

COUNCIL DOCKET OF Oct 20, 2008

Supplemental    Adoption    Consent    Unanimous Consent   Rules Committee Consultant Review

R -

O -

Living Wage Ordinance: Proposed Revisions, Enforcement, and Update on Status of Complaints

Reviewed    Initiated   By Budget   On 7/09/08   Item No. 2

RECOMMENDATION TO:

Forward the City Attorney's Report with recommendations A, B, and C to the full City Council for further discussion. Also, direct the City Attorney's office to begin analysis on Redevelopment Agency impacts and report back to the Budget and Finance Committee at a later date.

In addition, request the City Attorney's Office provide a full analysis and draft an Ordinance that incorporate Center for Policy Initiatives Proposal regarding enforcement of the Living Wage Ordinance and Contractor's Standards as part of the San Diego Municipal Code and to specifically include:

1. A comprehensive analysis of economic impact; (CONT'D NEXT PAGE)

VOTED YEA: Atkins, Faulconer, Frye, Madaffer

VOTED NAY:

NOT PRESENT: Hueso

CITY CLERK: Please reference the following reports on the City Council Docket:

REPORT TO THE CITY COUNCIL NO.

INDEPENDENT BUDGET ANALYST NO.

COUNCIL COMMITTEE CONSULTANT ANALYSIS NO.

OTHER:

City Attorney's July 3, 2008, report; City Attorney's July 3, 2008, PowerPoint; Summary of Living Wage Ordinance

COUNCIL COMMITTEE CONSULTANT *Marie Pich*

**000318**

RECOMMENDATION TO (CONT'D):

2. The role of the Internal Auditor;
3. Input from stakeholders and contractors that currently do business with the City;
4. An analysis and impact of including the Civic Theatre;
5. An analysis and impact of including Emergency Medical Services; and
6. An analysis from the Independent Budget Analyst and Mayor's office.

OFFICE OF  
**THE CITY ATTORNEY**  
CITY OF SAN DIEGO

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

Michael J. Aguirre  
CITY ATTORNEY

July 3, 2008

REPORT TO THE BUDGET & FINANCE COMMITTEE

LIVING WAGE ORDINANCE: PROPOSED REVISIONS, ENFORCEMENT, AND UPATE  
ON STATUS OF COMPLAINTS

**INTRODUCTION**

At the March 5, 2008 hearing of the Budget and Finance Committee [Budget Committee], the City Attorney provided an update on the effectiveness of the City's Living Wage Ordinance, codified at San Diego Municipal Code [SDMC] sections 22.4201, *et seq.* [LWO or the Ordinance], enforcement issues, and the status of the City's two active Living Wage complaints. In response to the City Attorney's report and the testimony of speakers during public comment, the Committee asked the City Attorney to make recommendations regarding revisions to the Ordinance, particularly in the area of enforcement. This Report includes proposed revisions to Ordinance, an analysis of the potential consequences of the proposed revisions, and an update on the status of the City's two active Living Wage complaints.

**DISCUSSION**

**I. Proposed Revisions.**

The Budget Committee requested that the Office of the City Attorney provide draft revisions to the LWO, and analysis of those revisions, in the following areas: a) creation of a cost recovery mechanism for enforcement; b) revision of the professional services exemption to allow the LWO to apply to certain workers in professional services industries; and c) revisions to address specific concerns about anti-competitive effects, as raised by representatives of Elite Show Services. Each of these draft revisions is included in the draft ordinances attached hereto, and discussed in detail below.

**A. Cost Recovery Fund.**

Councilmember Frye proposed, and the Budget Committee included in its motion, a proposal to create a cost recovery fund to meet the consensus need for improved enforcement of the LWO. As was reported to the Budget Committee, enforcement activities are currently the responsibility of one employee in the Purchasing and Contracting Department, who devotes half of her time to the LWO and the other half to unrelated matters. Because of the volume of City

contracts subject to the LWO, this staffing level permits only complaint-driven enforcement, and even that is minimal. Given the City's current fiscal constraints, the Committee felt that a self-funding mechanism to enhance enforcement efforts would stand the best chance of actually making a positive difference, and thus included in its motion a request for such a proposal.

Councilmember Frye's proposal was that all City Requests for Bid contain a component under which the contracting business would pay into an enforcement fund. We assume that this provision would also apply to contracts entered through other forms of City service procurement such as Requests for Proposals and sole source procurements, to the extent that the LWO would apply. Ms. Frye's suggestion would require the procuring City Department, when preparing the governing bid documents, RFP, or other contract documents, to require that the winning contractor pay an amount into an enforcement fund created specifically to cover enforcement-related costs. The amount of this payment would be determined by estimating the anticipated LWO management and enforcement costs associated with the specific contract.

The proposal as drafted by Councilmember Frye did not specify the timing or mechanism of this payment. We have drafted the revision based upon the presumption that the payment would only be required of a winning bidder or proposer. Further, we have assumed that the payment would be required after the completion of the competitive process, but prior to the final execution of a contract, during the time when the City is also obtaining other contract documents such as bonds and insurance certificates. In a competitive procurement context, the contractor would have the option of either building such cost into its bid or not, according to how they anticipated it would affect their competitive position. All payments received under this provision, as well as any other funds received as a result of enforcement efforts, would be segregated in a special fund for LWO enforcement.

Thus, we suggest the following addition to SDMC section 22.4230, to implement the Committee's intent as expressed in its motion:

(g) The *City* will incur costs to monitor a *service contract* with a *business*. To defray such costs, each *service contractor* shall, prior to the award of any *service contract*, remit to the *City* an amount equal to the *City's* reasonably anticipated costs of monitoring and enforcing this division with respect to the *service contract*, as determined by the Living Wage Administrator. The City Auditor shall, upon request of the *service contractor*, review and determine the reasonableness of such costs. The amount of such payment, with respect to any *service contract*, shall be stated in any request for bid, request for proposal, or other document through which the *City* solicits *service contracts*, which document shall state that the obligation of the *service contractor* to remit such payment as provided in this section is a condition precedent to the award of such *service contract*. Such payments shall be placed in a separate *City* fund, called the Living Wage Enforcement Fund, and may be used for costs

associated with administration, monitoring, enforcement, and other activities necessary to ensure compliance with this division.

B. Professional Services Exemption.

As discussed in the City Attorney's previous Reports to Council, the LWO currently exempts contracts in "professional service" categories. See Report to Council dated March 3, 2008 [RC-2008-8], pp.2-3 and Report to Council dated February 13, 2008 [RC-2008-5], pp. 3-4. Section 22.4215 of the Ordinance expressly exempts, 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).

Under this exemption, *all* service contracts falling within the listed 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. This exemption, as written, reaches service workers in professional fields, such as legal messengers or orderlies.

At the March 5 Budget Committee hearing, Councilmember Frye asked the City Attorney to propose revisions to SDMC section 22. 4215(a)(7) designed to narrow the professional services exemption so as not to include service workers in professional fields. Previously, at the October 17, 2007 hearing of the Budget Committee, Councilmember Frye expressed particular concern with the status of paramedics and emergency medical personnel [EMT] contracts, and requested that the City Attorney analyze the applicability of the Ordinance to such contracts. In our February 13, 2008 Report, we found that EMT contracts were exempt from the Ordinance because they fall within the category of "medical" contracts. Because the contracts for services in the medical field were categorically exempt, we did not reach the question of whether EMTs constitute "service workers" as opposed to "professionals." See RC-2008-5, pp. 3-4.

The City Attorney recommends two possible approaches for addressing Councilmember Frye's concerns. The first approach would be to revise SDMC § 22. 4215(a)(7) so that the exemptions applies *only to professionals* within professional service fields. For example, Council could amend SDMC section 22. 4215(a)(7) as follows:

contracts for professional services, such as design, engineering, financial, technical, legal, banking, medical, management, operating, advertising, or other professional services requiring professional judgment or expertise. This exemption shall not be interpreted to exempt non-professionals providing support services to professionals under such contracts, to the extent such non-professionals would otherwise be entitled to receive the wages required by this division (emphasis added to indicate defined terms).

A draft version of the Ordinance with this proposed revision, as well as the other revisions proposed in this Report, is attached hereto as **Exhibit A**.

Revising the Ordinance in this manner would broadly address the concern that service workers in professional fields are not currently protected by the Ordinance; however, narrowing the professional services exemption to this extent may substantially increase the number of contracts subject to the Ordinance. For example, the City's contracts with banking and financial institutions would be covered to the extent those contracts entail the involvement of service workers, such as tellers. Large, national banks could be deterred from bidding on City contracts if required to pay local tellers a higher rate than tellers in other locations. Likewise, law firms contracting with the City would be required to pay the Living Wage rate to service employees such as clerks or messengers. This may act as a deterrent to large law firms with employees outside of San Diego, who are paid less than the Living Wage. As Committee Chair Toni Atkins commented at the March 5 hearing, this broad a re-working of the exemption may undermine the protracted negotiations and many compromises that were reached when the Ordinance was first passed in 2005.

A second, more focused approach would be to specifically carve out paramedics and EMTs from the professional service exemption. For example, as the City Attorney proposed in our February 13, 2008 Report, Council could amend the above-referenced exemption to add the following language:

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. See RC-2008-5, pp. 3-5.

This approach would expressly entitle paramedics and EMTs to payment of the Living Wage while still generally exempting contracts in professional service categories. If the Committee prefers this approach, we would also recommend adding to the list of examples of service contracts in SDMC section 22.4205:

(g) Service workers in the medical field, such as emergency medical technicians and/or paramedics.

A draft version of the Ordinance with these proposed revisions, as well as the other revisions proposed in this Report, is attached hereto as **Exhibit B**.

The City Attorney is prepared to assist with either approach, as the Committee deems appropriate at this time.

#### C. Concerns Raised by Elite Show Services.

In addition to the provisions discussed above, Councilmember Frye also requested that the City Attorney consider revisions to the Ordinance designed to address the concerns raised by representatives of Elite Show Services. During the public comment portion of the March 5

hearing, a representative from Elite Show Services – a provider of security guards for large events – discussed some of his concerns regarding enforcement of the Ordinance. The Elite representative expressed two primary concerns:

First, the Elite representative commented that companies that are complying with the Ordinance are at a competitive disadvantage when bidding against companies that are not in compliance. This is largely due to the City's inability to proactively enforce the Ordinance. As discussed above, enforcement of the Ordinance is essentially complaint-driven at this time. Currently, the City has only one-half of a staff member – the Living Wage Administrator – dedicated to monitoring Living Wage issues. Obviously, this does not provide sufficient personnel to conduct periodic audits or engage in other proactive enforcement activities. Therefore, LWO violations usually come to the City's attention only after a complaint has been formally lodged by an aggrieved employee. Enhanced enforcement through increased staffing would most certainly be the most effective means of addressing this first concern.<sup>1</sup>

Second, the Elite representative suggested that due to the wording of the Ordinance, some events at a particular City facility are covered, while other events at that same City facility are not. This results in Elite having to pay all of its workers the Living Wage rate because it would be difficult to justify paying different rates depending on the event. This second concern has to do with how "City facility agreements" are defined in the Ordinance. As discussed in our March 3, 2008 Report, the Ordinance currently applies not only to agreements for the use of space at the five "City facilities" enumerated in the Ordinance,<sup>2</sup> but also to "subcontracts and concession agreements for *services* at [a] *City facility* with a combined annual value of payments in excess of \$25,000 for any single subcontractor or concessionaire, and with a term of more than 90 days." SDMC § 22.4205 (emphasis in original to indicate defined terms); see also RC-2008-8, p. 2.

In reality, many subcontracts and concession agreements for services at City facilities relate to short-term, high-revenue events. For example, a large scale event like Comic Con may involve subcontracts or concession agreements that far exceed \$25,000 in value, even though the duration of the event is only three days. As long as contracts for service workers at such events (e.g. security guards or food vendors) do not exceed a 90-day term, those workers are not currently entitled to receive a Living Wage. This can result in a security guard working one event at a City facility being covered by the Ordinance, while a security guard working another event *at that same City facility* is not due the difference in duration of the respective contracts.<sup>3</sup>

---

<sup>1</sup> As discussed above, the staff member who currently fills this position is also assigned to other duties accounting for about half of her time. Since the March 5 hearing, the Purchasing and Contracting Department has indicated that it may be getting one Senior Management Analyst position for Living Wage administration, contingent on the Fiscal Year 2009 budget.

<sup>2</sup> 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).

<sup>3</sup> In addition, a contract term may be easily manipulated. For example, a large, short-term event at the Convention Center may be planned two years in advance; however, the contract may be drafted to state that term of the contract

In order to avoid this, Council may wish to amend the definition of "City facility agreements" in SDMC section 22.4205 to eliminate the 90-day term requirement as follows:

*City facility agreement* means an agreement between the *City* and a *business* for the lease, use, or management of a *City facility* that generates \$350,000 or more in annual gross receipts to the *business*. *City facility agreement* includes (a) subleases or other agreements for the use of the *City facility* for 30 days or more in any calendar year; and (b) subcontracts and concession agreements for *services* at the *City facility* with a combined annual value of payments in excess of \$25,000 for any single subcontractor or concessionaire, ~~and with a term of more than 90 days.~~

If Council chose to eliminate the 90-day term requirement in the definition of City facilities as described above, we would also recommend removing the 90-day term requirement from the definition of "service contracts" in SDMC section 22.4205 as follows:

*Services contract* means a contract between the *City* and a *business* with a combined annual value of payments in excess of \$25,000 ~~and with a term of more than 90 days,~~ and any applicable subcontracts or franchises, to furnish *services*.

Although the 90-day term requirement is less likely to be an issue where services providers are in a direct contractual relationship with the City, we recommend revising the definition of service contracts in this manner for consistency.

The City Attorney is prepared to provide further analysis of any of the revisions proposed above, as well as assist the Committee with alternative revisions it may wish to pursue.

## II. Status of Two Living Wage Complaints.

At the March 5, 2008 hearing, the City Attorney reported on the City's two active Living Wage complaints, which are currently pending against Prudential Overall Supply and Jani-King, Inc. We have included below a brief update on each complaint.

### A. Prudential Overall Supply.

At the July 24, 2007 hearing of the City Council, employees of Prudential Overall Supply submitted a formal complaint for violations of the LWO. The employees claimed that Prudential, which provided uniform and laundry services to several City departments, was not paying a Living Wage to employees working on City contracts. The City has not renewed its contract with Prudential, and has since procured a new uniform and laundry vendor. After a preliminary investigation, the City Attorney found sufficient evidence of Living Wage violations to warrant filing a lawsuit against Prudential.

---

commences just before the event and concludes shortly thereafter. This may lead to the purposeful drafting of contracts so as to avoid the requirements of the LWO.

At the March 5 hearing, the Committee requested that the City Attorney provide an informational update in Closed Session when appropriate. The parties have since reached a tentative settlement agreement, which we anticipate will be executed and made available to the public within the next twenty days.

B. Jani-King, Inc.

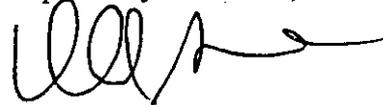
At the January 15, 2008 hearing of the City Council, a janitor previously employed by a franchisee of Jani-King, Inc. submitted a formal complaint for violations of the LWO. The City's Living Wage Administrator, in consultation with the City Attorney, is currently investigating the Jani-King complaint to determine to whether and to what extent Living Wage violations have occurred. To this point, counsel for Jani-King, Inc. has been cooperating with the City's requests for payrolls and other documentation, and has agreed to assist us in our efforts to obtain information from franchisees providing janitors for City contracts.

According to counsel for Jani-King, the complainant has been offered and has accepted an alternative position with Jani-King. The City has conducted interviews with key witnesses, and anticipates resolving remaining issues regarding this complaint within the next thirty days.

#### CONCLUSION

The City Attorney recommends the revisions to the Ordinance proposed above in order to: a) create a cost recovery fund to provide an additional income stream for monitoring contract compliance, b) narrow the exemption for professional services so as not to reach service workers in professional fields, and c) eliminate the 90-day term requirement for City facility agreements in order to reduce inconsistencies in application of the Ordinance. The City Attorney is prepared to assist with further analysis of these proposed revisions and other alternatives for enhancing enforcement, and will continue to keep the Council apprised regarding the two active Living Wage complaints.

Respectfully submitted,



MICHAEL J. AGUIRRE  
City Attorney

ORDINANCE NUMBER O- \_\_\_\_\_ (NEW SERIES)

DATE OF FINAL PASSAGE \_\_\_\_\_

AN ORDINANCE OF THE COUNCIL OF THE CITY OF SAN DIEGO AMENDING CHAPTER 2, ARTICLE 2, DIVISION 42 RELATING TO CITY OF SAN DIEGO LIVING WAGE ORDINANCE.

