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MICHIGAN CIVIL RIGHTS COMMISSION
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April 12, 2019

Honorable Dana Nessel
Attorney General of the State of Michigan
P.O. Box 30212
Lansing, MI 48909

RE: Request for Attorney General Opinion and Reconsideration of AG Opinion 7301

Dear Attorney General Nessel:

The Michigan Civil Rights Commission (Commission) met on Monday, March 25, 2019, to review a number of farmworker matters. This lookback included an Attorney General opinion regarding the scope of coverage of the Michigan Workforce Opportunity Wage Act (WOWA) as it relates to workers on farms utilizing less than 500 man-days of labor in any calendar quarter of the previous year (small farms) as defined by and exempted from the federal Fair Labor Standards Act [FLSA]. Following discussion, the Commission unanimously adopted a motion to request that you reconsider AG Opinion 7301.

In 2016, the Wage and Hour Division (WHD) of the Department of Licensing and Regulatory Affairs (LARA) reinterpreted who is covered by the state's minimum wage. The new position reversed decades of precedential interpretation that the state minimum wage law applied to employers who are not covered by the FLSA. On December 16, 2016, LARA requested the Attorney General to provide a "formal opinion regarding payment of wages to agricultural workers" and posed five specific questions to be considered in forming that opinion.

On December 19, 2017, the Office of the Attorney General issued AG Opinion 7301 which concluded (in part) that:

> Subsection 10(1)(b) of the Workforce Opportunity Wage Act, MCL 408.420(1)(b), excepts from its application, including its minimum hourly wage requirement, an employer whose employees are exempt from the federal minimum wage requirements of the Fair Labor Standards Act, 29 USC 201 et seq. This exception includes agriculture employees to the extent such employees are exempt from the federal minimum wage requirement under the Fair Labor Standards Act, 29 USC 213a(6).

The Commission is convinced that there are fatal flaws underlying the conclusion that Michigan employers who are exempt from the regulatory scope of the FLSA are, nonetheless, excused by that very law from paying their workers the state-mandated minimum hourly wage. Nor do we accept that the WOWA ever intended to leave "some employees without a right to a minimum hourly wage under the WOWA (or the FLSA)." [AG Opinion 7301, p. 9]

We believe that AG Opinion 7301 disregarded the plain language of the statute and the historical interpretations that have guided wage and hour decisions since enactment of the Michigan Minimum Wage Law (MMWL) of 1964. It also ignored the legislative history for the MMWL and the WOWA, including the comprehensive "savings clause" passed in 2006 as the MMWL subsection 14(5) and carried forward in 2014 as WOWA subsection 10(5). [Please note that a 2017 amendment to the WOWA caused subsection 10(5) to be renumbered as subsection 10(6).]

Michigan has long been committed to ensuring fair wages to all workers not covered by the FLSA. Specifically, the legislature enacted the MMWL as a "safety net" to ensure that workers not covered by the FLSA would be entitled to a minimum wage even though at that time the FLSA exempted agricultural and other workers from federal minimum wage coverage. In 1966 the FLSA was amended to extend federal minimum wage protection to workers on farms utilizing more than 500 man-days of labor in any calendar quarter of the previous year (large farms). While workers on small farms continued to be exempted from the FLSA, Michigan's minimum wage laws have continuously ensured that workers excluded from the FLSA would have minimum wage protection.

From 1964 until 2016, every legal authority as well as federal and state wage and hour agencies recognized that employees working on small farms were covered by Michigan's minimum wage laws. AG Opinion 7301 is an aberration that changed over fifty years of consistent interpretation relating to minimum wage protection conferred by both federal and state laws. In fact, AG Opinion 7301 upends Michigan's long history of ensuring minimum wage coverage for those employees not protected by the FLSA.

AG Opinion 7301's finding on page 9 that the WOWA "…subsection 10(1)(b) has the effect of leaving some employees without a right to a minimum hourly wage under the WOWA (or the FLSA)." misconstrues section 10. The WOWA subsection 10(1) came into play for the first time in 2006 when the state's minimum wage exceeded the federal minimum wage. The only employers covered by subsection 10(1) are those employers who are "subject to the minimum wage provisions" of the FLSA. In the agricultural context that means large farm employers.

Since small farm employers have never been covered by the FLSA they could NOT be subject to the provision of subsection 10(1). By extension, the AG could not rely on subsection 10(1)(b) to conclude that employees on small farms are exempt from the minimum wage provisions of the WOWA. It is our position that subsection 10(1)(b) can only apply to a certain class of employers, namely those employers who are brought under the WOWA by operation of subsection 10(1). In short, subsection 10(1)(b) is dependent on the applicability of subsection 10(1).

Further, to leave no doubt that employees not covered by the FLSA are afforded Michigan's minimum wage protection, the Commission holds that the "savings clause", enacted in 2006 as subsection 14(5) of the MMWL and carried forward in 2014 as the WOWA subsection 10(5), ensured that workers not covered by the FLSA could not be stripped of the minimum wage protection that has existed for them in Michigan since 1964.

Although AG Opinion 7301 recognized that "…the threshold question of the status of the employer under subsection 10(1)" should be the focus of its inquiry, it explicitly failed to answer this

question in its analysis. It is clear from its third question that LARA assumed that "an agricultural employer [who] utilizes less than 500 man-days per the exclusion in the FLSA…is not…subject to the minimum wage provisions of the FLSA." In other words, LARA accepted that "small farms" were -- and had previously been understood to be -- subject to the state minimum wage, since they were not covered by the minimum wage provisions of the FLSA.

Based on the foregoing, it is the Commission's position that the AG erred when he concluded that the WOWA subsection 10(1)(b) excepts from the state minimum hourly wage requirement an employer whose employees are exempt from the federal minimum wage of the FLSA. We request that the Office of the Attorney General clarify its position since it affects a number of agricultural workers (and other workers) in Michigan by responding to the following questions:

1. Is an employer that qualifies as a small farm (pursuant to the FLSA "500 man-day" standard) "subject to the minimum wage provisions of the FLSA" within the meaning of the WOWA, subsection 10(1)?

2. If the answer to the above questions is no, what "rights" are conferred to agricultural workers in the WOWA subsection 10(6)?

3. Are all agricultural workers covered by the WOWA - Michigan's minimum wage law?

4. If the answer to the above question is no, under what circumstances are agricultural workers covered and, conversely, not covered by (exempt from) the WOWA?

5. If an agricultural employer utilizes less than 500 man-days per the exclusion in the FLSA, or is not otherwise subject to the minimum wage provisions of the FLSA, are there any requirements that must be followed to compensate its agricultural employees?

Sincerely,

Alma Wheeler Smith
Chair

Stacie Clayton
Vice-Chair

Laura Reyes Kopack
Immediate Past Chair and Secretary