



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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March 20, 2015

FILE NO. 15-002

LABOR:

Authority of Counties, Municipalities,
and School Districts to Opt Out of
the Prevailing Wage Act

The Honorable Gary Forby
Chair, Senate Labor Committee
State Senator, 59th District
903 West Washington, Suite 5
Benton, Illinois 62812

The Honorable Jay C. Hoffman
Chair, House Labor & Commerce Committee
State Representative, 113th District
312 South High Street
Belleville, Illinois 62220

Dear Senator Forby and Representative Hoffman:

I have your letters inquiring whether counties, municipalities, and/or school districts have the authority to opt out of compliance with the Prevailing Wage Act (the PWA) (820 ILCS 130/0.01 *et seq.* (West 2012)). The Illinois Supreme Court has specifically addressed this issue with regard to home rule units of government and held that they must comply with the requirements of the PWA. Based on that decision and the limited authority of non-home-rule

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units of government, it is my opinion that they also are required to comply with the provisions of the PWA when seeking bids and awarding contracts for the construction or demolition of public works. Thus, counties, municipalities, and school districts do not possess the authority, either by the adoption of ordinances or resolutions that depart from the requirements of the PWA, or by referendum, to avoid compliance with its provisions.

BACKGROUND

The purpose of the PWA is to encourage the efficient and expeditious completion of public works by ensuring that workers receive a decent wage. *People ex rel. Department of Labor v. Sackville Construction, Inc.*, 402 Ill. App. 3d 195, 198, 930 N.E.2d 1063, 1065 (2010), *appeal denied*, 237 Ill. 2d 589, 938 N.E.2d 530 (2010). To that end, section 1 of the PWA (820 ILCS 130/1 (West 2012)) states:

It is the policy of the State of Illinois that a wage of no less than the general prevailing hourly rate as paid for work of a similar character in the locality in which the work is performed, shall be paid to all laborers, workers and mechanics employed by or on behalf of any and all public bodies engaged in public works.

Further, section 3 of the PWA (820 ILCS 130/3 (West 2012)) provides that not less than the "general prevailing rate of hourly wages"¹ must be paid to laborers, workers, and mechanics who

¹The PWA defines the phrase "general prevailing rate of hourly wages" as follows:

The terms "general prevailing rate of hourly wages", "general prevailing rate of wages" or "prevailing rate of wages" when used in this Act mean the hourly cash wages plus annualized fringe benefits for training and apprenticeship programs approved by the U.S. Department of Labor, Bureau of Apprenticeship and Training, health and welfare, insurance, vacations and pensions paid generally, in the locality in which the work is being performed, to employees engaged in work of a similar character on public works. 820 ILCS 130/2 (West 2013 Supp.), as amended by Public Acts 98-740, effective July 16, 2014; 98-756, effective July 16, 2014.

are employed by or on behalf of a public body engaged in the construction or demolition of public works. The term "public works" includes "all fixed works constructed or demolished by any public body, or paid for wholly or in part out of public funds." 820 ILCS 130/2 (West 2013 Supp.), as amended by Public Acts 98-740, effective July 16, 2014; 98-756, effective July 16, 2014. The PWA defines "public body" as follows:

"Public body" means the State or any officer, board or commission of the State or any political subdivision or department thereof, or any institution supported in whole or in part by public funds, and *includes every county, city, town, village, township, school district*, irrigation, utility, reclamation improvement or other district and every other political subdivision, district or municipality of the state whether such political subdivision, municipality or district operates under a special charter or not. (Emphasis added.) 820 ILCS 130/2 (West 2013 Supp.), as amended by Public Acts 98-740, effective July 16, 2014; 98-756, effective July 16, 2014.

The PWA requires that a call for bids for a public works project must specify that prevailing wages are to be paid. 820 ILCS 130/4(a-1) (West 2012). Each public body awarding a public works contract or otherwise undertaking any public works has the option of either ascertaining the general prevailing rate of hourly wages in the locality in which the work is performed or requesting that the Illinois Department of Labor ascertain and certify the prevailing rate of hourly wages.² 820 ILCS 130/4(a) (West 2012). Any contract for public works awarded

²Each public body that chooses to investigate and ascertain the prevailing wage must do so in June of each calendar year and (1) either publicly post or make available for public inspection its determination, and (2) file a certified copy of its determination with the Illinois Department of Labor no later than July 15th of each year. 820 ILCS 130/9 (West 2013 Supp.). The Department of Labor is charged with investigating and ascertaining the prevailing rate of wages for each Illinois county (in addition to ascertaining the prevailing rate of wages for those public bodies who so request). If a public body fails to investigate or ascertain the prevailing rate of hourly wages during June, that public body's prevailing rate of wages shall be the rate determined by the Department for the county in which such public body is located. 820 ILCS 130/9 (West 2013 Supp.).