§22.4201 **Purpose and Intent**

[No change in text]

§22.4202 **Citation**

[No change in text]

§22.4205 **Definitions**

Each word or phrase that is defined in this division appears in the text of this division in italicized letters. For purposes of this division, the following definitions shall apply:

*Business* means any corporation, partnership, limited liability corporation, joint venture, sole proprietorship, association, or trust, other than a public entity.

*City* means the City of San Diego, its organizational subdivisions, agencies, offices, or boards, but does not include independent agencies, such as the Housing Authority, Redevelopment Agency, and the Retirement Board, each of which is encouraged to adopt its own living wage policy.

*City facility* means any of the following facilities that are owned, operated, managed, or leased by the *City*:

- (a) Petco Park;
- (b) Qualcomm Stadium;
- (c) San Diego Sports Arena;
- (d) San Diego Convention Center; or
- (e) San Diego City Concourse.

*City facility agreement* means an agreement between the *City* and a *business* for the lease, use, or management of a *City facility* that generates \$350,000 or more in annual gross receipts to the *business*. *City facility agreement* includes (a) subleases or other agreements for use of the *City facility* for 30 days or more in any calendar year; and (b) subcontracts and concession agreements for *services* at

000328

the *City facility* with a combined annual value of payments in excess of \$25,000 for any single subcontractor or concessionaire, ~~and with a term of more than 90 days.~~

*City facility employer* means any *business* that has entered into a *City facility agreement*.

For the purposes of this division, *City facility employer* includes any sublessee, subcontractor, or concessionaire that retains employees to provide *services* at a *City facility*.

*City Manager* means the City Manager and his/her delegates and representatives. *Covered employee* means any individual employed on a full-time, part-time, temporary, or seasonal basis by (a) a *service contractor* with regard to any hours worked in performance of a *service contract*; (b) a *financial assistance recipient* who works at least 20 hours a month at the site that is the subject of the *financial assistance agreement* or at least 20 hours a month on the program that is the subject of the *financial assistance agreement*; or (c) a *City facility employer* with regard to any hours worked at a *City facility*. *Covered employee* does not include: (a) individuals who, in addition to wages, receive academic credit for their work from an accredited educational institution; and (b) individuals who participate in job training and education programs that have as their express purpose the provision of basic job skills or education.

*Covered employer* means any *service contractor*, *financial assistance recipient*, or *City facility employer*.

*Financial assistance agreement* means an agreement between the *City* and a *business* to provide direct financial assistance with the expressly articulated and identified purpose of encouraging, facilitating, supporting, or enabling: (a) economic development, job creation, or job retention; or (b) tourism, arts, and cultural programs. As to economic development, job creation, or job retention, this division shall apply to *financial assistance agreements* with a combined value over a period of five years of \$500,000 or more. As to tourism, arts, and cultural programs, this division shall apply to *financial assistance agreements* with a combined annual value of \$750,000 or more. Direct financial assistance includes funds, below-market loans, rebates, deferred payments, forgivable loans, land write-downs, infrastructure or public improvements, or other action of economic value identified in the *financial assistance agreement*. Financial assistance does not include below-market leases to non-profit organizations or indirect financial assistance, such as that provided through broadly applicable tax reductions or services performed by *City* staff. *Financial assistance agreement* includes subcontracts to perform *services* at the site that is the subject of the *financial assistance agreement* or for the program that is the subject of the *financial assistance agreement*.

*Financial assistance recipient* means any *business* that has entered into a *financial assistance agreement*. For the purposes of this division, *financial assistance recipient* includes all subcontractors retained by a *business* to perform *services* at the site that is the subject of the *financial assistance agreement*, or for the program that is the subject of the *financial assistance agreement*.

*Health benefits rate* means a minimum dollar amount per hour toward the cost of health and medical care insurance for employees and their dependents.

*Service contract* means a contract between the *City* and a *business* with a combined annual value of payments in excess of \$25,000 ~~and with a term of more than 90 days~~, and any applicable subcontracts or franchises, to furnish *services*.

*Service contractor* means any *business* that has been awarded a *service contract* subject to this division. For the purposes of this division, *service contractor* includes all subcontractors or franchisees retained by a *business* to perform any or all of the functions covered by a *service contract*.

*Services* means the following types of employment activities and any other nonmanagerial, non-supervisory, or non-professional services that are consistent with the intent of this division and designated in a *City facility agreement*, *financial assistance agreement*, or *service contract*:

- (a) Automotive repair and maintenance;
- (b) Cashiers;
- (c) Child care;
- (d) Concessions/retail sales;
- (e) Facility and building maintenance;
- (f) On-site food service/preparation;
- (g) Janitorial, custodial, and housekeeping;
- (h) Landscaping;
- (i) Laundry services;
- (j) Office/clerical;
- (k) Parking services;
- (l) Pest control;

000330

- (m) Security services;
- (n) Ushers and wheelchair attendants;
- (o) Ticket takers; and
- (p) Warehouse workers.

§22.4210 **Applicability of Living Wage Ordinance**

(a) This division shall apply to:

- (1) any *service contract*, including any applicable subcontract, entered into, awarded, amended, renewed, or extended on or after July 1, 2006.  
Compliance with this division is required during the term of the *service contract*. Notwithstanding the foregoing, *service contracts* for child care services are exempt from the requirements of this division until July 1, 2008.
- (2) any *financial assistance agreement* subject to the \$500,000 threshold, including any applicable subcontract, entered into, awarded, amended, renewed, or extended on or after July 1, 2006. Compliance with this division is required for a period of five years after the threshold amount has been received by the *business*.
- (3) any *financial assistance agreement* subject to the \$750,000 threshold, including any applicable subcontract entered into, awarded, amended, renewed, or extended on or after July 1, 2007. Compliance is required for one year after the threshold amount has been received by the *business*.
- (4) any *City facility agreement*, including any applicable sublease, subcontract, or concession agreement in effect on July 1, 2007. Compliance with this division is required during the term of the *City facility agreement*.

(b) *Service contracts, financial assistance agreements, and City facility agreements* shall not be subdivided into two or more contracts that logically should be made as a single transaction if the purpose of the subdividing is to avoid the requirements of this division.

## §22.4215

## Exemptions

- (a) Except for *City facility agreements*, the following contracts are exempt from the requirements of this division:
- (1) contracts subject to federal or state law or regulations that preclude the applicability of this division's requirements;
  - (2) contracts that involve programs where the *City* shares management authority with other jurisdictions, unless all the signatory jurisdictions agree to the applicability of this division's requirements to the contract;
  - (3) contracts for *services* by any other governmental agency;
  - (4) contracts for public works construction, recycling, or solid waste management franchises;
  - (5) cooperative procurement contracts, including contracts that use a bidding process that substantially complies with *City* requirements;
  - (6) contracts for the purchase of goods, property, or the leasing of property;
  - (7) contracts for professional services, such as design, engineering, financial, technical, legal, banking, medical, management, operating, advertising, or other professional services requiring professional judgment or expertise. This exemption shall not be interpreted to exempt non-professionals providing support services to professionals under such contracts, to the extent such non-professionals would otherwise be entitled to receive the wages required by this division.
  - (8) contracts where compliance with this division is not in the best interests of the *City* as certified by the *City Manager* and approved by the *City Council*.
- (b) The following businesses, even if otherwise qualified as a *covered employer*, are exempt from the requirements of this division:
- (1) *Businesses*, including their parent and subsidiary entities, employing twelve or fewer employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, so long as the *City* determines that the *business*, including any of its subcontractors, will not need to retain more

000332

than twelve employees to perform work related to a *service contract, financial assistance agreement, or City facility agreement.*

- (2) *Businesses* organized under Internal Revenue Service Code, section 501(c)(3) to provide community-based social services, other than child care services, and whose highest paid officer earns a salary that, when calculated on an hourly basis, is less than eight times the hourly wage rate of the lowest paid full-time employee.

§22.4220

### Payment of Living Wage and Provision of Benefits

- (a) *Covered employers* subject to this division shall pay *covered employees* a wage of no less than \$10.00 per hour if the *health benefits rate* is paid, or no less than \$12.00 per hour if the *health benefits rate* is not paid. The *health benefits rate* is \$2.00 per hour. The rates are effective beginning July 1, 2006.
- (b) Beginning July 1, 2007, the hourly wage rates and *health benefits rate* shall be upwardly adjusted each July 1 to reflect the change in the Consumer Price Index for All Urban Consumers for the San Diego – Carlsbad – San Marcos Metropolitan Statistical Area for the twelve-month period preceding December 31. Prior to April 1 of each year, the *City* shall calculate the new rates and provide notice to all *covered employers* by posting on the *City's* web site the rates in effect for the next fiscal year.
- (c) *Covered employers* shall provide to each *covered employee* a minimum of ten compensated days off per year for sick leave, vacation, or personal necessity leave at the *covered employee's* request. Such days off shall vest as accrued. Part-time employees shall accrue such days at a rate proportional to full-time employees. *Covered employees* shall be eligible to use accrued days off after the first six months of employment or consistent with employer policy, whichever is earlier. Paid holidays that are provided under established employer policy shall not be counted toward the provision of the ten compensated days off.
- (d) *Covered employers* shall also permit *covered employees* to take an additional ten uncompensated days off per year to be used for sick leave for the illness of the *covered employee* or a member of his or her immediate family, where the *covered employee* has exhausted all accrued compensated days off. This section does not mandate the accrual from year to year of uncompensated days off.

§22.4225 **Reporting and Notification Requirements**

- (a) *Every service contract, financial assistance agreement, and City facility agreement* shall require that the party contracting with the *City* be subject to the terms of this division and all regulations and rules promulgated under this division and that all applicable subcontractors, sublessees, and concessionaires comply with the terms of this division and all regulations and rules promulgated under this division.
- (b) Each *covered employer* shall notify its *covered employees* of the requirements of this division and of the possible availability of the Earned Income Tax Credit.
- (c) Each *covered employer* shall file a living wage certification with the *City Manager* within thirty days of becoming a *covered employer*. *Covered employers* must ensure that all applicable subcontractors, sublessees, and concessionaires file a living wage certification within thirty days of becoming covered by the requirements of this division. The living wage certification shall be completed on a form provided by the *City Manager*.
- (d) Each *covered employer* shall file with the *City Manager* an annual report regarding compliance with this division.

§22.4230 **Enforcement**

- (a) A *covered employee* claiming a violation of this division shall have the right to file an action against an employer in the appropriate court within one year after discovery of the alleged violation. The court may award any employee who files suit pursuant to this subdivision, the following:
  - (1) For failure to pay the minimum wage required by this division, the difference between the minimum wage required herein and the amount actually paid to the employee, plus interest.
  - (2) For failure to pay the *health benefits rate*, the difference between the *health benefits rate* required by this division and the amount actually paid towards the *health benefits rate*, plus interest.
  - (3) For retaliation for exercise of any rights provided for under this division, reinstatement, back pay, or any other relief that a court may deem appropriate.

000334

- (4) For a willful violation of this division, a court may award as a penalty up to treble the amount of monies to be paid as damages.
- (5) The court may award reasonable attorney's fees and costs to an employee who prevails in any such private action and to an employer who so prevails if the employee's suit is found to be frivolous.
- (b) A *business* is prohibited from any retaliation against an employee who alleges noncompliance with this division. Any such employee may report any alleged retaliation to the *City Manager*.
- (c) A *covered employee* claiming a violation of the division may file a complaint with the *City*. The *City* may, in its sole discretion, investigate and address any alleged violation of this division'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.
- (d) 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.
- (e) A violation of this division shall not be prosecuted as a misdemeanor, notwithstanding any other provision of the San Diego Municipal Code.
- (f) This division shall not be construed to limit an employee's right to bring legal action for a violation of any other laws concerning wages, hours, or other standards or rights nor shall exhaustion of remedies under this division be a prerequisite to the assertion of any other such right.
- (g) The *City* will incur costs to monitor a *service contract* with a *business*. To defray such costs, each *service contractor* shall, prior to the award of any *service contract*, remit to the *City* an amount equal to the *City's* reasonably anticipated costs of monitoring and enforcing this division with respect to the *service contract*, as determined by the Living Wage Administrator. The City Auditor shall, upon request of the *service contractor*, review and determine the reasonableness of such costs. The amount of such payment, with respect to any *service contract*, shall be stated in any request for bid, request for proposal, or other document through which the *City* solicits *service contracts*, which document shall state that the obligation of the *service contractor* to remit such payment as provided in this section is a condition precedent to the award of such *service contract*. Such payments shall be placed in a separate *City* fund.

called the Living Wage Enforcement Fund, and may be used for costs associated with administration, monitoring, enforcement, and other activities necessary to ensure compliance with this division.

**§22.4235 Administration**

- (a) The *City Manager* shall develop and implement administrative policies, rules, and regulations to carry out the intent of this division, including procedures for handling complaints by *covered employees*. The *City Manager* shall monitor compliance, including conducting periodic reviews of appropriate records maintained by *covered employers* to verify compliance and to investigate claimed violations.
- (b) The *City Manager* is authorized to create a citizens advisory committee for the purpose of making recommendations regarding how the policies and purposes of this division may be advanced.
- (c) On July 1, 2007, or as soon thereafter as is practicable, the *City Manager* shall submit a report to the City Council generally describing the effects of the City of San Diego Living Wage Ordinance upon the *City*.

**§22.4240 Collective Bargaining Agreements**

The provisions of this division shall not be superseded by any collective bargaining agreement unless the supersession is specifically agreed to in writing by the parties to the collective bargaining agreement.

**§22.4245 Severability**

If any provision of this division is declared legally invalid by a final judgment rendered in a court of competent jurisdiction, the provision declared invalid shall be deemed to be severable to the extent that the remaining provisions of this division can be enforced in a manner that substantially carries out the objectives of this division.

000337

ORDINANCE NUMBER O-\_\_\_\_\_ (NEW SERIES)

DATE OF FINAL PASSAGE \_\_\_\_\_

AN ORDINANCE OF THE COUNCIL OF THE CITY OF SAN DIEGO AMENDING CHAPTER 2, ARTICLE 2, DIVISION 42 RELATING TO CITY OF SAN DIEGO LIVING WAGE ORDINANCE.

§22.4201 **Purpose and Intent**

[No change in text]

§22.4202 **Citation**

[No change in text]

§22.4205 **Definitions**

Each word or phrase that is defined in this division appears in the text of this division in italicized letters. For purposes of this division, the following definitions shall apply:

*Business* means any corporation, partnership, limited liability corporation, joint venture, sole proprietorship, association, or trust, other than a public entity.

*City* means the City of San Diego, its organizational subdivisions, agencies, offices, or boards, but does not include independent agencies, such as the Housing Authority, Redevelopment Agency, and the Retirement Board, each of which is encouraged to adopt its own living wage policy.

*City facility* means any of the following facilities that are owned, operated, managed, or leased by the *City*:

- (a) Petco Park;
- (b) Qualcomm Stadium;
- (c) San Diego Sports Arena;
- (d) San Diego Convention Center; or
- (e) San Diego City Concourse.

*City facility agreement* means an agreement between the *City* and a *business* for the lease, use, or management of a *City facility* that generates \$350,000 or more in annual gross receipts to the *business*. *City facility agreement* includes (a) subleases or other agreements for use of the *City facility* for 30 days or more in any calendar year; and (b) subcontracts and concession agreements for *services* at

the *City facility* with a combined annual value of payments in excess of \$25,000 for any single subcontractor or concessionaire, ~~and with a term of more than 90 days.~~

*City facility employer* means any *business* that has entered into a *City facility agreement*.

For the purposes of this division, *City facility employer* includes any sublessee, subcontractor, or concessionaire that retains employees to provide *services* at a *City facility*.

*City Manager* means the City Manager and his/her delegates and representatives. *Covered employee* means any individual employed on a full-time, part-time, temporary, or seasonal basis by (a) a *service contractor* with regard to any hours worked in performance of a *service contract*; (b) a *financial assistance recipient* who works at least 20 hours a month at the site that is the subject of the *financial assistance agreement* or at least 20 hours a month on the program that is the subject of the *financial assistance agreement*; or (c) a *City facility employer* with regard to any hours worked at a *City facility*. *Covered employee* does not include: (a) individuals who, in addition to wages, receive academic credit for their work from an accredited educational institution; and (b) individuals who participate in job training and education programs that have as their express purpose the provision of basic job skills or education.

*Covered employer* means any *service contractor*, *financial assistance recipient*, or *City facility employer*.

*Financial assistance agreement* means an agreement between the *City* and a *business* to provide direct financial assistance with the expressly articulated and identified purpose of encouraging, facilitating, supporting, or enabling: (a) economic development, job creation, or job retention; or (b) tourism, arts, and cultural programs. As to economic development, job creation, or job retention, this division shall apply to *financial assistance agreements* with a combined value over a period of five years of \$500,000 or more. As to tourism, arts, and cultural programs, this division shall apply to *financial assistance agreements* with a combined annual value of \$750,000 or more. Direct financial assistance includes funds, below-market loans, rebates, deferred payments, forgivable loans, land write-downs, infrastructure or public improvements, or other action of economic value identified in the *financial assistance agreement*. Financial assistance does not include below-market leases to non-profit organizations or indirect financial assistance, such as that provided through broadly applicable tax reductions or services performed by *City* staff. *Financial assistance agreement* includes subcontracts to perform *services* at the site that is the subject of the *financial assistance agreement* or for the program that is the subject of the *financial assistance agreement*.

