STATE OF MICHIGAN

BILL SCHUETTE, ATTORNEY GENERAL

WORKFORCE OPPORTUNITY WAGE ACT:	Application of minimum wage laws to agricultural employees.
PAYMENT OF WAGES AND FRINGE BENEFITS ACT:	

Subsection 10(1)(b) of the Workforce Opportunity Wage Act, MCL 408.420(1)(b), excepts from its application, including its minimum hourly wage requirement, an employer whose employees are exempt from the federal minimum wage requirements of the Fair Labor Standards Act, 29 USC 201 *et seq*. This exception includes agriculture employees to the extent such employees are exempt from the federal minimum wage requirement under the Fair Labor Standards Act, 29 USC 213a(6).

The Payment of Wages and Fringe Benefits Act, MCL 408.471 *et seq*., may apply to provide wage protections to an employee, including an agriculture employee, who is excepted from the Workforce Opportunity Wage Act's minimum hourly wage requirements under subsection 10(1)(b), MCL 408.420(1)(b).

Opinion No. 7301 December 19, 2017

Shelly Edgerton, Director
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The Honorable Andy Schor
State Representative
The Capitol
Lansing, Michigan 48909

You have asked a series of questions regarding the application of Michigan's minimum wage law, the Workforce Opportunity Wage Act (WOWA), 2014 PA 138, MCL 408.411 *et seq*., to agricultural employees.

You first ask if all agriculture employees are covered by the WOWA.

The goal of statutory interpretation is to give effect to the intent of the Legislature. *Whitman v City of Burton,* 493 Mich. 303, 311–312 (2013); *Autodie LLC v Grand Rapids*, 305 Mich App 423, 428 (2014). If the language of the statute is unambiguous, it must be enforced as written. *Id.* Statutory provisions must be read "reasonably and in context," and subsections of statutory provisions should be read in a cohesive manner. *Autodie*, 305 Mich App at 428 (citations omitted).

The WOWA establishes Michigan's minimum hourly wage and overtime requirements, MCL 408.414 and MCL 408.414a, respectively. It was enacted May 27, 2014, repealing the Minimum Wage Act of 1964, MCL 408.381 *et seq*.[1] The WOWA provides that "an employer shall not pay any employee a rate that is less than prescribed" in the Act. MCL 408.413. Under the WOWA, an "employer" is defined in part as "[a] person, firm, or corporation . . . who employs 2 or more employees at any 1 time within a calendar year." MCL 408.412(d). And an "employee" is defined in part as "[a]n individual not less than 16 years of age employed by an employer on the premises of the employer or at a fixed site designated by the employer . . . ." MCL 408.412(c).

The WOWA does not specifically define the term agriculture employer or agriculture employee. Rather, the terms "employer" and "employee" as defined

[1] The Michigan Department of Licensing and Regulatory Affairs, Wage and Hour Division, is the state agency charged with administration of this Act. MCL 408.418.

generally apply to include agriculture employers in Michigan who employ two or more employees age 16 and older.

Relevant to your question, section 10 of the WOWA exempts certain employers and employees from application of the act:

> (1) *This act does not apply to an employer that is subject to the minimum wage provisions of the fair labor standards act of 1938, 29 USC 201 to 219, unless those federal minimum wage provisions would result in a lower minimum hourly wage than provided in this act. Each of the following exceptions applies to an employer who is subject to this act only by application of this subsection*:
>
> > (a) Section 4a [overtime provision] does not apply.
> >
> > (b) *This act does not apply to an employee who is exempt from the minimum wage requirements of the fair labor standards act of 1938, 29 USC 201 to 219.*
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> * * *
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> (3) This act does not apply to persons employed in summer camps for not more than 4 months or to employees who are covered under section 14 of the fair labor standards act of 1938, 29 USC 214.
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> (4) This act does not apply to agricultural fruit growers, pickle growers and tomato growers, or other agricultural employers who traditionally contract for harvesting on a piecework basis, as to those employees used for harvesting, until the board has acquired sufficient data to determine an adequate basis to establish a scale of piecework and determines a scale equivalent to the prevailing minimum wage for that employment. . . . [MCL 408.420(1), (3)–(4) (emphasis added).]

