STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL OPINION By KRIS MAYES ATTORNEY GENERAL June 15, 2023	No. I23-004 (R23-009) Re: Municipal and county authority to enact an ordinance requiring that public works contractors pay employees at least the prevailing wage

To: The Honorable Catherine Miranda
Arizona State Senate

Questions Presented

May a city enact a prevailing wage ordinance that requires contractors on municipal public works contracts to pay their workers no less than the wage rates that prevail for their trade in their geographic location?

Summary Answer

A city may regulate the minimum wages paid within its geographic boundaries under Arizona Revised Statutes § 23-364(I), so long as those wages are not less than the statewide minimum wage. This authority includes the ability to require that employees of contractors on local public works projects be paid not less than the prevailing wage.

Background

On March 21, 2023, the Phoenix City Council issued notice of a Special Meeting to be held the next day to consider a "Prevailing Wage Ordinance for City Projects" (the "Ordinance").[1] The Ordinance, which ultimately passed, amended Chapter 43, Article XIV of the City Code to require that every employee employed by a contractor or subcontractor working on a City public works contract in excess of $250,000 be paid "not less than the wages and fringe benefits prevailing for the same class and kind of work in the local area." Phoenix City Code § 43-53(A)(1). This amount was to be determined by the City Procurement Division. *Id.*

On April 17, 2023, Senator Catherine Miranda submitted to this Office a request for investigation under A.R.S. § 41-194.01, asking whether the prevailing wage provision of the Ordinance was permitted under state law. On April 19, after newly-elected City Council members assumed their seats, the Council voted to repeal the Ordinance. Because Senator Miranda's request for investigation was mooted by the repeal, this Office will treat her inquiry to a request for an Attorney General Opinion under A.R.S. § 41-193(A)(7).

Analysis

The question presented here involves the interpretation of two statutes that govern minimum wages paid to Arizona workers.

The first statute (the "Prevailing Wage" statute) deals with wages paid to employees who work on public works projects contracted by state agencies and political subdivisions. This statute, initially enacted through a referendum referred to the people by the legislature in 1984, states:

> Agencies and political subdivisions of this state shall not by regulation, ordinance or in any other manner require public works contracts to contain a

[1] City of Phoenix, Notice of Public Meeting (March 21, 2023), https://www.phoenix.gov/cityclerksite/City%20Council%20Meeting%20Files/Combined%20Notice%20with%20Attachments.pdf.

> provision requiring the wages paid by the contractor or any subcontractor to be not less than the prevailing rate of wages for work of a similar nature in the state or political subdivision where the project is located.

Laws 1984, S.C.R. No. 1001, § 1 (Referendum Measure, § 3), eff. Nov. 30, 1984, codified at A.R.S. § 34-321(B). The law defines a "[p]olitical subdivision" as "a city, charter city, town, county, school district, community college district, multi-county water conservation district, industrial development authority or special taxing district." A.R.S. § 34-321(E)(3). The statute further lists other nonwage-related conditions applicable to agencies and political subdivisions. *Id.* (C)(3).

The second relevant statute (the "Minimum Wage" statute) authorizes counties, cities, and towns to "regulate minimum wages and benefits" paid within their localities. This law was enacted by initiative in 2006 as Proposition 202,[2] and again in 2016 as Proposition 206.[3] The pertinent section of Prop. 206 is codified at A.R.S. § 23-364, which provides, in part:

> A county, city, or town may by ordinance regulate minimum wages and benefits within its geographic boundaries but may not provide for a minimum wage lower than that prescribed in this article.… This article shall be liberally construed in favor of its purposes and shall not limit the authority of the legislature or any other body to adopt any law or policy that requires payment of higher or supplemental wages or benefits, or that extends such protections to employers or employees not covered by this article.

A.R.S. § 23-364(I).

