

January 18, 2016

RE: LEGALITY OF MUNICIPAL PAID SICK AND SAFETY LEAVE ORDINANCES  
IN ARIZONA

To whom it may concern,

It has been asked whether, despite Ariz. Rev. Stat. Section 23-204 which purports to prohibit “city, town or other political subdivision[s] of this state” from regulating “paid and unpaid leave,” municipalities may pass enforceable, sick and safety leave ordinances. They may.

As is discussed more fully below, on November 7, 2006, the citizens of Arizona enacted a minimum wage law that includes, “A county, city, or town may by ordinance regulate minimum wages and benefits within its geographic boundaries.” A.R.S. § 23-364(I). The subsequent legislation passed by the state failed to satisfy the requirements of the Voter Protection Act, and is therefore unenforceable. Indeed, Section 204’s unenforceability was recently recognized by Arizona Attorney General Mark Brnovich in settling a suit related to the conflict in Flagstaff.

### DETAILED ANALYSIS

Consider the following brief history of the back and forth between the Arizona Legislature and the citizens of Arizona.

In late 1996, Tucsonans commenced a signature drive for the “Tucson Livable Wage Initiative,” which would have raised the minimum wage for the City to \$7.00 per hour effective January 1, 1998. *See Winkle v. City of Tucson*, 949 P.2d 502, 503 (Ariz. 1997). In early 1997, pursuant to Laws 1997, Ch. 51, §1, the Arizona Legislature declared that “the establishment of a uniform minimum wage is a matter of statewide concern” and prohibiting any political subdivision of the state from “establish[ing], mandate[ing] or otherwise require[ing] a minimum wage that exceeds the federal wage prescribed in 29 United States Code § 206.” A.R.S. § 23-362. (Note, Justice Feldman’s decision in 1997 held that the city election would go forward despite the state law apparently contradicting the initiative. The initiative failed.)

In 1998, the voters took away the Legislature’s ability to undo citizen initiatives. Here is how the Arizona Supreme Court recently described it:

¶ 9 “The Voter Protection Act, added to the Arizona Constitution by voters in 1998, limits the legislature's authority” to modify voter initiatives and referenda. *Ariz. Early Childhood*, 221 Ariz. at 469 ¶ 6, 212 P.3d at 807. Before the VPA’s adoption, the legislature could repeal or modify a voter-approved law passed by less than a majority of all registered voters. *Id.* ¶ 7; *see Adams v. Bolin*, 74 Ariz. 269, 284–85, 247 P.2d 617, 627–28 (1952) (interpreting former Article 4, Section 1(6) of the Arizona Constitution). The VPA, however, imposes heightened constitutional restrictions. Now the legislature cannot repeal “an initiative [or referendum] measure approved by a majority of the votes cast thereon.” Ariz. Const. art. 4, pt. 1, § 1(6)(B). Nor may it amend or supersede a voter-approved law unless the proposed legislation “furtheres the purposes” of the initiative or referendum measure and is approved by a three-fourths vote in the House of Representatives and Senate. Ariz. Const. art. 4, pt. 1, § 1(6)(C), (14).

*Cave Creek Unified Sch. Dist. v. Ducey*, 308 P.3d 1152, 1155 (Ariz. 2013).

With the enhanced authority provided by the Voter Protection Act in place, the citizens passed Proposition 202 to add Ariz. Rev. Stat. Section 23-364 to state law. The final paragraph of the new section

**I.** The legislature may by statute raise the minimum wage established under this article, extend coverage, or increase penalties. 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. State agencies, counties, cities, towns and other political subdivisions of the state may consider violations of this article in determining whether employers may receive or renew public contracts, financial assistance or licenses. This article shall be liberally construed in favor of its purposes and shall not limit the authority of the legislature or any other body to adopt any law or policy that requires payment of higher or supplemental wages or benefits, or that extends such protections to employers or employees not covered by this article.

A.R.S. § 23-364. Although by no means dispositive, on the Legislature’s website, the page displaying Ariz. Rev. Stat. Section 23-364 includes the following under the title: (Caution: 1998 Prop. 105 applies). <http://www.azleg.gov/ArizonaRevisedStatutes.asp?Title=23> (follow “23-364” hyperlink). The VPA applies to this statute.

In 2013, the Legislature attempted to undo the impact of the citizens by adding Ariz. Rev. Stat. Section 23-204. Laws 2013, Ch. 139, §1. House Bill 2280 has only one section, the one adding A.R.S. § 23-204. The official legislative filing is attached to this memorandum. It does not contain a section indicating that it satisfies the requirements of Proposition 105. Furthermore, on March 4, 2013, the measure passed the House by only a 32 to 27 vote. On April 18, 2013, it passed the Senate by only a 17 to 11 vote. Thus, it fell far short of the required three-fourth's majority in both houses, and it certainly does not "further the purpose" of the act. A copy of the chaptered bill is attached to this memorandum and demonstrates that it did not meet these requirements.

