

Supreme Court Decides not to Issue Advisory Opinion on the Constitutionality of the PMLA and IWOA

December 20, 2019

A divided Michigan Supreme Court ruled on Wednesday that it does not have the authority to issue an advisory opinion on whether the Paid Medical Leave Act and the Improved Workforce Opportunity Act were properly passed by the state Legislature, stating in one short paragraph:

On July 17, 2019, the Court heard oral argument on the requests by the House of Representatives and the Senate for an advisory opinion on the constitutionality of 2018 PA 368 and 2018 PA 369. On order of the Court, the requests are again considered, and they are DENIED, because we are not persuaded that granting the requests would be an appropriate exercise of the Court's discretion.

Supreme Court Case Nos. 159160, 159201. While there was considerable debate concerning the reason why an advisory opinion should not be issued, and strong dissenting opinions in the 48 page opinion, this ends the suspense – for now. The laws could be challenged directly in court, which would start the legal process over. But for the time being, both laws will remain as they were passed by the lame duck legislative session in 2018.

Let's look back at what happened. As you may recall, there were two citizen initiatives that were to appear on the November 2018 ballot which, among other things, would have (1) provided 40 hours of paid sick time to employees who work for smaller employers (having fewer than 10 employees) and 72 hours of paid sick time to employees working for employers with 10 or more employees; and (2) increased the minimum wage rate to \$10/hour with additional yearly increases, bringing the minimum wage rate to \$12/hour by 2022 and phasing out the tip credit by 2024.

If both initiatives became law by vote of the citizens, the Legislature could only change them by a three-quarters vote of all members of both chambers of the Legislature, rather than a simple majority vote.

But the citizen initiatives were removed from the ballot when the Legislature adopted both laws. If that was the end of the story, we would not now have issues to be decided by the Supreme Court. After the November election, the Legislature amended both laws and then Gov. Rick Snyder signed the amended versions into law during the lame duck session. That's the rub. Can they adopt and amend?

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The amendments significantly watered down the benefits to employees, making both laws friendlier to employers. For example, under the amended laws (which became effective March 29, 2019), paid sick time must only be provided by employers with 50 or more employees and then only 40 hours a year. Similarly, the minimum wage rate was increased to \$9.45 per hour, and it won't reach \$12 per hour until 2030. In addition, the tip credit will stay in place.

Democrats in the Legislature asked the state's new Attorney General Dana Nessel to opine on whether the so called "adopt and amend" process is constitutional under Article 2 § 9 of the Michigan Constitution, which begins by stating: "The people reserve to themselves the power to propose laws and to enact and reject laws, called the initiative, and the power to approve or reject laws enacted by the legislature, called the referendum."

The Republicans made the same request of the Supreme Court, believing its conservative majority would provide a more pro-employer opinion. The Supreme Court agreed to hold oral arguments on the issue but did not commit to issuing an advisory opinion. It requested briefs from the attorney general's office, arguing both for and against the constitutionality of the process that had been utilized by the Legislature and the new laws. On July 17, 2019, the Supreme Court held oral argument in *In re Advisory Opinion on 2018 PA 368 & 369*. It has now ruled.