what his gross taxable income is, and, of course, he's the only one that would really have that information.

So that, in a nutshell, is why we believe that he doesn't state a claim for relief, and we have asked for both -- we've asked for it to be dismissed, but also, alternatively, for summary judgment.

One other thing raised in the opposition was, they say that the Minimum Wage Amendment required us to notify Mr. Perera of the minimum wage in Nevada. Our response to that is that the Minimum Wage Amendment provides only that an employer shall provide written notification of the rate

adjustments to each of its employees, and the last rate adjustment was in 2010, which would be beyond the statute of limitations, but, regardless, Perera had notice. He knew what the rates were because of his labor commissioner claim, because he first asked for the $8.25 an hour, and then when he began receiving health insurance, he reduced it to $7.25 an hour.

And then I can talk about the class issues, but the class issues depend upon him. If his claim was dismissed, then there's no longer a class representative --

THE COURT: If you could address those, I would appreciate it.

MS. KOTCHKA: Okay. All right.

THE COURT: Yeah. But before you get to that, let me ask you a question about the notice thing, though, because whether he knew or no, isn't there still an obligation to provide notice?

MS. KOTCHKA: The notice is of a rate adjustment.

THE COURT: Right.

MS. KOTCHKA: The last time the rate was adjusted in Nevada was in 2010, which would be beyond the statute of limitations. He didn't bring his action until September 2014.

THE COURT: I feel like we're confusing things a little bit because I'm not sure what the obligation -- and I'm not saying whether their argument is a good argument or no, that what they saying -- so I want to make sure I understand your side of it, what they saying is that there should be tolling because there was a failure to give notice, and I believe there's an annual requirement to provide that notice, so I'm asking, was the notice provided?

MS. KOTCHKA: Well, the notice was provided in the sense that we

have always posted the federal notice, which is 7.25 an hour. We've been posting that for 16 years because we were aware that federal minimum wage applied to us. Up until *Thomas*, we were not aware that the state minimum wage applied.

THE COURT: All right.

MS. KOTCHKA: But the notice requirement is not notice every year. It's notice of a rate adjustment. So, in other words, our rates in Nevada haven't changed since 2010. There would be -- we would not be giving notice, and this year I expect that it's going to be the same. We would not be giving notice to employees unless it changes, unless there's a rate adjustment, meaning a change in the rate.

THE COURT: Okay. All right.

MS. KOTCHKA: Okay?

THE COURT: Now the class issues.

MS. KOTCHKA: Okay. Now, the class issues. Well, first of all, you have to have a class representative, and he's got to have similar claims. Here we're saying Mr. Perera doesn't have a similar claim to anybody else. All of our cab drivers worked different hours, different shifts. They made different amounts of money. They're paid on a commission basis. So none of them are paid the same. If --

THE COURT: Would you just briefly explain to me how that works so I under -- because I think that's probably invertant for me to understand that.

MS. KOTCHKA: Okay. Our cab drivers come in every day and they have a trip sheet, and they write in their own handwriting when they begin and then they write their last trip of the day and in between or all the trips that

they take. And they are paid on a -- they pay a trip charge of a dollar a trip, but then the book or the commissions that are made are split 50 percent. They get to keep 50 percent; the company itself keeps 50 percent.

Then they get paid tips. Nine percent of the book -- pursuant to an agreement we have with the IRS, nine percent of the book is declared as tips. We never see their tip money. That's just a percentage that we can take from the meter and declare as tips. That all goes to the IRS. Tax withholding gets done on all of that. So that's how it works.

And that's how you can track their hours to see if they've been paid minimum wage because you simply take the total commission for the day and you can divide by the hours, and if they make over the $7.25 an hour, if they're provided health insurance benefits and it's less than the ten percent of their gross taxable income or if they don't, they get paid the 8.25 an hour. But you can tell, and you can monitor it, and you can make up the difference, which is what Western Cab has been doing since the *Thomas* decision came out.

In terms of Rule 23, however, Rule 23, a class action, is for cases that can be decided on a single set of facts, the common issues of facts and law. And this particular kind of case is not appropriate for class action because you can't answer one question and use generalized proof to show that they're entitled to relief. And the reason for that is because each driver will be paid a different amount of money and each driver will earn a different hourly wage, which may be far less than the minimum wage or far greater than the minimum wage, and so you can't lump them all together and say, okay, with this, you know, you can decide one issue, and that will decide

whether there's liability across the board because that's not true.

You're going to have many, many cab drivers who are paid way, way beyond minimum wage, and then you may have a handful that are not, but you can't lump them all together, bring them all in as a class. You would be having separate trials for each driver to determine whether they were paid minimum wage and what the difference is if they were not.

So that's the reason why we have asked for the class to be de-certified, is because it's not an appropriate case under either the *Walmart-Dukes* case or the *Shuett-Beazer* case out of Nevada.

THE COURT: Walmart is pretty different from this, though, isn't it? When we're talking about *Walmart*, there were different stores and different supervisors. There wasn't, say, one consistent policy like we're talking about here in terms of how wages were calculated.

MS. KOTCHKA: Yes, there were different policies in different stores in *Walmart*, but here you have different circumstances with each individual driver. And the best example of that was his motion to add in a Mr. Ahmad. We've shown the Court that Mr. Ahmad, he made far more in wages than Mr. Perera, and he's not owed minimum wage under any theory, whether you use 7.25 or the 8.25, and that's an example of how they are not similarly situated. They don't really have anything in common other than the fact that they were a taxicab driver and they worked for Western Cab.

THE COURT: Well, so a cab driver who made commissions over the minimum wage wouldn't be part of the class because they got paid more than minimum wage, but how about somebody who is in -- assuming that what Mr. Perera says is correct, just for this argument, wouldn't other cab drivers who

had commissions less than the minimum wage be in the same position?

MS. KOTCHKA: No. They have to -- they have to -- they wouldn't be in an identical position because you'd have to take their wages --

THE COURT: Well, this is not --

MS. KOTCHKA: -- and their hours --

THE COURT: -- an identical position, though, right? It's the same or similar position.

MS. KOTCHKA: Right, but you still have to be able to ask one question, get one answer, a common answer, that would then apply to both of them, and I don't know what that question -- or that answer would be because you'd have to look at each one of them, and you'd have to look at their total compensation.

THE COURT: Uh-huh.