I. A prevailing wage is a type of "minimum wage."

As an initial matter, we must decide whether a "prevailing rate of wages" is a type of "minimum wage." Arizona law defines "[m]inimum wage" as "the nondiscretionary minimum

[2] Raise the Minimum Wage for Working Arizonans Act, Proposition 202 (2006), https://apps.azsos.gov/election/2006/info/PubPamphlet/Sun_Sounds/english/prop202.htm.
[3] The Fair Wages and Healthy Families Act, Proposition 206 (2016), https://apps.azsos.gov/election/2016/general/ballotmeasuretext/I-24-2016.pdf.

compensation due an employee by reason of employment, including the employee's commissions, but excluding tips or gratuities." A.R.S. § 23-350(5).

"Prevailing wage" is not a defined term in Arizona statutes. The City of Phoenix's Ordinance defined "prevailing wages" as "the rate of pay and the overtime and other benefits granted to such full-time workers in the local area." Phoenix City Code § 43-52. The section of the Ordinance titled "Minimum Wages and Benefits" states that employees working under a contract in excess of $250,000 must be "paid not less than the wages and fringe benefits prevailing for the same class and kind of work in the local area." *Id.* § 43-53(A)(1). In calculating the prevailing wage, the City's Procurement Division is directed to "refer to the federal Davis-Bacon Act." *Id.*

The Davis-Bacon Act governs the rate of wages paid to laborers and mechanics that work on public works projects funded by the federal government. 40 U.S.C. § 3141 *et seq.* The Act provides that advertisements "for every [public works] contract in excess of $2,000…which requires or involves the employment of mechanics or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics." *Id.* § 3142(a). The Act further provides that "[t]he minimum wages shall be based on the wages the Secretary of Labor determines to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work…in which the work is to be performed." *Id.* (b). In the Act's definitions section, the following terms share the same definition: "Wages, scale of wages, wage rates, minimum wages, and prevailing wages." *Id.* § 3141(2).

Therefore, both the Ordinance and the Act use the concept of a prevailing wage rate to describe the way in which minimum wages paid under federal and City public works contracts are to be calculated. *See, e.g.*, *United States v. Binghamton Const. Co.*, 347 U.S. 171, 178 (1954)

(describing the Davis-Bacon Act as "a minimum wage law designed for the benefit of construction workers"); *Univs. Rsch. Ass'n, Inc. v. Coutu*, 450 U.S. 754, 758–59 (1981) (referring to prevailing wage paid under federal contracts as "minimum wages"); *Dillingham Const. N.A., Inc. v. Cty. of Sonoma*, 190 F.3d 1034, 1041 (9th Cir. 1999) (stating "prevailing wage law establishes minimum wages" paid to workers on public works projects).

This understanding — that the prevailing wage rate is a type of minimum wage for certain workers — is likewise consistent with the historical understanding of these terms under Arizona law. In 1933 (two years after the passage of the Davis-Bacon Act at the federal level), the Arizona Legislature passed two relevant bills relevant.

The first, H.B. 37 (known as "chapter 12" of the Session Laws),[4] provided for "*minimum per diem wages* fixed by the state highway commission for manual or mechanical labor performed for said commission or for contractors performing work under contract with said commission," to be "paid to persons doing manual or mechanical labor so employed by or on behalf of the state or of any of its political subdivisions." *State v. Jaastad*, 43 Ariz. 458, 460 (1934) (quoting the statute) (emphasis added).

The second, H.B. 123 (known as "chapter 71" of the Session Laws),[5] provided in pertinent part as follows:

> Every contract in excess of one thousand dollars in amount, to which the state of Arizona, or any political subdivision thereof, is a party, which requires or involves the employment of laborers or mechanics in the construction, alteration or repair of any public buildings, or other improvements of the state of Arizona or any political subdivision thereof, shall contain a provision to

[4] Laws 1933, H.B. No. 37, https://azmemory.azlibrary.gov/nodes/view/20952?keywords=minimum%20wages&type=phrase&highlights=WyJtaW5pbXVtIiwid2FnZXMiLCJwcmV2YWlsaW5nIiwicmF0ZSJd.

