OFFICE OF COUNCIL PRESIDENT TODD GLORIA
CITY OF SAN DIEGO

MEMORANDUM

DATE: April 24, 2014

TO: Economic Development and Intergovernmental Relations Committee

FROM: Council President Todd Gloria Todd Gloria

SUBJECT: Improving Wages and Working Conditions in San Diego – Update

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As requested by the Committee on Economic Development and Intergovernmental Relations, I have been working with the City Attorney's office to prepare and present a DRAFT ordinance to the committee at your April 30, 2014 meeting.

The attached proposition includes two elements. It proposes five earned sick days per year be provided to workers in San Diego based upon hours worked. It also proposes a minimum wage of $13.09 per hour, which would be implemented over a three year period starting in July 2015.

The current minimum wage in California is $8.00, which will increase to $9.00 on July 1, 2014 and to $10.00 in January 1, 2016. If the proposed measure is approved, San Diego's minimum wage would be $11.09 in July 2015, $12.09 in July 2016, and reach $13.09 in July 2017. It would then be indexed to account for future inflation starting January 1, 2018.

While we continue to work with the City Attorney's office through the process, I am happy to present the committee with a sound policy from which to continue our discussion and further engage the public and stakeholders in this dialogue. I would request further committee input and direction on the proposition and for the committee to allow my office to continue to work with the City Attorney's office in order to return to the June 11, 2014 ED&IR Committee meeting for recommendation of final approval for placement on the November 2014 ballot by the City Council.

Attachment

cc: Honorable Mayor Kevin Faulconer
Honorable City Councilmembers
Honorable City Attorney Jan Goldsmith
Andrea Tevlin, Independent Budget Analyst
Liz Maland, City Clerk

PROPOSITION

AN ORDINANCE OF THE PEOPLE OF THE CITY OF SAN DIEGO AMENDING THE SAN DIEGO MUNICIPAL CODE BY AMENDING CHAPTER 2, ARTICLE 2, TO ADD DIVISION 46, SECTIONS 22.4601 THROUGH 22.4619, RELATING TO THE EARNED SICK LEAVE AND MINIMUM WAGE TO BE PROVIDED TO EMPLOYEES WORKING IN THE CITY OF SAN DIEGO.

WHEREAS, to safeguard the public welfare, health, safety, and prosperity of the people in the City of San Diego, it is essential that working persons earn wages that ensure a decent and healthy life; and

WHEREAS, a number of San Diego families live below the poverty level, and many who are employed do not earn sufficient wages to be self-sufficient and do not accrue sick leave; and

WHEREAS, when businesses do not pay a livable wage or allow workers to earn and use sick leave, the community and taxpayers bear associated costs in the form of increased demand for taxpayer-funded services including homeless shelters and other social services and community-based services; and

WHEREAS, most workers at some time during each year need limited time off from work to take care of their own health needs or the health needs of members of their families; and

WHEREAS, guaranteeing San Diego workers the right to earned sick leave will reduce recovery time from illnesses, promote the use of regular medical providers rather than hospital emergency departments, and reduce the likelihood of people spreading illness to other members of the workforce and to the public; and

WHEREAS, an increase in the minimum wage paid to employees and five annual days of sick leave could potentially increase workplace productivity, save costs through reduced

employee turnover, boost income for families, restore work/family balance, boost the local tax base through increased purchasing power by workers, and reduce certain health care costs;

NOW, THEREFORE,

BE IT ORDAINED, by the People of the City of San Diego:

Section 1. That Chapter 2, Article 2, of the San Diego Municipal Code is amended by adding Division 46, Sections 22.4601 through 22.4617, to read as follows:

Division 46: City of San Diego Earned Sick Leave and Minimum Wage Ordinance

§22.4601 Purpose and Intent

This Division ensures that employers in the *City* pay a livable minimum wage and provide their employees with the right to take earned, paid sick leave. By enabling more employees to support and care for their families through their own efforts and with less need for financial assistance from the government, and by protecting the rights of employees to care for their health and the health of their family members, the *City* can safeguard the general welfare, health, safety and prosperity of all San Diegans.