MS. KOTCHKA: And you'd have to look at their total hours, and you'd have to go through the mathematical computation for each of them. I mean, it can't be common. It's going to be individual by individual. And class actions in the minimum wage and overtime scenario arose with exemption cases where employers took a whole class of people performing the same job and said they were either exempt from overtime or they weren't exempt from overtime, and you could look at that category and you could look at the work they did, and with one fell swoop, you could answer the question, did -- do they fit the criteria for the exemption, do they not?

Those are appropriate cases for class determination because they affect a large number of people, and you have like one question. But as *Walmart v. Dukes* pointed out, if you have to do it on an individual-by-

individual basis and they said in that case to decide on discrimination, you'd have to go supervisor by supervisor, manager by manager, store by store. It's no longer a good vehicle for a class because you have to make that individualized determination, and here you would have to do it with the cab drivers.

THE COURT: But isn't their overtime example, which I am familiar with, isn't that example closer to this than the *Walmart* case? Because in the overtime example, your first question is, is this person entitled to overtime, and here the question is, were these cab drivers entitled to minimum wage and was it 7.25 or 8.25 or whatever. But then, even with the overtime example, you have to go on a case-by-case basis did the person work overtime, right? What hours qualified for overtime.

MS. KOTCHKA: Not if -- not if you said they were all exempt from overtime because they all did certain duties and the employer classified them all as exempt, but that --

THE COURT: Right, but the lawsuit is going to be the employees coming in and saying that they were entitled to overtime. If the employer doesn't prevail, there has to be a calculation on a person-by-person basis of whether they are entitled to the overtime pay. I mean, it just seems like a much closer analogy than when you're talking about discrimination by a bunch of different supervisors all over the country.

MS. KOTCHKA: If -- in those cases, with the exemption cases, usually they don't have that damage component because they usually work a set number of hours a week. Like they work a stipulated overtime, if you know what I mean. If you're classified as exempt and you require them to work 45

hours a week, then you don't have that individual damage determination.

Here there's no dispute after *Thomas* that the cab drivers have to be paid minimum wage. The question is, were they paid minimum wage? And in order to determine whether they were paid minimum wage, you've got to go through that individual class -- you've got to go through each individual case to determine if they were paid minimum wage.

THE COURT: Well, I mean, but I think there's a question before that, and that's -- the question is, should they have been paid for minimum wage from 2006, right?

MS. KOTCHKA: Well, yes, if you've got a statute of limitations, it's going to go back to 2006, but I don't think they're arguing that.

THE COURT: Obviously, there's a statute of limitations issue --

MS. KOTCHKA: Right.

THE COURT: -- but I think that's really the question, is when -- when the minimum wage pay starts.

MS. KOTCHKA: Okay.

THE COURT: Right?

[Defense counsel confer]

MS. KOTCHKA: Yeah, three district courts have ruled --

THE COURT: Well, I know, but, I mean, I'm looking at this file, looking at the facts and the law are in this particular case. So it's interesting, but not too helpful to me because I know -- and I know there's other courts that have decided differently as well, so it doesn't really help me a whole lot. You know, what I'm bound by is what the Nevada Supreme Court said, and then I've got to figure the rest of it out, so -- all right. So is there anything else that

you want to say about the class action case?

MS. KOTCHKA: Huh-uh, no. I think I've made the points.

THE COURT: Okay. Thank you. Mr. Greenberg.

MR. GREENBERG: Your Honor, first of all, in respect to Plaintiff's supplement, I would ask the Court to simply allow the portion of Plaintiff's first supplement that propounds a different amended complaint to add an additional plaintiff, if the Court would be inclined to grant the countermotion. Defendant --

THE COURT: Oh, there wasn't -- the countermotion was --

MR. GREENBERG: There is a counter --

THE COURT: Withstands, yeah.

MR. GREENBERG: Okay. Because --

THE COURT: Just not the part that is a supplement to this motion.

MR. GREENBERG: I understand, Your Honor.

THE COURT: All right.

MR. GREENBERG: And I got the impression that Your Honor really doesn't want counsel to be discussing the decisions made by other judges in this Court, and that's --

THE COURT: Honestly, I just don't -- it's not -- it's not binding authority, and when I have people all over the board making different decisions, it's not very helpful to me.

MR. GREENBERG: Judge Ellsworth, when I saw her a month or so ago, was extremely unhappy with counsel was discussing decisions made by other district judges on an issue.

THE COURT: I mean, I won't -- you know, I'm not going to say I'm

unhappy about it, and, certainly, I don't think the rules preclude it. We have a rule that precludes citation to -- you know, once the Supreme Court Rule 23 precludes citation to specifically unpublish Nevada Supreme Court decisions, so I don't think it's, you know, unethical or not allowed by the rules. I just don't think it's very helpful to me, so --

MR. GREENBERG: I understand Your Honor's position. There's a number of issues that have been discussed by counsel for Defendant that are in the papers. I don't want to take up the Court's time with issues that the Court doesn't feel are important or believed to be addressed by myself. There's this issue of whether the *Thomas* case actually has application to conduct after June of 2014. I can start with that, Your Honor, if the Court --

THE COURT: Go ahead. Why don't you. I would really like to do that.

MR. GREENBERG: Okay. Your Honor --

THE COURT: I called this case last for a reason so that we can take the time that you feel you need to go through this because it is complex.

MR. GREENBERG: Yes. Your Honor, in respect to the issue of the *Thomas* case having application to conduct prior to its publication, in the supplement that I was just referring, the first supplement, there is discussions from the Ninth Circuit Court of Appeals on this issue. They rejected that argument involving a different transportation company, a limousine company, that was raising the exact same issue.

In the *Thomas* case itself, Your Honor, upon remand back to this Court, the Defendant taxi companies in that case brought that argument to Judge Israel, who denied it. I don't have it -- I don't have actually a written order form him. It is on his docket. I'm waiting for him to sign an order on

that.

I think Your Honor understands that when we're dealing with a statutory change in the law where there's a pronouncement as to what the law is going to be and therefore parties are on notice as to the change in the law, it is very different than when we have the situation of *Gideon*, for example, Your Honor, that judicially announced change in the law and judicially made law, which changes how legal relations have to be governed prior to that essentially without notice --

THE COURT: Right.