000339

*Financial assistance recipient* means any *business* that has entered into a *financial assistance agreement*. For the purposes of this division, *financial assistance recipient* includes all subcontractors retained by a *business* to perform *services* at the site that is the subject of the *financial assistance agreement*, or for the program that is the subject of the *financial assistance agreement*.

*Health benefits rate* means a minimum dollar amount per hour toward the cost of health and medical care insurance for employees and their dependents.

*Service contract* means a contract between the *City* and a *business* with a combined annual value of payments in excess of \$25,000 ~~and with a term of more than 90 days~~, and any applicable subcontracts or franchises, to furnish *services*.

*Service contractor* means any *business* that has been awarded a *service contract* subject to this division. For the purposes of this division, *service contractor* includes all subcontractors or franchisees retained by a *business* to perform any or all of the functions covered by a *service contract*.

*Services* means the following types of employment activities and any other nonmanagerial, non-supervisory, or non-professional services that are consistent with the intent of this division and designated in a *City facility agreement*, *financial assistance agreement*, or *service contract*:

- (a) Automotive repair and maintenance;
- (b) Cashiers;
- (c) Child care;
- (d) Concessions/retail sales;
- (e) Facility and building maintenance;
- (f) On-site food service/preparation;
- (g) Janitorial, custodial, and housekeeping;
- (h) Landscaping;
- (i) Laundry services;
- (j) Office/clerical;
- (k) Parking services;
- (l) Pest control;

- (m) Security services;
- (n) Ushers and wheelchair attendants;
- (o) Ticket takers; and
- (p) Warehouse workers.
- (q) Service workers in the medical field, such as emergency medical technicians and/or paramedics.

§22.4210

**Applicability of Living Wage Ordinance**

- (a) This division shall apply to:
  - (1) any *service contract*, including any applicable subcontract, entered into, awarded, amended, renewed, or extended on or after July 1, 2006.  
Compliance with this division is required during the term of the *service contract*. Notwithstanding the foregoing, *service contracts* for child care services are exempt from the requirements of this division until July 1, 2008.
  - (2) any *financial assistance agreement* subject to the \$500,000 threshold, including any applicable subcontract, entered into, awarded, amended, renewed, or extended on or after July 1, 2006. Compliance with this division is required for a period of five years after the threshold amount has been received by the *business*.
  - (3) any *financial assistance agreement* subject to the \$750,000 threshold, including any applicable subcontract entered into, awarded, amended, renewed, or extended on or after July 1, 2007. Compliance is required for one year after the threshold amount has been received by the *business*.
  - (4) any *City facility agreement*, including any applicable sublease, subcontract, or concession agreement in effect on July 1, 2007. Compliance with this division is required during the term of the *City facility agreement*.
- (b) *Service contracts, financial assistance agreements, and City facility agreements* shall not be subdivided into two or more contracts that

logically should be made as a single transaction if the purpose of the subdividing is to avoid the requirements of this division.

§22.4215 Exemptions

- (a) Except for *City facility agreements*, the following contracts are exempt from the requirements of this division:
- (1) contracts subject to federal or state law or regulations that preclude the applicability of this division's requirements;
  - (2) contracts that involve programs where the *City* shares management authority with other jurisdictions, unless all the signatory jurisdictions agree to the applicability of this division's requirements to the contract;
  - (3) contracts for *services* by any other governmental agency;
  - (4) contracts for public works construction, recycling, or solid waste management franchises;
  - (5) cooperative procurement contracts, including contracts that use a bidding process that substantially complies with *City* requirements;
  - (6) contracts for the purchase of goods, property, or the leasing of property;
  - (7) 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.
  - (8) contracts where compliance with this division is not in the best interests of the *City* as certified by the *City Manager* and approved by the *City Council*.
- (b) The following businesses, even if otherwise qualified as a *covered employer*, are exempt from the requirements of this division:
- (1) *Businesses*, including their parent and subsidiary entities, employing twelve or fewer employees for each working day in each of twenty or more calendar weeks in the current or preceding

calendar year, so long as the *City* determines that the *business*, including any of its subcontractors, will not need to retain more than twelve employees to perform work related to a *service contract, financial assistance agreement, or City facility agreement.*

- (2) *Businesses* organized under Internal Revenue Service Code, section 501(c)(3) to provide community-based social services, other than child care services, and whose highest paid officer earns a salary that, when calculated on an hourly basis, is less than eight times the hourly wage rate of the lowest paid full-time employee.

§22.4220 **Payment of Living Wage and Provision of Benefits**

- (a) *Covered employers* subject to this division shall pay *covered employees* a wage of no less than \$10.00 per hour if the *health benefits rate* is paid, or no less than \$12.00 per hour if the *health benefits rate* is not paid. The *health benefits rate* is \$2.00 per hour. The rates are effective beginning July 1, 2006.
- (b) Beginning July 1, 2007, the hourly wage rates and *health benefits rate* shall be upwardly adjusted each July 1 to reflect the change in the Consumer Price Index for All Urban Consumers for the San Diego – Carlsbad – San Marcos Metropolitan Statistical Area for the twelve-month period preceding December 31. Prior to April 1 of each year, the *City* shall calculate the new rates and provide notice to all *covered employers* by posting on the *City's* web site the rates in effect for the next fiscal year.
- (c) *Covered employers* shall provide to each *covered employee* a minimum of ten compensated days off per year for sick leave, vacation, or personal necessity leave at the *covered employee's* request. Such days off shall vest as accrued. Part-time employees shall accrue such days at a rate proportional to full-time employees.  
*Covered employees* shall be eligible to use accrued days off after the first six months of employment or consistent with employer policy, whichever is earlier.  
Paid holidays that are provided under established employer policy shall not be counted toward the provision of the ten compensated days off.
- (d) *Covered employers* shall also permit *covered employees* to take an additional ten uncompensated days off per year to be used for sick leave for the illness of the *covered employee* or a member of his or her immediate family, where the *covered employee* has exhausted all accrued compensated days off. This section does not mandate the accrual from year to year of uncompensated days off.

000343

§22.4225      **Reporting and Notification Requirements**

- (a) Every *service contract, financial assistance agreement, and City facility agreement* shall require that the party contracting with the *City* be subject to the terms of this division and all regulations and rules promulgated under this division and that all applicable subcontractors, sublessees, and concessionaires comply with the terms of this division and all regulations and rules promulgated under this division.
- (b) Each *covered employer* shall notify its *covered employees* of the requirements of this division and of the possible availability of the Earned Income Tax Credit.
- (c) Each *covered employer* shall file a living wage certification with the *City Manager* within thirty days of becoming a *covered employer*. *Covered employers* must ensure that all applicable subcontractors, sublessees, and concessionaires file a living wage certification within thirty days of becoming covered by the requirements of this division. The living wage certification shall be completed on a form provided by the *City Manager*.
- (d) Each *covered employer* shall file with the *City Manager* an annual report regarding compliance with this division.

§22.4230      **Enforcement**

- (a) A *covered employee* claiming a violation of this division shall have the right to file an action against an employer in the appropriate court within one year after discovery of the alleged violation. The court may award any employee who files suit pursuant to this subdivision, the following:
  - (1) For failure to pay the minimum wage required by this division, the difference between the minimum wage required herein and the amount actually paid to the employee, plus interest.
  - (2) For failure to pay the *health benefits rate*, the difference between the *health benefits rate* required by this division and the amount actually paid towards the *health benefits rate*, plus interest.
  - (3) For retaliation for exercise of any rights provided for under this division, reinstatement, back pay, or any other relief that a court may deem appropriate.

- (4) For a willful violation of this division, a court may award as a penalty up to treble the amount of monies to be paid as damages.
- (5) The court may award reasonable attorney's fees and costs to an employee who prevails in any such private action and to an employer who so prevails if the employee's suit is found to be frivolous.
- (b) A *business* is prohibited from any retaliation against an employee who alleges noncompliance with this division. Any such employee may report any alleged retaliation to the *City Manager*.
- (c) A *covered employee* claiming a violation of the division may file a complaint with the *City*. The *City* may, in its sole discretion, investigate and address any alleged violation of this division'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.
- (d) 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.
- (e) A violation of this division shall not be prosecuted as a misdemeanor, notwithstanding any other provision of the San Diego Municipal Code.
- (f) This division shall not be construed to limit an employee's right to bring legal action for a violation of any other laws concerning wages, hours, or other standards or rights nor shall exhaustion of remedies under this division be a prerequisite to the assertion of any other such right.
- (g) The *City* will incur costs to monitor a *service contract* with a *business*. To defray such costs, each *service contractor* shall, prior to the award of any *service contract*, remit to the *City* an amount equal to the *City's* reasonably anticipated costs of monitoring and enforcing this division with respect to the *service contract*, as determined by the Living Wage Administrator. The *City Auditor* shall, upon request of the *service contractor*, review and determine the reasonableness of such costs. The amount of such payment, with respect to any *service contract*, shall be stated in any request for bid, request for proposal, or other document through which the *City* solicits *service contracts*, which document shall state that the obligation of the *service contractor* to remit such payment as provided in this section is a condition precedent to the award of such *service contract*. Such payments shall be placed in a separate *City fund*.

000345

called the Living Wage Enforcement Fund, and may be used for costs associated with administration, monitoring, enforcement, and other activities necessary to ensure compliance with this division.

**§22.4235 Administration**

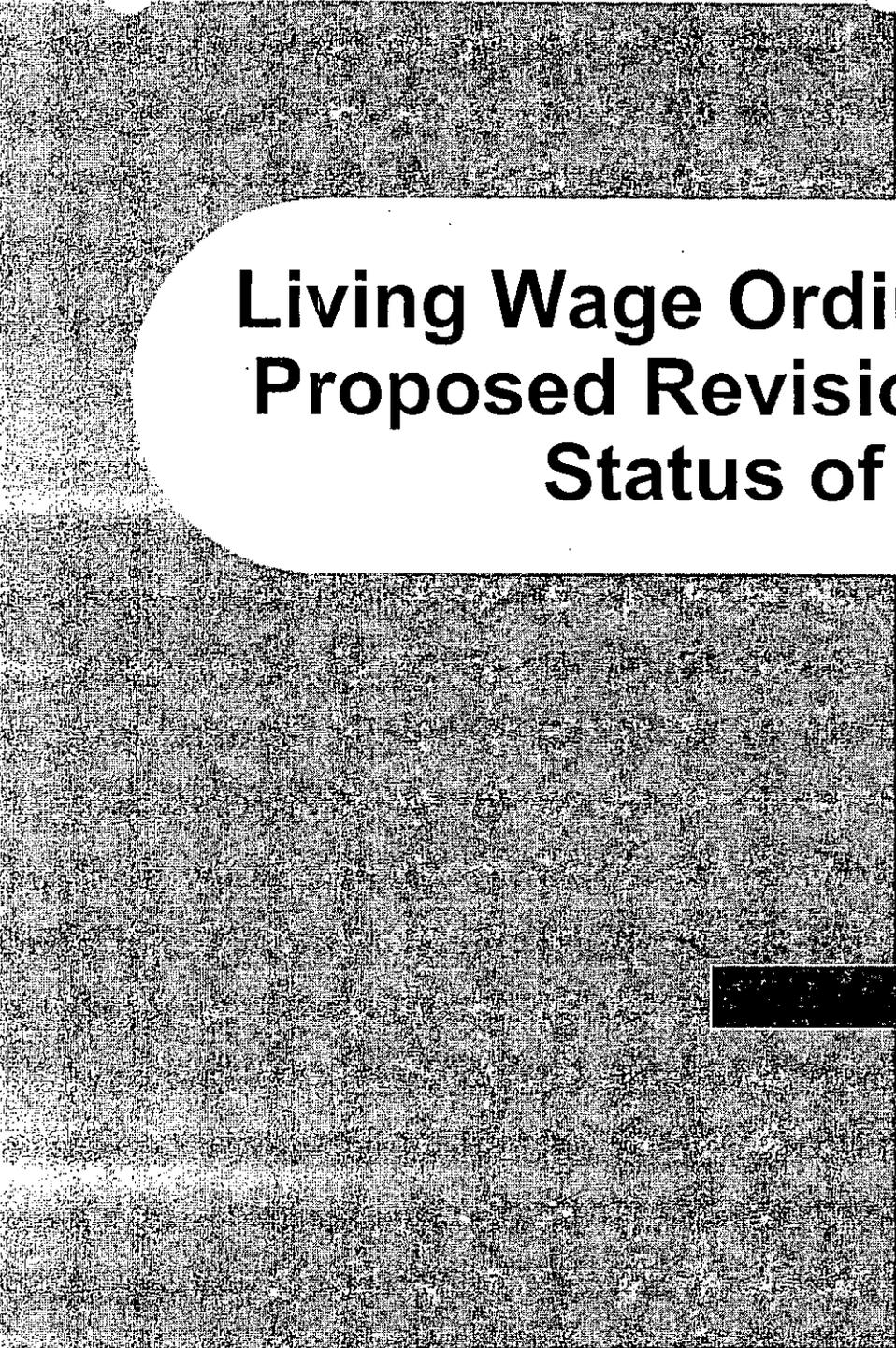
- (a) The *City Manager* shall develop and implement administrative policies, rules, and regulations to carry out the intent of this division, including procedures for handling complaints by *covered employees*. The *City Manager* shall monitor compliance, including conducting periodic reviews of appropriate records maintained by *covered employers* to verify compliance and to investigate claimed violations.
- (b) The *City Manager* is authorized to create a citizens advisory committee for the purpose of making recommendations regarding how the policies and purposes of this division may be advanced.
- (c) On July 1, 2007, or as soon thereafter as is practicable, the *City Manager* shall submit a report to the City Council generally describing the effects of the City of San Diego Living Wage Ordinance upon the *City*.

**§22.4240 Collective Bargaining Agreements**

The provisions of this division shall not be superseded by any collective bargaining agreement unless the supersession is specifically agreed to in writing by the parties to the collective bargaining agreement.

**§22.4245 Severability**

If any provision of this division is declared legally invalid by a final judgment rendered in a court of competent jurisdiction, the provision declared invalid shall be deemed to be severable to the extent that the remaining provisions of this division can be enforced in a manner that substantially carries out the objectives of this division.



**Living Wage Ordinance: Committee's  
Proposed Revisions, Enforcement &  
Status of Complaints**

Office of the City Attorney  
Michael J. Aguirre  
July 9, 2008



000347

BUDGET JUL 09 2008 #2

## Today's Presentation Will Cover:

- Proposed revisions to the LWO suggested by this Committee at its March 5, 2008 hearing
- Enforcement issues
- Status of two active complaints

# Proposed Revisions

- At the March 5 hearing, this Committee proposed three changes:
  - Creating a funding mechanism for enforcement
  - Narrowing the “professional services” exemption
  - Addressing anti-competitive effects felt by companies complying with the LWO

## Proposed Revisions, Contd.

- In order to create a funding mechanism for enforcement, the Committee suggested that **contractors help defray the up-front costs of compliance monitoring and enforcement**
- Council could amend SDMC § 22.4230 to add:

## Proposed Revisions, Contd.

- (g) The *City* will incur costs to monitor a *service contract* with a *business*. To defray such costs, each *service contractor* shall, prior to the award of any *service contract*, remit to the *City* an amount equal to the *City's* reasonably anticipated costs of monitoring and enforcing this division with respect to the *service contract*, as determined by the Living Wage Administrator. The City Auditor shall, upon request of the *service contractor*, review and determine the reasonableness of such costs. The amount of such payment, with respect to any *service contract*, shall be stated in any request for bid, request for proposal, or other document through which the *City* solicits *service contracts*, which document shall state that the obligation of the *service contractor* to remit such payment as provided in this section is a condition precedent to the award of such *service contract*. Such payments shall be placed in a separate *City* fund, called the Living Wage Enforcement Fund, and may be used for costs associated with administration, monitoring, enforcement, and other activities necessary to ensure compliance with this division.