[Recommendation: Include only first paragraph in codified sections of the ordinance.]

It is the purpose and intent in enacting this Division that San Diego workers be guaranteed the right to take earned sick leave. Most employees will at some time during each year need limited time off from work to take care of their own health needs or the health needs of members of their families. Guaranteeing employees earned sick leave will reduce recovery time from illnesses, promote the use of regular medical providers rather than hospital emergency departments, and reduce the likelihood of workers spreading illness to other members of the workforce and to the public.

It is also the purpose in enacting this Division to ensure that employees working in the *City* earn wages that ensure a decent and healthy life for themselves and their families. When employers do not pay a livable wage, the surrounding community and taxpayers bear costs in the form of increased demand for taxpayer-funded services, including homeless shelters. Jobs paying a decent wage will ensure a more stable workforce for the *City*, increase consumer income, decrease poverty, and invigorate neighborhood business.

§22.4602 Citation

This Division shall be cited as the City of San Diego Earned Sick Leave and Minimum Wage Ordinance.

§22.4603 Authority

This Division is adopted pursuant to the powers vested in the *City* under the Constitution and the laws of the State of California, including, but not limited to, the police powers vested in the *City* pursuant to Article XI, Section 7 of the California Constitution and Section 1205(b) of the California Labor Code.

§22.4604 Definitions

Each word or phrase defined in this Division appears in the text of this Division in italicized letters. To the extent that a federal, state, or other law is referenced within this Division, the citation includes and incorporates the law as it may be amended or renumbered in the future. For purposes of this Division, the following definitions apply:

Benefit Year means a regular and consecutive twelve-month period, as determined by an *Employer*.

Child means a biological, adopted, or foster child; a stepchild; a legal ward; a child of a *Domestic Partner*; or a child of an *Employee* standing in loco parentis.

City means the City of San Diego.

City Council means the Council of the City of San Diego.

Domestic Partners mean two adults in a relationship recognized by the State of California by filing as domestic partners under California Family Code section 297, and who have registered as domestic partners with a governmental entity pursuant to state or local law authorizing such registration, or with an internal registry maintained by the employer of at least one of the domestic partners.

Domestic Violence means "domestic violence" as defined in California Penal Code section 13700.

Earned Sick Leave means accrued increments of compensated leave provided by an *Employer* to an *Employee* as a benefit of the employment for use by the *Employee* during an absence from the employment because of a qualifying medical condition or event, as specified in Section

22.4606. *Earned Sick Leave* does not include any benefit provided under an employee welfare benefit plan subject to the federal Employee Retirement Income Security Act of 1974 (Public Law 93-406, as amended) and does not include any insurance benefit, workers' compensation benefit, unemployment compensation disability benefit, or benefit not payable from the *Employer*'s general assets.

Employee means any person who:

(a) In a calendar week performs at least two hours of work within the geographic boundaries of the *City* for an *Employer*; and

[Note: Legal research is needed regarding whether there are federal or state law issues related to placing requirements on an employer, located outside of the City of San Diego, regarding pay for an employee for work performed in the City.]

(b) Qualifies as an employee entitled to payment of a minimum wage from any employer under the California minimum wage law, as provided under Section 1197 of the California Labor Code and wage orders published by the California Industrial Welfare Commission, or is a participant in a Welfare-to-Work Program. *Employee* does not include any person who is authorized to be employed at less than the minimum wage under a special license issued under California Labor Code Sections 1191 or 1191.5; any person employed under a publicly subsidized summer or short-term youth employment program, such as the San Diego County Urban Corps Program; or any student employee, camp counselor, or program counselor of an organized camp as defined in California Labor Code Section 1182.4.

Employer means any person or persons, as defined in Section 18 of the California Labor Code, who exercises control over the wages, hours, or working conditions of any *Employee*, or suffers or permits the *Employee* to work, or engages the *Employee*. *Employer* does not include a person receiving services under the California In-Home Supportive Services program pursuant to Welfare and Institutions Code Sections 12300, or a person employing an independent contractor within the meaning of California Labor Code Section 3353.