MR. GREENBERG: -- because no one -- no one would know that that was going to happen. And this is all discussed in great detail in my papers, Your Honor. You know, in respect to this issue of whether Defendants actually had notice of this, before the constitutional amendment was enacted, we had the opinion of Mr. Sandoval, who's now our governor, as attorney general, who opined that this was going to abolish these exemptions. So, clearly, there was official legal notice from the highest law enforcement officer of the state that this was going to happen. The Defendants chose to ignore that advice and said, well, we think the labor commissioner implied otherwise or so forth.

Well, honestly, Your Honor, we don't really -- really they shouldn't be getting to that because the law is clear on its face. And, by the way, Your Honor, I just want to point that if they had concerns about this, knowing that this was coming, they could've come to the court for judicial declaration. They could've brought a class action themselves to have their drivers named as a defendant class, sought to pay any disputed monies into

this Court and sought a final binding resolution to determine what their legal liabilities were, Your Honor. They declined to do that. They declined to do it because they would much rather be here years later potentially facing a liability that may turn out to be much more limited. I think they made a very simple business decision. But let me move on, Your Honor.

Essentially, Defendant's motion asked the Court to make rulings based upon suppositions and allegations that it's asking the Court to accept as fact and then dismiss this case. We have no record here, Your Honor. I mean, this is essentially in a Rule 12 context, both in respect to this question of Mr. Perera, Mr. Ahmad, who's a proposed additional plaintiff in the amended complaint that I'm asking leave to file, as well as in respect to striking these class claims. So we have -- we have no record for the Court to examine.

I have pointed out in my response -- and counsel for the Defendants do address this issue of what the proper rate was. Was it 7.25? Was it 8.25? What do the records they proffer show in respect to the actual rate of compensation of Mr. Perera? Did they comply with the appropriate minimum wage? And this is discussed in my responding papers that there are two real problems with the record presented by Defendants.

First of all, the wage is 8.25, not 7.25, unless the proper health insurance is provided. Defendants know what insurance was made available to Mr. Perera. They know what his earnings were. They haven't bothered to detail this to the Court. They instead raise this argument that, well, Mr. Perera went to the labor commissioner at one time and said, I think I'm entitled to 7.25, so, therefore, he somehow should be bound by that belief he had at that

time or what he communicated to the labor commissioner, even though he has a constitutional right here. I don't see -- they don't cite any support for how that should be binding on this Court in respect to this issue of the appropriate rate, and it --

THE COURT: I agree with you there's a dispute of the facts over the appropriate rate.

MR. GREENBERG: Well, okay. Well, Your Honor, so if there's a dispute of fact over the appropriate rate and then we go and we look at what record the Court has before it, and this is discussed in my papers, Defendant's records, except at a 100 percent on their face is accurate, it's established that Mr. Perera is owed something like $41 or something because if the rate was 8.25, even under Defendant's reconciliation, he was at least for one week paid less than that 8.25 an hour rate.

Now, we also have another disputed issue of fact in respect to the records of the compensation and the hours that are there because he was forced to pay for the gas for the vehicle, which is discussed in his declaration. And while an employer can require an employee to pay certain expenses, he can't do that if it's going to reduce the compensation below the minimum wage threshold.

I mean -- and I think this is sort of self-evident. I mean, the employer could say, well, I'm going to pay you $10 an hour, which is clearly more than the minimum wage, but for every hour you work, you're going to have to give me $3 an hour back or you're going to have to devote -- you're going to have to donate $3 to some charity I have or something like that. I mean, then, in effect, the employee's working for $7 an hour, not $10 an

hour, because a condition of his employment is that he has to pay these other monies.

So it's reducing his rate of pay below the minimum. In the example I gave you, by the way, Your Honor, if it was $10 an hour and a $1 an hour mandatory payment, we wouldn't raise the same issue --

THE COURT: Right.

MR. GREENBERG: -- because it would still be $9 an hour. And this is in the CFR -- in respect to the federal minimum wage is discussed.

In response to this issue, we have this assertion from Defendants that, well, it's okay for us to make them use their tips or -- to pay for gas and that the United States Department of Labor somehow told us this was okay, although if you read carefully the declaration from their manager, it doesn't really say that. It was sort of an assumption that they made in terms of their policy to deal with the fact that they had an audit concluded in 2011 that found that they owed over $200,000 under the federal minimum wage standard.

And I would like to just bring that issue forward in respect to this discussion of the class certification issue or the class action allegation the Defendants are also looking at least to remove from this case, which is that -- I would submit that the Court really isn't even in a position to address that issue. Again, we're under a Rule 12 standard here. Okay? So the question is, do these pleadings on their face provide a sufficient basis that there could be a class certified -- assuming the allegations are true, that there's a large group of individuals, they're covered by the minimum wage requirement, they're not getting paid less than -- they're not getting paid, you know, in

compliance with the minimum wage. They have common circumstances.

The pleadings are sufficient. In fact, Defendants don't even actually address the pleading issue on that. They go to this question of, well, the circumstances in fact are all different. People work different hours. They got to pay different rates of pay. Well, Your Honor, that's extraneous from the pleadings, so it just isn't proper at this point. But to the extent that the Court wants to go peek beyond the pleadings and look sort of further into these issues, as I think Your Honor was pointing out, differences in damages do not prohibit certification, okay, if there are common issues in respect to liability, and there are common issues here, Your Honor.

We were just discussing this issue of what the appropriate minimum wage rate is, for example, Your Honor. They offer health insurance under the same terms to all their employees so that would be a common issue to be determined for all of the employees.

There are other, you know, common issues such as, you know, are these paid -- are the pay records necessarily -- you know, the gas charges that we were discussing, is that, in fact, an issue that is material to calculating compliance with the minimum wages? And also there are claims for equitable relief in this case, Your Honor.

One of the claims that is proposed in the amended complaint, which was filed with Plaintiff's first supplement adding Mr. Ahmad as an additional plaintiff, is this question of erroneous reporting to the IRS, which is that the cab drivers were being listed with the IRS as having income in excess of their true income because they were forced to pay these gasoline charges to maintain their employment, gasoline charges, which as I said, were illegal to

the extent that they reduced their earnings below the minimum wage. So we're asking for equitable relief in respect to some correction of those information reports, Your Honor.

And in terms of the Department of Labor's investigation, I just wanted to explain to the Court that, of course, doesn't determine finally anything in this case at this stage, obviously. But the Department of Labor in making that determination that there was this deficiency of $200,000 or so was crediting Defendants with tips that the drivers received, and they used a standard that's nine percent, I think, was mentioned by Defendants. As the IRS would say, well, we're going to imply a nine percent tip rate based on the commission earnings.