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when such prerequisites have not been met "shall be void as against public policy[.]" 820 ILCS 130/11 (West 2013 Supp.).

Pursuant to section 5 of the PWA (820 ILCS 130/5 (West 2013 Supp.), as amended by Public Act 98-756, effective July 16, 2014), contractors and subcontractors must create and maintain records of all laborers, mechanics, and other workers employed by them on a public works project and must file a certified payroll with the public body in charge of the project. "Any officer, agent or representative of any public body who wilfully violates, or willfully fails to comply with, any of the provisions of this Act * * * is guilty of a Class A misdemeanor." 820 ILCS 130/6 (West 2012).

ANALYSIS

Home Rule Units

Home rule units may exercise not only the powers delegated by statute, but also those powers granted by article VII, section 6, of the Illinois Constitution of 1970, which authorizes a home rule unit to "exercise any power and perform any function pertaining to its government and affairs[.]" except to the extent that home rule powers have been limited pursuant to section 6. In determining whether a home rule unit's action is a valid exercise of its home rule authority, the courts have applied a multi-step analysis. *County of Cook v. John Sexton Contractors Co.*, 75 Ill. 2d 494, 508, 389 N.E.2d 553, 557 (1979); *City of Oakbrook Terrace v. Suburban Bank & Trust Co.*, 364 Ill. App. 3d 506, 514, 845 N.E.2d 1000, 1007 (2006), *appeal denied*, 221 Ill. 2d 643, 857 N.E.2d 674 (2006).

Under that analysis, a home rule ordinance is a valid exercise of home rule power if: (1) the subject of the ordinance pertains to the home rule unit's "government and affairs"; and (2) the General Assembly has not expressly preempted the exercise of home rule powers. *Palm v. 2800 Lake Shore Drive Condominium Ass'n*, 2013 IL 110505, ¶36, 988 N.E.2d 75, 82-83 (2013). The General Assembly has not expressly limited or preempted the exercise of home rule powers in the PWA. The sole issue, therefore, is whether an ordinance opting out of the PWA "pertain[s] to [the] government and affairs" of the unit of local government, within the meaning of article VII, section 6(a), of the Constitution.

In analyzing whether a subject pertains to a home rule municipality's government and affairs for purposes of article VII, section 6(a), of the Illinois Constitution, courts have held that home rule powers relate to matters of primarily local concern, as opposed to matters of statewide concern. *Peoples Gas Light & Coke Co. v. City of Chicago*, 125 Ill. App. 3d 95, 100, 465 N.E.2d 603, 607 (1984). Therefore, "a subject [is] off-limits to local government control * * * where the state has a vital interest and a traditionally exclusive role." *City of Chicago v. StubHub, Inc.*, 2011 IL 111127, ¶25, 979 N.E.2d 844, 852 (2012); *see also Palm*, 2013 IL 110505, ¶36, 988 N.E.2d 75, 82-83. In this regard, the Illinois Supreme court has noted that "the concept of a vital state policy trumping municipal power is analytically appropriate under section 6(a)." *StubHub, Inc.*, 2011 IL 111127, ¶22 n.2, 979 N.E.2d 844, 851 n.2; *see also Palm*, 2013 IL 110505 at ¶36, 988 N.E.2d at 82-83.

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In *People ex rel. Bernardi v. City of Highland Park*, 121 Ill. 2d 1, 520 N.E.2d 316 (1988), the Illinois Supreme Court squarely addressed the issue of whether a home rule municipality must comply with the requirements of the PWA when seeking bids and awarding contracts for public works projects. In that case, the Illinois Department of Labor brought suit to enjoin the city from awarding a contract to improve the city's water intake system without first complying with the requirements of the PWA. *Bernardi*, 121 Ill. 2d at 5, 520 N.E.2d at 317-18. The city asserted that it was not required to comply with the PWA because it was a home rule unit. *Bernardi*, 121 Ill. 2d at 5, 520 N.E.2d at 318. The Department countered that compliance with the requirements of the PWA was not a matter pertaining to the government and affairs of the city and, therefore, was outside the scope of its home rule authority, irrespective of whether the General Assembly had expressly preempted the field. *Bernardi*, 121 Ill. 2d at 11, 520 N.E.2d at 320.

