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# Portland Hazard Pay Ordinance Upheld

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On February 1, 2021, Superior Court Justice Thomas Warren ruled that the hazard pay provision of a minimum wage ordinance, enacted by Portland voters in November 2020, was validly enacted; however, he also held that the hazard pay provision does not go into effect until January 1, 2022. Those rulings have been appealed to the Maine Supreme Judicial Court, which has issued an expedited briefing schedule. Oral arguments are expected to be held at the beginning of May.

Plaintiffs, who include the Portland Regional Chamber of Commerce, the Alliance for Addiction & Mental Health Services, Slab LLC, Nosh LLC, Gritty McDuff's, and Play it Again Sports are represented in the case by Attorney John Aromando of Pierce Atwood in Portland. The City of Portland and its City Manager, Jon Jennings, are represented by Attorney Dawn Harmon of Perkins Thompson in Portland. The intervenor-defendants, Caleb Horton and Mario Roberge-Reyes, two Whole Foods employees in Portland, are represented by Attorneys Shelby Leighton, Valerie Wicks, and David Webbert of Johnson, Webbert & Garvan in Augusta.

Plaintiffs challenged the validity of the emergency pay provision of the ordinance amendment, which was enacted via a citizen initiative on the November 2020 ballot. The initiative provided for an increase to Portland's minimum wage rate, which is presently \$12.00 per hour, to \$15.00 over the course of three years, with the first increase taking place on January 1, 2022. The initiative also contained a "hazard pay" provision that increased pay for work performed during a declared emergency to 1.5 times the regular rate under the ordinance.

Plaintiffs argued that the emergency pay provision was not a valid enactment under either the Maine Constitution or the Portland City Code. Plaintiffs also contended that even if the initiative was valid, the emergency pay provision did not take effect until January 1, 2022. The City of Portland took no position on the validity of the initiative generally, but argued that the initiative was invalid because it purported to apply to city employees.

The intervenors defended the validity of the initiative, and asserted that the emergency pay provision took effect on December 6, 2020, 30 days after the official result of the initiative was declared. Under the intervenors' interpretation, workers in Portland would be paid at least \$18.00 per hour throughout the duration of the declared state of emergency resulting from the COVID-19 pandemic.

Justice Warren sided with the workers, deciding that the minimum wage ordinance was validly enacted under both the Maine Constitution and the Portland City Code. Although the Law Court had previously held that the Maine Constitution allows direct initiatives only in regard to matters that are exclusively municipal, the court found that, since that time, municipalities have been granted more authority by virtue of Maine statutory law, 30-A M.R.S. § 3001.

In light of that expansion of municipal authority, the court found it logical to interpret the municipal initiative power as "coextensive with the broadened legislative authority of the city council except in those areas which the municipal code or charter has excluded." Although it concluded that the initiative was a valid enactment, the court's decision did not specifically address the City's position that the minimum wage ordinance did not apply to city workers, since city code prohibits citizen initiatives from affecting the hourly wages of city employees.

Justice Warren determined that the emergency pay provision of the initiative did not go into effect until January 1, 2022. He looked to the plain language of the initiative, which tied the emergency pay calculation to the amended minimum wages under the ordinance. Because the amendments did not commence until January 1, 2022, Justice Warren concluded that the emergency pay provision also did not commence until that date.

Both plaintiffs and intervenor-defendants have appealed Justice Warren's decision to the Law Court. On behalf of plaintiffs, who continue to contend that the emergency pay provision is not within the municipal voters' initiative power, Attorney Aromando commented, "Plaintiffs are businesses with employees based in Portland that have been significantly and adversely impacted by the economic effects of the pandemic. They were already struggling to maintain their work force and service levels prior to November 2020. The Emergency Wage has exacerbated the issues facing plaintiffs and other Portland businesses, many of whom have had to relocate, lay off employees, cut employee hours, reduce services, terminate benefits, or close entirely because of the Emergency Wage Provision. The concept of an emergency wage enhancement due to the effects of a global pandemic is manifestly a statewide public policy concern, not limited to the interests of just Portland residents, and one that is also having a significant impact on employers, workers, and consumers who do not reside in Portland."

Attorneys for the two workers / intervenor-defendants claimed the ruling was a victory for Portland voters, but said they had filed an appeal on the issue of the effective date of the hazard pay provision. In a statement released by their attorneys, Horton and Roberge-Reyes praised the court's decision upholding the hazard pay provision; noting that they have continued to report to work during the pandemic and deserved to be compensated for that risk to their health.

Attorney Leighton commented, "We are pleased with the Court's well-reasoned ruling that municipal voters have the authority to pass citizen initiatives on important workers' rights issues like the local minimum wage." Attorney Wicks said, "We are optimistic that the Law Court will rule that the hazard pay provision took effect in December 2020, especially because the ballot question put to voters indicated that the hazard pay would take effect in December 2020, during the pandemic."