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STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

February 5, 2016

Senator Michael Dembrow
900 Court Street NE S407
Salem OR 97301

Re: Statewide increase in minimum wage as unfunded mandate

Dear Senator Dembrow:

You asked whether the "unfunded mandate" provisions of Article XI, section 15, of the Oregon Constitution,[1] would apply to an Act of the Legislative Assembly increasing the minimum wage in this state. Although the issue is not free from doubt, we believe that an Oregon court would conclude that the text of Article XI, section 15, does not apply to a bill that increases the state minimum wage.

In addition, we have not had the time necessary to thoroughly research the issue or analyze this complicated constitutional issue. We therefore advise a certain amount of caution in relying on any aspect of this opinion. Our conclusions are based on our best efforts during the short time available.

Article XI, section 15.

In relevant part, Article XI, section 15 (1), provides that if "the Legislative Assembly or any state agency requires any local government to establish a new program or provide an increased level of service for an existing program, the State of Oregon shall appropriate and allocate to the local government moneys sufficient to pay the ongoing, usual and reasonable costs of performing the mandated service or activity." Subsection (2)(c) defines "program" to mean "a program or project imposed by enactment of the Legislative Assembly or by rule or order of a state agency under which a local government must provide administrative, financial, social, health or other specified services to persons, government agencies or to the public generally."

Subsection (11) provides, "In lieu of appropriating and allocating funds under this section, the Legislative Assembly may identify and direct the imposition of a fee or charge to be used by a local government to recover the actual cost of the program." Under subsection (3), the local government is not required to comply with the law, rule or order if the state does not provide sufficient moneys to the local government or, presumably, although it is not so stated, does not identify and direct the imposition of a fee or charge.

Under subsection (7), section 15 does not apply to:

[1] Article XI, section 15, was referred to the people by House Joint Resolution 2 (1995), and approved by voters as Ballot Measure 30 on November 5, 1996.

> (a) Any law that is approved by three-fifths of the membership of each house of the Legislative Assembly.
>
> (b) Any costs resulting from a law creating or changing the definition of a crime or a law establishing sentences for conviction of a crime.
>
> (c) An existing program as enacted by legislation prior to January 1, 1997, except for legislation withdrawing state funds for programs required prior to January 1, 1997, unless the program is made optional.
>
> (d) A new program or an increased level of program services established pursuant to action of the Federal Government so long as the program or increased level of program services imposes costs on local governments that are no greater than the usual and reasonable costs to local governments resulting from compliance with the minimum program standards required under federal law or regulations.
>
> (e) Any requirement imposed by the judicial branch of government.
>
> (f) Legislation enacted or approved by electors in this state under the initiative and referendum powers reserved to the people under section 1, Article IV of this Constitution.
>
> (g) Programs that are intended to inform citizens about the activities of local governments.

Subsection (8) provides, "When a local government is not required under subsection (3) of this section to comply with a state law or administrative rule or order relating to an enterprise activity, if a nongovernment entity competes with the local government by selling products or services that are similar to the products and services sold under the enterprise activity, the nongovernment entity is not required to comply with the state law or administrative rule or order relating to that enterprise activity."

Subsection (2)(a) defines "enterprise activity" to mean "a program under which a local government sells products or services in competition with a nongovernment entity."

<u>Interpretive method.</u>

The Oregon Supreme Court has recently stated the method to be used in interpreting constitutional amendments:

> We focus first on the text and context of a constitutional amendment for an obvious reason: "The best evidence of the voters' intent is the text and context of the provision itself[.]" . . . . Context for a referred constitutional amendment includes the historical context against which the text was enacted—including preexisting constitutional provisions, case law, and statutory framework. . . . However, "caution must be used before ending the analysis at the first level, *viz.*, without considering the history of the constitutional provision at issue." *Stranahan v. Fred Meyer, Inc.*, 331 Ore 38, 57, 11 P3d 228 (2000); *see State v. Algeo*, 354 Ore 236, 246, 311 P3d 865 (2013) ("We focus first on the text and

> context . . . but also may consider the measure's history, should it appear useful to our analysis."). The history of a referred constitutional provision includes "sources of information that were available to the voters at the time the measure was adopted and that disclose the public's understanding of the measure," such as the ballot title, arguments included in the voters' pamphlet, and contemporaneous news reports and editorials. . . . Although legislative history can be helpful, we are cautious in relying on statements of advocates, such as those found in the voters' pamphlet, because of the partisan character of such material.