In deciding whether the city was exercising a power pertaining to its government and affairs, the Court considered the following factors: (1) the extent to which the conduct in question affected matters outside the municipality; (2) the traditional role of municipal versus state regulation in the field; and (3) which level of government had the more vital interest in that regulation. *Bernardi*, 121 Ill. 2d at 13, 520 N.E.2d at 321. The Court emphasized the limit of the grant of power to home rule units, noting that article VII, section 6(a), of the Illinois Constitution "legitimizes only those assertions of authority that address problems faced by the regulating home rule unit, not those faced by the State or Federal governments." *Bernardi*, 121 Ill. 2d at 12-13, 520 N.E.2d at 321.

With respect to the first factor, the Court determined that the city's failure to comply with the PWA affected individuals outside of the city because the prevailing wage is determined by reference to wages paid on public works projects within the entire locality.³ *Bernardi*, 121 Ill. 2d at 16, 520 N.E.2d at 323; *see also Oakbrook Terrace*, 364 Ill. App. 3d at 514-15, 845 N.E.2d at 1008, citing *Bernardi*. Thus, one municipality's avoidance of its obligations under the PWA "could profoundly depress the prevailing wage" in the entire county and reduce earnings of workers outside the municipality's boundaries. *Bernardi*, 121 Ill. 2d at 13, 520 N.E.2d at 321-22.

Turning to the second factor, the Court concluded that the prevailing wage law fell within a field traditionally regulated by the State:

The "field" in which Highland Park has regulated by its decision to suspend the prevailing wage law is the promotion of a favorable labor climate through a comprehensive scheme of governmental intervention in the workplace. The prevailing wage law falls within that field since it both mitigates against an impoverished work force and "support[s] the integrity of the collective bargaining process by preventing the undercutting of employee wages in the private construction sector." (*State ex rel.*

³The term "locality" is defined as follows:

the county where the physical work upon public works is performed, except (1) that if there is not available in the county a sufficient number of competent skilled laborers, workers and mechanics to construct the public works efficiently and properly, "locality" includes any other county nearest the one in which the work or construction is to be performed and from which such persons may be obtained in sufficient numbers to perform the work and (2) that, with respect to contracts for highway work with the Department of Transportation of this State, "locality" may at the discretion of the Secretary of the Department of Transportation be construed to include two or more adjacent counties from which workers may be accessible for work on such construction. 820 ILCS 130/2 (West 2013 Supp.), as amended by Public Acts 98-740, effective July 16, 2014; 98-756, effective July 16, 2014.

Evans v. Moore (1982), 69 Ohio St. 2d 88, 91, 431 N.E.2d 311, 313). Establishing minimum requirements to attain those goals and to otherwise improve working conditions has traditionally been a matter of State concern, outside the power of local officials to contradict, and it remains so today.^[4] *Bernardi*, 121 Ill. 2d at 14, 520 N.E.2d at 322.

Finally, with respect to the third factor, the Court concluded that the State has a more vital interest in prevailing wage regulation than local governmental units:

Were home rule authorities allowed to govern their local labor conditions, the Illinois Constitution's vision of home rule units exercising their powers to solve local problems would be corrupted and that power used to create a confederation of modern feudal estates which, to placate local economic and political expediencies, would in time destroy the General Assembly's carefully crafted and balanced economic policies. *It is precisely for this reason, to avoid a chaotic and ultimately ineffective labor policy, that the State has a far more vital interest in regulating labor conditions than do local communities.* The disintegration of uniform labor rights and standards under State law would certainly follow the breakup of State monopoly in this field, and it is doubtful whether local units of government could agree upon statewide labor policies that would bring to Illinois the benefits of a well-compensated and skilled labor force. (Emphasis added.) *Bernardi*, 121 Ill. 2d at 16, 520 N.E.2d at 323.