So they used that to reduce the liability under the federal minimum wage standard because the federal minimum wage standard says the employer can pay less than the 7.25 if the worker gets tips. They get a discount basically for the amount of the tips that the worker gets. Nevada law doesn't allow that tip credit, as it is called, Your Honor.

So, in fact, if this case extends back to that time period that the U.S. Department of Labor looked at, it's very clear that a review of that audit will establish violations to a large group of drivers because that tip credit doesn't remove the Nevada liability during that time period. It did alleviate the federal liability because of the way the federal law works in this area is different.

So my point, again, Your Honor, is that there's a lot here to believe that there are issues that would be appropriately subject to certification, but we're not -- we shouldn't be even looking at that at this

point. We really should need a record, Your Honor. I mean, let's get a record before the Court. Plaintiff will move for class certification at the appropriate time when we've had an opportunity to conduct discovery, to find out what the records tell us about these various cab drivers. Are there common circumstances? What are the circumstances?

And as Your Honor was pointing out, for example, if we have certain drivers that clearly based upon agreeably accurate records of their compensation and hours of work could not possibly have been below this minimum wage threshold, well, they're not going to be part of the class. So we would need to define who is part of a class in this case, Your Honor.

I think Your Honor understands all of these issues. The remaining issue that I would like to discuss is just the statute of limitations issue and this question of the equitable tolling. I do want to point out, and this is, I believe, Exhibit A of my response, that the decision of Judge Tao in the *Williams* case on this, which is relied upon by Defendants, has been granted a mandamus petition to the extent of directing an answer. And in the order that's Exhibit A, they expressly directed the parties to address this issue of the District Court re-characterizing the claim broad in that case as being under the statutory scheme.

And this really goes to the heart of my difference with Defendants regarding this supposed two-year statute of limitations, which is, they're relying on this language in 608.260, and 608.260 says, "If an employer pays any employee a lesser amount than the minimum wage prescribed by regulation of the labor commissioner pursuant to the provisions of NRS 608.250." It is an express carve-out limitation saying we're going to

put a two-year statute of limitations on claims arising under 608.250. As Your Honor is aware, if this didn't exist, those 608.250 claims would be a three-year statute of limitations because that is the general statute of limitations in Nevada.

So to re-characterize this as applying to claims that don't arise under 608.250 -- in fact, don't even arise under any statute, but directly under Nevada's Constitution -- does not make any sense, Your Honor. The -- and this is discussed again in my brief, that because these claims arise directly from the Constitution, they have a different character and a different nature, and as constitutional claims, they are appropriately viewed under the catch-all four-year statute of limitations that Nevada applies to, you know, causes of action that are not otherwise provided because this isn't statutory, which would normally be three years.

I do cite the authorities in my brief discussing this. The Nevada Supreme Court, to the extent that it has actually looked at this issue at least in the context of other disputes, has opined, at least in passing, Your Honor, that that would be the correct analysis, that you would apply a four-year not otherwise provided catch-all statute of limitations to a claim emanating directly under Nevada's Constitution. That view is also consistent with all of the authorities I have looked at that arise in other jurisdictions. We had cases from New York, Nebraska, Texas, California.

So I think Your Honor understands our argument there and the reason why we believe the four-year period would be really the only appropriate period to use given the nature of the claims made in this case.

In respect to the argument of the equitable estoppel, again, this

is discussed in our brief. I think Your Honor understands the question of the estoppel and the notice is that the Constitution specifically provides that the employer shall provide written notification of the rate adjustment to each of its employees. This is the actual language in the Constitution when it occurs. The first one occurred in July 2007.

So when it says written notification to each, it would presumably mean that you have to actually give each of them in hand or by mail or with their paycheck a written statement advising them that the minimum wage rate in Nevada has changed. Now, that advisement isn't going to mean anything to someone who's getting paid a lot more than minimum wage because it's not a concern to them, but the reason why that's put in there is to help employees enforce their rights and to give them knowledge that they're entitled to this money.

And if we got to Section B of the Constitution, it provides this extremely broad grant of remedial rights, saying that, "Any employee claiming violation of this section may bring an action against his or her employer in the courts of the 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, damage, reinstatement injunctive relief." So, I mean, it couldn't be any broader, and, again, this is discussed in my response papers.

Judge Ellsworth did look at this issue. This is actually her minute order. She's not issued a final order on this. It's actually set forth at Exhibit A of Defendant's reply. At the very end of that minute order, she declined to make a ruling on this issue. She wanted a record to see what she

should consider in terms of the relevant issues bearing upon whether equitable estoppel or equitable tolling of the statute of limitations should be applied under these circumstances.

And I would submit that the Court really needs a record to be able to consider that issue and whether by not -- because the problem is, Your Honor, if the employer had the obligation to give the notice and he doesn't give the notice, what remedy would be appropriate to the employee except a toll, a maintenance -- the continuation of their rights that they were supposed to be told about. I mean, there wouldn't be any other appropriate remedy that would make the employee whole for the damage sustained by the failure to get that notice. What are you going to do? Are you going to order the employer to give the notice three years later and then tell the employee, well, tough luck, you can't make those claims anymore?

I think Your Honor understands that given the structure of the constitutional amendment, the force of law that it should require, is, of course, the supreme law of the state, the remedy I'm asking, the equitable estoppel remedy, would make sense or it should at least be reviewed upon a fuller record before the Court in terms of the relevant factors.

I've gone on quite a bit, Your Honor. I don't want to take up too much time of the Court.

THE COURT: Okay. I think we've touched on everything. Thank you.

MR. GREENBERG: Thank Your Honor.

MS. KOTCHKA: Yes. Okay. At the very beginning, Mr. Greenberg said that we're asking you to accept facts, but we haven't given you a record, but we have given you a record. We've given you actual pay documents

concerning Mr. Perera and Mr. Ahmad. Rule 12 allows you to submit records -- or documents outside the pleadings if you convert it to Rule 56, and when we filed our motion to dismiss, we did cite Rule 56(b) and asked the Court to take a look at it.

When Mr. Greenberg made the argument that on the $8.25 rate, we knew what our insurance was and the wages are, that's true, but that isn't the test for the ten percent. Again, it goes back to gross taxable income, which has been defined by regulation by the labor commissioner, and only Mr. Perera knows that. We think that --

THE COURT: Let me ask you a question about that. If you have to decide as the employer whether somebody gets 7.25 or 8.25 an hour based on the charges for insurance, how do you figure that out?

