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September 11, 2014

**VIA HAND DELIVERY**

H. Stephen Ott  
Metro Council Clerk  
City Hall  
601 W. Jefferson Street  
Louisville, KY 40202

**Re: Proposed Minimum Wage Ordinance**

Dear Mr. Ott:

We are writing to you on behalf of multiple clients<sup>1</sup> to provide information related to the legality of a proposed ordinance (the "Proposed Ordinance") seeking to raise the minimum wage for public and private employees in Jefferson County beyond that mandated by state law. Please find enclosed copies of this letter for distribution to each of the Louisville Metro Council Members.

A thorough review of applicable statutes, case law, action taken by the General Assembly, and other policy considerations respectfully leads us to the opposite conclusion of that provided in the August 25, 2014 Opinion Letter (the "Opinion Letter") by the Jefferson County Attorney's Office. We believe the enactment of the Proposed Ordinance would exceed Louisville Metro Council's (the "Metro Council") "Home Rule" authority, be preempted by state law, and be *ultra vires* and unenforceable.

We further note that the analysis of the Opinion Letter, were it correct, would apply equally to any of the satellite cities in Jefferson County, allowing any or all to establish their own minimum wage standards. If the Metro Council proceeds with its efforts, satellite cities disagreeing with the Metro Council's actions will be forced as a protective measure to enact their own ordinances re-establishing the state minimum wage standard within their boundaries.

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<sup>1</sup> Among others, we represent Greater Louisville Inc., Kentucky Restaurant Association, Inc., Kentucky Retail Federation, Inc., and individual Jefferson County employers.

**I. Enactment of Proposed Ordinance**

**Home Rule Authority**

It is a “basic principle” that local governments are creatures of the General Assembly. *Owensboro v. Bd. of Trustees*, 190 S.W.2d 1005, 1008 (Ky. 1945) (“municipal ordinances stand inferior to, and are subordinate to the laws of the state”). The Opinion Letter cites KRS 82.082, the municipal Home Rule statute, as authority for the Proposed Ordinance. Although the Metro Council may enact laws or regulations “in furtherance of [its] public purpose[s,]” under this statute, that delegated power is necessarily limited. KRS 82.082(1).<sup>2</sup>

Under municipal Home Rule authority, ordinances cannot be in “conflict with a . . . statute,” and cannot encroach on any “comprehensive scheme of legislation on the same general subject embodied” in state law. KRS 82.082(2). In other words, ordinances that are in direct contravention of state law, “infringe the spirit” of a statute or the constitution, or are “repugnant to the general policy of the state” are invalid and unenforceable. *Sheffield v. City of Fort Thomas*, 620 F.3d 596, 609 (6th Cir. 2010) (applying Kentucky law) (citing *Arnold v. Commonwealth ex rel. City of Somerset*, 218 S.W.2d 661, 662 (Ky. 1949)).

**Kentucky’s Minimum Wage Statute**

A plain meaning reading of KRS 337.275, the statute adopting a state minimum wage, reveals that enacting an ordinance raising the local minimum wage beyond the federal rate would exceed the power granted to the Metro Council by the General Assembly. *Wheeler & Clevenger Oil Co. v. Washburn*, 127 S.W.3d 609, 614 (Ky. 2004) (“[t]he most commonly stated rule in statutory interpretation is that the ‘plain meaning’ of the statute controls”). KRS 337.275(1) (emphasis added) provides:

*Except as may otherwise be provided by this chapter, every employer shall pay to each of his employees wages at a rate of . . . not less than . . . \$7.25 . . . an hour beginning July 1, 2009. If the*

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<sup>2</sup> KRS 82.082, the statute granting municipal Home Rule authority, applies to all classes of cities and consolidated local governments. See *Ky. Licensed Beverage Ass’n v. Louisville-Jefferson Cnty. Metro Gov’t*, 127 S.W.3d 647, 649 n. 1 (Ky. 2004) (“KRS 67C.101 gives a consolidated local government . . . all the powers and privileges that cities of the first class . . . are authorized to exercise . . . ‘including . . . those powers granted to cities of the first class’” under their Home Rule authority); Op. Att’y Gen. 93-71 (“the limitation on the exercise of power by all cities contained in KRS 82.082(2) also circumscribes the exercise of power by cities of the first class”).

