

STATE OF ARIZONA
OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL OPINION by TERRY GODDARD ATTORNEY GENERAL February 7, 2007	No. I07-002 (R06-039) Re: Proposition 202 (Minimum Wage Law) and the Disabled Worker
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To: The Honorable John McComish
Arizona House of Representatives

Questions Presented

You have requested a formal opinion answering the following questions regarding application of the State's new minimum wage law:

1. Does the new minimum wage law promulgated in Proposition 202 apply to the developmentally disabled worker or is the "special" minimum wage authorized by 29 U.S.C. § 214(c) of the Fair Labor Standards Act still applicable?
2. Are there any other federal exemptions that are still in effect? If so, which ones?
3. The official title of Proposition 202 contained a phrase alluding to the repeal of A.R.S. § 23-362. However, the text of the measure contains no such repeal. Does this mean that the old statute was not repealed?
4. If you determine that the old law was not properly repealed, and since the new law contains no express provision for workers with disabilities, can employers still pay "commensurate" wages in accordance with the reference to federal law found in the old A.R.S. § 23-362?

Summary Answer

The State's new minimum wage enacted in Proposition 202 applies to developmentally disabled workers.¹ The "special certificate" minimum wage authorized by the federal Fair Labor Standards Act (FLSA) at 29 U.S.C § 214(c) for disabled workers, which allows employers to pay a special minimum wage to disabled individuals, was not incorporated in Proposition 202 and is therefore inapplicable.

Although the text of Proposition 202 does not explicitly repeal former A.R.S. § 23-362, the language of the two directly conflict with one another and cannot be read together harmoniously. Therefore, the more recent enactment controls, and Proposition 202 impliedly repeals former A.R.S. § 23-362.

Background

Proposition 202 establishes a State minimum wage of \$6.75 per hour with an annual cost of living increase, provides for enforcement, establishes record-keeping requirements, and empowers the Industrial Commission to promulgate regulations consistent with the Proposition. *See* A.R.S. §§ 23-362 to -364 (as amended by Prop 202).

Until the Proposition's effective date on January 1, 2007, Arizona adult workers were covered solely by federal minimum wage laws contained in the FLSA. *See* 29 U.S.C. §§ 201–219.

The FLSA contains numerous exemptions. One of its exemptions applies to individuals employed under a "special certificate" pursuant to § 214 of the FLSA. Specifically, § 214 permits employers to obtain special certificates for certain qualifying employees and pay those employees a "special minimum wage rate" that is commensurate with the worker's productivity

¹ This Opinion does not address the relationship, if any, between a disabled worker's minimum wage and services the disabled worker might receive under Title XIX of the Social Security Act. It also does not address whether any particular worker is an employee subject to Arizona's new minimum wage law.

and that may be lower than the minimum wage prescribed by § 6 of the FLSA (codified at 29 U.S.C. § 206).² Disabled workers are one of the classes of employees that may be eligible for these special FLSA certificates.

Analysis

I. Application of Proposition 202 to Developmentally Disabled Workers.

Arizona is one of six states that enacted legislation in 2006 to raise its minimum wage.³ Two of the six states—Ohio and Missouri—adopted measures that exempted individuals with disabilities from the minimum wage provisions of their laws. *See* Ohio Const. art. II, § 34a; Ohio Rev. Code Ann. § 4111.14(C) (implementing Ohio Const. art II, § 34a); Mo. Rev. Stat. §§ 290.500(3)(g), 290.502 and 290.515. The remaining four states—Arizona, Nevada, Colorado and Montana—did not include in their laws any language similar to the FLSA that would exempt disabled workers from their new state minimum wage. *See* A.R.S. §§ 23-362 to -364; Nev. Const. art. 15, § 16; Colo. Const. art. XVIII, § 15; Mont. Code Ann. § 39-3-409.

The drafters of Proposition 202 did not, however, ignore all FLSA exemptions. For example, the FLSA exempts from its minimum wage and maximum hour requirements “any employee employed on a casual basis in domestic service employment to provide babysitting services or any employee employed in domestic service employment to provide companionship

² The commensurate wage is calculated by comparing the disabled worker’s productivity to that of an experienced, non-disabled worker and then reducing the prevailing wage for that position to compensate for any reduction in productivity. 29 C.F.R. § 525.9. The commensurate wage is always lower than the prevailing wage and is often lower than the minimum wage.

³ Ohio voters approved a constitutional amendment that raised the minimum wage to \$6.85 per hour but also adopted FLSA exemptions. Ohio Const. art. II, § 34a; Ohio Rev. Code Ann. § 4111.14(C). Specific language in the amendment allows for the issuance of a license to pay less than the state minimum wage rate for individuals with disabilities. Ohio Const. art II, § 34a. Likewise, Missouri’s Proposition B contains a specific exemption for individuals working in sheltered workshops certified by the Department of Elementary and Secondary Education. Mo. Rev. Stat. § 290.500(3)(g). Arizona, Nevada, Colorado and Montana did not provide any exemptions in the text of their legislation for the exclusion of the disabled worker who previously was covered under Subsection 214(C) of the FLSA. *See* A.R.S. §§ 23-362 to -364; Nev. Const. art. 15, § 16; Colo. Const. art. XVIII, § 15; Mont. Code Ann. § 39-3-409 (2007).

services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulation of the Secretary.” 29 U.S.C. § 213(a)(15).

