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REPORT TO THE COMMITTEE ON RULES,
OPEN GOVERNMENT AND INTERGOVERNMENTAL RELATIONS

LIVING WAGE ORDINANCE: ENFORCEMENT PROVISIONS AND APPLICABILITY
TO EMERGENCY MEDICAL PERSONNEL CONTRACTS

INTRODUCTION

At the October 17, 2007 hearing of the City Council's Rules, Open Government and Intergovernmental Relations Committee, Councilmember Donna Frye requested that the City Attorney address two questions related to the City's Living Wage Ordinance, codified at San Diego Municipal Code [SDMC] sections 22.4201, *et seq.* Councilmember Frye's two questions and brief answers are provided below, followed by an overview of the Living Wage Ordinance and analysis of the issues presented.

QUESTIONS PRESENTED

1. What enforcement tools does the Living Wage Ordinance [Ordinance] provide to City staff, and are those tools sufficient to enforce administrative requirements of the Ordinance such as the duty to post a notice to employees in the workplace?
2. Are emergency medical personnel contracts currently exempt from the Living Wage Ordinance, and if so, what are Council's options for extending application of the Ordinance to such contracts?

BRIEF ANSWERS

1. The Living Wage Ordinance provides a variety of remedies for enforcement, including termination of the subject contract or even debarment. Short of these remedies, the Ordinance permits any lesser penalties allowed by law. In addition, City staff has adopted administrative rules for implementing the Ordinance, which expressly permit less severe penalties such as withholding of payment on a contract until compliance is achieved.
2. The Living Wage Ordinance expressly exempts medical service contracts, such as contracts for emergency medical personnel. If the Council wishes to extend the provisions of the Ordinance to such contracts, it will need to do so by amending the Municipal Code.

DISCUSSION

In 2005, the City Council passed the City's Living Wage Ordinance after extended public debate. The Council considered multiple versions of the Ordinance, with varying degrees of applicability. The current version applies to City contracts for certain services, as well as contracts for any services performed at five specified "City facilities."¹ SDMC § 22.4210(a). Covered employers are required to pay a "living wage"² to service workers, as well as follow certain administration procedures to ensure compliance. For example, covered employers are required to include Living Wage provisions in applicable subcontracts, file certificates of compliance with the City within 30 days of becoming covered employers, and notify employees of their rights under the Ordinance. SDMC § 22.4225. The Ordinance provides various remedies for enforcing the provisions of the Ordinance, as will be discussed below.

A. Overview of Enforcement Provisions.

The Living Wage Ordinance sets forth various remedies for violations by covered employers in SDMC sections 22.4230, *et seq.*, entitled "Enforcement." The Ordinance permits aggrieved employees to file a court action within one year of an alleged violation, and/or to file a complaint with the City at any time. SDMC § 22.4230 (a), (c). Upon receipt of an employee complaint, the City may:

in its sole discretion, investigate and address any alleged violation of [the Ordinance's] requirements. However, the City's failure to investigate an alleged violation or otherwise enforce any of the provisions of this division shall not create any right of action or right to recover damages from the City by any person, including but not limited to an aggrieved employee. SDMC § 22.4230(c).

The Ordinance also sets forth the City's remedies upon finding that a violation has occurred:

The City has the discretion to terminate the service contract, financial assistance agreement, or City facility agreement and pursue *any other legal remedies* available to the City including debarment, if the covered employer fails to comply with this division. SDMC § 22.4230(d) (emphasis added).

While the Ordinance permits the extreme remedies of termination of the subject contract or debarment, these remedies may not be appropriate for lesser violations such as the failure to file certificates of compliance or failure to notify employees of their rights in a timely manner.

¹ The five specified City facilities are: Petco Park, Qualcomm Stadium, the San Diego Sports Arena, the San Diego Convention Center, and the San Diego City Concourse. SDMC § 22.4205 (a)-(e).

² The living wage was originally \$10 per hour plus \$2 in health benefits, or \$12 per hour. The living wage is upwardly adjusted each year based on the Consumer Price Index. SDMC § 22.4220(a).

Because the Ordinance allows the City to pursue “any other legal remedies,” the City may impose *less severe* penalties for minor infractions. For example, the City could withhold payment on a contract until a covered employer is in compliance.