[5] Laws 1933, H.B. No. 123, https://azmemory.azlibrary.gov/nodes/view/20952?keywords=minimum%20wages&type=phrase&highlights=WyJtaW5pbXVtIiwid2FnZXMiLCJwcmV2YWlsaW5nIiwicmF0ZSJd.

> the effect that the rate of wages for all laborers and mechanics employed by the contractor or any subcontractor on such public buildings or improvements, shall be not less than *the prevailing rate of wages* for work of a similar nature in the county, city, town, village, or other civic division of the state in which the public building or improvement is located….

Jaastad, 43 Ariz. at 461 (quoting the statute) (emphasis added).[6]

As the Arizona Supreme Court noted, the provisions of these chapters were together "commonly known as the Minimum Wage Laws" that applied to "public work, direct or indirect." *Highland Park Realty Co. v. City of Tucson*, 46 Ariz. 10, 12, 14 (1935). Based on the enactment of these laws, the Arizona Supreme Court concluded that "[t]he state as an employer of labor, speaking through its Legislature, has in no uncertain language determined upon a policy of guaranteeing a minimum per diem wage to certain of its employees," not only by passing chapter 12 to amend a prior law, but also by passing chapter 71, and indicated that they are both expressions of the same policy in favor of "fixing minimum wages" for certain workers. *State v. Anklam*, 43 Ariz. 362, 369–70 (1934).

Accordingly, the language in the Prevailing Wage statute referring to the "prevailing rate of wages" simply describes a manner of calculating minimum wages for certain Arizona workers. The prevailing wage amount calculated by the City Procurement Division would be "the nondiscretionary minimum compensation due" to the eligible workers, i.e., a minimum wage. A.R.S. § 23-350(5) ("'Minimum wage' means the nondiscretionary minimum compensation due

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[6] H.B. 123 was later codified, in modified form, at A.R.S. § 34-321, *et seq*., and was referred to as the "Little Davis-Bacon Act." *See Indus. Comm'n v. C&D Pipeline, Inc*., 125 Ariz. 64, 65–66 (App. 1979); Op. Atty. Gen. No. I79-313; Op. Atty. Gen. No. 71-8. Although the Arizona Court of Appeals held a section of the statute pertaining to the method of determining the general prevailing rate unconstitutional in 1979, Arizona's Little Davis-Bacon Act remained on the books until it was repealed by means of the 1984 referendum measure noted above. *See* S.C.R. No. 1001, Proposition 300 (1984), at 69–72, https://azmemory.azlibrary.gov/nodes/view/102831?keywords=&type=all.

an employee by reason of employment, including the employee's commissions, but excluding tips or gratuities.").

The Minimum Wage statute authorizes cities to set minimum wages, but the Prevailing Wage statute prohibits cities from setting prevailing wages. Because a prevailing wage is a type of minimum wage, these statutes conflict as applied to cities (and counties and towns). Accordingly, we must determine whether the statutes can be harmonized.

II. The Prevailing Wage and Minimum Wage statutes can be harmonized.

"[W]hen two statutes appear to conflict, whenever possible, [courts] adopt a construction that reconciles one with the other, giving force and meaning to all statutes involved." *UNUM Life Ins. Co. of Am. v. Craig*, 200 Ariz. 327, 333 ¶ 28 (2001); *see also Fleming v. State Dep't of Pub. Safety*, 237 Ariz. 414, 417 ¶ 12 (2015) ("[W]hen statutes relate to the same subject matter, we construe them together as though they constitute one law and attempt to reconcile them to give effect to all provisions involved."). If "two conflicting statutes cannot operate contemporaneously, the more recent, specific statute governs over [an] older, more general statute." *UNUM*, 200 Ariz. at 333 ¶ 29 (internal quotation omitted).

Each of these statutes is arguably more specific than the other in a certain respect. The Prevailing Wage statute is more specific in that it deals only with minimum wages payable under public works contracts; whereas the Minimum Wage statute deals with the regulation of all types of minimum wages. Conversely, the Minimum Wage statute is more specific in that it pointedly conveys specific authority to counties, cities, and towns; whereas the Prevailing Wage statute applies broadly to all agencies and political subdivisions of the state.