Like the FLSA, Proposition 202 also exempts individuals “performing babysitting services in the employer’s home on a casual basis.” A.R.S. § 23-362(A). However, the Proposition is silent regarding “companionship services.” Proposition 202’s omission of the FLSA companionship services exemption supports the conclusion that the drafters of the Proposition made a conscious decision regarding the FLSA exemptions the Proposition would adopt and those the Proposition would omit, e.g., the special minimum wage exemption for disabled workers. *See State v. Gonzales*, 206 Ariz. 469, 471, ¶ 11, 80 P.3d 276, 278 (App. 2003) (explaining rule of statutory construction that the expression of one thing is the exclusion of another).

In addition, the FLSA does not usurp state law regarding the establishment of a minimum wage. The FLSA states that “[n]o provision of this Chapter or of any order thereunder shall excuse non-compliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this Chapter.” 29 U.S.C. § 218(a); *see also* 29 C.F.R. § 525.20 (“[n]o provision of these regulations, or of any special minimum wage certificate issued thereunder, shall excuse noncompliance with any other Federal or State law or municipal ordinance establishing higher standards”); *Pac. Merch. Shipping Ass’n v. Aubry*, 918 F.2d 1409, 1419 (9th Cir. 1990) (where a state legislates in the area of minimum wage, the provisions of the state statute will be enforced where a worker receives additional benefits provided by state law). Thus, the plain language of the FLSA provides that a worker is entitled to a state or local minimum wage that is higher than the federal minimum wage.

Because Proposition 202 did not incorporate the “special certificate” minimum wage provisions of FLSA for disabled workers, employers are required to pay the higher state minimum wage to developmentally disabled workers subject to Proposition 202.⁴

II. Implied Repeal of A.R.S. § 23-362.

In 1997, the Legislature enacted A.R.S. § 23-362, which prohibited any “political subdivision of this state” from establishing a minimum wage higher than the “federal minimum wage prescribed in 29 United States Code § 206.” 1997 Ariz. Sess. Laws ch. 51.⁵ This law effectively ensured that Arizona was governed solely by the federal minimum wage law provisions.

The official title of Proposition 202 states: “An Initiative Measure: Repealing Section 23-362, amending by adding new Section 23-362 relating to the Arizona Minimum Wage Act.” The text of the proposed amendment adds new statutes A.R.S. §§ 23-362, 23-363 and 23-364. Nowhere, however, does the text of the proposed amendment explicitly repeal the previous version of A.R.S. § 23-362. When voters pass an initiative, it is the text of the measure that becomes law. A.R.S. § 19-127(B) (“The secretary of state shall cause every measure . . . submitted under the initiative and approved by the people to be printed with the general laws enacted by the next ensuing session of the legislature.”). Thus, Proposition 202 does not explicitly repeal A.R.S. § 23-362 because the text of the proposed amendment does not so provide.

⁴ It should be noted that this conclusion applies only to developmentally disabled workers who are not covered by any other state or federal exemption.

⁵ Former A.R.S. § 23-362 reads in full:

- A. The legislature declares that the establishment of a uniform minimum wage is a matter of statewide concern.
- B. No political subdivision of this state may establish, mandate or otherwise require a minimum wage that exceeds the federal minimum wage prescribed in 29 United States Code § 206.

The question then becomes whether Proposition 202 impliedly repealed A.R.S. § 23-362. Although implicit repeal of statutes is not favored, *UNUM Life Insurance Company of America v. Craig*, 200 Ariz. 327, 333, ¶ 28, 26 P.3d 510, 516 (2001), courts will find implied repeal to have occurred when two statutes are so in conflict that they cannot stand together. *State ex rel. Purcell v. Superior Court*, 107 Ariz. 224, 227, 485 P.2d 549, 552 (1971).

Here, prior to the enactment of Proposition 202, A.R.S. § 23-362 established that Arizona workers were governed by the federal minimum wage law, and it specifically prohibited political subdivisions of the State from enacting their own minimum wage laws. In contrast, Proposition 202 established a state minimum wage law, setting forth a minimum wage higher than the federal level, and providing for certain exemptions and mechanisms for enforcement of the minimum wage law. Proposition 202 also specifically empowers state political subdivisions such as counties, cities, or towns to regulate minimum wages and benefits by ordinance. A.R.S. § 23-364(I) (“A county, city, or town may by ordinance regulate minimum wages and benefits within its geographic boundaries but may not provide for a minimum wage lower than that prescribed in this article.”). This is in direct contrast to, and in direct conflict with, the version of A.R.S. § 23-362 that was in effect before Proposition 202. Because the language of Proposition 202 and the previous version of A.R.S. § 23-362 cannot be interpreted harmoniously, Proposition 202 impliedly repeals the previous statute.⁶

Conclusion

Developmentally disabled workers are not exempt from the minimum wage enacted in Proposition 202. Thus, developmentally disabled workers formerly earning a sub-minimum

⁶ Because Proposition 202 impliedly repeals A.R.S. § 23-362 (1997 Ariz. Sess. Laws ch. 51), the last question regarding the application of the former statute is moot.

wage under the FLSA “special certificate” are entitled to earn the new state minimum wage of \$6.75 per hour if they are employees subject to the new law.⁷ In addition, Proposition 202 impliedly repealed the previous version of A.R.S. § 23-362.

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⁷ The Legislature's ability to now incorporate an exemption for disabled workers is limited by article IV, part 1, section 1 of the Arizona Constitution. Any amendment to a voter-approved initiative must “further the purpose” of the proposition and receive approval of at least three-fourths of the members of the House of Representatives and Senate. Alternatively, the Legislature could refer the issue to the voters.