

Opinion No. 16.

**Labor — Constitutional Amendment —
Hours of Labor—Retail Stores—
Cities and Towns.**

HELD: 1. Section 3073.1, relating to the hours of labor, in retail stores, by reason of the constitutional amendment, is applicable to all cities or towns, irrespective of their population.

January 28, 1939.

Mr. E. C. Burris
 Commisisoner of Labor
 Capitol Building
 Helena, Montana

My Dear Mr. Burris:

You have submitted the question as to whether the words "in all cities and towns having a population of twenty-five hundred (2500) or over," as found in Section 3073.1, R. C. M., 1935, have been repealed by Article XVIII, as amended, of the State Constitution. Section 3073.1 provides:

"A period of eight (8) hours shall constitute a day's work and a period of not to exceed forty-eight (48) hours shall constitute a week's work in all cities and towns having a population of twenty-five hundred (2500), or over for all persons employed in retail stores, and in all leased businesses where the lessor dictates the price, also kind of merchandise that is sold, and the hours and conditions of operation of the business, all persons employed in delivering goods sold in such stores, all persons employed in wholesale warehouses used for supplying retail establishments with goods, and all persons employed in delivering goods to retail establishments from such wholesale warehouses."

Sections 4 and 5 of Article 18 of the State Constitution provide:

"A period of eight hours shall constitute a day's work in all industries, occupations, undertakings and employment, except farming and stock raising; provided, however, that the Legislative Assembly may by law reduce the number of hours constituting a day's work whenever in its opinion a reduction will better promote the general welfare, but it shall have no authority to increase the number of hours constituting a day's work beyond that herein provided.

"All acts and parts of acts in conflict herewith are hereby repealed."

The rule in construing a statute or constitutional amendment, where a statute, or part thereof, is in conflict with a subsequently enacted constitu-

tional amendment is to consider the statute, or part thereof, repealed.

In re. Stuart 53 Cal. 745,
 Arie v. State, 100 Pac. 23 (Okla.),
 Wren v. Dixon, 161 Pac. 722,
 (Nev.)
 People v. Field, 181 Pac. 526,
 Hawley v. Anderson, 195 Pac.
 358, (Or.).

This rule of construction is fortified by Section 5 of Article 18, supra, because that section expressly repeals all acts or parts of acts in conflict.

The only question left to be determined is whether the above quoted words in Section 3073.1 are in conflict with the subsequent constitutional amendment. The amendment, by reason of making no reference to towns or cities with a population of twenty-five hundred people or over, is applicable to all towns or cities without reference to their population. The Constitution makes no exception as to towns or cities under twenty-five hundred population, nor does it classify the same upon the basis of population. The statutory application of the eight-hour day and the forty-eight-hour week law to only towns or cities of twenty-five hundred population or over is in conflict and repugnant with the amendment, as determined not only by the rules of construction enunciated by the decisions of the court, but by the express provisions of the amendment itself. The words in the statute in conflict with the amendment become innoxious and are repealed. Having been repealed, the statute must be read with the omission of the repealed language, and as follows:

"A period of eight (8) hours shall constitute a day's work and a period of not to exceed forty-eight (48) hours shall constitute a week's work * * * * * (omitted) for all persons employed in retail stores, and in all leased businesses where the lessor dictates the price, also kind of merchandise that is sold, and the hours and conditions of operation of the business, all persons employed in delivering goods sold in such stores, all persons employed in wholesale warehouses used for supplying retail establishments with goods, and all persons employed in delivering goods to retail establishments from such wholesale warehouses."

In the case of *Rose v. Sullivan*, 56 Mont. 480, the statute therein referred to provided that only a male could hold the office of county auditor. The subsequent adoption of Section II of Article IX to the State Constitution removes sex qualifications. The court said:

“By the adoption of that amendment the sex attribute was eliminated as a qualification to vote and by force of the language employed in Section 11, Article IX, it was also eliminated as a qualification to hold any office under the Constitution or laws of this state.”

The words “all industries, occupations, undertakings and employments, except farming and stock raising,” as found in Section 4 of Article 18, as amended, cannot be inserted or substituted, in Section 3073.1, for the words “retail stores, etc.” Language in a statute must be excluded or omitted by reason of a conflict with a subsequently enacted constitutional provision, but there is no authority granted to insert, include, substitute or replace language therein.

Section 10519. *Morrison v. Farmers' State Bank*, 70 Mont. 146.