[Note: A policy determination is needed on how broadly to define Employer. Generally, California's wage and hour laws (*e.g.*, minimum wage, overtime, meal periods, rest breaks, etc.) do not cover independent contractors. Further legal research may be needed depending on how broadly the ordinance defines Employer.]

Enforcement Office means the *City* Department or Office that the *City Council* designates to enforce this Division.

Family Member means a *Child*, *Spouse*, *Parent*, grandparent, grandchild, *Sibling*, or the *Child* or *Parent* of a *Spouse*.

Health Care Provider means any person licensed under federal or California state law to provide medical or emergency services, including, but not limited to, doctors, nurses and emergency room personnel.

Minimum Wage means an hourly minimum rate to be paid to *Employees,* as defined in Section 22.4607 of this Division.

Parent means a biological, foster, or adoptive parent; a step-parent; a legal guardian; or a person who stood in loco parentis when the *Employee* was a minor child.

Public Health Emergency means a state of emergency declared by the City, the Governor of the State of California, or U.S. President.

Retaliation means any threat, discipline, discharge, demotion, suspension, reduction in *Employee* hours, or any other adverse employment action against any *Employee* for exercising or attempting to exercise any right guaranteed under this Division.

Safe Time means time away from work that is necessary due to *Domestic Violence, Sexual Assault*, or *Stalking*, provided the time is to allow the *Employee* to obtain for the *Employee* or the *Employee's Family member*:

(a) Medical attention needed to recover from physical or psychological injury or disability caused by *Domestic Violence*, *Sexual Assault*, or *Stalking*;

(b) Services from a victim services organization;

(c) Psychological or other counseling;

(d) Relocation due to the *Domestic Violence*, *Sexual Assault*, or *Stalking*; or

(e) Legal services, including preparing for or participating in any civil or criminal legal proceeding related to or resulting from the *Domestic Violence*, *Sexual Assault*, or *Stalking*.

Sexual Assault means "rape" as defined in California Penal Code section 261 or "sexual battery" as defined by California Penal Code section 243.4.

Sibling means a brother or sister, whether related through half blood, whole blood, or adoption, or one who is a step-sibling.

Spouse means a person to whom an *Employee* is legally married under the laws of the State of California, or the *Employee's Domestic Partner*.

Stalking means the unlawful conduct described in California Penal Code section 646.9.

Welfare-to-Work Program means the CalWORKS Program, County Adult Assistance Program (CAAP), which includes the Personal Assisted Employment Services (PAES) Program, and General Assistance Program, and any successor programs.

§22.4605 Accrual of Earned Sick Leave

(a) *Employers* must provide *Earned Sick Leave* to their *Employees* in accordance with this Division.

(b) *Employers* must provide an *Employee* with one hour of *Earned Sick Leave* for every thirty hours worked by the *Employee* within the geographic boundaries of the City, but *Employers* are not required to provide an *Employee* with *Earned Sick Leave* in less than one-hour increments for a fraction of an hour worked. *Employers* are also not required to provide more than forty hours of *Earned Sick Leave* to an *Employee* in a *Benefit Year*. *Earned Sick Leave* must be compensated at the same hourly rate or other measure of compensation as the *Employee* earns from his or her employment at the time the *Employee* uses the *Earned Sick Leave*.

(c) An *Employer* required to provide *Earned Sick Leave* pursuant to this Division who provides an *Employee* with an amount of paid leave, including paid time off, paid vacation, or paid personal days sufficient to meet the requirements of this section, and who allows such paid leave to be used for the same purposes and under the same conditions as *Earned Sick Leave* required pursuant to this Division, is not required to provide additional *Earned Sick Leave* to such *Employee*.

(d) *Earned Sick Leave* begins to accrue at the commencement of employment or on April 1, 2015, whichever is later, and an *Employee* is entitled to begin using *Earned Sick Leave* on the ninetieth calendar day following commencement of his or her employment or on July 1, 2015, whichever is later. After the ninetieth calendar day of employment or after July 1, 2015, whichever is later, such *Employee* may use *Earned Sick Leave* as it is accrued.

