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The Honorable Senator Steve Stivers
Chair, Senate Insurance, Commerce
and Labor Committee
The Ohio Senate
Senate Building
Room #134, First Floor
Columbus, Ohio 43215

Dear Senator Stivers:

I am a Clinical Professor of Law at Cleveland-Marshall College of Law, Cleveland State University. I teach employment law courses in the law school. I have been asked by Policy Matters Ohio for an opinion about legislation that has been proposed to implement Section 34a of Article II of the Ohio Constitution. That section was, of course, enacted by passage of Issue 2, the Ohio Fair Minimum Wage Amendment (hereinafter "Amendment") in the November election. Having reviewed both Senate Bill 401 and the companion - and substantively very similar - legislation passed by the Ohio House of Representatives, Amended Substitute House Bill 690, it is my opinion certain provisions of both of these bills are fundamentally inconsistent with the Amendment.

For instance, the Amendment adopted by reference certain definitions of the federal Fair Labor Standards Act (FLSA), but specifically did not adopt the FLSA exemptions, which are found in a separate section of the FLSA and are not part and parcel of the definition of "employee". The Amendment did not simply fail to mention the FLSA exemptions; it specifically states: "Only the exemptions set forth in this section shall apply." It is abundantly clear that the Amendment was not intended to provide for the non-coverage of workers exempted from FLSA coverage. Yet, both House Bill 690 and Senate Bill 401 would incorporate a version of the FLSA exemptions, contrary to the explicit language of the Amendment.

Another troubling feature is the provision in both House Bill 690 and Senate Bill 401 for alternative dispute resolution, including arbitration in lieu of litigation. While the Amendment does not specifically forbid arbitration, it does specifically mention “any court of competent jurisdiction” as the venue for an action to enforce the rights set forth in the Amendment. The Amendment also refers to a finding of a violation by “the state or a court” and the amount of back wages to be “set by the state or court.” The Amendment, therefore, does not seem to contemplate findings by arbitrators.

It has been argued to the Committee that only voluntary arbitration is permitted by the proposed legislation. However, there is a substantial and crucial difference between an agreement to mandate binding arbitration of future potential claims required as a condition of employment, and an agreement to arbitrate an existing, known dispute. The latter could legitimately be characterized as voluntary; the former is more commonly considered mandatory, since the person wishing to be or remain hired is unlikely to understand what rights she is agreeing to waive or to be able to refuse the employer’s conditions of employment. For this reason, both the EEOC and the National Academy of Arbitrators have gone on record opposing mandatory agreements to arbitrate as a condition of employment. (See, EEOC, Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment; National Academy of Arbitrators Statement and Guidelines.) Absent a provision in the proposed legislation clarifying that only truly voluntary agreements to arbitrate known claims, not agreements required as a condition of employment, would be permitted, the implementing legislation would be extremely problematic.

Other submissions to the Committee have identified additional problems with the proposed legislation, including the treatment of class actions. Again, as to most of the problems identified, there is a divergence between the clear intent of the Amendment and the language of the proposed enabling legislation that would render the legislation vulnerable to challenge.

I understand that Representative Seitz and other proponents of the legislation have asserted that notwithstanding the Amendment, the legislature has the power to enact whatever legislation regarding the minimum wage that it sees fit because of Article II, Section 34 of the Ohio Constitution. In my opinion, that assertion is incorrect. The language upon which Representative Seitz relies states “[L]aws may be passed fixing and regulating the hours of labor, establishing a minimum wage, and providing for the comfort, health, safety and general welfare of all employees; and no other provision of the constitution shall impair or limit this power.” Contrary to what has been argued regarding this language, it does not mean that the Amendment passed in November is null and void. The language providing that “no other provision of the constitution shall impair or limit this power” was meant to clarify that provisions such as the equal protection, due process, takings, and home rule provisions of the Ohio constitution should not be construed as implicitly invalidating statutory labor protections, as they were prior to 1912 when Article II, Section 34 was adopted as part of an overhaul of the Ohio constitution that also added additional labor protections. It in no way limits the sovereign power of the people of Ohio to amend the constitution to establish minimum labor standards and to bar the legislature from weakening those standards, as they did in the Minimum Wage Amendment.

The Minimum Wage Amendment approved in November quite clearly does not diminish the protections for workers authorized by Article II, Section 34. Quite the opposite: the Amendment clearly adds additional protections for Ohio workers. Therefore, it is not in conflict with Article II, Section 34. However, as discussed above, both Amended Substitute House Bill

690 and Senate Bill 401 would diminish protections specifically provided for by the voters of Ohio in the Minimum Wage Amendment. Since the Minimum Wage Amendment explicitly forbids the legislature from weakening its protections, the proposed legislation is in direct conflict with the new constitutional provision. That the legislature is mandated to refrain from limiting labor protections provided by the Ohio Constitution is well-settled. See *Stange v City of Cleveland*, 94 Ohio St. 377 (1916).

For the foregoing reasons, it is my opinion that the proposed legislation discussed above is seriously deficient and I urge the Committee to report a bill more closely attuned to the actual Amendment passed by the voters of Ohio in November.

Sincerely,

Kenneth J. Kowalski

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