That the Legislature added a new law plainly contradicting the citizens' initiative, rather than explicitly repealing the statute is not relevant. Again, as the current Supreme Court explained just two years ago, the Court will find implicit repeal or amendment "when conflicting statutes cannot be harmonized to give each effect and meaning." *Cave Creek*, 308 P.3d at 1158 (citing *UNUM Life Ins. Co. of Am. v. Craig*, 200 Ariz. 327, 333 ¶ 29, 26 P.3d 510, 516 (2001) (implied repeal); *Ariz. State Tax Comm'n v. Reiser*, 109 Ariz. 473, 479, 512 P.2d 16, 22 (1973) (implied amendment)).

Ariz. Rev. Stat. Ann. § 23-364	Ariz. Rev. Stat. Ann. § 23-204
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.	The regulation of employee benefits pursuant to this chapter and federal law is not subject to further regulation by a city, town or other political subdivision of this state.

Rarely has impossibility more plainly been demonstrated. X and Not X cannot both be true. The people's law prevails. Arizona municipalities are free to regulate wages and benefits so long as they are not less than those prescribed in Title 23, Chapter 2, Article 8. Also, attached to this memorandum is the settlement agreement entered into by Arizona's Attorney General, which includes in paragraph 6, "A.R.S. § 23-204, to the extent that it operates to prevent political subdivisions from regulating minimum wage, violates the Voter Protection Act." There is no reason to believe this logic would apply any less to benefits, which are also explicitly addressed in both statutes above.

Municipalities in Arizona are authorized to establish minimum wages and employee benefits that exceed the state levels.

# Exhibit 1

House Engrossed

**FILED**  
**KEN BENNETT**  
**SECRETARY OF STATE**

State of Arizona  
House of Representatives  
Fifty-first Legislature  
First Regular Session  
2013

CHAPTER 139

# **HOUSE BILL 2280**

AN ACT

AMENDING TITLE 23, CHAPTER 2, ARTICLE 1, ARIZONA REVISED STATUTES, BY ADDING SECTION 23-204; RELATING TO EMPLOYMENT PRACTICES AND WORKING CONDITIONS.

(TEXT OF BILL BEGINS ON NEXT PAGE)

1 Be it enacted by the Legislature of the State of Arizona:

2 Section 1. Title 23, chapter 2, article 1, Arizona Revised Statutes,  
3 is amended by adding section 23-204, to read:

4 23-204. Employee benefits; state preemption; exemption

5 A. THE REGULATION OF EMPLOYEE BENEFITS, INCLUDING COMPENSATION, PAID  
6 AND UNPAID LEAVE AND OTHER ABSENCES, MEAL BREAKS AND REST PERIODS, IS OF  
7 STATEWIDE CONCERN. THE REGULATION OF EMPLOYEE BENEFITS PURSUANT TO THIS  
8 CHAPTER AND FEDERAL LAW IS NOT SUBJECT TO FURTHER REGULATION BY A CITY, TOWN  
9 OR OTHER POLITICAL SUBDIVISION OF THIS STATE.

10 B. THIS SECTION DOES NOT APPLY TO ANY EMPLOYEE BENEFIT, INCLUDING  
11 COMPENSATION, PAID AND UNPAID LEAVE AND OTHER ABSENCES, MEAL BREAKS AND REST  
12 PERIODS PROVIDED BY A CITY, TOWN OR OTHER POLITICAL SUBDIVISION OF THIS STATE  
13 TO ANY OF ITS EMPLOYEES.

APPROVED BY THE GOVERNOR APRIL 29, 2013.

FILED IN THE OFFICE OF THE SECRETARY OF STATE APRIL 30, 2013.

Passed the House March 4, 2013

Passed the Senate April 18, 2013

by the following vote: 32 Ayes,

by the following vote: 17 Ayes,

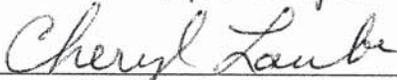
27 Nays, 1 Not Voting

11 Nays, 2 Not Voting

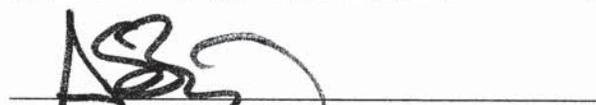


Speaker of the House

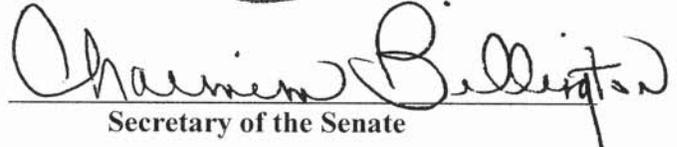
*Pro Tempore*



Chief Clerk of the House



President of the Senate



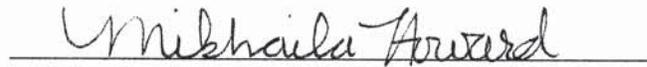
Secretary of the Senate

EXECUTIVE DEPARTMENT OF ARIZONA  
OFFICE OF GOVERNOR

This Bill received by the Governor this

25 day of April, 2013

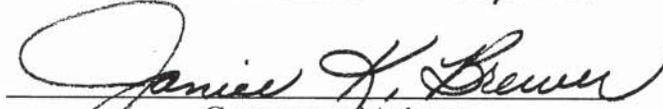
at 3:30 o'clock P M.