(e) *Employees* who are not covered by the overtime requirements of federal and state law or regulations are assumed to work forty hours in each work week for purposes of *Earned Sick Leave* accrual unless their regular work week is less than forty hours, in which case *Earned Sick Leave* accrues based upon that regular work week.

(f) *Employees* may determine how much *Earned Sick Leave* they need to use, provided that *Employers* may set a reasonable minimum increment for the use of *Earned Sick Leave* not to exceed two hours.

(g) Unused *Earned Sick Leave* must be carried over to the following *Benefit Year* but no *Employer* is required to allow the use of more than forty hours of *Earned Sick Leave* in a *Benefit Year*.

(h) If an *Employee* is transferred to a separate division, entity, or location in the *City*, but remains employed by the same *Employer*, such *Employee* is entitled to all *Earned Sick Leave* accrued at the prior division, entity or location and is entitled to retain or use all *Earned Sick Leave* as provided pursuant to the provisions of this Division. When there is a separation from employment and the *Employee* is rehired within six months of separation by the same *Employer*, previously accrued *Earned Sick Leave* that was not used shall be reinstated and such *Employee* shall be entitled to use such accrued *Earned Sick Leave*.

§22.4606 Use of Earned Sick Leave

(a) An *Employee* may use *Earned Sick Leave* for any of the following reasons:

(1) The *Employee* is physically or mentally unable to perform his or her duties due to illness, injury, or a medical condition of the *Employee*.

(2) The absence is for the purpose of obtaining professional diagnosis or treatment for a medical condition of the *Employee*.

(3) The absence is for other medical reasons of the *Employee*, such as pregnancy or obtaining a physical examination.

(4) The *Employee* is providing care or assistance to a *Family Member*, with an illness, injury, or medical condition, including assistance in obtaining professional diagnosis or treatment of a medical condition.

(5) The *Employee*'s absence is for the *Employee*'s use of *Safe Time*.

(6) The *Employee*'s place of business is closed by order of a public official due to a *Public Health Emergency*, or the *Employee* is providing care or assistance to a *Child*, whose school or child care provider is closed by order of a public official due to a *Public Health Emergency*.

(b) An *Employer* may require reasonable notice of the need to use *Earned Sick Leave*. Where the need is foreseeable, an *Employer* may require reasonable advance notice of the intention to use such *Earned Sick Leave*, not to exceed seven days notice prior to the date such *Earned Sick Leave* is to begin. Where the need is not foreseeable, an *Employer* may require an *Employee* to provide notice of the need for the use of *Earned Sick Leave* as soon as practicable.

(c) For an absence of more than three consecutive work days, an *Employer* may require reasonable documentation that the use of *Earned Sick Leave* was authorized by subsection (a) of this Section. Documentation signed by a licensed *Health Care Provider* indicating the need for the amount of *Earned Sick Leave* taken must be considered reasonable documentation and an *Employer* may not require that the documentation specify the nature of the *Employee's* or the *Employee's Family Member's* injury, illness, or medical condition.

(d) An *Employer* must not require an *Employee*, as a condition of taking *Earned Sick Leave*, to search for or find a replacement worker to cover the hours during which such *Employee* is using *Earned Sick Leave*.

§22.4607 Minimum Wage

(a) *Employers* must pay *Employees* no less than the *Minimum Wage* set forth in this Section for each hour worked within the geographic boundaries of the *City*.

(b) The *Minimum Wage* is an hourly rate defined as follows:

(1) Starting July 1, 2015, the *Minimum Wage* is $11.09.

(2) Starting July 1, 2016, the *Minimum Wage* is $12.09.

(3) Starting July 1, 2017, the *Minimum Wage* is $13.09.

(4) Starting January 1, 2018, and each year thereafter, the *Minimum Wage* increases by an amount corresponding to the prior year's increase, if any, in the cost of living. The prior year's increase in the cost of living is measured by the percentage increase, if any, as of August of the immediately preceding year over the level as of

August of the previous year of the Consumer Price Index (Urban Wage Earners and Clerical Workers, U.S. City Average for All Items) or its successor index as published by the U.S. Department of Labor or its successor agency, with the amount of the minimum wage increase rounded to the nearest multiple of five cents. The adjusted *Minimum Wage* will be announced by the *City* by October 1 of each year, and will become effective as the new *Minimum Wage* on January 1 of the succeeding year. The adjusted *Minimum Wage* will be noticed and posted as set forth in this Division.