Although subsection 10(4) conditionally exempts certain agricultural employers from the Act, your questions involve the interpretation and application of the broader exemption set forth in subsection 10(1).[2]

[2] In addition, section 4a excepts some agricultural employees from the overtime requirements:

> (4) Subsections (1), (2), and (3) do not apply to any of the following:

Subsection 10(1) exempts an employer from the WOWA if the employer is subject to the federal Fair Labor Standards Act (FLSA), 29 USC 201 *et seq*. The FLSA broadly defines the term "employer," 29 USC 203(d),[3] and requires that "[e]very employer shall pay to each of his employees[4] who in any workweek is engaged in commerce or in the production of goods for commerce," the applicable minimum wage, which includes a minimum wage for "agriculture" employees. 29 USC 206(a)(1), (4). Thus, as a general matter, employers of employees working in agriculture are covered by the FLSA and its minimum wage requirements, and Michigan agriculture employers would be exempt from WOWA under subsection 10(1). But that exemption does not apply if application of the FLSA would result in payment of a minimum wage lower than that set by the WOWA. MCL 408.420(1).

Michigan's minimum hourly wage requirement currently exceeds that set by the FLSA, as Michigan's minimum is presently set at $8.90 per hour and set to increase to $9.25 on January 1, 2018, and it has exceeded the FLSA since October 1, 2006. See MCL 408.414 and 29 USC 206; 2006 PA 81. As a result,

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* * *

> (e) An employee employed in agriculture, including farming in all its branches, which among other things includes: cultivating and tilling soil; dairying; producing, cultivating, growing, and harvesting agricultural or horticultural commodities; raising livestock, bees, fur-bearing animals, or poultry; and a practice, including forestry or lumbering operations, performed by a farmer or on a farm as an incident to or in conjunction with farming operations, including preparation for market, delivery to storage, or delivery to market or to a carrier for transportation to market or processing or preserving perishable farm products. [MCL 408.414(4)(e).]

[3] Section 203 defines "employer" to "include[ ] any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency . . . ." 29 USC 203(d).

[4] The term "employee" generally means "any individual employed by an employer." 29 USC 203(e)(1).

Michigan employers, including agriculture employers, are generally subject to the WOWA, including its minimum wage requirements, with two caveats. First, under subsection 10(1)(a), the overtime provisions of the WOWA do not apply to the employer. MCL 408.420(1)(a). Second, under subsection 10(1)(b), the WOWA does not apply if the *employee* of the employer is exempt from the FLSA's minimum wage requirements. MCL 408.420(1)(b). Subsection 10(1)(b) creates a parallel exemption from state minimum wage requirements if the employee is exempt from federal minimum wage requirements.

The list of employees exempt from the federal minimum wage requirements is set forth in section 213 of the FLSA, 29 USC 213, and includes certain agriculture employees.[5] With respect to agriculture employees, subsection 213(a)(6) exempts five categories of employees:

> [A]ny employee employed in agriculture
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> (A) if such employee is employed by an employer who did not, during any calendar quarter during the preceding calendar year, use more than five hundred man-days[6] of agricultural labor,
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> (B) if such employee is the parent, spouse, child, or other member of his employer's immediate family,
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> (C) if such employee (i) is employed as a hand harvest laborer and is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece

[5] Other exempt employees include certain professional and administrative employees, employees of recreational or amusement establishments, employees of various aquacultural operations, newspaper employees, switchboard operators, domestic care employees, criminal investigators, certain computer analysts or programmers, and border patrol agents, among others. See 29 USC 213(a)(1)–(18).

[6] A "man-day" means "any day during which an employee performs any agricultural labor for not less than one hour." 29 USC 203(u).

> rate basis in the region of employment, (ii) commutes daily from his permanent residence to the farm on which he is so employed, and (iii) has been employed in agriculture less than thirteen weeks during the preceding calendar year,
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> (D) if such employee (other than an employee described in clause (C) of this subsection) (i) is sixteen years of age or under and is employed as a hand harvest laborer, is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (ii) is employed on the same farm as his parent or person standing in the place of his parent, and (iii) is paid at the same piece rate as employees over age sixteen are paid on the same farm, or
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> (E) if such employee is principally engaged in the range production of livestock . . . . [29 USC 213(a)(6) (paragraph breaks inserted).]