Given this tension, the language of these two statutes can be read together in only two ways. The first option is to read the prohibition in the Prevailing Wage statute as an exception to the broad authority granted by the later-enacted Minimum Wage statute. That is, counties, cities, and towns can regulate minimum wages within their borders except for requiring a prevailing wage for public works contractors.

The second possible reading is to interpret the Minimum Wage statute as exempting counties, cities, and towns from the list of political subdivisions subject to the Prevailing Wage statute's earlier prohibition. The plain text and context in which the Minimum Wage law was enacted both support the latter approach.

A. The Statutory Text

The later-enacted Minimum Wage statute does not contain an exclusion for public works contracts, nor does it incorporate or reference the Prevailing Wage statute as a limitation on its grant of authority. To the contrary, the Minimum Wage statute states it is to "be liberally construed in favor of its purposes and *shall not limit the authority*" of counties, cities, and towns "to adopt any law or policy that requires payment of higher or supplemental wages or benefits" than those required by state law. A.R.S. § 23-364(I) (emphasis added).

Thus, the text of the Minimum Wage statute contemplates that counties, cities, and towns may exercise broader authority in this area. Reading the earlier-enacted Prevailing Wage statute as creating an exclusion to the Minimum Wage law for public works contracts would violate this provision by limiting the unqualified authority that the later-enacted Minimum Wage statute expressly confers. *See State v. Cassius*, 110 Ariz. 485, 487 (1974) (when later statute expresses more specific intent than more general existing statutes, new statute is "taken as an exception to the general intent, and both will stand"). Put differently, the earlier Prevailing Wage statute was

obviously enacted with no awareness of the law to come, but the Minimum Wage law was enacted with the benefit of hindsight. And there is no indication in the text that the Minimum Wage statute meant to contort around the existing Prevailing Wage prohibition.

Accordingly, and because the Prevailing Wage and Minimum Wage statutes only conflict as to counties, cities, and towns, the statutes are best harmonized by interpreting the Minimum Wage statute as exempting counties, cities, and towns from the list of political subdivisions subject to the Prevailing Wage prohibition. *See Didlo v. Talley*, 21 Ariz. App. 446, 448 (1974) (finding statute dealing with "hearings before the Real Estate Commissioner" to be controlling because it was more specific than a "general statute [regarding hearings] applicable to all State agencies"); *Monroe v. Ariz. Acreage LLC*, 246 Ariz. 557, 562–63 ¶¶ 16-21 (App. 2019) (finding more recent statute of limitation governed where parties each argued that one statute was more specific than the other in different ways); *Lavidas v. Smith*, 195 Ariz. 250, 253 ¶ 13 (App. 1999) ("Although both statutes here are quite specific, we must give effect to the more recent enactment.").

In light of this resolution of the tension between the Prevailing Wage and Minimum Wage statutes, there is no conflict between state law and the Ordinance, and thus there is no state law-based preemption here.

B. Relevant Context

The context in which Props. 202 and 206 were enacted supports this harmonization as the most reasonable construction. *See UNUM*, 200 Ariz. at 330–32 ¶¶ 12–24 (examining historical background and context of statutes).

Prop. 202 repealed a 1997 statute which provided that "[n]o political subdivision … may establish, mandate or otherwise require a minimum wage that exceeds the federal minimum wage."

A.R.S. § 23-362 (1997); Prop. 202 ("AN INITIATIVE MEASURE REPEALING SECTION 23-362"); Op. Atty. Gen. No. I07-002 (stating Prop. 202 repealed prior version of A.R.S. § 23-362).

As stated in the 1997 bill, the legislature's intent was to prevent the creation of "an anticompetitive marketplace." 1997 Ariz. Legis. Serv. Ch. 51 (H.B. 2292). The legislature expressed concern that mandatory wage laws "jeopardize[] jobs and job growth and may cause job loss." *Id.* That bill, as well as the Prevailing Wage statute passed thirteen years earlier, reflects the policy decisions of the time and an unfavorable view of minimum wage regulation.

