



OFFICE OF THE CITY ATTORNEY

To: Mayor Sylvester “Sly” James and Members of the City Council
From: William D. Geary, City Attorney
Subject: Municipal minimum wage ordinances
Date: March 30, 2015

This memorandum is confidential attorney-client correspondence.

BACKGROUND

You have asked that the Law Department provide you background information on ordinances for which an attorney cannot certify to its legality. That situation has arisen for an ordinance introduced last Thursday and pending in the Planning, Zoning & Economic Development Committee.

I prepared for introduction Ordinance 150217 based upon a draft ordinance prepared outside the Law Department and provided to me. This ordinance, if enacted, would establish a minimum wage required to be paid by all private employers located within Kansas City.

CONCLUSION

There are several elements of the ordinance that lead me to conclude that the City does not have the authority to enact the ordinance:

- (1) The ordinance conflicts with §67.1571, RSMo, which forbids the adoption of local minimum wage ordinances.
- (2) The ordinance is preempted by the Missouri Minimum Wage Law, §290.500, RSMo, *et seq.*, because it would forbid what the state allows – the payment of wages from \$7.65 to \$9.99 per hour.
- (3) The ordinance establishes an enforcement procedure that allows private parties to sue for damages, but ordinances may not establish causes of action for the state courts to adjudicate.

Furthermore, I do not believe the City has the authority to mandate a minimum wage in its own contracts because of the broad terms of §67.1571, RSMo.

Finally, to act in an area that is already preempted by the State of Missouri, may only encourage those in the General Assembly who believe local governments are lawless wastelands of social engineering, to continue their assault on local governments.

DISCUSSION

Section 67.1571, RSMo., preempts local minimum wage ordinances.

The first element is section 67.1571 of the Revised Statutes of Missouri. This statute reads:

No municipality as defined in section 1, paragraph 2, subsection (9) shall establish, mandate or otherwise require a minimum wage that exceeds the state minimum wage.

The definition referred to by the provision includes “any city.”

The Missouri Minimum Wage Law preempts local minimum wage ordinances.

Secondly, the Missouri Minimum Wage Law¹ provides that “every employer shall pay to each employee wages at the rate of [current rate], or the federal minimum wage, whichever is higher.² The minimum wage is increased or decreased annually based upon the Consumer Price Index.³ The federal minimum wage is \$7.25 per hour; ⁴the Missouri minimum wage is \$7.65 per hour.

A municipal minimum, or living, wage of \$10.00 per hour would mean a business could comply with the Missouri Minimum Wage Law and still be in violation of the ordinance if anyone is paid less than \$10.00 per hour in the first year of the ordinance’s existence. Although an ordinance may supplement a state law, but when the expressed or implied provisions of the statute and ordinance are inconsistent or in irreconcilable conflict, then the statute annuls the ordinance. A conflict exists when an ordinance permits that which the statute prohibits or prohibits that which the statute permits.⁵ Because any wage of \$7.65 through \$9.99 per hour is allowed under the Missouri Minimum Wage Law, but would be illegal under the ordinance, the ordinance is preempted.

Cities may not enact causes of actions to be adjudicated by state courts.

A third element of the ordinance also is unlawful. Proposed section 50-481(b) establishes a new cause of action for persons not paid the proper minimum wage:

The City, any individual aggrieved by a violation of this Ordinance, or any entity whose members have been aggrieved by a violation of this Ordinance, may bring a civil action in a court of competent jurisdiction to restrain, correct, abate or

¹ §290.500, RSMo, *et seq.*

² Regulations state that “at least” the minimum wage must be paid.

³ §290.502, RSMo.

⁴ 29 U.S.C. §206(a)(1).

⁵ *State ex rel. Teefey v. Board of Zoning Adjustment of Kansas City*, 24 S.W.3d 681, 685 (Mo. 2000); *see also City of Kansas City v. Carlson*, 292 S.W.3d 368 (Mo.App. 2009).

remedy any violation of this article and, upon prevailing, shall be entitled to such legal or equitable relief as may be appropriate to remedy the violation including, without limitation, reinstatement, the payment of any wages due, an additional amount as liquidated damages equal to twice the amount of any wages due, injunctive relief, and reasonable attorney's fees and costs.

It has long been established that

a municipal ordinance cannot create a civil liability against a person violating it and in favor of persons injured by its violation, for this is a power which belongs alone to the sovereign power of the state. The only liability which attaches to the infraction of such an ordinance is the penalty it imposes.⁶

Because of the broad prohibition of §67.1571, RSMo, extending to “mandates” by local government, the City may not include in its contracts minimum wages.

I have also been asked if the City can establish a minimum wage on its own contracts. Ordinarily, the City may require terms and conditions in its contracts that do not violate any state prohibition. For example, we may choose to require insurance of a certain minimum on a project. There is no state prohibition. However, the statute prohibiting the establishment of a minimum wage is not limited to a police power regulation or even to an ordinance. Again, it states

No municipality as defined in section 1, paragraph 2, subsection (9) shall establish, mandate or otherwise require a minimum wage that exceeds the state minimum wage.

To “mandate” a minimum wage in a bid or request for proposals is inconsistent with the deceptively broad prohibition of the statute.

Under the current conditions, taking action may incite the General Assembly to do more damage to local control of municipal affairs.

An important consideration for you may also be legislation pending in the General Assembly. Senate Bill 455 and House Bill 865 prohibit the establishment of a minimum wage, and also prohibits requiring an employer to provide any level of employment benefits that exceed state or federal law. They also prohibit imposing a “ban the box” rule on private employers. Sponsors of the legislation, which is also part of the Missouri Chamber of Commerce & Industry legislative goals for 2015, have said their intent is to “make sure small business owners would not deal with confusing and complex regulations that vary across the state.”⁷ A sponsor, Rep. Caleb

⁶ *Moran v. Pullman Palace Car Co.* 36 S.W. 659, 661 (Mo. 1896), cited in and relied on, 62 C.J.S. *Municipal Corporations* §232 (2015).

⁷ Mark Slavitt, *New proposal would ban local minimum wage* (Feb. 9, 2015) <<http://www.connectmidmissouri.com/news/story.aspx?id=1161368#.VRoDstLF-So>>.

Rowden, also said “When you have regulations that vary so widely in some of these areas, you’re setting a trap for business owners.”⁸

The Senate sponsor, Sen. Mike Kehoe, has also said: “I believe in the local control, but I also believe in commerce,” and that he was concerned by the “several municipalities that have gone on their own” to preempt the state government.⁹

Despite Sen. Kehoe’s claim otherwise, the legislation expresses the philosophy that what is good for Portageville is good for Kansas City, and that all local regulation should come from Jefferson City. This is the predominate philosophy of the General Assembly despite the Missouri Constitution’s grant of power to local governments and recognition that local matters do, in fact, matter.¹⁰ To take an action that is, at least in my opinion, preempted by the state already, can only generate fuel for the fire of stripping local governments of their ability to address local issues.



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City Attorney

⁸ *Id.*

⁹ Eli Yokley , Missouri legislators working to rein in local minimum wage hikes, ‘ban the box’ ordinances (March 17, 2015) <<http://politicmo.com/2015/03/17/missouri-legislators-working-to-rein-in-local-minimum-wage-hikes-ban-the-box-ordinances/>>.

¹⁰ MO. CONST. art. vi §19(a).