Accordingly, the Court held that "[a]ttempting a geographically selective repeal of the [PWA] affected persons and entities outside [the municipality] and intruded into a field traditionally regulated by the State owing to the State's vital interests." *Bernardi*, 121 Ill. 2d at 16, 520 N.E.2d at 323. Consequently, "[c]ompliance with the Prevailing Wage Act is a matter

⁴The Court cited to various Illinois statutory provisions enacted by the General Assembly "in the discharge of its traditional function" in the field of labor regulation. *See Bernardi*, 121 Ill. 2d at 14-15, 520 N.E.2d at 322.

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pertaining to statewide, and decidedly not local, government or affairs." *Bernardi*, 121 Ill. 2d at 16, 520 N.E.2d at 323. Therefore, because the regulation of wages on public works projects is not a proper subject for the exercise of home rule powers, the Court found that home rule municipalities are required to comply with the PWA's requirements.

Bernardi is dispositive of the question of whether home rule legislation may supersede the PWA's requirements. Under *Bernardi*, because a home rule unit's avoidance of the requirements of the PWA would have an extraterritorial impact on wages paid outside its boundaries, intrude into a field of labor regulation which has traditionally been a matter of State concern, and frustrate the State's vital interest in regulating labor conditions and maintaining statewide uniform labor rights and standards, compliance with the PWA is a matter pertaining to statewide government and affairs. Accordingly, home rule powers do not extend to the adoption of local ordinances or resolutions purporting to supersede the provisions of the PWA.

Non-Home-Rule Units

In contrast to home rule units, non-home-rule counties and municipalities may exercise only those powers that have been expressly granted to them by the Constitution or by statute, together with those powers that are necessarily implied therefrom to effectuate the powers that have been expressly granted. Ill. Const. 1970, art. VII, §7; *Inland Land Appreciation Fund, L.P. v. County of Kane*, 344 Ill. App. 3d 720, 724, 800 N.E.2d 1232, 1236 (2003); *Village of Sugar Grove v. Rich*, 347 Ill. App. 3d 689, 694, 808 N.E.2d 525, 530 (2004), *appeal denied*, 212 Ill. 2d 555, 824 N.E.2d 292 (2004). Similarly, school districts "shall have only [the] powers

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granted by law." Ill. Const. 1970, art. 7, §8. Given *Bernardi's* holding regarding home rule units, it is clear that non-home-rule units may not adopt ordinances opting out of compliance with the PWA either.

Even without considering *Bernardi*, no constitutional or statutory provisions either expressly or impliedly authorize counties, municipalities, or school districts to adopt ordinances or resolutions opting out of the coverage of the PWA.⁵ Further, there are no constitutional or statutory provisions authorizing local referenda relating to the applicability of the PWA.⁶ Accordingly, non-home-rule units and school districts do not have the authority to opt out of the PWA's provisions either by the adoption of an ordinance or resolution or by the passage of a referendum.

CONCLUSION

For the reasons stated above, it is my opinion that all counties, municipalities, and school districts must comply with the provisions of the Prevailing Wage Act when seeking bids and awarding contracts for public works projects. Neither home rule nor non-home-rule units

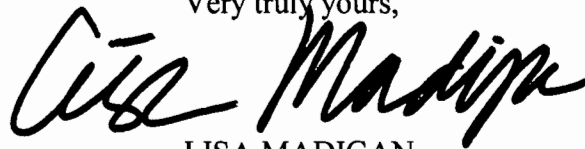
⁵Where the General Assembly has intended to exclude a public body or a specific public works project from the PWA, it has done so by express statutory provision. *See, e.g.*, 20 ILCS 805/805-40 (West 2012) (The Department of Natural Resources is authorized to establish Adopt-A-Park programs with individual or group volunteers. "The Prevailing Wage Act and the administrative rules adopted thereunder, 56 Ill. Adm. Code 100, shall not apply to any Department project or job in which volunteers are utilized under the Adopt-A-Park program").

⁶In the absence of an express constitutional or statutory provision authorizing a referendum, propositions may be submitted to voters under section 28-6 of the Election Code (10 ILCS 5/28-6 (West 2012)). The results of questions of public policy submitted under section 28-6 are merely advisory and have no binding effect, however. *See* 1983 Ill. Att'y Gen. Op. 39.

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have the authority to opt out of compliance with its requirements by the adoption of an ordinance or resolution or pursuant to referendum.

Very truly yours,

A handwritten signature in black ink, appearing to read "Lisa Madigan". The signature is fluid and cursive, with the first name "Lisa" written in a smaller, more compact script than the last name "Madigan".

LISA MADIGAN
ATTORNEY GENERAL