



From the Reno Office

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VIA EMAIL (Randy.Kirner@asm.state.nv.us)

Assemblyman Randy Kirner
Assembly Commerce and Labor Chair
401 South Carson Street
Room 4108
Carson City, NV 89701-4747

Re: *Senate Bill 193*

Dear Assemblyman Kirner:

I am a Vice Chair of the Nevada Restaurant Association (NvRA) and a practicing attorney in Nevada focused primarily on Employment Law. I am also a registered lobbyist for the NvRA. On behalf of the NvRA, I write to express support and gratitude for your recent efforts to improve the legal landscape for Nevada businesses by addressing the crucial issues of daily overtime pay in Senate Bill 193.

By eliminating daily overtime pay requirements, SB 193 will bring Nevada law in line with the majority of other states, and will make Nevada a more attractive place to do business. Without the obligation to pay daily overtime, employers will be able to reallocate funds from paying overtime wages to hiring additional workers, thus creating more jobs. Employers of tipped workers will also be more willing and able to allow their employees to work longer shifts which will permit those employees to take home significantly more tip income than they currently stand to earn with the daily overtime requirement in effect.

In addition, Nevada currently follows a "rolling 24-hour" workday for calculating daily overtime. This standard is difficult to administer and often creates unintended overtime liability because it does not conform to a calendar day. Elimination of daily overtime makes this definition of workday for overtime purposes irrelevant. SB 193 will bring much-needed clarity and greater efficiency to a point of law that has long been a source of confusion and headaches for employers and employees alike. Overall, SB 193 is an excellent initiative.

However, I would also like to bring to your attention my serious concern with that portion of SB 193 which aims to raise the state minimum wage, in some situations, to \$9.00 per hour. While NvRA neither supports nor opposes an increase in the minimum wage to \$9.00 per hour, I do not

believe that the Legislature may raise the state minimum wage rate by statute without violating the Nevada Constitution.

I. The Nevada Constitution Does Not Permit Statutory Minimum Wage Increases

The Nevada minimum wage is set forth in the Nevada Constitution. That Constitutional scheme provides for, among other things, two scenarios whereby the state minimum wage may be increased: 1) where the federal minimum wage is increased, or 2) due to an increase in the Consumer Price Index.¹ Moreover, the latter scenario is subject to 3 percent cap on any annual increase. Since the Constitution addresses how and when the state minimum wage may be raised, any other method of increase would be constitutionally impermissible.

This conclusion is apparent based upon the Nevada Supreme Court's discussion in *Thomas v. Nevada Yellow Cab Corp.*, 327 P.3d 518 (2014), decided last year. In that case, the Court held that the Legislature cannot change the Nevada constitutional scheme regarding minimum wage exceptions by mere legislation. As the Nevada Supreme Court wrote in *Yellow Cab*: "If the Legislature could change the Constitution by ordinary enactment, no longer would the Constitution be superior paramount law, unchangeable by ordinary means. It would be on a level with ordinary legislative acts, and, like other acts . . . alterable when the legislature shall please to alter it." Further, the Court followed the principle of *expressio unius est exclusio alterius*—the expression of one thing is the exclusion of another. That is, anything addressed by the Constitution on minimum wage cannot be changed by statute. Here, since the Constitution dictates how the minimum wage may be increased, the Court would therefore strike down any increase that does not follow the mechanism set forth in the Constitution. The voters of Nevada amended the Constitution to specify, among other things, how and when the state minimum wage would be increased. New legislation enacting mere statutes to increase minimum wage is not a method set forth in the Constitution.

II. Attempting to Improperly Raise the Minimum Wage by Statute Politicizes Minimum Wage Increases

Raising the minimum wage by statute may have unintended and unwanted political effects. One advantage of the constitutional minimum wage provision is that it depoliticizes the minimum wage and protects it from legislative political whims. Therefore, I strongly recommend that SB

¹ The Constitution reads, in relevant part: "Each employer shall pay a wage to each employee of not less than the hourly rates set forth in this section. The rate shall be five dollars and fifteen cents (\$5.15) per hour worked, if the employer provides health benefits as described herein, or six dollars and fifteen cents (\$6.15) per hour if the employer does not provide such benefits *These rates of wages shall be adjusted by the amount of increases in the federal minimum wage over \$5.15 per hour, or, if greater, by the cumulative increase in the cost of living. The cost of living increase shall be measured by the percentage increase as of December 31 in any year over the level as of December 31, 2004 of the Consumer Price Index (All Urban Consumers, U.S. City Average) as published by the Bureau of Labor Statistics, U.S. Department of Labor or the successor index or federal agency. No CPI adjustment for any one-year period may be greater than 3%.*" (Nev. Const. art. XV, § 16(A)) (emphasis added).

193 be passed *without* the minimum wage increase. If it is the will of the Legislature to raise the minimum wage, then separate legislation should be introduced to begin the process of amending the Nevada Constitution to increase the state minimum wage to \$9.00 per hour (or some other amount). This will require the approval of two successive legislative sessions, then a vote of the people of Nevada.

Thank you for your time and consideration of this important matter.

Sincerely,



S. Brett Sutton
SUTTON HAGUE LAW CORPORATION

cc Katherine Jacobi, NvRA