(5) In the event that the California or federal minimum wage is increased above the level of the *Minimum Wage* in force under this Section, the *Minimum Wage* under this Section will be increased to match the higher California or federal wage, effective on the same date as the increase in the California or federal minimum wage takes effect.

(c) An *Employer* that meets the requirements to claim a credit against the California minimum wage under California Labor Code Section 1197 and wage orders published by the California Industrial Welfare Commission for meals or lodging provided to *Employees* may claim a credit in the same amount against the *Minimum Wage* required under this Section.

§22.4608 Notice and Posting

(a) The bulletin and notices specified in this Section will be published by the *City* and made available to *Employers* in English, Spanish, and any other language for which the San Diego County Registrar of Voters provides translated ballot materials pursuant to section 203 of the federal Voting Rights Act. The materials specified in this Section will be made available to *Employers* by April 1 in 2015, 2016, and 2017; by October 1 in 2018; and by October 1 of each year thereafter:

(1) A bulletin announcing the adjusted *Minimum Wage* for the upcoming year and its effective date.

(2) A notice for *Employers* to post in the workplace informing *Employees* of the current *Minimum Wage* and of their rights to the *Minimum Wage* and *Earned Sick Leave*, including information about the accrual and use of *Earned Sick Leave*, the right to be free from *Retaliation*, and the right to file a complaint with the *Enforcement Office* or a court of competent jurisdiction.

(3) A template notice suitable for use by *Employers* in compliance with this Section.

(b) Every *Employer* must post in a conspicuous place at any workplace or job site where any *Employee* works the notice published each year by the *City* informing *Employees* of the current *Minimum Wage* and of their rights to the *Minimum Wage* and *Earned Sick Leave* under this Division. Every *Employer* must post this notice in the workplace or on the job site in English and any other language that is referenced in subsection (a) and spoken by at least five percent of the *Employees* at the *Employee*'s job site.

(c) Every *Employer* must also provide each *Employee* at the time of hire, or by April 1, 2015, whichever is later, written notice of the *Employer's* name, address, and telephone number and the *Employer's* requirements under this Division. The notice must be provided to the *Employee* in English and in the *Employee's* primary language, if it is a language referenced in subsection (a) and spoken by at least five percent of the *Employees* at the *Employee*'s job site.

[Subsection (c) may be difficult to enforce, and it seems inapplicable to employees who are earning benefits greater the requirements of this Division.]

§22.4609 Employer Records

Employers must retain contemporaneous written or electronic records documenting their *Employees'* wages earned and accrual and use of *Earned Sick Leave* for a period of four years, and shall allow the *Enforcement Office* to access such records in furtherance of an investigation conducted pursuant to this Division. An *Employer's* failure to retain contemporaneous written or electronic records documenting its *Employees'* accrual and use of *Earned Sick Leave*, or an *Employer's* failure to grant the *Enforcement Office* reasonable access to such records, shall create a rebuttable presumption that the *Employer* has violated this section and the *Employee's* reasonable estimate regarding hours worked, wages paid, *Earned Sick Leave* accrued, and *Earned Sick Leave* taken shall be relied upon.

[Note: California Labor Code section 1174 requires employers to retain payroll records for three years. Legal research is needed to determine whether this creates an impermissible conflict or other potential legal problems with enforcement.]

§22.4610 Confidentiality and Nondisclosure

No *Employer* may require an *Employee* to disclose details related to the medical condition of the *Employee's* or the *Employee's Family Member* as a condition for using *Earned Sick Leave* under this Division, except where

disclosure is required or authorized by state or federal law. Employers who obtain medical or other personal information about an *Employee* or an *Employee's Family Member* for the purposes of complying with *Earned Sick Leave* requirements of this Division must maintain the confidentiality of the information and must not disclose it, except with the permission of the *Employee* or as required by law.