State v. Sagdal, 356 Or. 639, 642-643 (2015) (citations omitted).

Analysis.

A. Text

For purposes of this opinion, Article XI, section 15, applies if the Legislative Assembly requires any local government to establish a new program or provide an increased level of service for an existing program. A "program" is a program or project imposed by enactment of the Legislative Assembly under which a local government must provide administrative, financial, social, health or other specified services to persons, government agencies or the public generally.

Because the proposed legislation would increase the existing minimum wage rates, we believe the bill does not require establishment of a *new* program. Moreover, the bill requires an increased level of service for an existing program only if the local government's payment of wages to employees is a "program." We believe that the plain meaning of the text does not support this reading.

The only way in which paying an increased minimum wage to employees would be a program within the meaning of Article XI, section 15, would be if it the local government is thereby providing financial services to persons. When paying wages to employees, however, a local government acts as an employer. An employer does not provide financial services to employees by paying them. Rather, the employees perform services for the employer, which in turn executes its obligations under the employment contract by rendering consideration for the services. Under the proposed bill, the amount of consideration a local government must pay to minimum wage employees would be increased, but that is not the same as an increased level of *service*.

By contrast, the Attorney General, in a 1999 opinion, read the terms "program" and "service" as used in Article XI, section 15, broadly, and, reinforced by legislative history of the joint resolution that referred the constitutional amendment to the people, opined that section 15 was intended to apply to state-mandated personnel services. 49 Op. Att'y Gen. 152, 155. Consequently, according to the Attorney General, a proposed 1999 bill to increase the retirement allowances of all PERS retirees was a legislatively imposed requirement that local governments provide increased financial services to persons within the meaning of section 15. *Id.*

The Attorney General further reached the conclusion that "[t]he apparent purpose of Article XI, section 15, is to limit the state's ability to unilaterally increase a local government's

financial obligations." *Id.* at 157. If so, the text certainly is an oblique way of accomplishing this broad purpose. Compare, for instance, the "unfunded mandate" provision of the Florida Constitution adopted in 1990, six years before Ballot Measure 30:

> (a) No county or municipality shall be bound by any general law *requiring such county or municipality to spend funds or to take an action requiring the expenditure of funds* unless the legislature has determined that such law fulfills an important state interest and unless: funds have been appropriated that have been estimated at the time of enactment to be sufficient to fund such expenditure; the legislature authorizes or has authorized a county or municipality to enact a funding source not available for such county or municipality on February 1, 1989, that can be used to generate the amount of funds estimated to be sufficient to fund such expenditure by a simple majority vote of the governing body of such county or municipality; the law requiring such expenditure is approved by two-thirds of the membership in each house of the legislature; the expenditure is required to comply with a law that applies to all persons similarly situated, including the state and local governments; or the law is either required to comply with a federal requirement or required for eligibility for a federal entitlement, which federal requirement specifically contemplates actions by counties or municipalities for compliance.

Article VII, section 18, Florida Constitution.

Unlike the text, or context, of Article XI, section 15, the language of Article VII, section 18, of the Florida Constitution, unambiguously "limit[s] the state's ability to unilaterally increase a local government's financial obligations." The Attorney General's conclusion would draw no distinction between Florida's clear constitutional language and section 15.