Thus, agriculture employees in Michigan who fall into the five categories outlined in subsection 213(a)(6) of the FLSA are exempt from the WOWA's hourly minimum wage requirements under the plain language of subsection 10(1)(b). MCL 408.420(1)(b). But if an agriculture employee in Michigan is not within those five categories, an employer is required to pay its agriculture employees WOWA's minimum hourly wage. See MCL 408.413 and 408.420(1).

This interpretation has been challenged on three grounds.[7] First, it is asserted that applying subsection 10(1)(b) to employers whose employees are exempt from the FLSA conflicts with the plain language of subsection 10(1). Second, it is asserted that interpreting subsection 10(1)(b) as creating an exemption for employers from Michigan's minimum wage requirements with respect to employees exempt from the FLSA is inconsistent with the purpose of the WOWA.

[7] The Michigan Department of Civil Rights and the Michigan Civil Rights Commission provided this office with written comments regarding the requests from Director Edgerton and Representative Schor.

And third, even if that interpretation is correct, it is asserted that subsection 10(5), MCL 408.420(5), nevertheless preserves the rights of certain employees to receive WOWA's minimum wage.

None of these arguments is persuasive in light of the statute's plain language. Subsection 10 provides, in part:

> (1) *This act does not apply to an employer that is subject to the minimum wage provisions of the fair labor standards act of 1938* . . . unless those federal minimum wage provisions would result in a lower minimum hourly wage than provided in this act. Each of the following exceptions *applies to an employer* who is subject to this act only by application of this subsection:
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> * * *
>
> (b) *This act does not apply to an employee who is exempt from the minimum wage requirements of the fair labor standards act of 1938* . . . . [MCL 408.420(1)(b) (emphasis added).]

The assertion is that an employer with employees that are all "exempt from the minimum wage requirements" of the FLSA under subsection 10(1)(b) cannot, therefore, be an "employer that is subject to the minimum wage provision of the" FLSA under subsection 10(1). The example given is that of agriculture employees of a small farm who are exempt from FLSA under section 213(a)(6) because their agriculture employer "did not, during any calendar quarter during the preceding calendar year, use more than five hundred man-days of agricultural labor." 29 USC 213(a)(6). If the small farm's employees are exempt under the FLSA, the reasoning goes, their employer is not subject to the FLSA and subsection 10(1)(b) cannot be applied to the farm's employees to deny them payment of WOWA's minimum wage.

But that interpretation focuses on the status of an employee, a later inquiry, rather than on the threshold question of the status of the employer under subsection 10(1). Subsection 10(1) captures an "employer" that is "subject to" the minimum wage provisions of the FLSA. The FLSA provides that "[e]very employer . . . who in any workweek is engaged in commerce or in the production of goods for commerce," must pay its employees the federal minimum wage. 29 USC 206(a). That broad language includes virtually all employers, including agricultural employers, unless the employer does not engage in "trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof," 29 USC 203(b), or is otherwise exempt. Thus, any employer who meets the FLSA's requirements is an "employer" for purposes of subsection 10(1) of the WOWA.

Only after this threshold requirement under subsection 10(1) is met do the "exceptions" that "appl[y] to an employer" come into play. Under subsection 10(1)(b)'s exception, an employer does not have to apply the WOWA to its employees that are "exempt from the minimum wage requirements" of the FLSA. MCL 408.420(1)(b). If an employer also has non-exempt employees, the employer must apply the WOWA to those employees. The practical result of these provisions may well be that an employer technically subject to the WOWA under subsection 10(1), ultimately has no employees subject to the requirements of the WOWA through application of subsection 10(1)(b)'s exception. But this construction is consistent with section 3 of the WOWA, MCL 408.413, which generally makes all

employers subject to the Act—"An employer shall not pay any employee at a rate that is less than prescribed in this act"—unless an *employer* is exempt from the Act under section 10, MCL 408.420.

