Summary & Recommendations on Farmworker Minimum Wage Issue

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November 22, 2016

On November 17, 2016, LARA's Wage-Hour Division announced that farmworkers who work on small farms (that do not meet the 500 "man day" standard of FLSA) are not subject to the minimum wage protection under Michigan law. It is MDCR's position that LARA's Wage-Hour Division's reversal of its long standing position that farmworkers are covered in Michigan by the minimum wage protection is incorrect.

Two key laws come into play, the Fair Labor Standards Act (FLSA) and the Workforce Opportunity Wage Act, P.A. 138 of 2014 (WOWA). It is MDCR's position that Act 138 in Sec. 10 specifically, the first sentence, does NOT apply to **employers** who are subject to the minimum wage provisions of FLSA. Conversely, those employers NOT covered by FLSA would be subject to WOWA. Who are employers subject to the minimum wage provisions of FLSA?

Fact Sheet #12 of WHD (U.S. Department of Labor related document) reads that "any **employer** in agriculture who did **not** utilize more than 500 "man days" of agricultural labor in any calendar quarter of the preceding calendar year is exempt from the minimum wage . . . . provisions of FLSA for the current calendar year. A "man day" is defined in any day during which an employee performs agricultural work for at least one hour." Accordingly, such an employer would **not** be covered by FLSA. However, any employer who utilized more than 500 "man days" of agricultural labor in any calendar quarter of the preceding calendar year would be subject to FLSA for the current year. Fact Sheet #12 appears to place the burden on the employer to establish that such an employer is exempt from coverage under FLSA. An employer under Act 138 is defined in Sec 2 (d) to mean "a person, firm, or corporation, ... who employs 2 or more employees at any time within a calendar year." Sec. 3 of Act 138 states "an employer shall not pay any employee at a rate that is less than prescribed in this act." If the 500 "man days" requirement is not met, then FLSA would not apply and conversely Act 138 would apply for the reasons outlined in this paragraph.

If an employer is subject to FLSA then the federal minimum wage provisions of FLSA applies unless such federal minimum wages are less than those establish under Act 138. In such case, the higher minimum wage provisions of Act 138 applies. However, the last sentence in Sec. 10 (1) provides certain additional exceptions to an employer outlined in Sec. 10 (1)(a) dealing with overtime and Sec. 10 (1)(b) dealing with employees being **exempt** from minimum wage requirements of FLSA even if the employer is subject to FLSA. Fact Sheet #12 of WHD lists four (4) "additional **exemptions** from the minimum wage . . . . provisions of the Act" even for employers meeting the 500 "man days" requirements. These include:

- Agricultural employees who are immediate family members of their employer
- Employees principally engaged in the production of livestock
- Local hand harvest laborers who commute daily from their permanent residence, are paid on a piece rate basis in traditionally piece-rated occupation, and were engaged in agriculture less than 13 weeks during the preceding calendar year
- Non-local minors, 16 years of age or under, who are hand harvesters, ... employed on the same farm as their parent and paid the same piece rate as those over 16

Sec. 10 (1)(b) aims to mirror the exemptions found in FLSA to extend to small farms covered by WOWA to exclude the same group of employees. Thus, farmworkers would be entitled to the minimum wage protection under Act 138 of WOWA except for the 4 exemptions identified.

In addition, there is a catch-all found under Sec. 10(5) of Act 138 which reinforces that the intent of the law is not to deny minimum wage to workers that existed on September 30, 2006, regardless of how LARA would like to interpret Sec. 10(1)(b). MDCR finds nothing nor heard anything at the November 17, 2016 meeting addressing this issue by LARA's Wage-Hour Division.

Finally, the new LARA interpretation is that WOWA as a whole does not apply to an agricultural worker. In other words, that farmworkers are not covered by the Act. However, WOWA Sec. 4a(4)(e) clearly and directly provides that the overtime rules do not apply to an agricultural worker.

This begs the question: Why create an exception to a rule when the rule does not apply?

The answer is that the rules of statutory interpretation do not allow it. The rules, as set forth by the Michigan Supreme Court require that to the extent that there is any vagueness in WOWA, such as Sec. 4a(4)(e) must have meaning. However, if farmworkers are not covered by the Act at all, an additional provision that says they are not covered by some parts of the Act is unnecessary surplusage that carries no meaning.

The ONLY way to give meaning to the exception saying part of the rules do not apply to farmworkers – is to first read the WOWA as a whole to include them.

The rules of statutory construction demand that this Court " 'give effect to every word, phrase, and clause and avoid an interpretation that would render any part of the statute surplusage or nugatory.' " People v. Cunningham, 496 Mich. 145, 154, 852 N.W.2d 118 (2014), quoting State Farm Fire & Cas. Co. v. Old Republic Ins. Co., 466 Mich. 142, 146, 644 N.W.2d 715 (2002).
Wyandotte Elec. Supply Co. v. Elec. Tech. Sys., Inc., 499 Mich. 127, 140, 881 N.W.2d 95, 101 (2016)

Every word of a statute should be read to give it meaning, and so the court must avoid interpretations that render words unnecessary or meaningless.
In re MCI Communications, 460 Mich 396,415 (1999)

In order to defend their new interpretation of WOWA, LARA would have to argue that the wording of the statute excluding farmworkers from minimum wage (and all other parts of the Act) is so clear that this "surplusage" should be ignored. The very fact that it took LARA's Wage - Hour 10 years to come up with the argument establishes that no such clarity exists.

In summary, for the reasons outlined previously, MDCR propose the following:

1. Delay/postpone adoption of LARA's Wage - Hour Division new position. There are enough questions raised that require further research and clarification.
2. Statutory interpretation as outlined by LARA's Wage – Hour Division is faulty for the reasons outlined above. Farmworkers are covered under WOWA even though not covered by FLSA except as to those farmworkers falling within the 4 exceptions found in Fact Sheet #12 of WHD.
3. An **equitable estoppel argument** can be made here. Both farmworkers and growers relied on Wage – Hour Division's interpretation for the past 10 years on the minimum wage provisions of Act 138. Wage – Hour Division is gaining an undue advantage and causing the farmworker to be subjected to economic injury due to Wage – Hour Division's shift from its prior position.
4. Lack of an **economic impact assessment** comparing the NEW Interpretation vs the existing interpretation. LARA's Wage – Hour Division failed to determine the potential financial impact that the NEW interpretation would have on both farm growers and farmworker. Although there appears to be approximately 860 plus farms in Michigan using migrant farmworkers the percentage subject to WOWA and FLSA was not disclosed by LARA. Understanding the cost to grower and farmworker as a result of the proposed change by LARA is a must for the benefit of the economy of the State of Michigan. No injury would result to either party, grower and farmworker, in delaying implementation of the new interpretation proposed by Wage-Hour Division pending completion of an economic impact assessment performed by LARA, Wage – Hour Division.