

MARY JO LANZAFAME
ASSISTANT CITY ATTORNEY

AMANDA L. GUY
DEPUTY CITY ATTORNEY

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

Jan I. Goldsmith

CITY ATTORNEY

1200 THIRD AVENUE, SUITE 1620
SAN DIEGO, CALIFORNIA 92101-4178
TELEPHONE (619) 236-6220
FAX (619) 236-7215

January 14, 2014

**REPORT TO COMMITTEE ON ECONOMIC DEVELOPMENT AND
INTERGOVERNMENTAL RELATIONS**

**PROPOSED AMENDMENTS TO THE LIVING WAGE ORDINANCE OF THE SAN DIEGO
MUNICIPAL CODE**

INTRODUCTION

City staff proposes to amend the Living Wage Ordinance (LWO) of the San Diego Municipal Code (SDMC). SDMC §§ 22.4201- 22.4245. This Office has not been provided an adequate opportunity to analyze these proposed amendments entirely and only recently began working with staff to address several legal issues pertaining to SDMC sections 22.4320(a)(1)-(2), 22.4320(a)(6) and 22.4235(a). This Report raises general legal concerns that should be explored before the proposed LWO amendments are adopted.

DISCUSSION

The proposed LWO amendments that present the most significant legal concerns are the changes to SDMC section 22.4230 pertaining to enforcement of the LWO. The majority of these amendments enlarge the recovery available to covered employees and the City through either an enforcement action brought by a covered employee or the City Manager. Of these, this Report analyzes the following proposed additions: (1) the award of liquidated damages to the City through a City action; (2) the award of liquidated damages to an employee through an employee action; and (3) lengthening the statute of limitations for employee actions.

**I. AWARD OF LIQUIDATED DAMAGES TO CITY THROUGH CITY ACTION
MAY NOT BE ENFORCEABLE**

Proposed SDMC section 22.4230(d)(4)(ii) permits the City's recovery of "liquidated damages in the amount of three times the difference between the wages required to be paid and the actual amount of wages paid" through a City LWO enforcement action. These liquidated damages are punitive penalties, which must be proportional to the employer's misconduct, sufficient to achieve the penalty's deterrent purpose, and not constitutionally excessive. *Kinney v. Vaccari*, 27 Cal. 3d 348, 356 (1980). Moreover, civil "[p]enalties are never favored by courts of law or equity, and statutes imposing penalties or creating forfeitures must be strictly construed." *No Oil, Inc. v. Occidental Petroleum Corp.*, 50 Cal. App. 3d 8, 29 (1975).

The amount of proposed liquidated damages is triple, or “treble,” the amount of wages owed. Treble damages are not facially unconstitutional, however, they may pose “a risk of producing arbitrary, disproportionate results.” *McHugh v. Santa Monica Rent Control Bd.*, 49 Cal. 3d 348, 379 (1989). At least one court has held treble damages imposed through a local ordinance to be unconstitutional. *Balmoral Hotel Tenants Ass’n v. Lee*, 226 Cal. App. 3d 686, 696 (1990). In *Balmoral*, violations of a local rent control ordinance permitted trebling of damages in a civil action, including damages for mental anguish. The court found treble damages for mental anguish unconstitutionally excessive because it amplified the uncertainty inherent in such computations. *Id.* at 694.

The proposed amendments also create uncertainty regarding the amount of treble damages in the event of a LWO violation. SDMC section 22.4230(d)(4)(ii) trebles “the difference between the wages required to be paid and the actual amount of wages paid.” It is uncertain whether this language refers to the wages owed to a single covered employee, to all covered employees, or an intermediate number. The amount of treble damages may vary widely depending upon the number of employees chosen to calculate damages, and this ambiguity could expose the ordinance to repeated constitutional challenges. Whether the amount imposed pursuant to this LWO amendment would be found excessive would ultimately be determined on a case-by-case basis. *Hale v. Morgan*, 22 Cal. 3d 388, 404 (1978).