## Proposed Revisions, Contd.

- Currently, service workers in “professional” categories are exempt
- SDMC § 22.4215(a)(7) specifically exempts contracts in professional categories, such as:
  - Legal
  - Medical
  - Banking

## Proposed Revisions, Contd.

- At the March 5 hearing, the Committee suggested clarifying this exemption to reach at least some service workers within professional categories
- Specific concern: paramedics and emergency medical technicians (EMTs)

## Proposed Revisions, Contd.

- We propose two alternatives for amending SDMC § 22.4215(a)(7)
  - **Option 1** (broad): re-word exemption so as to only reach professionals within these categories
  - **Option 2** (narrow): re-word exemption to specify that it does not apply to paramedics or EMTs

## Proposed Revisions, Contd.

- **Option 1:** Exemption includes “contracts for professional services, such as design, engineering, financial, technical, legal, banking, medical, management, operating, advertising, or other professional services requiring professional judgment or expertise. This exemption shall not be interpreted to exempt non-professionals providing support services to professionals under such contracts, to the extent such non-professionals would otherwise be entitled to receive the wages required by this division.”

## Proposed Revisions, Contd.

- **Option 2:** Exemption includes: “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.”

## Proposed Revisions, Contd.

- At the March 5 hearing, representatives from Elite services discussed anti-competitive effects of complying with the LWO
- Two issues
  - Lack of resources for enforcement
  - Uneven application of LWO due to definition of “City facility agreements” (SDMC § 22.4205)

## Proposed Revisions, Contd.

- City facility agreements include subcontracts and concession agreements when:
  - Exceed \$25,000 in value, *and*
  - Term of more than 90 days
- LWO Does not reach subcontracts and concession agreements with less than 90-day terms, which results in uneven application

## Proposed Revisions, Contd.

- The Committee's concern could be addressed by amending the definition of "City facilities agreements" at SDMC § 22.4205 to include: "(b) subcontracts and concession agreements for *services* at the *City facility* with a combined annual value of payments in excess of \$25,000 for any single subcontractor or concessionaire, ~~and with a term of more than 90 days.~~"

# Enforcement Issues

- Enforcement is currently complaint-driven
- Only ½ staff member assigned to LWO administration
- Insufficient staff to engage in proactive enforcement, such as periodic audits

## Enforcement Issues, Contd.

- Lack of enforcement may be addressed in part by:
  - Amending LWO to include funding mechanism
  - Additional staff
- If the Committee wishes to pursue other enforcement ideas, City Attorney can provide further analysis in a subsequent report

# Status of LWO Complaints

- Prudential Overall Supply:
  - Complaint publicly filed on July 24, 2007
  - City Attorney filed lawsuit on Sept. 27, 2007
  - Parties have reached tentative settlement

## Status of LWO Complaints, Contd.

- Jani-King, Inc.
  - Complaint publicly filed on Jan. 18, 2008
  - Living Wage Administrator has reviewed payrolls and conducted interviews in consultation with City Attorney
  - Complainant has been rehired by Jani-king at an alternate location
  - We anticipate resolution of this matter within the next 30 days

# Conclusion

# Q & A

**Proposal on Enforcement of the Living Wage Ordinance and Contractor Standards.**  
**(SUMMARY)****Problem 1: Unintended consequences of exemptions within current law**

Certain exemptions within the Living Wage law allow some contractors to continue to pay poverty wages, even though they are similarly situated as other contracts. Paramedics contracts were exempted from paying living wages. Furthermore, the City Attorney has raised questions about whether the Civic Theater is part of the Concourse. Also, the exemption for "professional services" is currently undefined. Such exemptions give an unfair competitive advantage in low wage service contracts, even when other employers in the same area of service pay living wages. Finally, services contemplated to be outsourced under the managed competition program (street cleaning and repairs, trash collection and recycling, right of way maintenance, and water and wastewater maintenance) should be explicitly covered by the living wage law.

**Solution 1: Remove problematic exemptions in current law**

All service contracts, financial assistance agreements and City facilities agreements should be presumed to be covered under the living wage ordinance unless granted an exemption from the Purchasing Department. Contracts for paramedics, street cleaning and repairs, trash collection and recycling will be covered. In order to clarify questions raised by the City Attorney, the Civic Theater is explicitly included in the Concourse. The definition for Professional Services have been referenced to California's Labor Code.

**Problem 2: Investigation process unclear**

When a complaint is made, the City is under no obligation to investigate. Workers who complain of not receiving the living wage are not adequately protected from retaliation by the employer, especially since "retaliation" is not clearly described. When complaints are investigated, the process is not clear or open to public input.

**Solution 2: Establish a fair, open process of investigating and enforcing the law.**

All legitimate worker complaints must be investigated. The steps of the investigation process must be clearly defined and must include whistle-blower protections, proper recordkeeping and public accountability.

All employees should have protection against retaliation from employers when they pursue their rights under the law, including whether they are the complainant or cooperate in an investigation. Once a complaint is filed, there should be a clear process with specific duties and timeframes for all parties. For example, an investigation must be concluded in 60 days and the outcome reported in writing to the employee. If the investigation continues past this time, the employee receives a status update every 30 days until the investigation is concluded.

If the City Auditor determines that a violation has occurred, the contractor is notified with a 10-day notice to correct the problem. Before a declaration of non-responsibility, a public hearing by an independent body such as the Council Audit Committee should be held. The hearing will determine what action should be taken against the contractor. The contractor will have the opportunity to present evidence to support their case. The Audit

000366

Committee will forward its recommendation regarding the responsibility of the contractor to the City Council for a final determination of non-responsibility.

**Problem 3: Current penalties for violations are discretionary and too weak to deter violations.**

The current law states that penalties “may” be awarded, does not have fines, and does not explicitly allow the city to cancel the contract for “material breach” when a contractor is non-responsible.

**Solution 3: Strong deterrent-level fines and penalties for lawbreakers.**

Even after being noticed about a violation (such as living wage), if the contractor continues the violation or does not make significant progress towards a correction, the City can cancel the contract under “material breach” or the contractor declared non-responsible. Similar to Los Angeles and Oakland codes, fines of up to \$100 per day of violation may be charged for willful violations that are not remedied after city gives a 10-day written notice. Furthermore, based on a finding of living wage violations, the City may request the City Council to debar the contractor for three years or until all penalties and restitution have been paid, whichever is longer.

Non-responsible contractors will be named on a list maintained by the Purchasing Department for five years. After two years, contractors may appeal their appearance on the list and provide evidence that they are responsible under the Contractor Standards section.

---

Attachment 1: Strikeout-Underline version of the proposed amendments to the Living Wage Ordinance. (Article 2, Division 42 of the San Diego Municipal Code)

Attachment 2: Strikeout-Underline version of the proposed amendments to the Contractor Standards. (Section 22.3224 of the San Diego Municipal Code)

000367

**Article 2: Administrative Code****Division 32: Contracts for Personal Services, Goods, and Consultants****STRIKEOUT UNDERLINE VERSION OF PROPOSED AMENDMENTS****§ 22.3224 Contractor Standards***(Added 5-24-2005 by O-19383 N.S.)*

- (a) Prior to awarding a *contract for Services* greater than \$50,000, the City shall make a determination that the *bidder* has the capability to fully perform the contract requirements and the business integrity to justify the award of public tax dollars. Among the factors to be considered are: (1) financial resources, including financial sufficiency under California Labor Code Section 2810; (2) technical qualifications; (3) experience; (4) material, equipment, and expertise necessary to carry out the work; (5) a satisfactory record of performance; and (6) a satisfactory record of compliance with applicable statutes and regulations.
- (b) As part of its bid, proposal, or other application for a *contract for Services*, a *bidder* will be required to submit a response, under penalty of perjury, that will seek to determine if the *bidder* meets the standards set forth in paragraph (a) of this Section.
- (c) During the term of a *contract for Services*, the contractor shall comply with all applicable local, state and federal laws, including health and safety, labor and employment, and licensing laws, that affect the employees, worksite or performance of the contract. Upon award of a contract, contractors shall complete a Pledge of Compliance attesting under penalty of perjury to compliance with this paragraph. Whenever any contract, which was not initially subject to this section is amended, the contractor shall complete a Pledge of Compliance attesting under penalty of perjury to compliance with this paragraph. Each contractor shall notify the Purchasing Agent within fifteen calendar days upon receiving notification that a government agency has begun an investigation of the contractor that may result in a finding that the contractor is or was not in compliance with said laws, or that there has been a finding by a government agency or court of competent jurisdiction of a violation of such laws by the contractor. Initiation of an investigation is not, by itself, a basis for a determination of non-responsibility by an awarding authority.
- (d) Contractors shall ensure that their subcontractors complete a Pledge of Compliance attesting under penalty of perjury to compliance with paragraph (c) of this Section, unless the subcontract is below the threshold requirements for contracts contained in paragraph (a).
- (e) Violations of this Article may be reported to the City Auditor who shall investigate such complaint. Whether based upon such complaint or otherwise, if the City has determined that the contractor has violated any provision of this Article, the City shall issue a written notice to the contractor that the violation is to be corrected within ten calendar days from receipt of notice. In the event the contractor has not corrected the violation, or taken reasonable steps to correct the violation within ten calendar days, then the City Auditor may:

- (1) Request the awarding authority to declare a material breach of the contract and exercise its contractual remedies thereunder, which are to include but not be limited to termination of the contract.
- (2) Request the awarding authority to declare the contractor to be non-responsible in accordance with the procedures set forth in paragraph (f).
- (f) Before being declared non-responsible, a contractor shall be notified of the proposed determination of non-responsibility, served with a summary of the information upon which the awarding authority is relying and provided with an opportunity to be heard in accordance with applicable law. At the responsibility hearing by the Audit Committee, the contractor will be allowed to rebut adverse information and to present evidence that it has the necessary quality, fitness and capacity to perform the work. The Audit Committee will forward its recommendation to the City Council. The determination by the City Council that the contractor is non-responsible shall be final and constitute exhaustion of the contractor's administrative remedies.
- (g) A list of individuals and entities which have been determined to be non-responsible by the City shall be maintained by the Purchasing Agent. After two years from the date the individual or entity has been determined to be non-responsible, the individual or entity may request removal from the list by the awarding authority. If the individual or entity can satisfy the awarding authority that it has the necessary quality, fitness, and capacity to perform work in accordance with the criteria set forth in paragraph (a) of this Section, its name shall be removed from the list. Unless otherwise removed from the list by the awarding authority, names shall remain on the list for five years from the date of being declared non-responsible.
- (h) This section applies to all contracts, including but not limited to Contracts for Services, Consultant Contracts, Maintenance Contracts and Public Works Contracts.

000369

**Article 2: Administrative Code****Division 42: City of San Diego Living Wage Ordinance***(Added 06/06/2005 by O-19386 N.S.)***STRIKEOUT UNDERLINE VERSION OF PROPOSED AMENDMENTS****§ 22.4201 Purpose and Intent**

The *City* awards many taxpayer-funded agreements to private *businesses* that provide *services* to the public and to the *City* or that are intended to promote economic development, job creation, and retention. The *City* also owns, operates, manages, or leases sports, entertainment, or convention facilities and contracts with *businesses* to use these facilities or provide services at these locations to the public. It is the experience of the *City* that many of these services to the public and to the *City* are provided by workers who live at or below the poverty line. This division provides that when agreements, including *service contracts*, *financial assistance agreements*, and *City facilities agreements* are extended by the *City* to private *businesses* these taxpayer funded benefits are used in a way that advances the interests of the *City* as a whole, by creating jobs that keep workers and their families out of poverty. This division therefore requires *covered employers* and their subcontractors to pay their employees a wage that will enable a full-time worker to meet basic needs and avoid economic hardship. Paying service employees a living wage is intended to improve the quality of services provided to the *City* and to the public by reducing high turnover, absenteeism, and instability in the workplace. This division also promotes the *City's* policies and programs that seek to meet the employment and economic development needs of the *City* and its workforce. Private businesses that do not fall into any of the above described categories are not required to comply with this division.

**§22.4202 Citation**

This division shall be cited as the City of San Diego Living Wage Ordinance.

**§22.4205 Definitions**

Each word or phrase that is defined in this division appears in the text of this division in italicized letters. For purposes of this division, the following definitions shall apply:

*Business* means any corporation, partnership, limited liability corporation, joint venture, sole proprietorship, association, or trust, other than a public entity.

*City* means the City of San Diego, its organizational subdivisions, agencies, offices, or boards, but does not include independent agencies, such as the Housing Authority, Redevelopment Agency, and the Retirement Board, each of which is encouraged to adopt its own living wage policy.

*City facility* means any of the following facilities that are owned, operated, managed, or leased by the *City*:

- (a) Petco Park;

- (b) Qualcomm Stadium;
- (c) San Diego Sports Arena;
- (d) San Diego Convention Center; or
- (e) San Diego City Concourse, including Civic Theater.

*City facility agreement* means an agreement between the *City* and a *business* for the lease, use, or management of a *City facility* that generates \$350,000 or more in annual gross receipts to the *business*. *City facility agreement* includes (a) subleases or other agreements for use of the *City facility* for 30 days or more in any calendar year; and (b) subcontracts and concession agreements for *services* at the *City facility* with a combined annual value of payments in excess of \$25,000 for any single subcontractor or concessionaire, and with a term of more than 90 days.

*City facility employer* means any *business* that has entered into a *City facility agreement*. For the purposes of this division, *City facility employer* includes any sublessee, subcontractor, or concessionaire that retains employees to provide *services* at a *City facility*.

*City Manager* means the City Manager and his/her delegates and representatives.

*Covered employee* means any individual employed on a full-time, part-time, temporary, or seasonal basis by (a) a *service contractor* with regard to any hours worked in performance of a *service contract*; (b) a *financial assistance recipient* who works at least 20 hours a month at the site that is the subject of the *financial assistance agreement* or at least 20 hours a month on the program that is the subject of the *financial assistance agreement*; or (c) a *City facility employer* with regard to any hours worked at a *City facility*. *Covered employee* does not include: (a) individuals who, in addition to wages, receive academic credit for their work from an accredited educational institution; and/or (b) individuals who participate in job training and education programs that have as their express purpose the provision of basic job skills or education.

*Covered employer* means any *service contractor*, *financial assistance recipient*, or *City facility employer*.

*Financial assistance agreement* means an agreement between the *City* and a *business* to provide direct financial assistance with the expressly articulated and identified purpose of encouraging, facilitating, supporting, or enabling: (a) economic development, job creation, or job retention; or (b) tourism, arts, and cultural programs. As to economic development, job creation, or job retention, this division shall apply to *financial assistance agreements* with a combined value over a period of five years of \$500,000 or more. As to tourism, arts, and cultural programs, this division shall apply to *financial assistance agreements* with a combined annual value of \$750,000 or more. Direct financial assistance includes funds, below-market loans, rebates, deferred payments, forgivable loans, land write-downs, infrastructure or public improvements, or other action of economic value identified in the *financial assistance agreement*. Financial assistance does not include below-market leases to non-profit organizations or indirect financial assistance, such as that provided through broadly applicable tax reductions or services performed by *City* staff. *Financial assistance agreement* includes subcontracts to perform *services* at the site that is the subject of the *financial assistance agreement* or for the program that is the subject of the *financial assistance agreement*.

**000371**

*Financial assistance recipient* means any *business* that has entered into a *financial assistance agreement*. For the purposes of this division, *financial assistance recipient* includes all subcontractors retained by a *business* to perform *services* at the site that is the subject of the *financial assistance agreement*, or for the program that is the subject of the *financial assistance agreement*.

*Health benefits rate* means a minimum dollar amount per hour toward the cost of health and medical care insurance for employees and their dependents.

*Service contract* means a contract between the *City* and a *business* with a combined annual value of payments in excess of \$25,000 and with a term of more than 90 days, and any applicable subcontracts or franchises, to furnish *services*. For the purpose of this division, *service contract* includes all *services* provided through the managed competition program under Charter section 117(c).

*Service contractor* means any *business* that has been awarded a *service contract* subject to this division. For the purposes of this division, *service contractor* includes all subcontractors or franchisees retained by a *business* to perform any or all of the functions covered by a *service contract*.

*Services* means the following types of employment activities and any other non-managerial, non-supervisory, or non-professional services that are consistent with the intent of this division and designated in a *City facility agreement*, *financial assistance agreement*, or *service contract*:

- (a) Automotive repair and maintenance;
- (b) Cashiers;
- (c) Child care;
- (d) Concessions/retail sales;
- (e) Facility and building maintenance;
- (f) On-site food service/preparation;
- (g) Janitorial, custodial, street cleaning and housekeeping;
- (h) Landscaping;
- (i) Laundry services;
- (j) Office/clerical;
- (k) Parking services;
- (l) Pest control;
- (m) Security services;
- (n) Ushers and wheelchair attendants;

- (o) Ticket takers; and
- (p) Warehouse workers;
- (q) Waste collection and waste disposal, including recycling;
- (r) Right-of-way maintenance; and
- (s) Water and wastewater maintenance.