The City has already adopted an administrative scheme for enforcement of the Ordinance, which includes penalties short of terminating a contract or debarment. The Ordinance expressly permits the Mayor to “develop and implement administrative policies, rules, and regulations” to carry out the intent of the Ordinance, including “*procedures for handling complaints* by covered employees.” SDMC § 22.4235 (emphasis added). Pursuant to this provision, the Mayor, through the City’s Living Wage Administrator, has promulgated the “City of San Diego Rules Implementing the Living Wage Ordinance” [Rules], which are currently posted on the Purchasing and Contracting Department’s website. See http://www.sandiego.gov/purchasing/pdf/lwo_rules.pdf.

The Rules include comprehensive administrative procedures for compliance and enforcement of the Ordinance, as well as the following forms for covered employers and employees:

- Notice to Employees
- Certificate of Compliance
- Application for Exemption; and
- Employee Complaint Form

In addition to posting the “Notice to Employees” and filing a “Certificate of Compliance,” the Rules require covered employers to maintain records sufficient to demonstrate compliance with the Ordinance and to cooperate with City audits and investigations. If a covered employer fails to comply with these requirements, the Living Wage Administrator may recommend that payment be withheld on the subject contract. Rules, p. 15, 18. Upon finding that a payment violation has occurred, the Living Wage Administrator may also require covered employers to submit back-pay to employees. Rules, p. 20. Such penalties provide the Living Wage Administrator with options other than contract termination or debarment, within her discretion.

In extreme cases, where full application of these administrative options does not provide sufficient protection to covered employees, the City Attorney may file a court action to protect employees’ rights. The City Attorney recently brought one such action.

B. Applicability to Emergency Medical Personnel Contracts.

Councilmember Frye also asked about the applicability of the Living Wage Ordinance to contracts for emergency medical personnel. The City currently contracts with one company, San Diego Medical Services Enterprises [SDMSE], to provide its emergency medical personnel,

including paramedics and emergency medical technicians [EMTs]. When the SDMSE contract was first entered into, the Living Wage Ordinance was not yet in effect for service agreements. Because the City is currently in the process of procuring a new contract for such services, Councilmember Frye's inquiry regarding the applicability of the Ordinance is timely.

Contracts for medical services, including contracts for emergency medical personnel, are currently exempt from the Living Wage Ordinance. Section 22.4215, entitled "Exemptions," expressly provides that certain categories of contracts are not subject to the Ordinance, including, in pertinent part:

contracts for design, engineering, financial, technical, legal, banking, *medical*, management, operating, advertising, *or other professional services*. SDMC § 22.4215(a)(7) (emphasis added).

The most straightforward reading of this exemption is that *all* service contracts falling with the enumerated categories (e.g. "legal" or "medical") are exempt from the Ordinance regardless of the nature of the service provided. In addition, all contracts in *other professional fields* are exempt.³

The decision to exclude all medical service contracts appears to have been a policy judgment on the part of the Council at the time the Ordinance was passed. The broad category of medical services includes EMTs and paramedics. A review of the City's existing agreement with SDMSE and related documents shows that certain entry level EMTs and paramedics do not make a living wage as defined by the Ordinance. If the Council wishes to extend the Living Wage Ordinance to boost the pay of such workers, it would have to do so by amending the Municipal Code. For example, the Council could amend the above-referenced exemption to add the following language (in underline):

contracts for design, engineering, financial, technical, legal, banking, medical, management, operating, advertising, or other professional services. The exemption for medical service contracts does not extend to contracts for emergency medical personnel, such as emergency medical technicians and/or paramedics.

A larger question for the Council to consider would be whether to extend the Ordinance to non-professional workers in some of the other categories enumerated, such as support staff employed by firms providing engineering or legal services to the City. As always, the City Attorney stands ready to assist with any revisions to the Ordinance proposed by Council.

³ An alternative reading could be that only contracts for professional services *within* the enumerated categories are exempt from the Ordinance. Under this reading, for example, only contracts with medical *professionals* (such as doctors or nurses) would be exempt – not contracts for medical *service workers* (such as orderlies). Because we believe the interpretation articulated above to be the more straightforward one, and the result intended by Council, we do not need to address whether EMTs or paramedics would qualify as "professionals" in this context.

CONCLUSION

The Living Wage Ordinance and the Rules implementing it currently provide City staff with a variety of remedies to enforce the terms of the Ordinance. The Ordinance itself expressly permits termination of contracts or debarment, as well as any other legal remedies. The Rules set forth administrative procedures, as well as lesser penalties for minor infractions. Currently, the Living Wage Ordinance expressly exempts medical service contracts, such as contracts for emergency medical personnel. If the Council would like the Ordinance to apply to such contracts, it will need to amend the Municipal Code to limit this exemption.

Respectfully submitted,

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