

Opinion No. 71-114

October 15, 1971

BY: OPINION OF DAVID L. NORVELL, Attorney General

TO: Mr. Ricardo M. Montoya State Labor Commissioner State Labor & Industrial Commission 137 E. De Vargas Street Santa Fe, N.M. 87501

QUESTIONS

FACTS

Attorney General Opinion No. 70-61, issued September 8, 1970, held, in essence, that the State Labor Commissioner's authority to issue predetermined wage rates for highway construction given him by the New Mexico Public Works Minimum Wage Act (§§ 6-6-6 to -10, N.M.S.A., 1953 Comp.) was preempted by the Secretary of Labor's authority to issue pre-determined wage rates under 23 U.S.C. 113.

The New Mexico State Labor Commissioner has now requested a reconsideration of Attorney General Opinion No. 70-61 in light of a copy of a letter from Warren D. Landis, Assistant Administrator, Wage and Hour Division, U.S. Department of Labor to Mr. Paul H. Bachman, Commissioner of Labor, State of Wyoming in which Mr. Landis stated:

"Where federal funds, subject to contract labor standards, are provided and the State and the Federal rate differ the Federal rates are required to be paid if the minimum rates required by the State determination are lower. On the other hand, if State rates are higher than Federal rates, the contractor is required under the State law to pay the higher rate."

QUESTIONS

1. Are the provisions of Sections 6-6-6 through 6-6-10, N.M.S.A., 1953 Comp. preempted by 23 U.S.C. 113 or by any other Federal statute relating to predetermine wage rates?
2. If the answer to Question No. 1 is no, what validity does Attorney General Opinion No. 70-61 have?

CONCLUSIONS

1. See analysis.
2. See analysis.

OPINION

{*172} ANALYSIS

1. We have examined the Department's letter and find it to be a persuasive and correct statement of the preemption doctrine. Further, we do not think it to be the proper prerogative of this office to support the doctrine of Federal Preemption when the Federal government itself disclaims it. Therefore, the position of the Department of Labor is hereby incorporated as the opinion of this office. According to the terms of this opinion, we conclude that the New Mexico Public Works Minimum Wage Act is preempted by the Federal Government's predetermined wage rate only when the New Mexico rate is lower than that predetermined by the Federal Government.

2. Accordingly, Attorney General Opinion No. 70-61 is correct in our opinion in those situations in which the Federal pre-determined rate is higher than the pre-determined rate of the State of New Mexico. However, insofar as Attorney General Opinion No. 70-61 holds that there is a Federal preemption if the Federal rate is lower than the State rate, that opinion is reversed.

Further, it is our opinion that the State and those political subdivisions of the State whose contracts are subject to both the State and Federal predetermined wage laws henceforth include both rates in their advertisements for bids and require the contractor to pay the higher of these rates.