Moreover, in reaching the conclusion that Article XI, section 15, would apply to state-mandated personnel services, the Attorney General relied heavily on oral and written testimony for House Joint Resolution 2 (1995). In fact, this is the only evidence that clearly supports the opinion. Unfortunately, the Oregon Supreme Court has since held that the legislative history of a joint resolution is not relevant to an interpretation of the constitutional amendment that was referred to the people by the resolution:

> Contrary to amici's suggestion, however, the history that we consider does not include early drafts of the legislative bill that later was referred to the people, nor does it include statements made by legislators in hearings on that matter. Those materials may be indicative of the legislature's intent in crafting Measure 50 but, as we stated most recently in *Stranahan*, 331 Or. at 57, "it is the ***people's*** understanding and intended meaning of the provision in question—as to which the text and context are the most important clue—that is critical to our analysis." . . . It follows that only those materials that were presented to the public at large help to elucidate the public's understanding of the measure and assist in our interpretation of the disputed provision. *Id.* at 64-65.

Shilo Inn Portland/205 v. Multnomah County, 333 Or. 101, 129-130 (2001) (emphasis in original). *See also* Johansen, Freeman & Seal, "Interpreting the Oregon Constitution," in *Interpreting Oregon Law* (2009) at 7-27. Thus, we believe that a court would place no reliance on the Attorney General's use of legislative history in reaching the conclusion that Article XI, section 15, was meant to apply to state-mandated personnel services, such as increases in PERS benefits. And without that legislative history, we believe the Attorney's General reading of the constitutional provision is so broad and literal as to defy the plain meaning of the text.

Finally, you also asked whether the fact that the minimum wage has been increased numerous times over the years would support the conclusion that another increase does not require a local government to establish a new program or provide an increased level of service for an existing program. If the payment of employees by a local government were a program at all, then an increase in the minimum wage could be an increased level of service, though probably not a new program. We believe, however, that the payment of employees by a local government is not a program under the plain meaning of the constitutional text. Inveteracy does not add anything to the analysis.

B. Context

Contextual material for Article XI, section 15, is thin and ambiguous. There were no other relevant sections in the Oregon Constitution at the time Article XI, section 15, was adopted and no other ballot measures related to unfunded mandates in the 1996 general election. There was, however, Ballot Measure 36, which increased the state minimum wage from $4.75 per hour to $6.50 per hour over a three-year period. *Oregon Blue Book*, published by the Secretary of State, Ballot Measure 30 was adopted with 731,127 "yes" votes (or 56.4 percent of the total cast on the measure) while Ballot Measure 36 was adopted with 769,725 "yes" votes (or 56.8 percent of the total). *1997-98 Oregon Blue Book*, at 369.

This could suggest that the voters who adopted the unfunded mandate provision were perfectly comfortable with the state's imposing a higher minimum wage rate that applied to local governments. Note, however, that Article XI, section 15 (7)(f) provides that section 15 does not apply to "[l]egislation enacted or approved by electors in this state under the initiative and referendum powers reserved to the people under section 1, Article IV of this Constitution." Thus, the approval of Ballot Measure 36 could also support the conclusion that the voters disfavored only *legislative* increases in the minimum wage.

C. History

As stated above, the history of a referred constitutional provision includes "sources of information that were available to the voters at the time the measure was adopted and that disclose the public's understanding of the measure," such as the ballot title, arguments included in the voters' pamphlet, and contemporaneous news reports and editorials. *State v. Sagdal*, 356 Or. at 642-643.

HJR 2 (1995) and Ballot Measure 30 were part of a movement that led to Congressional enactment of the Unfunded Mandates Reform Act of 1995, P.L. 104-4 (UMRA). It is beyond question that during this period increases in the federal minimum wage were widely considered unfunded mandates.

In 1993, for instance, the United States Conference of Mayors "published the first national study of the impact of unfunded federal mandates on U.S. cities. . . . It is widely

acknowledged that the results of that survey . . . were instrumental in helping secure the enactment of the [UMRA]. . . .” The United States Conference of Mayors, “Impact of Unfunded Federal Mandates and Cost Shifts on U.S. Cities: A Preliminary Report in 59 Cities,” June 2005, at 1. The 1993 study, “Impact of Unfunded Federal Mandates on U.S. Cities: A 314-City Survey” (October 26, 1993), included data from three Oregon cities: Gresham, Lake Oswego and Springfield. The survey collected cost data on 10 unfunded federal mandates, including the Fair Labor Standards Act, which the study noted “establishes and sets the minimum wage and specifies a range of labor practices, including overtime compensation, for both the public and private sectors.”