MS. KOTCHKA: Well, I think you can figure it out by looking at the total, what their total wages are, at least with you.

THE COURT: Right.

MS. KOTCHKA: And if you look at the time period and you just take -- you can take ten percent. I mean, it's going to be far less than what their gross taxable income is, but you could make the determination based on what they make with you as the employer, their wages, their compensation, you could do the ten percent. But don't forget, their gross taxable income, although minimum wage excludes tips, gross taxable income doesn't exclude tips.

THE COURT: Right.

MS. KOTCHKA: So you can consider their tip income and looking at that, and that's one of the reasons that we gave you the tip income in our

documents in Exhibit 9, was to show you that the gross taxable income is going to be much higher than their minimum wage income. So that's how you look at it to determine whether they get the 7.25 or 8.25, but most of our cab drivers make far -- this isn't a big issue because most of them make far over minimum wage. It's a tips classification, and most of the money is made in tips and not in the booking them out.

Now, in federal law, you can consider tips, Mr. Greenberg was correct, but under state law for minimum wage purposes, you have to carve the tips out. And so --

THE COURT: Right.

MS. KOTCHKA: And so we did.

MR. MORAN: But if they're insured, they get the higher rate.

THE COURT: Right.

MS. KOTCHKA: Right. On the differences in damages that he talked about, we submitted Mr. Greenberg's solicitation letter to you. That's Exhibit 10 in the reply.

THE COURT: Uh-huh.

MS. KOTCHKA: And in that very letter that he's writing to our cab drivers, he's telling them that if they make less than between 80 to $90 a day, they may be entitled to minimum wage. We're showing you that Mr. Perera made over that. So by his criteria alone, Mr. Perera met the minimum wage standards.

He made an allegation that they might have to -- that the employer might have to file something with the IRS because we reported the gas as income, and that's just not true. We never showed their payments for

their gas as income, and the entire issue concerning the gas arose out of the federal DOL on it in which we were paying for gas --

THE COURT: I want to make sure because -- I want to make sure that I'm understanding this correctly. What I believe that Mr. Greenberg was saying was not that the payment for gas was reflected as income, but the expectation that the cab drivers would pay for the gas should actually reduce the amounts of their income when looking at whether they're being paid minimum wage.

MS. KOTCHKA: Okay. But he also referred something about to the IRS, but taken just that --

THE COURT: That's what I understood. Is that correct, Mr. Greenberg?

MR. GREENBERG: Your Honor, yes, this is only an issue to the extent that those payments go below the minimum wage, and there was an IRS report above the minimum wage for that period.

THE COURT: Right. Got it.

MR. GREENBERG: Okay.

MS. KOTCHKA: Okay. Anyway, the DOL --

THE COURT: There's a lot of pieces here.

MS. KOTCHKA: Okay. This is where the gas issue arose. At the DOL audit back in 2012, we were paying for gas for all of our employees. The DOL told us you can't consider gas in the minimum wage computation. You don't get a credit for paying for it. If you don't pay for it, it doesn't hurt. You have to look at the paycheck, what they actually get on the paycheck. So as a result of that audit, we changed our practice and we said, okay, drivers, you

pay for gas. We will change the compensation formula. They used to get like 30 percent of the book. We will increase that to 50 percent so that you make more money, so that you could go out and pay for the gas.

And although Mr. Greenberg wants to argue that that's part of their minimum wage, the federal government has already told us it's not. They came back in to do another audit. They looked at the gas issue. They basically went away and said, you're doing everything correctly. So we don't think really that they can raise that issue.

In addition to that, the Minimum Wage Amendment says we can't consider tips, but the Minimum Wage Amendment in Nevada doesn't say you can't use your tip money to pay for gas. So we have declared tips. We have undeclared tips. We have all these fees that the drivers make when they take people to certain vendors and the vendors pay them. So, certainly, all of that can be used to pay for gasoline.

The notice issue again, we do a state posting, you know, where we post our -- on the bulletin board for our drivers, where we post our federal notice that we gave the Court information on.

THE COURT: Right.

MS. KOTCHKA: We also do the state notice. So the rates, the 7.25 and the 8.25, have been up there on the board, you know, for the state minimum wage rates, you know, for years as well. We don't, you know, hand them a piece of paper because we didn't believe until *Thomas* happened that we were required to pay the state minimum wage, but the state minimum wage rates were posted, and I think there's an argument that can be made that that was written records.

This thing on the statute of limitations, Mr. Greenberg argues that the four years applies under the catch-all, but there's an exception to the catch-all that says -- and I'm not sure if it's 11.010, but there's a statute that says that the cause of action begins and it refers to set by statute. And what we're saying is, the catch-all can't even pick up this -- this statute of limitations because we have a statute; we have 260.

And while he argues about all the different remedies and things that are in the Minimum Wage Amendment that are bigger, more than just the minimum wage regulations, that's true, but those remedies apply to the causes of action that the Minimum Wage Amendment created for like discrimination and retaliation. They create those causes of action right in the Minimum Wage Amendment if you're fired because you report a minimum wage violation.

And so, therefore, those other remedies apply to those causes of action. It's the back pay that applies to if you don't pay the minimum wage. That's -- that's really your only remedy for that. And, of course, the equitable relief is, you have to pay it from now on. And we've already given Your Honor in the affidavit of Martha Sarver, her commitment after *Thomas,* that she's been checking the wages to make sure that we are complying with the minimum wage Amendment, so, therefore, equitable relief wouldn't be any good anyway.

He made some argument that, oh, gee, there's all this statute of limitations, it's greater than the minimum wage statute of two years, but that has never been determined by the Court yet. And if the Court wants to borrow a statute of limitations on those causes of action which are an issue here, the Court might borrow, for example, from NRS 613, which is a 180-day

statute of limitations for discrimination on the basis of age, race, national origin, et cetera. So the other -- the other claims that are contained in the Minimum Wage Amendment really have nothing to do with what statute of limitation should be applied in this case, which we still contend should be the two years.

And I think the final thing that we wanted to bring to your attention was, Mr. Greenberg wasn't involved in the DOL wage an hour investigation, so he really has no personal knowledge of it. And, again, on the class action allegations, I still think it's going to be a case by case, person by person. We are requesting not only that you grant our motion, but you deny his motion to amend --

THE COURT: Well, we haven't gotten to that yet, so hang on.