This construction of subsection 10(1)(b) has the effect of leaving some employees without a right to a minimum hourly wage under the WOWA (or the FLSA). Some assert that this result conflicts with what they believe to be the principal purpose of the WOWA (to provide protections for Michigan employees who are not covered by the FLSA), but this asserted purpose is not borne out in the text and structure of the WOWA or its predecessor, the Minimum Wage Law of the 1964, as amended.

Subsections 10(1)(a) and (b) were added to the Minimum Wage Law of 1964 in 2006 by Public Act 373 shortly after the state's minimum hourly wage requirements were increased to exceed the federal minimum hourly wage through enactment of Public Act 81 of 2006. Public Act 81 significantly raised the State's minimum hourly wage rate, and because the rate now exceeded the federal rate, generally subjected Michigan employers to the Minimum Wage Law whereas before most employers were subject only to the FLSA. Legislative history indicates that subsection 10(1)(a), regarding overtime, was added to maintain the status quo for Michigan employers who would now be subject to the Minimum Wage Law due to the increase in the hourly minimum wage rate. Senate Fiscal Analysis, House Bill 6213, April 4, 2007, pp 1-2, 4. There is little discussion of subsection 10(1)(b), the "employee" exemption. A contemporaneous analysis prepared by the Michigan

Department of Labor & Economic Growth observed that opponents of the legislation believed it went "beyond returning overtime provisions to the status quo *in that it expands the number of individuals who would not receive the minimum wage . . . .*" (Appendix A, Mich Dep't of Labor & Economic Growth's Bill Analysis, HB 6213, September 6, 2006) (emphasis added). This result is borne out by the plain language of subsection 10(1)(b), as discussed above. The Legislature's intent to do so is also supported by its contemporaneous enactment of subsection 10(2).

Subsection 10(2), added by 2006 PA 373, provides, in part:

> (2) *Notwithstanding subsection (1), an employee shall be paid in accordance with the minimum wage and overtime compensation requirements of section 4 and 4a* if the employee meets either of the following conditions:
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> > (a) He or she is employed in domestic service employment to provide companionship services as defined in 29 CFR 552.6 . . . .
> >
> > (b) He or she is employed to provide child care, but is not a live-in domestic service employee as described in 29 CFR 552.102 . . . [MCL 408.420(2)(a),(b) (emphasis added).]

The Legislature recognized that these two categories of employees—domestic service and child-care employees—would not be entitled to overtime or minimum wage under subsections 10(1)(a) and (b), and specifically determined the State would provide them these protections. The Legislature did not do so with respect to other employees, including agricultural employees, although it certainly could have, or could do so in the future.

The addition of subsection 10(2) and absence of any other exceptions to the exemptions makes clear that subsection 10(1)(b) was intended to exclude from the

law's coverage other employees that fell under the FLSA exemptions—including some agricultural employees. *In re MCI Telecommunications Complaint*, 460 Mich 396, 415 (1999)(explaining "the express mention of one thing in a statute implies the exclusion of other similar things") (citations omitted).

Finally, addressing the last assertion, subsection 10(5) of the WOWA, MCL 408.420(5), does not preserve the rights of employees excluded from coverage of the WOWA under subsection 10(1)(b) to receive WOWA's minimum wage. Like subsections 10(1)(a)–(b) and 10(2), subsection 10(5) was added to the Minimum Wage Law by 2006 PA 373. It was reenacted without change in the WOWA, 2014 PA 138, and provides:

> Notwithstanding any other provision of this act, subsection (1)(a) and (b) and subsection (2) do not deprive an employee or any class of employees of any right that existed on September 30, 2006 to receive overtime compensation or to be paid the minimum wage. [MCL 408.420(5).]

September 30, 2006 was the day before Public Act 373 of 2006 took effect. See enacting section 1, 2006 PA 373 ("This amendatory act takes effect October 1, 2006.").

Subsection 10(5) is a savings clause. The purpose of a savings clause is to preserve rights accrued under a repealed or amended statute. See *Attorney General ex rel Dep't of Nat'l Resources v Sanilac Co Drain Comm'r*, 173 Mich App 526, 532 (1988). Michigan courts have long held that the effect of amending a specific section of an act, in the absence of a savings clause, "is to strike the former section from the

law, obliterate it entirely, and substitute the new section in its place." *Rookledge v Garwood*, 340 Mich 444, 445 (1954).