**§22.4210 Applicability of Living Wage Ordinance**

(a) This division shall apply to:

- (1) any *service contract*, including any applicable subcontract, entered into, awarded, amended, renewed, or extended on or after July 1, 2006. Compliance with this division is required during the term of the *service contract*. Notwithstanding the foregoing, *service contracts* for child care services are exempt from the requirements of this division until July 1, 2008.
- (2) any *financial assistance agreement* subject to the \$500,000 threshold, including any applicable subcontract, entered into, awarded, amended, renewed, or extended on or after July 1, 2006. Compliance with this division is required for a period of five years after the threshold amount has been received by the *business*.
- (3) any *financial assistance agreement* subject to the \$750,000 threshold, including any applicable subcontract entered into, awarded, amended, renewed, or extended on or after July 1, 2007. Compliance is required for one year after the threshold amount has been received by the *business*.
- (4) any *City facility agreement*, including any applicable sublease, subcontract, or concession agreement in effect on July 1, 2007. Compliance with this division is required during the term of the *City facility agreement*.

(b) *Service contracts, financial assistance agreements, and City facility agreements* shall not be subdivided into two or more contracts that logically should be made as a single transaction if the purpose of the subdividing is to avoid the requirements of this division.

**§22.4215 Exemptions.**

(a) Except for *City facility agreements*, the following contracts are exempt from the requirements of this division:

- (1) contracts subject to federal or state law or regulations that preclude the applicability of this division's requirements;
- (2) contracts that involve programs where the *City* shares management authority with other jurisdictions, unless all the signatory jurisdictions agree to the applicability of this division's requirements to the contract;
- (3) contracts for *services* by any other governmental agency;

000373

- (4) contracts for public works construction, ~~recycling, or solid waste management franchises~~;
  - (5) cooperative procurement contracts, including contracts that use a bidding process that substantially complies with *City* requirements;
  - (6) contracts for the purchase of goods, property, or the leasing of property;
  - (7) contracts for design, engineering, financial, technical, legal, banking, medical, management, operating, advertising, or other professional services under California Labor Code Section 515.
  - (8) contracts where compliance with this division is not in the best interests of the *City* as certified by the *City Manager* and approved by the *City Council*.
- (b) The following businesses, even if otherwise qualified as a *covered employer*, are exempt from the requirements of this division:
- (1) *Businesses*, including their parent and subsidiary entities, employing twelve or fewer employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, so long as the *City* determines that the *business*, including any of its subcontractors, will not need to retain more than twelve employees to perform work related to a *service contract*, *financial assistance agreement*, or *City facility agreement*.
  - (2) *Businesses* organized under Internal Revenue Service Code, section 501(c)(3) to provide community-based social services, other than child care services, and whose highest paid officer earns a salary that, when calculated on an hourly basis, is less than eight times the hourly wage rate of the lowest paid full-time employee.
- (c) The definitions of *service contract*, *financial assistance agreement*, or *City facility agreement* shall be liberally interpreted so as to further the policy objectives of this Division. All *service contracts*, *financial assistance agreements*, or *City facility agreements* shall be presumed to meet the corresponding definition, subject, however, to a determination by the *City* of non-coverage or exemption on any basis allowed by this article, including, but not limited to, non-coverage for failure to satisfy such definition. The Purchasing Department shall by regulation establish procedures for informing persons engaging in such transactions with the *City* of their opportunity to apply for a determination of non-coverage or exemption and procedures and findings for making determinations on such applications.

#### §22.4220 Payment of Living Wage and Provision of Benefits

- (a) *Covered employers* subject to this division shall pay *covered employees* a wage of no less than \$10.00 per hour if the *health benefits rate* is paid, or no less than \$12.00 per hour if the *health benefits rate* is not paid. The *health benefits rate* is \$2.00 per hour. The rates are effective beginning July 1, 2006.
- (b) Beginning July 1, 2007, the hourly wage rates and *health benefits rate* shall be upwardly adjusted each July 1 to reflect the change in the Consumer Price Index for All Urban Consumers for the San Diego – Carlsbad – San Marcos Metropolitan Statistical Area for the

000374

twelve-month period preceding December 31. Prior to April 1 of each year, the *City* shall calculate the new rates and provide notice to all *covered employers* by posting on the *City's* web site the rates in effect for the next fiscal year.

- (c) *Covered employers* shall provide to each *covered employee* a minimum of ten compensated days off per year for sick leave, vacation, or personal necessity leave at the *covered employee's* request. Such days off shall vest as accrued. Part-time employees shall accrue such days at a rate proportional to full-time employees. *Covered employees* shall be eligible to use accrued days off after the first six months of employment or consistent with employer policy, whichever is earlier. Paid holidays that are provided under established employer policy shall not be counted toward the provision of the ten compensated days off.
- (d) *Covered employers* shall also permit *covered employees* to take an additional ten uncompensated days off per year to be used for sick leave for the illness of the *covered employee* or a member of his or her immediate family, where the *covered employee* has exhausted all accrued compensated days off. This section does not mandate the accrual from year to year of uncompensated days off.

#### §22.4225 Reporting and Notification Requirements

- (a) Every *service contract*, *financial assistance agreement*, and *City facility agreement* shall require that the party contracting with the *City* be subject to the terms of this division and all regulations and rules promulgated under this division and that all applicable subcontractors, sublessees, and concessionaires comply with the terms of this division and all regulations and rules promulgated under this division.
- (b) Each *covered employer* shall notify its *covered employees* of the requirements of this division and of the possible availability of the Earned Income Tax Credit.
- (c) Each *covered employer* shall file a living wage certification with the *City Manager* within thirty days of becoming a *covered employer*. *Covered employers* must ensure that all applicable subcontractors, sublessees, and concessionaires file a living wage certification within thirty days of becoming covered by the requirements of this division. The living wage certification shall be completed on a form provided by the *City Manager*.
- (d) Each *covered employer* shall ~~file with the *City Manager* an annual report regarding~~ compliance with this division maintain records documenting compliance with this Division. At a minimum, records shall include each covered employee name, address, date of hire, job classification, rate of pay, hours worked in each pay period, and paid and unpaid time off (accrued and used). These records shall be maintained for three years after the *City's* final payment in the contract and shall be made available to the *City* upon request.

#### §22.4230 Enforcement

- (a) A *covered employee* claiming a violation of this division shall have the right to file an action against an employer in the appropriate court within one year after discovery of the alleged violation. The court may award any employee who files suit pursuant to this subdivision, the following:

000375

- (1) For failure to pay the minimum wage required by this division, the difference between the minimum wage required herein and the amount actually paid to the employee, plus interest.
  - (2) For failure to pay the *health benefits rate*, the difference between the *health benefits rate* required by this division and the amount actually paid towards the *health benefits rate*, plus interest.
  - (3) For retaliation for exercise of any rights provided for under this division, reinstatement, back pay, or any other relief that a court may deem appropriate.
  - (4) For a willful violation of this division, a court ~~may~~shall award as a penalty up to treble the amount of monies to be paid as damages.
  - (5) The court ~~may~~shall award reasonable attorney's fees and costs to an employee who prevails in any such private action and to an employer who so prevails if the employee's suit is found to be frivolous.
- (b) A *business* is prohibited from any retaliation against an employee who alleges non-compliance with this division or cooperates with an investigation regarding compliance with this Division. A *business* shall not discharge, reduce in compensation, or otherwise discriminate against any employee for complaining to the City with regard to the employer's compliance or anticipated compliance with this division, for opposing any practice proscribed by this division, for participating in proceedings related to this division, for seeking to enforce his or her rights under this division by any lawful means, or for otherwise asserting rights under this division. Any such employee may report any alleged retaliation to the *City Manager*.
- (c) A *covered employee* claiming a violation of the division may file a complaint with the *City*. The *City* ~~may, in its sole discretion,~~ shall investigate and address any alleged violation of this division'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.
- (d) ~~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. Whether based upon a complaint or otherwise, where the *City Auditor* has determined that an employer has violated this article, the *City Auditor* shall issue a written notice to the employer that the violation is to be corrected within ten (10) days. In the event that the employer has not demonstrated to the *City* within such period that it has cured such violation, the *City Auditor* may then:~~
- (1) Request the awarding authority to declare a material breach of the *service contract, financial assistance agreement, or City facility agreement* and exercise its contractual remedies thereunder, which are to include, but not be limited to, termination of the *service contract, financial assistance agreement, or City facility agreement* and the return of monies paid by the *City* for services not yet rendered.

C00376

(2) Request the City Council to debar the employer from future City contracts for three (3) years or until all penalties and restitution have been fully paid, whichever occurs last. Such debarment shall be to the extent permitted by, and under whatever procedures set forth in Division 8, Article 2 of Chapter 2.

(3) Request the City Attorney to bring a civil action against the employer seeking any legal remedies including but not limited to:

(i) Where applicable, payment of all unpaid wages or health premiums prescribed by this article; and/or

(ii) A fine payable to the City in the amount of up to one hundred dollars (\$100) for each violation for each day the violation remains uncured.

(e) A violation of this division shall not be prosecuted as a misdemeanor, notwithstanding any other provision of the San Diego Municipal Code.

This division shall not be construed to limit an employee's right to bring legal action for a violation of any other laws concerning wages, hours, or other standards or rights nor shall exhaustion of remedies under this division be a prerequisite to the assertion of any other such right.

**§22.4235 Administration**

(a) The *City Manager* shall develop and implement administrative policies, rules, and regulations to carry out the intent of this division, including procedures for handling complaints by *covered employees*. The *City Manager* shall monitor compliance, including conducting periodic reviews of appropriate records maintained by *covered employers* to verify compliance and to investigate claimed violations.

(b) The *City Manager* is authorized to create a citizens advisory committee for the purpose of making recommendations regarding how the policies and purposes of this division may be advanced.

(c) On July 1, ~~2007~~ of each year, or as soon thereafter as is practicable, the *City Manager* shall submit an annual report to the City Council generally describing the effects of the City of San Diego Living Wage Ordinance upon the *City*.

**§22.4240 Collective Bargaining Agreements**

The provisions of this division shall not be superseded by any collective bargaining agreement unless the supersession is specifically agreed to in writing by the parties to the collective bargaining agreement.

**§22.4245 Severability**

If any provision of this division is declared legally invalid by a final judgment rendered in a court of competent jurisdiction, the provision declared invalid shall be deemed to be severable to the extent that the remaining provisions of this division can be enforced in a manner that substantially carries out the objectives of this division.

RECEIVED  
OCT-9 PM 3:19  
CITY CLERKS OFFICE

Office of  
The City Attorney  
City of San Diego

MEMORANDUM  
MS 59

(619) 236-6220

**DATE:** November 6, 2008  
**TO:** Sara Richardson, Office of the City Clerk  
**FROM:** City Attorney  
**SUBJECT:** Revised Versions of O-2009-49 and O-2009-50-a

---

Please find enclosed revised versions of O-2009-49 relating to Contractor Standards (San Diego Municipal Code Chap. 2, Art., 2, Div. 32), and O-2009-50-a relating to the Living Wage Ordinance (San Diego Chap.2, Art. 2, Div. 42). In addition to the changes adopted by the City Council in its October 20, 2008 motion, we made the following revisions in Division 42:

1. In Section 22.4225(d), first sentence, we made grammatical changes and replaced the word "contract" with "*service contract, financial assistance agreement, or City facility agreement*" to be consistent with the defined terms set forth in Section 22.4205. Our revisions to the wording proposed by motion are indicated in strike-through (deletions) and double-underline (additions), below:
  - (d) Each *covered employer* shall file with the *City Manager* an annual report documenting compliance with this division. The *covered employer* will maintain records documenting compliance for at least three years, ~~and not to exceed~~ but will not be required to maintain such records for more than seven years, after the *City's* final payment ~~in on the contract~~ *service contract, financial assistance agreement, or City facility agreement* ~~and;~~ such records shall be made available to the *City* upon request.
2. In Section 22.4225(e), first sentence, we replaced the phrase "wage rates" with "wage rate requirements of this division."

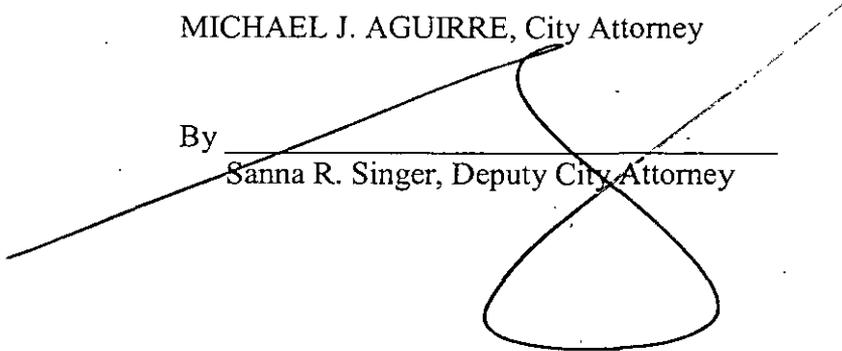
Sara Richardson  
Office of the City Clerk  
November 6, 2008  
Page 2

000378

We made other non-substantive changes to correct typographical errors in the ordinances.

MICHAEL J. AGUIRRE, City Attorney

By \_\_\_\_\_  
Sanna R. Singer, Deputy City Attorney

A large, handwritten signature in black ink is written over the signature line and extends upwards into the name of Michael J. Aguirre. The signature is a stylized, cursive name that appears to be 'Sanna R. Singer'.

SRS

Cc: City Council Members

000379

OFFICE OF  
**THE CITY ATTORNEY**  
CITY OF SAN DIEGO

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

**Michael J. Aguirre**  
CITY ATTORNEY

October 16, 2008

REPORT TO THE HONORABLE  
MAYOR AND CITY COUNCIL

LIVING WAGE ORDINANCE: SUPPLEMENTAL REPORT ON BUDGET & FINANCE  
COMMITTEE PROPOSALS

### INTRODUCTION

On October 6, 2008, the Office of the City Attorney issued its Report to Council, summarizing and analyzing changes proposed to the City's Living Wage Ordinance ["LWO" or "Ordinance"] by the Budget and Finance Committee [Budget Committee]<sup>1</sup> and others [RC-2008-22]. In that Report, we also noted that we had held an informal meeting of stakeholders at the request of Budget Committee members, that we intended to hold a second such meeting, and that we would issue a further report on the results of that meeting. This supplemental report provides that information, updates a few minor matters discussed in our previous report, and attaches corrected draft ordinances.

### DISCUSSION

#### 1. Stakeholder Input

##### A. Second Stakeholder Meeting

On October 8, 2008, the Office of the City Attorney hosted the second of two informal stakeholders' meetings to discuss proposed revisions to the LWO.<sup>2</sup> The discussion included both the proposals that the Budget Committee had forwarded to the full Council on July 9, 2008, and other proposals from interested stakeholders. Direct invitees to the meeting included representatives of:

---

<sup>1</sup> It should be noted that the Budget Committee, by motion on March 5, 2008, instructed the Office of the City Attorney to draft a set of proposals to revise the LWO, and then on July 9, 2008, moved to forward those proposals to the full Council. The Committee's July 9, 2008 motion did not include any recommendation regarding passage, however. Thus, when this report refers to the "Budget Committee proposals," it is referring to their origin, rather than to any position for or against the proposals taken by the Committee.

<sup>2</sup> As noted in our October 6, 2008 Report on this topic, we also met with stakeholders on September 25, 2008.

- the San Diego Regional Chamber of Commerce,
- Sea World,
- the Boon Group,
- Elite Show Services,
- the Center on Policy Initiatives,
- Civic Theatre ushers,
- Civic Theatre management,
- Rural Metro,
- the Interfaith Council on Worker Justice,
- the Maintenance Cooperation Trust Fund,
- the Independent Budget Analyst
- Council Districts 2, 3, and 6, and
- the City's Living Wage Program and Purchasing Department.

In addition, all invitees were encouraged to forward the invitation to whomever they deemed appropriate. Attendees included representatives of:

- the Boon Group,
- Mission Bay Lessees,
- Civic Theatre management,
- Civic Theatre ushers,
- the California Restaurant Association,
- the Center on Policy Initiatives,
- the San Diego Regional Chamber of Commerce,
- Local 127,
- the City's Living Wage Program and Purchasing Department,
- the Independent Budget Analyst, and
- Council District 3.

At the meeting, there was extensive discussion of each aspect of the proposal by the Center on Policy Initiatives [CPI], as forwarded by the Budget Committee to the Council, as well as a brief review of the Budget Committee's proposals, which had been discussed at a previous stakeholders' meeting. Although the stakeholders discussed the various proposals in significant detail, asked many questions, presented rationales, and raised concerns, the group did not reach a consensus regarding either an overall approach to amending the LWO, nor the details of any particular proposal. Several issues did arise in discussion, however, that should be called to the Council's attention.

First, some stakeholders noted that while the LWO provides options to either pay the required wage rate entirely in cash (currently \$12.71 per hour) or to pay a somewhat lower rate (currently \$10.58 per hour) supplemented by health benefits, the Ordinance does not specify

what type of health benefits qualify a covered employer to pay the lower wage rate. In addition, the Ordinance does not expressly address whether employers are permitted to require a co-premium from employees.