Due to the foregoing, the Committee should consider removal of the proposed liquidated damages language from SDMC section 22.4230(d)(4)(ii), or revisions engineered to make the liquidated damages proportional to the employer’s misconduct, such as by limiting their application to willful violations. Such a revision could mirror the distinction currently found in SDMC section 22.4230(a)(4) for covered employee actions. If the proposed amendment is retained, this Office also recommends revisions to clarify the penalty’s scope in order to avoid the same concerns noted in *Balmoral*.

II. AWARD OF LIQUIDATED DAMAGES TO EMPLOYEES THROUGH EMPLOYEE ACTIONS MAY NOT BE ENFORCEABLE

Amendments to SDMC sections 22.4230(a)(1)-(2) propose to make available the award of liquidated damages to a covered employee, which could be recovered in addition to monetary damages and interest that are currently available under the LWO. Proposed SDMC section 22.4230(a)(6) additionally provides that if a covered employee prevails against his or her employer in a civil action addressing LWO violations, “[t]he courts shall award liquidated damages to be paid by the employer to the employee in the amount of three times the difference between the wages required to be paid and the actual amount of wages paid.”

This presents a legal issue because, as discussed above, liquidated damages are construed as a penalty and are subject to constitutional limitations in their application. Further, these proposed amendments, unlike those pertaining to the City’s recovery of liquidated damages, include additional mandatory language. SDMC § 22.4230(a)(6) (“The court shall award

liquidated damages . . . ”). Such mandatory language poses a greater risk of producing disproportionate and excessive penalties, as it does not take into account the culpability of the person paying them. *Hale*, 22 Cal. 3d at 399.

The proposed amendment is also duplicative of, and internally inconsistent with, the LWO. Although phrased differently, existing SDMC section 22.4230(a)(4) and proposed SDMC section 22.4230(a)(6) both operate to require payment of a penalty to a covered employee in the amount of three times the actual monetary damages. In addition to their duplicity, they contain conflicting provisions as SDMC section 22.4320(a)(4) limits its application of the penalty to instances of willful violations. These conflicting provisions could lead to arbitrary and discriminatory enforcement of the LWO. Regulations specified in an ordinance must be clear, definite and specific in their application and operation so their application is not left to the whims of officials. *Stacy & Witbeck, Inc. v. City & County of San Francisco*, 36 Cal. App. 4th 1074, 1084 (1995). Therefore, it is recommended that the liquidated damages language in SDMC sections 22.4230(a)(1)-(2) either be deleted or revised to be more definite and specific in its application to operation.

III. INCREASING THE STATUTE OF LIMITATIONS FOR EMPLOYEE ACTIONS

The LWO amendments propose increasing the statute of limitations under which a covered employee may file a civil action against an employer from a one-year period to three years. SDMC § 22.4230(a). This three-year period is longer than the statutory periods we reviewed in other living wage ordinances in California.¹ Further, this three-year statute of limitations exceeds the statutory period found in the similar context of state minimum wage law. Provisions of the California Labor Code mandate payment of minimum wages to employees and have been found to provide a one-year statute of limitations in lieu of a three-year period if a penalty such as liquidated damages is sought. *Martinez v. Combs*, 49 Cal. 4th 35, 48 (examining liquidated damages in the context of minimum wage under Cal. Lab. Code § 1194.2). Therefore, the state’s application of a one-year statutory period is most analogous to the City’s LWO, which also provides for payment of liquidated damage to covered employees through these amendments. This is a policy issue for the Council to decide, as either option (i.e. one or three years) is available under applicable law.

¹ The cities of Hayward and Sacramento specify a one-year statute of limitations. Other living wage ordinances, including those of Berkeley, Richmond, Los Angeles, San Jose, and San Francisco City and County, are silent and therefore subject to the one-year statutory period under California law if penalties are sought.

CONCLUSION

This Report addresses the main legal issues pertaining to the proposed LWO amendments that were noted by this Office prior to this Committee's meeting. This Office recommends that the LWO amendments be revised to minimize the legal risk to the City. In addition to the areas addressed in this Report, the proposed amendments will also require revisions pertaining to formatting, definitions, and other proposed language to ensure consistency with the SDMC.

JAN I. GOLDSMITH, City Attorney

By /s/ Amanda L. Guy
Amanda L. Guy
Deputy City Attorney

ALG:js
RC-2014-2
Doc. No. 702383_2