MS. KOTCHKA: Huh? What?

THE COURT: Hang on a second. We're going to get to that in a second.

MS. KOTCHKA: Oh, okay.

THE COURT: I can only do one at a time.

MS. KOTCHKA: Okay.

THE COURT: All right.

MS. KOTCHKA: All right.

THE COURT: So let's go ahead and go to the motion to amend. Mr. Greenberg.

MR. GREENBERG: Your Honor, if the Court was interested, there were a few things that I want to respond to about what Ms. Kotchka said, but if you want me to address just the amendment request --

THE COURT: You know what, if you'll just go to the amendment.

MR. GREENBERG: Okay. Yes, Your Honor. The amendment seeks to add this claim regarding this issue of the gas payment, which I was discussing with Your Honor previously. To the extent they're getting, you know, a payment during a pay period for acts which is reduced by a Y gas payment they have to make and that results in a Z amount, which is an amount that is below the minimum wage, that Z amount should not be getting reported to the IRS as income to them because they never got it. I mean, they were required to get it under the Minimum Wage Amendment, but they never did. So these reports are in error, and they should be corrected because they are exposing our clients to -- the class members here to potentially additional tax liabilities.

The other purpose of the amendment, Your Honor, is also to -- well, there are claims for punitive damages and for other relief based upon this intentional misconduct in respect to that false characterization, I was just mentioning as to the income, and, quite honestly, Your Honor, the origin of this January 2012 policy to make them pay for the gas was instituted in response to the DOL's investigation because it hid from the DOL the violations that were going on, because they no longer appeared on the payroll.

When they took the gas off the top, they could see that the commissions that were going to the drivers were winding up to be less than the minimum wage. When they took gas payments out of the commissions split equation, it made it look like the drivers were getting more money, but, in fact, they weren't.

But, Your Honor, in respect to the amendment, which is what I supposed to be addressing, the other issue is to add Mr. Ahmad as an

additional named plaintiff, punitive representative of the class. We do have a declaration from him affirming as to his willingness to be a representative.

In response to that, Defendants make the same argument they make in respect to Mr. Perera, which is that, well, see, if we have these records here which we insist are correct, although we actually don't for Mr. Ahmad have all of his trip sheets. We only have two sheets, and we have -- we have a bunch of what are told are reconciliations of his hours of work and pay and resulting hourly rates that they claim he received.

That's clearly incompetent, Your Honor, in terms of the factual issue of whether this man does or does not have a claim that would be typical or common to the class. I mean, does this man potentially have -- does he have a right to come in here and make a minimum wage claim or not? We don't have a record to judge that, Your Honor, so, I mean, it really is premature, improper request that the Court make rulings of fact without a record, essentially accepting Defendants' assertions as true. But I would point, actually, that those records also on their face are very questionable.

For example, at Exhibit 9-1, for the first week of 2013, they say Mr. Ahmad made 9.12 an hour. If he made 9.12 an hour and that does not reflect the deductions for the gas, which we've already gone over for Mr. Perera, those deductions for the gas definitely reduced his earnings by at least a dollar to $2 an hour. So right there the Court has in front of it strong indication that Mr. Ahmad does potentially have a claim for minimum wage compensation because he was compensated less than 8.25 an hour as required by the Constitution.

But we're all getting ahead of ourselves. Again, we're not here

to address these merits as to whether the claim is, in fact, established or not. It's completely improper for Defendants to be opposing the amendment on that basis. They don't deny that he worked for them during the relevant time period that he was a taxi driver, so on the pleadings, he presumptively is an appropriate plaintiff. I mean, we'll get to these issues of what the -- you know, what the facts are and whether a disposition as a matter of undisputed fact was appropriate before the Court, but we have no discovery. We have no records. We can't do any of that.

Hopefully, I've addressed the Court's concerns regarding the amendment. As I said, there were some other issues that were discussed by Ms. Kotchka, but I don't need to spend the Court's time on that if the Court --

THE COURT: All right. Thank you.

MR. GREENBERG: Thank you.

THE COURT: Counsel, is there anything else?

MS. KOTCHKA: Yes. Mr. Ahmad, as I said earlier, we have submitted his payroll records. There's no question that even at the higher rate, the $8.25, he's well above that rate. This issue --

THE COURT: Well, I suppose my concern, though, is that the standard should allow an amendment, I can't really do a factual evaluation with respect to allowing them to amend the complaint. I need to focus on affairs of legal basis for denying a request to amend the complaint.

MS. KOTCHKA: Well, they would have to show -- I mean, for the amendment not to be futile, they'd have to show that he's similar to Mr. Perera, and I don't see that they made any showing of that. For him to come in as another class representative, they've got to make a similarity showing,

and there's -- there is none. I mean, they aren't similar.

They didn't work the same time period. Again, they didn't work the same hours. They didn't make the same amount of money. I mean, he hasn't alleged that as part of his complaint. And he also seeks, when he does the amendment on the complaint, to add this gas issue, but that's -- I mean, there's -- there's no basis to add the gas issue.

We have not -- we responded to what the DOL told us to do, and we did the right thing as we pointed out in our affidavit. I don't know how to get that before the Court other than through that vehicle. The drivers, we don't report that the gas is part of the income; we report what they're paid and we report the declared tips.

The drivers themselves go to the IRS and take a deduction for the gas payments they've made, and so I don't know why this IRS issue keeps coming up, but the IRS has been told properly from all sides exactly what's going on. We're not hiding anything. We're not misrepresenting anything on the gas.

So our primary basis on the motion to amend is just that there is no issue with respect to the gas, and the Minimum Wage Amendment certainly doesn't refer to gas in any context, and they're not similar. And if they're not similar, then he can't be added under Rule 15.

THE COURT: Okay. Sir, do you have anything that you want to respond to that?

MR. GREENBERG: Your Honor, as the Court pointed out previously, class members don't need to be identical. There needs to be a common issue and judicial efficiency and resolution of the common issue. We're not

anywhere need that stage in terms of --

If Mr. Ahmad worked in a completely different job -- he was a dispatcher in Defendant's taxi business and not a taxi driver -- then perhaps he wouldn't be a proper plaintiff in this case, but it's uncontested that they both were taxi drivers. They're both making these allegations that they didn't get paid the minimum. Maybe they worked different time periods. Some overlapping, some not. Maybe they -- they were paid different amounts. They worked different hours.