  
Secretary to the Governor

Approved this 29<sup>th</sup> day of

April

at 4:30 o'clock P M.

  
Governor of Arizona

EXECUTIVE DEPARTMENT OF ARIZONA  
OFFICE OF SECRETARY OF STATE

This Bill received by the Secretary of State

this 30<sup>th</sup> day of April, 2013

at 9:35 o'clock a M.

  
Secretary of State

# Exhibit 2

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AZ Bar No. 027828  
Counsel for Defendants

**SUPERIOR COURT OF THE STATE OF ARIZONA**  
**COUNTY OF MARICOPA**

THE FLAGSTAFF LIVING WAGE  
COALITION, an unincorporated  
association; STEVEN LEVIN, a single  
person; and, NICOLE MARIE RUIZ, a  
single person,

Plaintiffs,

v.

STATE OF ARIZONA, a body politic;  
MARK BRNOVICH, Attorney General of  
the State of Arizona, in his official  
capacity,

Defendants.

No. CV2015-004240

**FINAL STIPULATED JUDGMENT**

The Court, pursuant to Rule 54, Arizona Rules of Civil Procedure, and A.R.S.

§ 12-1831, having considered the parties' agreement to this Final Stipulated Judgment as evidenced by their respective counsels' signatures below, the Court declares as follows:

1. Plaintiffs in this matter seek to establish a higher local minimum wage in Flagstaff.

2. The Arizona legislature passed A.R.S. § 23-362 in 1997, declaring the regulation of minimum wage to be a matter of statewide concern and barring regulation of minimum wage by political subdivisions.

3. Proposition 202 (2006), entitled the "Raise the Arizona Minimum Wage For Working Arizonan's Act," adopted by the voters of Arizona, and codified in relevant part at A.R.S. section 23-361(I), allows counties, cities and towns in Arizona the right to establish local minimum wages that exceed the state mandated minimum wage. A.R.S. § 23-361(I), as part of a voter-passed initiative, is protected by the Voter Protection Act (1998), Ariz. Const., art. 4, pt. 1, Section 1 (6)(C) and (14).

4. The legislature later passed A.R.S. § 23-204, which prohibits the regulation of employee compensation by cities, towns, and other political subdivisions.

5. A.R.S. § 23-362, passed in 1997, has been impliedly repealed by Proposition 202.

6. A.R.S. § 23-204, to the extent that it operates to prevent political subdivisions from regulating minimum wage, violates the Voter Protection Act.

7. As plaintiffs brought this lawsuit only in order to seek to establish a higher local minimum wage and this lawsuit may be resolved on those grounds, the Court makes no findings regarding any other provision of A.R.S. § 23-204.

8. The State of Arizona will pay \$7,500 in attorney's fees and costs. This resolves all claims to attorney's fees and costs in this matter.

9. Pursuant to Rule 54(c), Arizona Rules of Civil Procedure this is a final judgment disposing of all matters in this action.

DATED: \_\_\_\_\_

\_\_\_\_\_  
Honorable Roger Brodman  
MARICOPA COUNTY SUPERIOR COURT

The undersigned agree to the form and content of this Final Stipulated Judgment.

MIKKEL (MIK) JORDAHL, P.C.

DATED: June 29, 2015. By

/s/ Mikkel Jordahl – State Bar No. 012211  
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Attorneys for Plaintiffs

AIKEN SCHENK HAWKINS & RICCIARDI P.C.

DATED: June 29, 2015. By

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Attorneys for Plaintiffs

MARK BRNOVICH  
Attorney General of the State of Arizona

DATED: June 29, 2015. By

/s/ James Driscoll-MacEachron – State Bar No. 027828  
James Driscoll-MacEachron  
Assistant Attorney General  
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Phoenix, Arizona 85007-2997  
Attorneys for Defendants

COPY of the foregoing e-filed and lodged with the Clerk of the Court and electronically transmitted this 29th day of June, 2015, to:

Clerk of the Court  
Maricopa County Superior Court  
201 West Jefferson Street  
Phoenix, Arizona 85003-2243

COPY of the foregoing mailed (and electronically transmitted if marked \*) this date to:

Rep. David M. Gowan, Sr.  
Office of the Speaker  
Arizona House of Representatives  
1700 W. Washington Street, Suite H  
Phoenix, AZ 85007-2844

Sen. Andy Biggs  
Office of the President  
Arizona State Senate  
1700 W. Washington Street, Suite H  
Phoenix, AZ 85007-2844

/s/ Maureen Riordan

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