KRS 82.082 is “nothing more than a codification of rules of law developed by the courts of this Commonwealth in construing the validity of municipal ordinances.” Op. Att’y Gen. 93-71 (citing *Boyle v. Campbell*, 450 S.W.2d 265 (Ky. 1970); see also *Sheffield v. City of Fort Thomas*, 620 F.3d 596, 609 (6th Cir. 2010) (“[t]he drafters of [KRS 82.082] attempted to codify the common law rule of state supremacy over local governments”) (internal citation omitted).

federal minimum hourly wage<sup>3</sup> as prescribed by 29 U.S.C. sec. 206(a)(1) is increased in excess of the minimum hourly wage in effect under this subsection, the minimum hourly wage under this subsection *shall be increased to the same amount, effective on the same date as the federal minimum hourly wage rate.*<sup>4</sup>

Well-worn canons of statutory interpretation require that legislative intention be “ascertain[ed] . . . from the words employed in . . . the statute and not [by] . . . guess[ing] what the Legislature may have intended but did not express.” *St. Clair v. Commonwealth*, 140 S.W.3d 510, 567-68 (Ky. 2004) (internal citation omitted). Other state laws demonstrate that where the General Assembly means to empower municipalities to regulate in areas it has already pervasively regulated, its intention is clearly stated on the face of the statute. For example, under the Kentucky Civil Rights Act, the legislature has given “[c]ities and counties [the authority] . . . to adopt and enforce ordinances, orders, and resolutions prohibiting . . . discrimination . . . .” KRS 344.300. Here, KRS 337.275 anticipates that the minimum wage statewide will remain aligned with the federal rate, and provides no power to local governments to veer from that directive.

The Opinion Letter cites KRS 337.395 as providing the Metro Council with the power to enact the Proposed Ordinance. On its face, however, that statute is merely a “grandfather clause” ensuring only that “other law of the state”<sup>5</sup> more favorable to employees and in effect at the time the state minimum wage statute was enacted remained intact and unchanged:

Any standards relating to minimum wages, maximum hours, overtime compensation, or other working conditions, *in effect* under *any other law of this state* which are more favorable to employees than standards applicable hereunder shall not be deemed to be amended, rescinded or otherwise affected by KRS 337.275 . . . .

KRS 337.395 (enacted in 1974 and unchanged since that date) (emphasis added); *Wheeler*, 127 S.W.3d at 614; *see also generally Barker v. Family Dollar, Inc.*, 2012 U.S. Dist. LEXIS 153331, \*29 (W.D. Ky. Oct. 25, 2012).

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<sup>3</sup> Non-exempt employees working in interstate commerce must be paid at least federal minimum wage. 29 U.S.C. § 206(a).

<sup>4</sup> The current version of KRS 337.275, as quoted above, was enacted in 2007. *See* 2007 Ky. Acts. Ch. 305, sec. 1, p. 180. The General Assembly added the language borrowing the federal minimum wage, which effectively applies to nearly every employee in this Commonwealth, in 1998 after spending several years trying to keep pace with Congress’s frequent amendments to the federal rate. *See* 1998 Ky. Acts. Ch. 240, sec. 1, p. 895.

<sup>5</sup> An example of what the General Assembly meant by “any other law of this state” includes KRS 337.505 (the prevailing wage law). It is, of course, a state law, and not a local ordinance.

It is axiomatic that an ordinance passed by the Metro Council, while significant within the Louisville and Jefferson County communities, hardly qualifies as “law of the state.” See *Boyle v. Campbell*, 450 S.W.2d 265, 268 (Ky. 1970) (describing ““laws of the state”” as ““state law of general character and statewide application””) (citing 37 Am. Jur. Mun. Corp. § 165). It is equally plain that any ordinance adopted now could not have been in effect when the state minimum wage law was enacted over forty years ago.

### **Kentucky Case Law**

The Opinion Letter provides that “[n]o Kentucky court has determined that KRS Chapter 337 preempts local legislation[.]” There are at least two cases, however, that strongly support the conclusion that the Proposed Ordinance would be preempted by state law.

For example, in *Snyder v. Owensboro*, a city enacted an ordinance establishing an hourly wage rate for municipal fire fighters weeks before Kentucky’s wage and hour laws were enacted. 555 S.W.2d 246, 248-49 (Ky. 1977). The Kentucky Supreme Court held that the ordinance was valid and enforceable because declaring it “void would require a non-permissible retroactive application” of state statute. *Id.* at 249; see also *Miller v. Lexington-Fayette Urban Cnty. Gov’t*, 557 S.W.2d 430, 433 (Ky. App. 1977) (substantially the same facts) (“there [can] be no retroactive application of the statutes so as to void ordinances adopted prior to the effective date of the statute”). The inference is obvious: the Owensboro and Lexington ordinances would have been invalid and preempted if they had not already been in place before the effective date of the state wage and hours laws.