Those are issues -- whether those issues would prevent certification is a different issue. We're not there. The Court has no record to consider that. But in respect to whether they at least punitively could bring a case jointly to say, this happened to us, we want to be representatives of a class, it's a very low threshold, Your Honor. We're not here to determine the facts at this point. The Defendants will have an opportunity to say, well, Mr. Perera or Mr. Ahmad could or couldn't be the proper representatives at a particular time, but we didn't get to these issues. It's way, way down the road, the proper record, Your Honor.

THE COURT: All right.

MR. GREENBERG: Thank you.

THE COURT: Thank you. There are many, many apparent issues going on here, and I want to make sure that I give both sides' arguments due consideration, so I'm going to get a written order out to you shortly.

MS. KOTCHKA: Okay. Thank you.

THE COURT: Thank you.

/ / /

MR. GREENBERG: Thank you, Your Honor.

[Proceedings concluded at 11:20 a.m.]

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio-visual recording of the proceeding in the above entitled case to the best of my ability.

Renee Vincent

Renee Vincent, Court Recorder/Transcriber

APPENDIX 12

APPENDIX 12

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DISTRICT COURT

CLARK COUNTY, NEVADA

LAKSIRI PERERA and IRSHAD AHMED, Individually and on behalf of others similarly situated, Plaintiffs, vs. WESTERN CAB COMPANY, Defendant.	Case No.: A-14-707425-C Dept.: V **SECOND AMENDED COMPLAINT** **ARBITRATION EXEMPTION CLAIMED BECAUSE THIS IS A CLASS ACTION CASE**

LAKSIRI PERERA and IRSHAD AHMED, individually and on behalf of others similarly situated, by and through their attorney, Leon Greenberg Professional Corporation, as and for a Second Amended Complaint against the defendant, state and allege, as follows:

JURISDICTION, PARTIES AND PRELIMINARY STATEMENT

1. The plaintiff, LAKSIRI PERERA, is a resident of Clark County in the State of Nevada and is a former employee of the defendant. The plaintiff, IRSHAD AHMED, (collectively the "individual plaintiffs" or the "named plaintiffs") is a resident of Clark County in the State of Nevada and is a former employee of the defendant.

2. The defendant, WESTERN CAB COMPANY, (hereinafter referred to as "Western Cab" or "defendant") is a corporation existing and established pursuant to the laws of the State of Nevada with its principal place of business in the County of Clark, State of Nevada and conducts business in Nevada.

CLASS ACTION ALLEGATIONS

3. The plaintiffs bring this action as a class action pursuant to Nev. R. Civ. P. §23 on behalf of themselves and a class of all similarly situated persons employed by the defendant in the State of Nevada.

4. The class of similarly situated persons consists of all persons employed by defendant in the State of Nevada during the applicable statute of limitations periods prior to the filing of this Complaint continuing until date of judgment, such persons being employed as taxi cab drivers (hereinafter referred to as "cab drivers" or "drivers") such employment involving the driving of taxi cabs for the defendant in the State of Nevada.

5. The common circumstance of the cab drivers giving rise to this suit is that while they were employed by defendant they were not paid the minimum wage required by Nevada's Constitution, Article 15, Section 16 for many or most of the days that they worked in that their hourly compensation, when calculated pursuant to the requirements of said Nevada Constitutional Provision, did not equal at least the minimum hourly wage provided for therein.

6. The named plaintiffs are informed and believe, and based thereon allege that there are at least 100 putative class action members. The actual number of class members is readily ascertainable by a review of the defendant's records through appropriate discovery.

7. There is a well-defined community of interest in the questions of law and fact affecting the class as a whole.

8. Proof of a common or single set of facts will establish the right of each member of the class to recover. These common questions of law and fact predominate

over questions that affect only individual class members. The individual plaintiff's claims are typical of those of the class.

9. A class action is superior to other available methods for the fair and efficient adjudication of the controversy. Due to the typicality of the class members' claims, the interests of judicial economy will be best served by adjudication of this lawsuit as a class action. This type of case is uniquely well-suited for class treatment since the employer's practices were uniform and the burden is on the employer to establish that its method for compensating the class members complies with the requirements of Nevada law.

10. The individual plaintiffs will fairly and adequately represent the interests of the class and have no interests that conflict with or are antagonistic to the interests of the class and have retained to represent them competent counsel experienced in the prosecution of class action cases and will thus be able to appropriately prosecute this case on behalf of the class.

11. The individual plaintiffs and their counsel are aware of their fiduciary responsibilities to the members of the proposed class and are determined to diligently discharge those duties by vigorously seeking the maximum possible recovery for all members of the proposed class.

12. There is no plain, speedy, or adequate remedy other than by maintenance of this class action. The prosecution of individual remedies by members of the class will tend to establish inconsistent standards of conduct for the defendant and result in the impairment of class members' rights and the disposition of their interests through actions to which they were not parties. In addition, the class members' individual claims are small in amount and they have no substantial ability to vindicate their rights, and secure the assistance of competent counsel to do so, except by the prosecution of a class action case.

AS AND FOR A FIRST CLAIM FOR RELIEF ON BEHALF OF THE NAMED PLAINTIFF AND ALL PERSONS SIMILARLY SITUATED PURSUANT TO NEVADA'S CONSTITUTION

13. The named plaintiffs repeat all of the allegations previously made and bring this First Claim for Relief pursuant to Article 15, Section 16, of the Nevada Constitution.

14. Pursuant to Article 15, Section 16, of the Nevada Constitution the named plaintiffs and the class members were entitled to an hourly minimum wage for every hour that they worked for defendant and the named plaintiffs and the class members were often not paid such required minimum wages.