Second, some stakeholders suggested that because some of the proposed revisions would specifically affect City facility agreements, that more outreach take place to alert City facility operators and affected contractors and subcontractors to the pending changes.

Third, Don Telford of San Diego Theatres, Inc., suggested that further clarity was needed regarding whether, if the LWO is extended to the Theatre, it would include activities that are run by the Theatre but actually take place outside the Theatre's walls, such as concessions on the Civic Center Plaza.

Fourth, some stakeholders suggested that the interplay of LWO revisions with the Managed Competition program needed further study, and might be illuminated by discussion with other cities that have implemented both programs simultaneously.

Fifth, representatives from CPI suggested the inclusion of mandatory posting requirements in the LWO, noting that dissemination of information to covered employees was a critical concern. CPI also suggested draft language that would require the City to resolve employee complaints within 60 days, with 30-day extensions when reasonable. However, the latter suggestion was not discussed at length by the group.

Finally, the stakeholders discussed CPI's proposal to amend Article 2, Chapter 2, Division 32 of the San Diego Municipal Code ("Contractor Standards") to include a public hearing procedure for determinations of contractor non-responsibility. Ms. Lani Lutar of the San Diego Regional Chamber of Commerce noted that the currently proposed 10-day period to cure reports of non-compliance might not provide contractors with sufficient time to address concerns.

## B. Responses and Recommendations

### 1. Health Benefits

The LWO defines "health benefits rate" as "a minimum dollar amount per hour toward the cost of health and medical care insurance for employees and their dependents." San Diego Municipal Code [SDMC] section 22.4205. However, the LWO also authorized implementing rules, which the administration has adopted. See Rules Implementing the Living Wage Ordinance [Rules]. The Rules, Section A, provide greater clarity:

Health benefits may include the following types of insurance:  
medical health coverage, dental, vision, mental

health, and disability income. For purposes of the LWO, retirement benefits, accidental death and dismemberment insurance, life insurance, and other benefits that do not provide medical or health-related coverage will not be credited toward the cost of providing *covered employees* with health benefits.

In addition, the Rules, Section D.2.d, provide that, “[a] co-premium may be required of a *covered employee* only if the cost of health and medical care insurance is greater than the minimum dollar amount per hour as specified in the LWO” (emphasis in original to indicate defined term).

In light of this, we believe that the Rules provide the greater clarity that some stakeholders sought, and do not recommend amending the Ordinance with regard to this issue.

## 2. City Facilities Outreach

As discussed above, the proposals affecting City facilities (e.g., the addition of the Civic Theatre as a City facility, and the elimination of the 90-day requirement for City facility agreements), were previously addressed at the July 9 Budget Committee hearing. Management for the Civic Theatre, Mr. Don Telford, was present at both stakeholders’ meetings. In addition, our office has separately informed administrators at the various City facilities of the pending changes.

## 3. Clarification of Civic Theatre

In light of the concerns raised at the second stakeholder’s meeting, we recommend clarifying SDMC section 22.4205(f), to state explicitly that inclusion of the Civic Theatre as a “City facility” is intended to result in the LWO applying to events occurring at the Civic Theatre, including any activities that occur outside the walls of the building on the plaza directly adjacent to the Theatre itself. We have included our proposed modification to Section 22.4205(f) in both corrected draft versions of the LWO, attached hereto as **Exhibit A** and **Exhibit B**.

## 4. Interplay with Managed Competition

We have not yet been able to identify any California cities that simultaneously implemented new Managed Competition Programs and new or newly revised Living Wage Ordinances. We do not believe any changes to the proposals as previously drafted are necessary to accommodate Managed Competition.

## 5. Posting Requirements and Timeline for City Investigations

We have included CPI's suggestions for mandatory posting requirements and a timeline for City investigations in the attached matrix (**Exhibit D**), discussed below. Because CPI did not present these proposals to the Budget Committee at the July 9 hearing, they are not included in either version of the draft LWO ordinance; however, Council could move to direct the City Attorney to include these suggestions in the final version of the ordinance. Notably, the Rules, Section D.4 currently require posting.

## 6. Contractor Standards

We are prepared to assist Council with any revisions to the Contractor Standards ordinance that it may wish to make in response to the comments above. While no stakeholders offered specific proposals in this area, the ordinance could be amended to extend the 10-day compliance period or to ease the administrative transition period by providing a delayed effective date for the revisions.

### 2. Corrections and Clarifications

This report attaches corrected versions of the LWO (**Exhibit A** and **Exhibit B**) and Contractor Standards ordinance (**Exhibit C**), which make the above-noted change regarding Civic Theatre events, and make other non-substantive typographical corrections.<sup>3</sup>

In addition, it bears noting that the version of the LWO revisions before the Council includes a reference, at Section 22.4230(d)(3), to a "determination of non-responsibility under division 32." This reference is to a new CPI proposal to amend Division 32 to provide for such a finding, which does not exist under current law. Thus, if the Council chooses not to make the proposed addition to Division 32, this reference will need to be deleted.

### 3. Attached Matrix

Because of the complex interplay of the various proposals, we have provided a matrix of proposals, attached to this Report. This document is intended to permit the Council to easily identify individual revisions, their origin, and whether they are included in the draft ordinances before the Council.

The matrix presents proposed revisions in three categories, which are shown in the second, third, and fourth columns. The first describes the Budget Committee's proposals arising out of its March 5, 2008 meeting, which our office drafted at the Budget Committee's request

---

<sup>3</sup> One correction of note is that, in the previous versions of the draft LWO, the definition of "Covered employee" appeared in underline indicating that the entire definition was new. In fact, the definition exists in the current LWO. CPI has proposed only a minor, grammatical change to this definition. This change is now accurately reflected.

and presented at the July 9, 2008 hearing. The second describes CPI's proposals, which were presented to the Budget Committee on July 9, 2008, and included in the Committee's motion for forwarding to the full Council. All proposed revisions in these two categories have been included in the draft ordinances as placed on the Council docket, because the Budget Committee so moved. Thus, if the Council approves these ordinances without amendment, these provisions will take effect. Disapproval of any individual provision in these two categories would require a motion to amend the proposed ordinance to remove that provision.

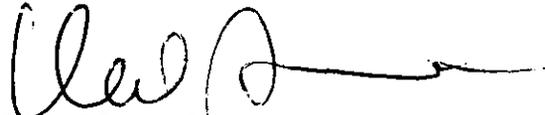
The last category includes proposals to revise the LWO in ways that were not included in the Budget Committee's motion. Such revisions were, therefore, not included in the drafts we provided to the Council for consideration. In response to the Budget Committee's directive that we solicit stakeholder input, we invited such additional proposals, and have included those proposals in the third section of the matrix. As discussed above, proposals in this section are not incorporated into the drafts that we have placed before the Council at the Committee's direction. Therefore, Council would be required to specifically move for their inclusion in the final ordinance. These additional proposals include:

- CPI's proposal to impose a mandatory requirement to post information about the LWO in workplaces;
- CPI's proposal to impose a mandatory deadline for resolution of LWO complaints by City staff; and
- Elite's proposal to eliminate the \$25,000 contract size threshold, below which the LWO does not apply, discussed in our October 6 Report ( RC-2008-22, p. 6)

### CONCLUSION

With these additions to our previous Report, we stand ready to assist the Council in its decisions on revising the LWO.

Respectfully submitted,



MICHAEL J. AGUIRRE  
City Attorney

OFFICE OF  
**THE CITY ATTORNEY**  
CITY OF SAN DIEGO

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

Michael J. Aguirre  
CITY ATTORNEY

October 6, 2008

REPORT TO THE HONORABLE  
MAYOR AND CITY COUNCIL

LIVING WAGE ORDINANCE: BUDGET & FINANCE COMMITTEE  
RECOMMENDATIONS

### INTRODUCTION

At the July 9, 2008 hearing of the Budget and Finance Committee [Budget Committee], the City Attorney provided an update on the effectiveness of the City's Living Wage Ordinance, codified at San Diego Municipal Code [SDMC] sections 22.4201, *et seq.* [LWO or the Ordinance], and presented draft revisions requested by the Budget Committee at its March 5, 2008 hearing. The proposed revisions were designed to: (1) create a cost recovery fund to help fund enforcement, (2) narrow the professional services exemption so as to bring paramedics and emergency medical technicians, and possibly others, within the protections of the Ordinance, and (3) reduce inconsistency in application of the Ordinance by eliminating the 90-day requirement for City facility agreements and service contracts. See Report to Council dated July 3, 2008 [RC-2008-17].

The Budget Committee moved to forward these revisions to City Council for consideration, and also moved to forward a package of revisions proposed by the Center for Policy Initiatives [CPI] designed to further enhance the protections of the Ordinance. In addition, Councilmember Faulconer requested that our Office hold a public meeting to solicit input from various stakeholders regarding the proposed changes to the Ordinance. In cooperation with the Independent Budget Analyst and Council Districts 3 and 6, we held a meeting on September 25, 2008, which was attended by representatives from CPI, Elite Show Services, San Diego Theatres, Inc., Rural Metro, the San Diego Chamber of Commerce, and various other stakeholders. Due to the number of interested parties and complexity of the issues, we plan to hold another stakeholders' meeting on October 8, 2008. We will provide Council with a supplemental report regarding the outcome of the second stakeholders' meeting.

This Report provides a summary of the Budget Committee revisions and the revisions proposed by CPI, which we have reviewed and revised to ensure proper form and consistency with existing law. We have also included input from the stakeholders' meeting regarding the proposed revisions where appropriate. We have attached two versions of the Ordinance for Council's consideration, which incorporate both the revisions previously presented to the Budget

Committee and CPI's proposals; the first version (attached as **Exhibit A**) includes a broad rewording of the professional services exemption, and the second version (attached as **Exhibit B**) includes an alternative, more narrow rewording of this exemption, as will be discussed in more detail below.

## DISCUSSION

### I. Budget Committee Revisions.

At its March 5, 2008 hearing, the Budget Committee requested that the our Office provide draft revisions to the LWO, and analysis of those revisions, in the following areas: (1) creation of a cost recovery mechanism for enforcement; (2) revision of the professional services exemption to allow the LWO to apply to certain workers in professional services industries; and (3) revisions to address specific concerns about anti-competitive effects raised by representatives of Elite Show Services, a company that provides security guard services. We have provided a brief analysis of each of these revisions below.

#### A. Cost Recovery Fund.

Councilmember Frye proposed, and the Budget Committee included in its March 5 motion, a proposal to create a cost recovery fund to meet the consensus need for improved enforcement of the LWO. Until recently, enforcement activities were the responsibility of one employee in the Purchasing and Contracting Department, who devoted half of her time to the LWO and the other half to unrelated matters. Because of the volume of City contracts subject to the LWO, this staffing level permitted only complaint-driven enforcement. Although an analyst position has since been added to assist with LWO administration, there are still limited resources to engage in proactive enforcement measures, such as audits and field inspections. Given the City's current fiscal constraints, the Committee felt that a self-funding mechanism to enhance enforcement efforts would stand the best chance of making a positive difference, and thus included in its motion a request for such a proposal.

Councilmember Frye's proposal was that all City Requests for Bid [RFB] contain a component under which the contracting business would pay into an enforcement fund. We assumed that this provision would also apply to contracts entered through other forms of City service procurement such as Requests for Proposals [RFP] and sole source procurements, to the extent that the LWO would apply. Councilmember Frye's suggestion would require the procuring City Department, when preparing the governing RFB, RFP, or other contract documents, to require that the winning contractor pay an amount into an enforcement fund created specifically to cover enforcement-related costs. The amount of this payment would be determined by estimating the anticipated LWO management and enforcement costs associated with the specific contract.

We have drafted the provision to require payment only of a winning bidder or proposer. Further, the payment would be required after the completion of the competitive process, but prior to the final execution of a contract, during the time when the City is also obtaining other contract

documents such as bonds and insurance certificates. In a competitive procurement context, the contractor would have the option of either building such cost into its bid or not, according to how the contractor anticipated it would affect the contractor's competitive position. All payments received under this provision, as well as any other funds received as a result of enforcement efforts, would be segregated in a special fund for LWO enforcement.

Thus, we presented to the Budget Committee on July 9, 2008, the following addition to SDMC section 22.4230, to implement the Committee's intent as expressed in its March 5, 2008 motion:

(g) The *City* will incur costs to monitor a *service contract* with a *business*. To defray such costs, each *service contractor* shall, prior to the award of any *service contract*, remit to the *City* an amount equal to the *City's* reasonably anticipated costs of monitoring and enforcing this division with respect to the *service contract*, as determined by the Purchasing Agent.<sup>1</sup> The *City Manager*<sup>2</sup> shall, upon request of the *service contractor*, review and determine the reasonableness of such costs. The amount of such payment, with respect to any *service contract*, shall be stated in any request for bid, request for proposal, or other document through which the *City* solicits *service contracts*, which document shall state that the obligation of the *service contractor* to remit such payment as provided in this section is a condition precedent to the award of such *service contract*. Such payments shall be placed in a separate *City* fund, called the Living Wage Enforcement Fund, and may be used for costs associated with administration, monitoring, enforcement, and other activities necessary to ensure compliance with this division.

The Budget Committee voted to forward this provision without amendment to the full Council.

At the September 25, 2008 stakeholders' meeting, some stakeholders pointed out that the cost recovery fund provision, as drafted, does not extend to City facility agreements even though those agreements may impose just as much of an enforcement burden on the City as service contracts. Because enforcement costs would be incorporated into bid documents, it would be difficult to extend this provision to City facility agreements, which are not generally procured through the City. Thus, although the stakeholders recognized an apparent inequity, there was no consensus on whether or how to correct it.

<sup>1</sup> In the version of the Ordinance that was presented to the Budget Committee on July 9, this provision stated that contractors would remit the "reasonably anticipated costs of monitoring and enforcing this division with respect to the *service contract*, as determined by the Living Wage Administrator." RC-2008-17, pp. 2-3. Because the Living Wage Administrator is not a position codified in the City Charter or Municipal Code, we have since changed "Living Wage Administrator" to "Purchasing Agent."

<sup>2</sup> In the version of the Ordinance that was presented to the Budget Committee on July 9, this provision stated that the "City Auditor shall, upon request of the *service contractor*, review and determine the reasonableness of such costs." RC-2008-17, pp. 2-3. Based upon a consensus that has emerged since then, we have changed "City Auditor" to "City Manager," allowing the responsibility to be placed wherever the executive branch deems it appropriate.

## B. Professional Services Exemption.

As discussed in the City Attorney's previous Reports to Council, the LWO currently exempts contracts in "professional service" categories. See Report to Council dated March 3, 2008 [RC-2008-8], pp.2-3 and Report to Council dated February 13, 2008 [RC-2008-5], pp. 3-4. Section 22.4215 of the Ordinance expressly exempts, 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).

Under this exemption, *all* service contracts falling within the listed 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. This exemption, as written, reaches service workers in professional fields, such as legal messengers or orderlies.

At the March 5 Budget Committee hearing, Councilmember Frye asked the City Attorney to propose revisions to SDMC section 22. 4215(a)(7) designed to narrow the professional services exemption so as not to include service workers in professional fields. Previously, at the October 17, 2007 hearing of the Budget Committee, Councilmember Frye expressed particular concern with the status of paramedics and emergency medical personnel [EMT] contracts, and requested that the City Attorney analyze the applicability of the Ordinance to such contracts. In our February 13, 2008 Report, we found that EMT contracts were exempt from the Ordinance because they fall within the category of "medical" contracts. See RC-2008-5, pp. 3-4.

The City Attorney has recommended, and the Budget Committee has forwarded for Council consideration, two possible approaches for addressing Councilmember Frye's concerns. The first approach would be to revise SDMC § 22. 4215(a)(7) so that the exemptions applies *only to professionals* within professional service fields. For example, Council could amend SDMC section 22. 4215(a)(7) as follows:

contracts for professional services, such as design, engineering, financial, technical, legal, banking, medical, management, operating, advertising, or other professional services requiring professional judgment or expertise. This exemption shall not be interpreted to exempt non-professionals providing support services to professionals under such contracts, to the extent such non-professionals would otherwise be entitled to receive the wages required by this division (emphasis added to indicate defined terms).

A draft version of the Ordinance with this proposed revision, as well as the other revisions proposed in this Report, is attached hereto as **Exhibit A**.

Revising the Ordinance in this manner would broadly address the concern that service workers in professional fields are not currently protected by the Ordinance; however, narrowing the professional services exemption to this extent may substantially increase the number of contracts subject to the Ordinance. For example, the City's contracts with banking and financial institutions would be covered to the extent those contracts entail the involvement of service workers, such as tellers. Large, national banks could be deterred from bidding on City contracts if required to pay local tellers a higher rate than tellers in other locations. Likewise, law firms contracting with the City would be required to pay the Living Wage rate to service employees such as clerks or messengers. This may act as a deterrent to large law firms with employees outside of San Diego, who are paid less than the Living Wage. As Committee Chair Toni Atkins commented at the March 5 Budget Committee hearing, this broad a reworking of the exemption may undermine the protracted negotiations and many compromises that were reached when the Ordinance was first passed in 2005.