Moreover, the case that is cited in the Opinion Letter as providing “guidance” related to preemption is unhelpful. In *Lexington Fayette County Food & Beverage Association v. Lexington-Fayette Urban County Government*, the Court held that “[l]ocal regulation is not . . . precluded simply because the legislature has taken some action in regard to the same subject.” 131 S.W.3d 745, 750 (Ky. 2004). The decision involved an ordinance regulating smoking in public places. *Id.* at 748. The Court found that the ordinance was valid as it did not conflict with five random state statutes dealing with tobacco in other unrelated situations, like selling cigarettes to minors. *Id.* at 750-51 (“the statutes presented are not a comprehensive system of legislation . . . but . . . a collection of various statutes that mention smoking”).

Kentucky’s state minimum wage law, however, is not a random statute that happens to relate to the same general subject matter as the Proposed Ordinance. Indeed, KRS 337.275 is one statute within a comprehensive scheme codified in 1974 as part of a sweeping overhaul of Kentucky’s wage and hour laws. See, e.g., *Ky. Licensed Beverage Ass’n v. Louisville-Jefferson Cnty. Metro Gov’t*, 127 S.W.3d 647, 649 (Ky. 2004) (ordinance allowing local board to levy fines against non-licensees was invalid because the legislature had already enacted a comprehensive scheme of legislation regulating alcoholic beverages). Additionally, unlike the local law at issue in the *Lexington* case, the Proposed Ordinance covers exactly the same subject matter as the state statute. Thus, the General Assembly has spoken, the field is occupied, and any local law altering the state minimum wage statute’s terms would be invalid and unenforceable.



### Past Legislative Action

Members of the Kentucky House and Senate have introduced legislation attempting to increase the state minimum wage beyond the current federal rate. *See* S.B. 215/H.B. 1, 2014 Gen. Assemb., Reg. Sess. (Ky. 2014).<sup>6</sup> That legislation expired in committee, translating into a clear unwillingness by the General Assembly to depart from the statute's current language. If municipalities were already authorized to enact their own minimum wage rates, any amendment to KRS 337.275—and the state minimum wage statute itself—would be rendered superfluous.

### Other State Statutes

State laws providing authority for certain employees to receive compensation in excess of the state minimum wage suggest that KRS 337.275 cannot be ignored or unilaterally altered by a local government. *See, e.g.*, KRS 337.505 (providing a prevailing wage rate for laborers, workmen, and mechanics engaged in construction of public works); KRS 157.390 (providing that teachers shall be paid according to a salary schedule based on rank and experience); KRS 83A.070 (requiring cities to enact an ordinance fixing compensation for city employees according to a classification plan); KRS 67C.402 (providing authority for police officers to collectively bargain for an agreed upon rate of pay or wages). If municipalities could enact their own wage rates that conflict with state law, these statutes would be unnecessary.

### Other Policy Issues

The inevitable problems that would arise as a result of the Proposed Ordinance also weigh in favor of finding that its enactment would exceed the Metro Council's Home Rule authority. Where "a subject . . . has been partially covered by general [state] law and . . . is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the municipality[,]" preemption is appropriate. *Commonwealth v. Do, Inc.*, 674 S.W.2d 519, 521 (Ky. 1984).

Here, lack of uniformity in minimum wage rates across Kentucky would hamstring employers, cause significant job loss, and create more bureaucracy and confusion in enforcing statewide wage and hour laws. As exemplified by outcomes in other areas of the country,<sup>7</sup> inconsistent local wage rates could also cause unhealthy competition among neighboring communities that are already struggling because of the tepid economy. The list of companies

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<sup>6</sup> Available at <http://www.lrc.ky.gov/record/14RS/SB215.htm>;  
<http://www.lrc.ky.gov/record/14RS/HB1.htm>.

<sup>7</sup> The enclosed CD includes audio from a story that aired on National Public Radio on August 28, 2014, documenting the problems that have resulted from differing local minimum wages in two cities in California. A mall that straddles the cities' limits serves as a microcosm of the unhealthy competition that can occur as a result of lack of uniformity in local wage rates. Steve Henn, NPR, A Mall With Two Minimum Wages, Aug. 28, 2014, available at <http://www.npr.org/blogs/money/2014/08/28/343430393/a-mall-with-two-minimum-wages>.