Although a savings clause will not prevail over a subsequent clear and distinct enactment, it may help explain any ambiguous or doubtful language. *Id.* The language of subsection 10(5) makes clear that the Legislature intended to preserve any "right" to "receive" minimum wage or overtime that had accrued to an employee on or before September 30, 2006, the day before the exemptions in subsection 10(1)(a) and (b) became effective. In other words, an employee who was covered under the WOWA on or before September 30, 2006, would still be entitled to make a claim for minimum wage and overtime on October 1, 2006, or after, so long as the employee had earned the wage or overtime before that date. Without the savings clause, an employee who was covered by the former law on or before September 30, 2006, but not on October 1, 2006, would have been unable to maintain a cause of action for violation of the Act. See MCL 408.419(1) ("If an employer violates this act, the employee affected by the violation, at any time within 3 years, may" bring a civil action or file a claim.).

So, while the savings clause here is helpful in clarifying the ambiguous point of an employee's right to pursue a claim on or after October 1, 2006, subsection 10(5) does not prevail over the amendments provided in subsection 10(1)—specifically the exceptions found in subsections 10(1)(a) and (b). Instead, it simply preserves a claim for minimum wage or overtime that accrued to the employee on or before September 30, 2006. In other words, it does not, as has been asserted,

preserve any right to overtime and minimum wage that existed on September 30, 2006, in perpetuity. If that were the correct interpretation, it would render the changes to section 10 meaningless. The scope of the WOWA changed considerably with the 2006 amendments. The savings clause cannot be interpreted to continue the status quo beyond the enactment of the new provision. That interpretation is contrary to the language of the statute and the purpose of a savings clause.

It is my opinion, therefore, that subsection 10(1)(b) of the WOWA, MCL 408.420(1)(b), excepts from its application, including its minimum hourly wage requirement, an employer whose employees are exempt from the federal minimum wage requirements of the FLSA, 29 USC 201 *et seq*. This exception includes agriculture employees to the extent such employees are exempt from the federal

minimum wage requirement under the FLSA, 29 USC 213a(6).[8]

Lastly, you ask if there are any wage protections for the employees of employers that are excepted from paying minimum wages under the WOWA based on application of subsection 10(1)(b).

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[8] This opinion does not address the question regarding the application of the doctrine of equitable estoppel to the Department of Licensing and Regulatory Affairs based on the Department's past conflicting interpretations of MCL 408.420(1)(b). "[T]he doctrine of equitable estoppel is a judicially created exception to the general rule that statutes of limitation run without interruption." *Cincinnati Ins Co v Citizens Ins Co,* 454 Mich 263, 270 (1997). This doctrine does not impact the statutory interpretation questions presented here. Moreover, it has limited application to the State, *Attorney General v Ankersen,* 148 Mich App 524, 544 (1986); *Michigan Muni Liability & Prop Pool v Muskegon Co Bd of Co Rd Comm'rs,* 235 Mich App 183, 195 (1999), and any application would depend upon the particular employee's or employer's factual circumstances, *Ankersen,* 148 Mich App at 544.

Notably, such employees and employers would still be subject to all generally applicable laws. Specific to your question, the Payment of Wages and Fringe Benefits Act, MCL 408.471 *et seq.*, is the Michigan statute that regulates the time and manner of payment of wages. In addition to enforcing wage agreements, MCL 408.481, this Act provides protection against improper deductions, MCL 408.477. This Act covers all employees and employers, as defined in the statute, see MCL 408.471(c) and (d), and would include employees who are employed by an agricultural employer. Depending upon the particular factual circumstances, this Act may apply to provide wage protections to an employee excepted from the WOWA, including an agriculture employee. There may also be other civil laws that an employee could rely upon with respect to a wage or employment dispute, in addition to protections provided by criminal laws.

It is my opinion, therefore, that the Payment of Wages and Fringe Benefits Act may apply to provide wage protections to an employee, including an agriculture employee, who is excepted from the WOWA's minimum hourly wage requirements under subsection 10(1)(b).

Sincerely,

BILL SCHUETTE
Attorney General