§22.4611 Retaliation Prohibited

It is unlawful for any *Employer* to engage in *Retaliation* against an *Employee* for exercising any right provided pursuant to this Division. The protections of this Division apply to any *Employee* who reasonably and in good faith reports a violation of this Division to his or her *Employer* or a governmental agency tasked with overseeing the enforcement of any wage and hour law applicable to the *Employer*. Rights under this Division include, but are not limited to, the right to request payment of the *Minimum Wage*, request and use *Earned Sick Leave*, file a complaint for alleged violations of this Division with the *Enforcement Office* or in court, communicate with any person about any violation or alleged violation of this Division, participate in any administrative or judicial action regarding an alleged violation of this Division, or inform any person of his or her potential rights under this Division.

§22.4612 Implementation, Enforcement, and Remedies

[Note: This Section requires additional legal review, including a review of due process issues and whether the penalties are lawful.]

(a) The *City Council* will designate the *Enforcement Office.*

(b) The *Enforcement Office* will have full authority to implement and enforce this Division, as set forth in an implementing ordinance to be approved by the *City Council*. The ordinance will establish a system to receive and adjudicate complaints and to order relief in cases of violations.

(c) The *City* or any person claiming harm from a violation of this Division may bring an action against the *Employer* in court to enforce the provisions of this Division. Persons claiming harm from a violation of this Division shall be entitled to all remedies available to remedy any violation of this Division, including but not limited to back pay, an additional amount equal to double the back pay as liquidated damages, equitable damages for any *Earned Sick Leave* unlawfully denied, reinstatement, and injunctive relief. Violations of this Division are declared to irreparably harm the public and covered *Employees* generally. The court shall award reasonable attorney's fees and costs

to any plaintiff, including the *City*, who prevails in an action to enforce this Division.

(d) Any Employer, who fails to pay *Minimum Wage* when required by this Division, or who fails to provide *Earned Sick Leave* when required by this Division, shall be subject to a civil penalty of up to, but not to exceed, $1,000 per violation. Any *Employer*, who fails to comply with the notice and posting requirements of this Division, shall be subject to a civil penalty of $100 for each day the violation occurs, but not to exceed a total civil penalty of $ _____ **[Need policy recommendation.]**

(e) Violations of this Division may not be prosecuted as a misdemeanor, nor will this Division give rise to any cause of action for damages against the *City* in its enforcement of this Division.

(f) Submitting a complaint to the *Enforcement Office* is neither a prerequisite for, nor a bar to, bringing a private cause of action.

§22.4613 Consistency with Federal and State Law

(a) This Division must not be interpreted or applied to create any authority, duty, or requirement in conflict with any federal or state law, rule, or regulation.

(b) This Division must not be interpreted or applied to impair the rights of any *Employer* or *Employee* under any federal or state collective bargaining procedures binding by law on the *Employer* and *Employees*.

§22.4614 Compliance with Legal Agreements

This Division must not be interpreted to modify any obligation of an *Employer* to comply with any contract, collective bargaining agreement, employment benefit plan, or other agreement providing higher wages or more earned sick leave to an *Employee*.

§22.4615 No Effect on Higher Wages or More Earned Sick Leave

This Division must not be construed to discourage or prohibit an *Employer* from providing higher wages or more earned sick leave to its *Employees*.

§22.4616 Amendment

This Division may be amended by the *City Council* with respect to matters relating to its implementation and enforcement, and to raise the *Minimum*

Wage, and to otherwise expand or strengthen protections for *Employees*, but may not be amended to reduce or limit protections for *Employees*. In the event that any provision of this Division is held legally invalid, the City Council retains the power to adopt legislation concerning the subject matter that was covered in the invalid provision.

§22.4617 Effective Date

This Ordinance shall take effect on January 1, 2015.
[Alternative: This Division shall become operative 90 days after its adoption by the voters at the November 4, 2014 election. This Division shall have prospective effect only.**]**

END OF PROPOSITION

Section 2. [Duty to Defend provision – under legal review.]

Section 3. [Conflicting Measures provision – under legal review.]

[Election-related provisions, including ballot box language, to be added when Ordinance is final.]

Doc. #772583

DRAFT