(manufacturing, service, retail, food and beverage, and various other industries) that would be directly impacted include many which are located on the border of more business-friendly counties, both in this state and in Indiana. How many would move to Oldham or Bullitt or Spencer County? How many new businesses would never locate in Louisville in the first place if the minimum wage is nearly 40 percent higher here?

The legal structure of Louisville/Jefferson County Metro Government—a “consolidated local government”—only exacerbates these complications. Under this form of local government, cities other than those of the first class that were incorporated prior to consolidation “continue to exercise all powers and perform the functions permitted by the Constitution and general laws of the Commonwealth . . . .” KRS 67C.111(1). As recognized in *Russell County Fiscal Court v. Kelley*, the delegation of authority to the Metro Council to exercise a power “not in conflict” with a statute “clearly limits that authority where it would overlap with that of another governmental body.” 823 S.W.2d 941, 942 (Ky. App. 1991), *disc. rev. den.* (Nov. 8, 1991). In Jefferson County, there are multiple cities that may pass their own local laws even if they conflict with ordinances promulgated by the Metro Council. Jefferson County could end up with multiple local wage rates to enforce across blurred municipal lines. At a minimum, satellite cities disagreeing with the Metro Council’s actions will be forced as a protective measure to enact their own ordinances re-establishing the state minimum wage standard within their boundaries.

In short, the adverse effects of the Proposed Ordinance simply overwhelm any possible benefit to Louisville and Jefferson County, and therefore, preemption would be appropriate.

## II. Enforcement of Proposed Ordinance

### Jurisdiction

Regardless of whether the Metro Council has the power to enact the Proposed Ordinance, it does not have the ability to compel citizens to obey it.

The Opinion Letter provides that KRS 337.020 creates an enforcement mechanism for the Proposed Ordinance because it gives “[e]very . . . employee . . . a right of action against any . . . employer for the full amount of his wages due on each regular pay day.” Reading the statute in full, however, it is clear that it relates to timing of an employer’s payment of wages to an employee:

Every employer . . . shall, as often as *semimonthly*, pay to each of its employees all wages . . . . Every such employee shall have a right of action against any such employer for the full amount of his wages *due on each regular pay day*.

KRS 337.020 (emphasis added); *see also* Op. Att’y Gen. 76-681 (“[t]he apparent intention of the Legislature in enacting KRS 337.020 is to require that [an employer pay employees’] . . . wages at certain specified times”).

Further, while KRS 337.020 does provide a mechanism for relief for an employee aggrieved by a violation of state law, it does not provide a private right of action in the courts or any administrative agency for a violation of some local ordinance. Under well-settled Kentucky law, subject matter jurisdiction of the courts is determined by common law, state statute, and the state Constitution, and the jurisdiction of an administrative agency is “limited solely to that granted by Legislature.” See Ky. Const. §§ 110-113; *Hyatt v. Commonwealth*, 72 S.W.3d 566, 577 (Ky. 2002); *Auxier v. Commonwealth, Bd. of Embalmers & Funeral Directors*, 553 S.W.2d 286, 288 (Ky. App. 1977). The Metro Council cannot create judicial or agency jurisdiction by enacting the Proposed Ordinance.

### **Proper Forum for Action**

KRS 337.310 and KRS 337.385 fix two specific forums for an aggrieved employee to seek redress for alleged wage and hour violations: “a court of competent jurisdiction” or the Labor Cabinet in an administrative hearing. See *Parts Depot, Inc. v. Beiswenger*, 170 S.W.3d 354, 358-62 (Ky. 2005). Presumably, this is because the General Assembly found these bodies to be well-versed in the subject matter and equipped to fairly handle a dispute.

There is no authority in the legislative scheme, however, indicating that a code enforcement board established pursuant to KRS 65.8808—the second endorsed enforcement mechanism in the Opinion Letter—is a proper forum. See *Hardwick v. Boyd Cnty. Fiscal Ct.*, 219 S.W.3d 198, 202 (Ky. App. 2007) (“[e]very . . . grant of authority [by the General Assembly] carries with it the prohibition of exercising any authority ‘in a manner different from that permitted’”). While the draft Proposed Ordinance does not include the creation of such a board, it should be noted that providing for a forum not provided in state statute would plainly exceed the Metro Council’s power. *Id.*; see also *Boyle*, 450 S.W.2d at 268-69.