15. The defendant's violation of Article 15, Section 16, of the Nevada Constitution involved malicious and/or fraudulent and/or oppressive conduct by the defendant sufficient to warrant an award of punitive damages for the following, amongst other reasons:

(a) Defendant despite having, and being aware of, an express obligation under Article 15, Section 16, of the Nevada Constitution, such obligation commencing no later than July 1, 2007, to advise the plaintiff and the class members, in writing, of their entitlement to the minimum hourly wage specified in such constitutional provision, failed to provide such written advisement;

(b) Defendant was aware that the highest law enforcement officer of the State of Nevada, the Nevada Attorney General, had issued a public opinion in 2005 that Article 15, Section 16, of the Nevada Constitution, upon its effective date, would require defendant and other employers of taxi cab drivers to compensate such employees with the minimum hourly wage specified in such constitutional provision. Defendant consciously elected to ignore that opinion and not pay the minimum wage required by Article 15, Section 16, of the Nevada Constitution to its taxi driver

employees in the hope that it would be successful, if legal action was brought against it, in avoiding paying some or all of such minimum wages;

(c) Defendant, to the extent it believed it had a colorable basis to legitimately contest the applicability of Article 15, Section 16, of the Nevada Constitution to its taxi driver employees, made no effort to seek any judicial declaration of its obligation, or lack of obligation, under such constitutional provision and to pay into an escrow fund any amounts it disputed were so owed under that constitutional provision until such a final judicial determination was made.

16. Defendant also engaged in the following malicious, illegal and bad faith conduct which was intended to conceal its violations Article 15, Section 16, of the Nevada Constitution and caused additional injury to the plaintiffs for which they seek redress:

In or about January of 2012, defendant started requiring the plaintiffs and the class members to pay from such plaintiffs' and class members' own, personal funds, 100% of the cost of the fuel consumed in the operation of the taxicabs they drove for the defendant. That fuel was essential for the operation of defendant's taxi cab business and plaintiffs could not work for defendants unless they agreed to pay for that fuel from their personal funds. By requiring the plaintiff and the class members to personally pay for the cost of such fuel the defendant was reducing the wages it actually paid the plaintiff and the class members to an amount below the minimum hourly wage required by Article 15, Section 16, of the Nevada Constitution. That was because after deducting from the "on the payroll records" wages paid by the defendant to the plaintiffs and the class members the cost of the taxi cab fuel they were forced by the defendant to

pay, the resulting "true" wage paid to such persons by the defendant was below the minimum hourly wage required by Article 15, Section 16, of the Nevada Constitution. Defendant willfully and maliciously engaged in this conduct to make it appear to any otherwise uninformed person who was examining its payroll records that it was paying the minimum wage required by Article 15, Section 16, of the Nevada Constitution when it was not. Defendant instituted this policy specifically to deceive certain government agencies, including but not necessarily limited to, the United States Department of Labor which had previously found the defendant in violation of the minimum wage law enforced by such agency. Such conduct by the defendant also resulted in the defendant issuing knowingly false and inaccurate statements of the plaintiff's and the class members' income to the United States Internal Revenue Service and the Social Security Administration, such statements inflating and exaggerating the actual income earned by such persons and resulting in them being required to pay additional taxes that they did not actually owe.

17. Defendant engaged in the acts and/or omissions detailed in paragraphs 15 and 16 in an intentional scheme to maliciously, oppressively and fraudulently deprive its taxi driver employees of the hourly minimum wages that were guaranteed to those employees by Article 15, Section 16, of the Nevada Constitution. Defendant so acted in the hope that by the passage of time whatever rights such taxi driver employees had to such minimum hourly wages owed to them by the defendant would expire, in whole or in part, by operation of law. Defendant so acted consciously, willfully, and intentionally to deprive such taxi driver employees of any knowledge that they might be entitled to such minimum hourly wages, despite the defendant's obligation under Article 15, Section 16, of the Nevada Constitution to advise such taxi driver employees of their right to those minimum hourly wages. Defendant's malicious, oppressive and fraudulent conduct is also demonstrated by its failure to make any

allowance to pay such minimum hourly wages if they were found to be due, such as through an escrow account, while seeking any judicial determination of its obligation to make those payments.

18. The named plaintiffs seek all relief available to them and the alleged class under Nevada's Constitution, Article 15, Section 16 including appropriate injunctive and equitable relief to make the defendant cease its violations of Nevada's Constitution and a suitable award of punitive damages.

19. The named plaintiffs on behalf of themselves and the proposed plaintiff class members, seek, on this First Claim for Relief, a judgment against the defendant for minimum wages owed since November 28, 2006 and continuing into the future, such sums to be determined based upon an accounting of the hours worked by, and wages actually paid to, the plaintiff and the class members along with an award of damages for the increased, and false, tax liability the defendant has caused the plaintiffs and the class members to sustain, a suitable injunction and other equitable relief barring the defendant from continuing to violate Nevada's Constitution and requiring the defendant to remedy at its expense the injury to the class members it has caused by falsely reporting to the United States Internal Revenue Service and the Social Security Administration the income of the class members, a suitable award of punitive damages, and an award of attorneys' fees, interest and costs, as provided for by Nevada's Constitution and other applicable laws.

AS AND FOR A SECOND CLAIM FOR RELIEF PURSUANT TO NEVADA REVISED STATUTES § 608.040 ON BEHALF OF THE NAMED PLAINTIFF AND THE PUTATIVE CLASS

20. Plaintiffs repeat and reiterate each and every allegation previously made herein.

21. The named plaintiffs bring this Second Claim for Relief against the defendant pursuant to Nevada Revised Statutes § 608.040 on behalf of themselves and the alleged class of all similarly situated employees of the defendant.

22. The named plaintiffs have been separated from their employment with the

defendant and at the time of such separation were owed unpaid wages by the defendant.

23. The defendant has failed and refused to pay the named plaintiffs and numerous members of the putative plaintiff class who are the defendant's former employees their earned but unpaid wages, such conduct by such defendant constituting a violation of Nevada Revised Statutes § 608.020, or § 608.030 and giving such named plaintiffs and similarly situated members of the putative class of plaintiffs a claim against the defendant for a continuation after the termination of their employment with the defendant of the normal daily wages defendant would pay them, until such earned but unpaid wages are actually paid or for 30 days, whichever is less, pursuant to Nevada Revised Statutes § 608.040.

24. As a result of the foregoing, the named plaintiffs seek, on behalf of themselves and the similarly situated putative plaintiff class members, a judgment against the defendant for the wages owed to them and such class members as prescribed by Nevada Revised Statutes § 608.040, to wit, for a sum equal to up to thirty days wages, along with interest, costs and attorneys' fees.

WHEREFORE, plaintiffs demand the relief on each cause of action as alleged aforesaid.

Plaintiffs demand a trial by jury on all issues so triable.

Dated this 16th day of June, 2015.

Leon Greenberg Professional Corporation

By: */s/ Leon Greenberg*

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