Public policy clearly shifted among voters with the passage of Prop. 202 in 2006, which was intended to ensure that "[a]ll working Arizonans [are] paid a minimum wage that is sufficient to give them a fighting chance to provide for their families."[7] Further, voters did not simply authorize counties, cities, and towns to set an across-the-board minimum wage — they used broader language, conferring authority to "*regulate* minimum wages and benefits." A.R.S. § 23-364(I) (emphasis added).

In 2011, the legislature added subsection (C) to the Prevailing Wage statute, prohibiting political subdivisions from entering into agreements with labor organizations. S.B. 1403, 50th Leg., 1st Reg. Sess. (Ariz. 2011). This amendment also added the definition of "political subdivision" found in subsection (D)(2). *Id.* In 2015, the Legislature again amended the statute to add subsections (C)(1)-(3), strengthening the prohibition against agreements with labor organizations. S.B. 1090, 52nd Leg., 1st Reg. Sess. (Ariz. 2015). But in 2016, Arizona voters reaffirmed their support for wage regulation favoring workers with the passage of Prop. 206, which added requirements to the Minimum Wage statute related to earned paid sick time.

[7] Prop. 202, § 2(1).

The evolving policy judgments by the legislature — which includes the voters, *see* Ariz. Const. art. IV, Pt. 1 § 1 — have culminated in the most recent and more specific 2016 law; that context supports the harmonization explained above and is most consistent with the Minimum Wage statute's express instruction to construes the statute "in favor of its purposes."

C. Consistency with Voter Protection Act

Furthermore, as a voter-approved initiative, the Minimum Wage statute is shielded by the Voter Protection Act ("VPA"), which prohibits the legislature from amending or repealing voter-approved legislation "unless the amending legislation furthers the purposes of such measure" and is approved by "at least three-fourths of the members of each house of the legislature." Ariz. Const. art. IV, Pt. 1 § 1(6)(C). The Prevailing Wage statute, although enacted as a referendum, predates the VPA and is therefore not subject to its protections.[8]

The text of the 2011 and 2015 amendments to the Prevailing Wage statute do not override the authority counties, cities, and towns received under the Minimum Wage statute in 2006. But to the extent that the Legislature may have intended the amended definition of "political subdivisions" to specifically apply the prevailing wage prohibition to counties, cities, and towns, such an amendment would be ineffective under the VPA.

In *Meyer v. State*, the court of appeals considered a statute that "removed from cities, towns, and other political subdivisions the authority to regulate employee benefits, including nonwage compensation." 246 Ariz. 188, 193 ¶ 12 (App. 2019) (internal quotation omitted). The court determined that the measure "explicitly prohibits what the Minimum Wage Act permits,"

[8] The Voter Protection Act, Proposition 105, § 2 (1998) (stating the Act "SHALL APPLY RETROACTIVELY TO ALL INITIATIVE AND REFERENDUM MEASURES DECIDED BY THE VOTERS AT AND AFTER THE NOVEMBER 1998 GENERAL ELECTION"), https://apps.azsos.gov/election/1998/Info/PubPamphlet/prop105.html.

i.e., the ability to regulate benefits, and therefore it violated the VPA's express prohibition on legislative changes to voter-approved laws. *Id.* at 195 ¶ 24. Similarly, here, any measure that purports to limit the authority of counties, cities, and towns to regulate minimum wages within their boundaries would not be permitted under the VPA.

Conclusion

The Minimum Wage statute gives counties, cities, and towns the authority to regulate minimum wages within their geographic boundaries. This authority includes the ability to enact an ordinance directing that contractors pay employees working on a locality's public works projects within its geographic boundaries no less than the prevailing wage in the area.[9]

Kris Mayes
Attorney General

[9] Under this Opinion, all other political subdivisions listed in the Prevailing Wage statute, § 34-321(E)(3), continue to be subject to the prevailing wage prohibition. Also, counties, cities, and towns continue to be subject to the non-wage-related provisions of § 34-321(C).