### **Procedural Confusion**

Creating a code enforcement board to hear complaints and issue orders for violations of the Proposed Ordinance could also undoubtedly cause procedural confusion. Under KRS 337.285(2), the General Assembly has granted an uncompensated or undercompensated employee the unequivocal right to sue his or her employer in court. Decisions by a local code enforcement board may likewise end up in district or circuit court if they are appealed. KRS 65.8831. Under the analysis in the Opinion Letter, parallel cases could proceed through the court system creating inefficiency and risking inconsistent judgments.<sup>8</sup>

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<sup>8</sup> This can be compared with a municipality’s establishment, by ordinance pursuant to statute, of a local human rights commission. KRS Chapter 344 anticipates that three different forums—the local commission, the state Commission on Human Rights, or a court—can hear complaints brought under those statutes and determines which has jurisdiction in the event of a conflict. The three forums are mutually exclusive, not parallel. KRS 344.270.

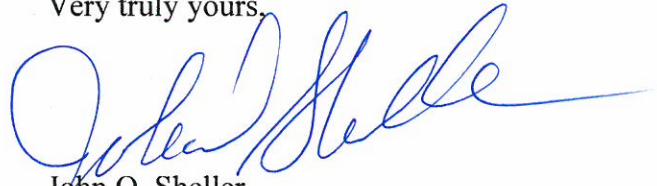
**Criminalizing Civil Conduct**

In enacting KRS Chapter 337, the General Assembly devised a set of laws designed to exhaustively address wage and hour issues for employers and employees, and ensure the state is in compliance with federal law. These statutes are civil and remedial in nature. KRS 337.990; KRS 337.994 (providing for civil penalties for violations of KRS Chapter 337).

Yet, as the third enforcement mechanism, the Opinion Letter offers the option of designating a violation of the Proposed Ordinance as a criminal misdemeanor under KRS 83A.065. This enforcement mechanism is not included in the draft Proposed Ordinance. It should be noted, however, that if Metro Council did pursue this option, it would be criminalizing conduct that has been deemed inherently civil by the General Assembly. Such a conflict between a local law and the laws of the state cannot stand. *See Thomas v. Commonwealth*, 563 S.W.2d 491, 493 (Ky. App. 1978) (invalidating an ordinance that made criminal an act state law determined was not criminal).

In light of these points, we respectfully urge the Metro Council to abandon the Proposed Ordinance. Thank you for your consideration, and please do not hesitate to contact us if you have any questions or concerns.

Very truly yours,



John O. Sheller  
Timothy J. Eifler

JOS/ml  
Enclosures

cc: The Honorable Greg Fischer, Mayor of the City of Louisville (via hand delivery)  
The Honorable Mike O'Connell, Jefferson County Attorney (via regular mail)  
The Honorable Bill Dieruf, President of the Jefferson County League of Cities (via regular mail)  
Mayors, Incorporated Cities in Jefferson County (via regular mail)  
Jonathan Steiner, Executive Director and CEO, Kentucky League of Cities (via regular mail)  
The Honorable Jack Conway, Kentucky Attorney General (via regular mail)  
The Honorable Robert Stivers, President of the Kentucky Senate (via regular mail)  
Kentucky Senate, Jefferson County Delegation (via regular mail)  
The Honorable Greg Stumbo, Speaker of the Kentucky House of Representatives (via regular mail)  
Kentucky House of Representatives, Jefferson County Delegation (via regular mail)  
Ronald Peters, President of Paradise Tomato Kitchens, Inc. (via e-mail and regular mail)



Mr. Ott, Metro Council Clerk  
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Kent Oyler, President and CEO of Greater Louisville Inc. (via e-mail and regular mail)  
Stacy Roof, President and CEO of the Kentucky Restaurant Association, Inc. (via e-mail and regular mail)  
Tod Griffin, President of the Kentucky Retail Federation, Inc. (via e-mail and regular mail)  
Sebastian Kitchen, *The Courier-Journal* (via e-mail)  
Phillip M. Bailey, WFPL News (via e-mail)  
Braden Lammers, *Louisville Business First* (via e-mail)  
Shae Hopkins, KET Executive Director (via regular mail)  
Scott Reynolds, WAVE-3 (via e-mail)  
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