A second, more focused approach would be to specifically carve out paramedics and EMTs from the professional service exemption. For example, as reflected in our February 13, 2008 Report, Council could amend the above-referenced exemption to add the following language:

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 emergency medical personnel, such as emergency medical technicians and/or paramedics. See RC-2008-5, pp. 3-5.

This approach would expressly entitle paramedics and EMTs to payment of the Living Wage while still generally exempting contracts in professional service categories. If the Council prefers this approach, we would also recommend adding to the list of examples of service contracts in SDMC section 22.4205:

(g) Service workers in the medical field, such as emergency medical technicians and/or paramedics.

A draft version of the Ordinance with these proposed revisions, as well as the other revisions proposed in this Report, is attached hereto as **Exhibit B**.

At the July 9 Budget Committee hearing, CPI also proposed revisions to Section 22.415(a)(7) designed to clarify the professional services exemption, which are included in the attached draft Ordinances and discussed more fully below.

#### C. Concerns Raised by Elite Show Services.

In addition to the provisions discussed above, Councilmember Frye also requested that the City Attorney consider revisions to the Ordinance designed to address the concerns raised by

representatives of Elite Show Services. During the public comment portion of the March 5 Budget Committee hearing, a representative from Elite Show Services – a provider of security guards for large events – discussed some of his concerns regarding enforcement of the Ordinance. The Elite representative expressed two primary concerns:

First, the Elite representative commented that companies that are complying with the Ordinance are at a competitive disadvantage when bidding against companies that are not in compliance. This is largely due to the City's inability to proactively enforce the Ordinance. As discussed above, enforcement of the Ordinance is essentially complaint-driven at this time. Currently, the City has only one and one-half staff members dedicated to monitoring Living Wage issues. This does not provide sufficient personnel to conduct periodic audits or engage in other proactive enforcement activities. Therefore, LWO violations usually come to the City's attention only after a complaint has been formally lodged by an aggrieved employee. Enhanced enforcement through increased staffing would be the most effective means of addressing this first concern.

Second, the Elite representative suggested that due to the wording of the Ordinance, some events at a particular City facility are covered, while other events at that same City facility are not. This results in Elite having to pay all of its workers the Living Wage rate because it would be difficult to justify paying different rates depending on the event. This second concern has to do with how "City facility agreements" are defined in the Ordinance. As discussed in our March 3, 2008 Report, the Ordinance currently applies not only to agreements for the use of space at the five "City facilities" enumerated in the Ordinance, but also to "subcontracts and concession agreements for *services* at [a] *City facility* with a combined annual value of payments in excess of \$25,000 for any single subcontractor or concessionaire, and with a term of more than 90 days." SDMC § 22.4205 (emphasis in original to indicate defined terms); see also RC-2008-8, p. 2.

In reality, many subcontracts and concession agreements for services at City facilities relate to short-term, high-revenue events. For example, a large scale event like Comic Con may involve subcontracts or concession agreements that far exceed \$25,000 in value, even though the duration of the event is only four days. As long as contracts for service workers at such events (e.g. security guards or food vendors) do not exceed a 90-day term, those workers are not currently entitled to receive a Living Wage. This can result in a security guard working one event at a City facility being covered by the Ordinance, while a security guard working another event *at that same City facility* is not, due to the difference in duration of the respective contracts.<sup>3</sup> In order to avoid this, Council may wish to amend the definition of "City facility agreements" in SDMC section 22.4205 to eliminate the 90-day term requirement as follows:

---

<sup>3</sup> In addition, a contract term may be easily manipulated. For example, a large, short-term event at the Convention Center may be planned two years in advance; however, the contract may be drafted to state that term of the contract commences just before the event and concludes shortly thereafter. This may lead to the purposeful drafting of contracts so as to avoid the requirements of the LWO.

*City facility agreement* means an agreement between the *City* and a *business* for the lease, use, or management of a *City facility* that generates \$350,000 or more in annual gross receipts to the *business*. *City facility agreement* includes (a) subleases or other agreements for the use of the *City facility* for 30 days or more in any calendar year; and (b) subcontracts and concession agreements for *services* at the *City facility* with a combined annual value of payments in excess of \$25,000 for any single subcontractor or concessionaire, ~~and with a term of more than 90 days.~~

If Council chose to eliminate the 90-day term requirement in the definition of City facilities as described above, we would also recommend removing the 90-day term requirement from the definition of "service contracts" in SDMC section 22.4205 as follows:

*Services contract* means a contract between the *City* and a *business* with a combined annual value of payments in excess of \$25,000 ~~and with a term of more than 90 days~~, and any applicable subcontracts or franchises, to furnish *services*.

Although the 90-day term requirement is less likely to be an issue where services providers are in a direct contractual relationship with the City, we recommend revising the definition of service contracts in this manner for consistency.

At the stakeholders' meeting, a representative from Elite also suggested eliminating the \$25,000 threshold for City facility agreements and service contracts in order to broaden application and enhance consistency even further. The Elite representative also noted that since enactment of the LWO, his company has benefited from improved employee morale and reduced turnover. Elite contends that even-handed enforcement and application will be easier to achieve with this additional change.

## II. CPI Revisions.

At the July 3 Budget Committee hearing, CPI presented a package of revisions designed to extend the protections of the Ordinance and enhance enforcement. We have summarized below the various revisions proposed by CPI. In some cases, we revised CPI's proposed language in order to ensure proper form and consistency with existing law. When we have done so, we have noted those changes below.

### A. Inclusion of Civic Theatre as a City Facility.

CPI proposed revising the definition of City facilities in Section 22.4205 to include the Civic Theatre. Currently, the Ordinance applies not only to service contracts, but also to "City facility agreements." City facility agreements include certain agreements for use of space or services at five identified "City facilities," which include: (a) Petco Park, (b) Qualcomm Stadium, (c) San Diego Sports Arena, (d) San Diego Convention Center, and (e) San Diego City Concourse. SDMC § 22.4205. In our March 3 Report, we suggested that Council could expand

the list of City facilities to reach other large City-owned structures such as the Civic Theatre (see RC- 2008-8, pp. 1-2), and CPI specifically included the Civic Theatre in the package of revisions it presented to the Budget Committee on July 9. We have modified CPI's proposal slightly by listing the Civic Theatre as a separate subdivision (f) in Section 22.4205 rather than revising Section 22.4205(e) to state "San Diego City Concourse, including Civic Theatre."<sup>4</sup>

At the July 9 hearing, Mr. Patrick McNamara, an usher, discussed the positive impact the LWO would have on ushers employed at the Civic Theatre, and also suggested possible inclusion of the Balboa Theatre<sup>5</sup> as a City facility. At the September 25, 2008 stakeholders' meeting, Don Telford, a representative from San Diego Theatres, Inc., argued that each of the five City facilities currently listed in the Ordinance receives some form of support or subsidy from the City. Mr. Telford indicated that the Civic Theatre does not currently receive any subsidy from the City, and could be severely financially impacted by this extension of the LWO. In addition, Mr. Telford indicated that most or all other regional theatres have volunteer rather than paid ushers. The Civic Theatre would likely move to the use of volunteer ushers if subjected to the LWO, as it might be unable to absorb the fiscal impact.

B. Inclusion of Definition of Covered Employee.

CPI proposed adding a definition for "covered employee," which includes full-time, part-time, temporary and seasonal workers but does not include workers in academic and job training programs.

C. Expansion of Definition of Service Contracts.

CPI proposed revising the definition of service contracts in Section 22.4205 of the Ordinance to expressly include, "all services provided through the managed competition program under Charter section 117(c)." In addition, CPI recommended expanding the list of examples of service contracts in Section 22.4205 to include: street cleaning, waste collection and waste disposal, recycling, right-of-way maintenance, and water and wastewater maintenance contracts.

D. Clarification of Exemptions.

CPI proposed revising Section 22.4215 of the Ordinance ("Exemptions") to clarify the professional services exemption. Specifically, CPI suggested revising the professional services exemption (subdivision (a)(7)) to be consistent with California Labor Code section 515(a), which

---

<sup>4</sup> The purpose of this modification is to avoid confusion regarding whether other structures in the Civic Center Plaza area are City facilities. In a memorandum to the City's Living Wage Administrator dated January 18, 2008, the City Attorney found that the "San Diego City Concourse," as used in the LWO, refers only to the 114,000 square-foot facility used as a public event center and meeting hall, and not other structures in the Civic Center Plaza area, such as the Civic Theatre. The City Attorney's conclusion was based on the legislative record, which revealed that Council was presented with a fiscal analysis of the LWO as applied to the "City Concourse" as distinct from the "Civic Theatre" when it passed the Ordinance.

<sup>5</sup> The Balboa Theatre is actually owned by the Redevelopment Agency, and thus cannot be made subject to the LWO.

defines the kinds of employees who are exempt from overtime pay.<sup>6</sup> Because this proposal is consistent with the other revisions to the professional services exemption discussed above, we have included CPI's proposal in both versions of the Ordinance attached hereto.

CPI also proposed revising Section 22.4215(c) to include a general presumption against a determination of exempt status. We modified CPI's proposal slightly to clarify that the Purchasing Agent (a position codified in the Charter and Municipal Code) rather the Purchasing Department would be responsible for establishing procedures for determining exemptions, and simplified the proposed wording of Subdivision (c).

E. Clarification of Reporting Requirements.

CPI proposed revising Section 22.4225 of the Ordinance ("Reporting and Notification Requirements") to specify the types of records covered employers would be responsible for maintaining, including "each covered employee name, address, date of hire, job classification, rate of pay, hours worked in each pay period, and paid and unpaid time off (accrued and used)." In addition, CPI proposed specifying that such records should be maintained for three years after the City's final payment on the relevant contract. We made non-substantive modifications to CPI's proposed language in order to be consistent with terminology used in remainder of the Ordinance, and clarified the timeframe within which such records shall be made available to the City if requested.

F. Enhancement of Enforcement Provisions.

CPI proposed various revisions to Section 22.4230 of the Ordinance ("Enforcement"). For example, CPI proposed revising Subdivisions (a)(4) and (a)(5) to impose a mandatory, rather than discretionary, duty on courts to fine up to treble damages in the case of willful violations and award attorneys' fees to the prevailing party in civil actions brought pursuant to the Ordinance. In addition, CPI proposed revising Subdivision (b) to broaden and clarify the LWO's protections against retaliation. CPI also proposed revising Subdivision (c) to impose a mandatory, rather than discretionary duty on the City to investigate LWO complaints. Finally, CPI proposed revising Subdivision (d) to specify the remedies available to the City for violations of the Ordinance, including declaring a material breach of the relevant contract, instituting debarment proceedings, requesting that the City Attorney bring a civil action, and ordering the payment of unpaid wages and/or fines up to \$100 per day for each violation. We made non-substantive modifications to CPI's proposed language for Subdivisions (b) and (d) in order to be consistent with terminology used in remainder of the Ordinance, and to clarify that the City Manager rather than City Auditor would have authority to impose the various remedies.

G. Annual Reporting Requirement

---

<sup>6</sup> Such an employee "customarily and regularly exercises discretion and independent judgment in performing [their] duties, and earns a monthly salary equivalent to no less than two times the state minimum wage for full-time employment." Labor Code § 515(a)

CPI proposed revising Section 22.4235 to impose an annual reporting duty on the City Manager. Previously, the LWO required only a single report on July 1, 2007.

H. Revisions to Division 32

Finally, CPI presented to the Budget Committee a set of proposed revisions to a different portion of the Municipal Code. Chapter 2, Article 2, Division 32 contains general rules for the City's procurement of contracts for goods, services, and consultants. At Section 22.3224, is addresses "Contractor Standards," and sets forth certain demonstrations of "capability to fully perform the contract requirements and...business integrity" that must be met for any contract exceeding \$50,000. The CPI proposal would add significantly to this section. It would expand the section's applicability beyond service contracts, to also include contracts for goods and cooperative procurement contracts. It would require prospective contractors and subcontractors to sign a Pledge of Compliance with the section's requirements. Thereafter, failure to comply with the section's requirements could result in a finding that the contractor was in breach of the contract, resulting in the invocation of remedies up to and including termination. In addition, after a hearing, the City could declare a contractor "non-responsible" – in essence, a finding that the contractor does not have the "capability [or] business integrity" to perform City work for a period of two years, after which the contractor could apply for reinstatement. Absent an affirmative decision by the City to reinstate the contractor, a finding of non-responsibility would last for five years. Such a finding would have to follow a due process procedure under applicable law.

This proposal is modeled on a similar one that has been in place, and functioning effectively, in Los Angeles since 2000. It would provide a less drastic alternative to debarment, while still allowing the City to ensure that its contractors have the requisite resources and character to perform City work. It would also provide due process to prospective contractors prior to any exclusion from City contracting. While it would provide an additional tool for enforcement of the Living Wage Ordinance, the proposed revision of section 22.3224 would not be specific to that subject matter. We have made non-substantive modifications to CPI's proposed revisions to Section 22.3224 to clarify the procedure and ensure consistency existing municipal law.

000395

Honorable  
Mayor and City Council

-11-

October 6, 2008

### CONCLUSION

These revisions reflect both the direction of the Budget Committee and the input of numerous stakeholders subsequent to that direction. Since there will undoubtedly be further input from interested parties as they review these draft Ordinances, the Office of the City Attorney stands ready to address this anticipated additional input in a subsequent report, and at the Council's hearings on this matter.

Respectfully submitted,



MICHAEL J. AGUIRRE  
City Attorney

MPC:SRS:js  
RC-2008-22



## THE CITY OF SAN DIEGO

---

**OFFICE OF THE INDEPENDENT BUDGET ANALYST REPORT**

---

Date Issued: October 18, 2008

IBA Report Number: 08-110

City Council Docket Date: October 20, 2008

Item Number: # 150

---

## Proposed Amendments to the Municipal Code related to the City's Living Wage Ordinance

### OVERVIEW

At the March 5, 2008 meeting of the Budget and Finance Committee (Committee), the Office of the City Attorney provided an update on the effectiveness of the City's Living Wage Ordinance (LWO), enforcement issues and the status of two City LWO complaints. In response to direction from the Committee, the Office of the City Attorney returned to the Committee on July 9, 2008 to present draft revisions to the LWO. These revisions were designed to 1) create a cost recovery fund to help fund LWO enforcement, 2) narrow the existing professional services exemption to exclude emergency medical technicians, paramedics and possibly other employees, and 3) reduce inconsistency in the application of LWO by eliminating the 90-day requirement for City facility agreements and service contracts.

The Committee moved to forward the draft LWO revisions, together with proposed LWO amendments received from the Center for Policy Initiatives (CPI), to the City Council for consideration. The Committee's action requested the City Attorney's Office to further analyze proposed revisions to the LWO and draft ordinances incorporating CPI's proposed amendments to both the LWO and Contractor's Standards sections of the San Diego Municipal Code (Code). Additionally, the Committee requested analysis from the IBA and the Mayor related to the proposed amendments.

The Office of the City Attorney submitted two reports (dated October 6, 2008 and October 16, 2008) to the Mayor and City Council in response to the Committee's action on July 9<sup>th</sup>. These reports discuss and present three ordinances for City Council consideration. Except for different language regarding the professional services

**Office of Independent Budget Analyst**

202 C Street, MS 3A • San Diego, CA 92101

Tel (619) 236-6555 Fax (619) 236-6556

exemption, two of the ordinances (Exhibits A and B) are identical and address proposed changes to the LWO (Division 42 of the Code). The third ordinance (Exhibit C) incorporates CPI's proposed revisions to Contractor Standards (in Division 32 of the Code).

The IBA understands that the Mayor's Office is currently developing a report in response to the proposed LWO revisions and amendments to the Code. Our office has discussed the proposed LWO amendments with representatives from the City Attorney's Office, the Purchasing Department, CPI and various other stakeholders. This report endeavors to provide fiscal and policy considerations associated with the proposed amendments to the LWO.

## FISCAL/POLICY DISCUSSION

Exhibit D of the City Attorney's report dated October 16, 2008 provides a matrix of the proposed revisions to the Code. The matrix lists all of the proposed revisions in the order they appear in the Code. Although this report does not comment on all of the proposed revisions, our comments are presented below in the order they appear in the matrix and the Code.

### Living Wage Ordinance

#### **Section 22.4205 (f): Definitions - City Facility (Civic Theatre)**

Except for specified exemptions, the LWO currently applies to following five "*City facilities*": Petco Park, Qualcomm Stadium, San Diego Sports Arena, San Diego Convention Center and the San Diego Concourse. As footnoted in their October 6<sup>th</sup> report, the City Attorney has previously opined that the Civic Theatre is not included in the San Diego City Concourse as used in the LWO. In order to incorporate CPI's proposed amendment to include workers at the Civic Theatre, the Civic Theatre is proposed to be defined as a sixth City facility within this section of the Code.

