

CITY OF MILWAUKEE

Form CA-43

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Common Council
200 East Wells, Room 205

Re: Common Council File Number 041311, Minimum Wage Ordinance

Dear Council Members:

We have been asked to review Common Council File 041311, "A substitute ordinance relating to minimum wage requirements for employers located in the city" for legality and enforceability.

If enacted, the primary argument a challenger to the ordinance would raise is that by enacting a minimum wage that is applicable statewide, the state has preempted the City from setting a higher minimum wage. In general, a court will conclude that the state legislature intended to withdraw the power of a municipality to act if it finds any of these four circumstances are present: "(1)...the legislature has expressly withdrawn the power of municipalities to act; (2)...the ordinance logically conflicts with the state legislation; (3)...the ordinance defeats the purpose of the state legislation; or (4)...the ordinance goes against the spirit of the state legislation." *Anchor Savings & Loan Association v. Equal Opportunities Commission*, 120 Wis. 2d 391, 397 (1984).

While we can safely conclude that the legislature has not expressly withdrawn the power of the City to enact a minimum wage ordinance, a court may conclude that any of the other three circumstances are present in this case. In other words, a court could conclude that the ordinance would prohibit what state law specifically allows, (i.e., payment of a minimum wage of \$5.15 per hour), and that sanctioning such an ordinance would lead to a hodgepodge of minimum wage classifications, contrary to the spirit of the legislation enacting a statewide rate.

Conversely, it may be argued that the purpose of the state law is simply to assure that employers pay *not less than* the statewide minimum wage of \$5.15 per hour. In other

words, a court could conclude that the City's minimum wage may go further than state law, but does not logically conflict with, defeat the purpose of, or go against the spirit of, state law, because compliance with the City's ordinance will also constitute compliance with state law.

As you are aware, Madison enacted a similar ordinance in 2004, raising the minimum wage above that provided for in state law as of January 1, 2005. An association of business owners have filed suit in Dane County Circuit Court challenging the legality of this ordinance, primarily based on the preemption argument described above. Judge Maryann Sumi denied the business owners' motion for a temporary injunction against enforcement of the ordinance, finding in part that the business owners did not have a reasonable likelihood of prevailing on the merits of their claim. As of this writing, a motion hearing on the merits of their claim is scheduled for March 30, 2005, and a decision will presumably follow shortly thereafter. It should be noted that any outcome in the Dane County case would not be binding on circuit courts in Milwaukee County, and that the decision may well be appealed.

Thus, while we can say that a legal challenge to a minimum wage ordinance of this type is highly likely, we cannot predict with certainty the likely outcome of such a challenge. We can recommend that if you decide to enact such an ordinance, that you create a record that will support your determinations regarding the conditions which led you to do so. The record should also reflect the rationale for the selected wage rates, as well as the anticipated impact of the increase.

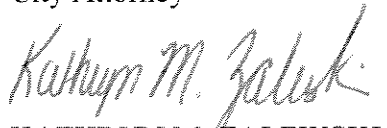
Finally, at the Finance and Personnel Committee Hearing on February 17, a question was posed regarding potential liability should the City enact the minimum wage ordinance. In a legal challenge to the ordinance, the plaintiff will most likely seek a declaration that the ordinance is unenforceable, (as did the plaintiff in the Dane County case), rather than damages. Any state law claim for damages against the City or City officials would almost surely be barred by § 893.80(4), Stats. Furthermore, we could locate no analogous cases where a plaintiff sought damages alleging a violation of federal law.

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Very truly yours,



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