UMRA “requires the separate, recorded approval of a majority of both houses of Congress for any provision in a bill that imposes costs of more than $50 million on state and local governments. “Recent Legislation: Federalism—Congress requires a separate recorded vote for any provision establishing an unfunded mandate,” 109 Harvard Law Review 1469, 1470 (April 1996). This point of order procedure under UMRA was sustained against a bill containing a minimum wage provision on March 28, 1996. Elizabeth Garrett, “States in a Federal System: Enhancing the Political Safeguards of Federalism? The Unfunded Mandates Reform Act of 1995,” 45 Kansas Law Review 1113, 1145 (July 1997).

There certainly were opinions stated in the Salem *Statesman Journal* that treat Ballot Measure 30 as a companion to the UMRA. See, for instance, Randy Franke, “State should pay for mandates,” April 4, 1995, at 7A (“Although relief from federal access to our local checkbooks is now in place, the Oregon Legislature continues to micro-manage our budgets from the Capitol. . . . HJR 2 . . . would change the state’s constitution and require allocation of state money to local governments to cover the expenses of future state mandates.”); John Henrikson, “Rethink unfunded mandates, officials say,” February 3, 1995, at 3A (“Local officials say the unfunded mandates bill being considered in Congress and a similar state constitutional amendment the Legislature may pass on to Oregon voters, are good first steps.”).

All that said, there are a few difficulties with relying on this history. The first is whether it is the kind of history that the Oregon Supreme Court will consider when interpreting a constitutional amendment. The question is, how likely is it that voters were aware of the policy details of the national unfunded mandates movement?

Second, given how central minimum wage increases were to the discussion of the UMRA, it is remarkable that the material in the 1996 general election Voters’ Pamphlet makes no mention of minimum wage laws. The examples of unfunded mandates cited in the arguments in favor and opposition in the pamphlet include laws requiring expansion of county jail space (p. 25); appropriate public safety and quality education (p. 26); elections to be conducted at polling places, land use planning, county assessment of property for taxation, free access by utilities to county rights-of-way (p. 27); and education for handicapped children, local enforcement of building and fire codes, and county provision of flu shots for senior citizens (p. 28).

Similarly, in 1995, when the Legislative Assembly was considering HJR 2, coverage in the Salem *Statesman Journal* did not cite minimum wage laws as an example of an unfunded mandate, at either the federal or state level. The examples cited included laws requiring the installation of Braille lettering inside firehouses, testing drinking water for contaminants, protection of the environment, giving disabled people access to public buildings, cleaning up air pollution, increasing standards on municipal water quality and waste discharge, elevators and ramps in public buildings, public housing standards, land-use procedures, county property tax assessment programs, background checks for handgun purchases (Erin Kelly, “Many cheer

anti-mandate movement," February 3, 1995, at 1A); federal stormwater disposal permits, and local five-year plans for Section 8 public housing clients to transition off public assistance (John Henrikson, "Rethink unfunded mandates, officials say," February 3, 1995, at 7A).

The Oregon Supreme Court has cited the Voters' Pamphlet and local news coverage and editorials as examples of relevant history for interpreting a constitutional amendment. That material does not support the conclusion that the voters would have intended Article XI, section 15, to apply to laws increasing the state minimum wage. It is much less clear that the court would place similar reliance on material suggesting that minimum wage increases were considered a core form of unfunded mandate in the national movement, even though that movement may have led to the enactment of HJR 2 (1995) and the adoption of Ballot Measure 30.

D. Conclusion

Although the issue is not free from doubt, we believe that an Oregon court would conclude that the text of Article XI, section 15, does not apply to a bill that increases the state minimum wage. Thus, local governments would have to comply with the minimum wages established by the bill without receiving appropriations or the authority to impose a fee or charge from the Legislative Assembly.

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Very truly yours,

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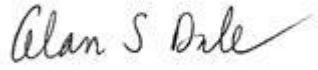

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