In order to ascertain the potential fiscal impact of the LWO, Civic Theatre management (Don Telford) analyzed the Theatre's payroll records for calendar year 2007 and determined that application of the LWO would result in an additional operating expense of approximately \$192,000 for the Civic Theatre. A new collective bargaining agreement is in the process of being negotiated for concession stand workers and bartenders (the Theatre is currently negotiating with HERE Local 30). If approved, the estimated increase in operating expense would be reduced to approximately \$170,000. IF LWO had been applied in 2007, impacted workers at the Theatre would have included Ushers/Ticket Takers (101), Ticket Sellers (16), Housekeepers (8), Public Safety (16) and Concession Stand Workers/Bartenders (32).

The IBA notes the following considerations with respect to this proposed revision:

- The San Diego Civic Theatre is owned by the City and operated by San Diego Theatres (SDT), a nonprofit corporation. SDT does not receive financial support from the City for operating the Theatre. SDT's annual budget to operate the Civic Theatre is approximately \$3.1 million. As a percentage of their annual operating budget, \$192,000 is approximately 6.2% and \$170,000 is approximately 5.5%.
- In calendar year 2007, the Civic Theatre hosted 167 performances and had total attendance of 315,358. Dividing total 2007 attendance (315,358) into the potential LWO fiscal impact of \$192,000 into equates to approximately 61 cents a ticket. The IBA is not sure whether SDT has the ability to add a surcharge to ticket prices or if they could alternatively build these costs into individual user contracts. If the latter, sufficient lead time would be required as we understand that such contracts are typically negotiated one or two years in advance.
- If the LWO were to be applied to the Civic Theatre, SDT management could consider moving to a partial or all volunteer ushering staff which could have unintended consequences for current workers. The IBA has been informed that the Civic Theatre and the Balboa Theatre are the only theatres in the San Diego region that use paid ushers; other theaters use volunteer ushers.

**Section 22.4205 (f): Definitions - City Facility Agreement**

Amending this definition to remove "with a term of more than 90 days" would make sub-90 day subcontracts and concession agreements at defined *City facilities* subject to LWO. City departments rarely enter into service contracts of less than 90 days duration, so this change would have a negligible impact for City service contracts subject to LWO. The IBA is concerned that this amendment would require additional LWO administrative staff to monitor compliance or conduct periodic audits. Additionally, there is some question as to the ability of City Purchasing Department staff to effectively oversee subcontracts and concession agreements controlled by different management structures.

The IBA acknowledges the concerns raised by Elite Show Services related to enforcement and equity that have been noted in the City Attorney's October 6<sup>th</sup> memorandum. Limited City Purchasing Department staff currently must rely on management at the defined *City facilities* to monitor their obligations under the LWO. Purchasing staff currently assists the defined *City facilities* by providing information and support materials to their managements. Finally, the IBA understands that CPI currently favors leaving this definition unchanged, with the under 90-day exemption in place.

**Section 22.4205 (f): Definitions - Service Contract (Managed Competition) and Services (Defined)**

These definition amendments include language further defining the term *service contract* to include all services provided through the managed competition program. This amendment would ensure that all services contracted out pursuant to managed competition would be subject to provisions of the LWO.

CPI has further proposed to amend the definition of *services* by including street cleaning; waste collection and disposal, including recycling; right-of-way maintenance; and water and wastewater maintenance. This amendment would expressly include these services as types of non-managerial, non-supervisory, non-professional services intended to be covered by the LWO. These services have been identified for inclusion due to their presumed targeting for managed competition. It should be noted that this proposed amendment is not intended to extend to contracts for public works construction or capital improvements, which are categorically exempt from the LWO.

The apparent overarching intent of the latter two proposed definition amendments is to ensure that any service contracted out under managed competition is subject to the LWO. To the extent that would-be private contractors are currently paying wages that are below those mandated by the LWO, these amendments may potentially result in higher bid prices submitted by private contractors under the competition process. Given that the City pays a living wage, this would provide for an even playing field with respect to wage in a managed competition scenario.

However, it is important to note that the City may have existing contracts for the four services proposed to be expressly included in the definition of *Services* (street cleaning; waste collection and disposal, including recycling; right-of-way maintenance; and water and wastewater maintenance). If so, adoption of this revised definition for *Services* may have a financial impact if these contracts are not currently abiding by LWO requirements. Further analysis would be necessary to determine the financial impact, if any, for this proposed amendment.

#### **Section 22.4215 (a) (4): Exemptions**

This section removes the current exemption for *recycling or solid waste management franchises*. See the comments above for 22.4205 (f) as they relate to the proposal to amend the definition of *Services*.

#### **Section 22.4215 (a) (7): Exemptions**

There are two proposed changes to this section of the Code. The first change was initiated by CPI and is captured in both the Exhibit A and Exhibit B ordinances (attached to the October 16<sup>th</sup> City Attorney report). The proposed change seeks to better define professional service contracts by referencing the California Labor Code [Section 515(a)]. This section of the Labor Code defines professional employees and further specifies that they earn a monthly salary equivalent to no less than two times the state minimum wage for full-time employment (\$8.00/hour).

When asked by the IBA, the City Attorney's Office was uncertain if this Labor Code reference would exclude service workers (administrative staff, tellers, clerks, etc.) from the LWO at professional service firms used by the City (banks, law firms, etc.). CPI's Labor Code reference could be interpreted to bring service workers in professional fields who are making less than twice the current minimum wage within the protections of the

LWO. As noted in the City Attorney's October 6<sup>th</sup> report, this could make it challenging for the City to enter into certain professional service contracts (banking, legal services, etc.). If the City Council does not intend to bring such workers within the protections of the LWO, we recommend either not adopting this revision to Subdivision (a) (7) or directing the City Attorney's office to draft clarifying language to better define professional service contracts. Alternatively, if the City Council intends to apply the LWO to professional service contracts, the IBA notes that there will likely be a significant increase in compliance monitoring responsibilities for LWO administrative staff.

The second amendment to the professional services exemption resulted in the two revised versions of the LWO presented as Exhibit A (broad definition version) and Exhibit B (narrow definition version). The last added sentence of Subdivision (a) (7) in the Exhibit A ordinance purposefully does not exempt all non-professionals providing support services for professionals contracting with the City. The last added sentence of Subdivision (a) (7) in the Exhibit B ordinance purposefully narrows the exemption to only apply to emergency medical technicians (EMTs) and/or paramedics (hence they would be covered by the LWO).

The IBA has learned that depending on the shift schedule worked and overtime factors, most EMTs and paramedics earn close to or exceed LWO requirements. For example, entry level EMTs working 12-hour shifts start at \$8.50 an hour for the first 8 hours and \$12.75 an hour for the final four hours of each shift which equates to just under \$10 an hour with benefits. The current living wage requirement is \$10.58 an hour plus benefits or \$12.70 an hour without benefits. Paramedics working 12-hour shifts begin at \$12.24 an hour for the first 8 hours and \$18.36 for the final four hours of each shift with benefits.

It should also be noted that the City's contract for Emergency Medical Services ends on December 31, 2008 and a new contract process for 2009 is currently underway. We further understand that there may no longer be an interest in adopting the Exhibit B ordinance that would apply LWO to EMTs and paramedics. If that is the case and to the extent that the Exhibit A ordinance is alternatively considered, the IBA would again note the City Attorney's comments about certain professional service firms potentially being deterred from bidding on City contracts because LWO provisions would apply to their service workers.

#### **Section 22.4215 (c): Exemptions**

This section retains a sentence recommended by CPI specifying that when LWO applicability is in doubt (with respect to the definitions of *service contract*, *financial assistance agreement*, or *City facility agreement*), there will be a presumption against the determination of exempt status.

**Section 22.4225 (d): Reporting and Notification Requirements**

This section has been recommended by CPI and would require each covered employer to submit an annual report with significant employee data to the *City Manager*. This subsection goes on to define detailed records that must be maintained for three years without specifying if they are to be maintained by the covered employer, the City or both. The IBA recommends that the City Council request that the City Attorney clarify this language. We further note that while this provision helps LWO enforcement, it also imposes a recordkeeping burden on the covered employer and City staff (who must review and file this information).

**Section 22.4230 (c): Enforcement – Complaint Investigations**

The proposed revision to this section imposes a mandatory, rather than a discretionary, duty on the City to investigate and address any alleged LWO violations. Although failure by the City to follow-up as required on an alleged violation does not create any right or action to recover damages from the City, such a requirement could impose a significant workload burden on current LWO administrative staff (1.5 employees in the Purchasing Department) and support from the City Attorney's Office.

**Section 22.4230 (d): Enforcement – LWO Violations**

Proposed revisions to this section allow a covered employer 10 days to correct a violation. If a violation is not corrected within that timeframe, the City Manager is compelled to take one or more actions including, but not limited to: declaring a material breach of the service contract, initiating proceedings to debar a covered employer, or requesting the City Attorney to bring a civil action against the covered employer. At the October 8<sup>th</sup> stakeholder meeting convened by the Office of the City Attorney, Lani Lutar of the San Diego Regional Chamber of Commerce expressed concern that 10 days may not allow a covered contractor sufficient time to correct a violation and suggested that the proposed timeframe be extended.

**Section 22.4230 (g): Enforcement – Living Wage Enforcement Fund**

This provision was developed to fund a sufficient level of LWO monitoring and enforcement. If adopted, it would impose a yet to be determined fee on service contractors to cover the costs of reasonable LWO monitoring and enforcement as determined by the City Manager. There were 105 City LWO service contracts in FY 08. While this language provides a useful cost recovery mechanism, the Purchasing Department and other LWO stakeholders have yet to agree on what might constitute a "reasonable" level of monitoring and enforcement. Until that is known, it is difficult to develop/implement a fee structure and hire LWO administrative staff if needed.

There are also contractor fee equity considerations that have yet to be addressed. As noted in the City Attorney's October 6<sup>th</sup> memorandum, this provision does not extend to *City Facility Agreements* even though those agreements impose just as much of an

enforcement burden on Purchasing Department staff as *Service Contracts*. Additionally, the cost of monitoring and enforcement may change over time, yet changing an established fee structure to maintain equity and reflect actual costs can be challenging.

LWO Program administration currently consists of 1.5 staff. In addition to routine program administration (contract management, responding to requests for information, working with covered employers and their employees, developing and distributing informational materials for the program, etc.), it is reasonable to expect that LWO administrative staff will increasingly be asked to investigate complaints, perform audits, and otherwise monitor compliance. The IBA believes the various ordinance proposals discussed in this report could significantly add responsibilities for LWO administrative staff. The IBA concurs with the Committee that it is important for the City to monitor and enforce its programs and the Code. However, we are concerned that there may not be sufficient staff to effectively administer the current or potentially modified LWO Program. For example, the Program has yet to complete a contractor audit despite having capable and committed staff.

Having said that, it may be that only one or two additional administrative staff is needed. If that is determined to be the case, then it may be more practical to add an additional staff member than to quickly attempt to develop an accurate/equitable contractor fee structure. An alternative idea might be to partially cost recover through the LWO covered *City facility agreements*.

The IBA understands the difficult fiscal environment the City currently faces. We struggle to balance this primary concern with our unease that the City may not be able to effectively monitor and enforce its LWO Program. Noting the current projected fiscal year deficit, CPI has indicated that they do not support establishing a fee on contracts at this time, which means there would be no identified funding source for increased enforcement. However, concerns have also been raised that such a fee, if created, would simply be passed back to the City through bidders' cost proposals. This is a significant concern that should be further evaluated given the City's projected deficit.

#### **Section 22.4235: Administration**

This revision would require that the City Manager submit an annual report to the City Council generally describing the effects of the LWO. The IBA supports this revision as a means of systematically evaluating program effectiveness and keeping the City Council regularly apprised of this program.

#### **Contractor Standards Ordinance**

The IBA believes the City Attorney has done a good job of explaining the origin and implications of this proposed ordinance (Exhibit C) on page 10 of their October 6<sup>th</sup> report. It is important to note that the proposed revisions apply to all City contracts including consultant agreements, maintenance contracts and public works contracts.

While these proposed revisions may help with LWO enforcement, they will also have broader implications for other City contracts and operations.

**Section 22.3224 (d): Contractor Standards – Pledge of Compliance**

This provision would require all contractors to complete a Pledge of Compliance attesting under penalty of perjury to comply with the provisions of this ordinance. Additionally subcontractors whose subcontracts are greater than \$50,000 in value must also complete a Pledge of Compliance. If a contractor is subsequently found to have violated the provisions of this ordinance, the contractor could be found to be in breach of their contract and subject to remedies including termination. Additionally, after a hearing, the City could declare a contractor to be “non-responsible” and not eligible to do business with the City for a period of two years.

The Purchasing Department currently requires contractors to complete (and sign under penalty of perjury) a Contract Standards Questionnaire providing useful financial contractor information, contact performance history and compliance records. Additionally, contractors subject to LWO are required to complete (and sign under penalty of perjury) an LWO Certification of Compliance. The IBA felt this should be mentioned acknowledging that we do not fully understand the legal/enforcement advantages garnered with an additional Pledge of Compliance.

**Section 22.3224 (f): Contractor Standards – Audit Committee Hearings**

This provision contemplates the City’s Audit Committee serving as an appeal hearing body for contractors who have been found by the City Manager to be non-responsible as described above. This responsibility has yet to be contemplated for the Audit Committee and is not within the current Audit Committee Charter. Agendas for regularly scheduled monthly Audit Committee meetings have been fully booked and special meetings are often held for priority issues such as reviewing the City’s financial statements or hearing the results of completed audits. Additional research is needed to determine if this is an appropriate role for an Audit Committee or whether a different form of appeals board should be established for this purpose.

## CONCLUSION

The IBA does not provide recommendations for many of the proposed revisions to the LWO and the Contractor Standards Ordinance before the City Council. The purpose of this report is to provide additional information on proposed amendments to the Code that could have significant fiscal or policy implications. The IBA does believe that the City should be able to reasonably monitor and enforce its adopted programs like LWO.

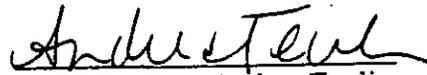
After considering the implications associated with the proposed LWO amendments, it may be determined that additional LWO administrative staff is required. The IBA generally supports the concept of recovering costs from those entities requiring

monitoring and enforcement. However, the possibility of these costs being passed back to the City through increased contract costs needs to be evaluated particularly in these difficult fiscal times. We have also suggested that it may be possible to partially recover costs through *City facility agreements* covered by the LWO.

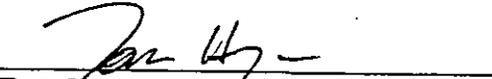
Additional discussion should be thoughtfully undertaken between LWO administrative staff and stakeholders to determine what constitutes a "reasonable" level of administrative staff to ensure adequate monitoring and LWO enforcement. Once a reasonable staffing level has been determined and the potential fiscal implications of new contractor fees has been evaluated, the City Council will be better able to evaluate the possibility of new fees or, alternatively, evaluate LWO staffing as one budget priority competing with other budget priorities in a difficult fiscal environment.



Jeff Kavar  
Fiscal & Policy Analyst



APPROVED: Andrea Tevlin  
Independent Budget Analyst



Tom Haynes  
Fiscal & Policy Analyst

TO: CITY ATTORNEY CITY ATTORNEY 3. DATE: OCTOBER 6, 2008

4. SUBJECT: Amendments to San Diego Municipal Code section 22.3224, relating to Contractor Standards. Amendments to San Diego Municipal Code sections 22.4205, 22.4215, 22.4225, 22.4230, and 22.4235 relating to the Living Wage Ordinance.

5. PRIMARY CONTACT (NAME, PHONE & MAIL STA.) Sanna Singer, 533-4513 MS 59 6. SECONDARY CONTACT (NAME, PHONE & MAIL STA.) Michael Calabrese 533-5872 MS 59 7. CHECK BOX IF REPORT TO COUNCIL IS ATTACHED

8. COMPLETE FOR ACCOUNTING PURPOSES

FUND	n/a				9. ADDITIONAL INFORMATION / ESTIMATED COST:
DEPT.	n/a				
ORGANIZATION	n/a				
OBJECT ACCOUNT	n/a				
JOB ORDER	n/a				
C.I.P. NUMBER	n/a				
AMOUNT	\$0.00				

10. ROUTING AND APPROVALS

ROUTE (#)	APPROVING AUTHORITY	APPROVAL SIGNATURE	DATE SIGNED	ROUTE (#)	APPROVING AUTHORITY	APPROVAL SIGNATURE	DATE SIGNED
1	ORIGINATING DEPARTMENT	<i>[Signature]</i>	10/6/08	8	DEPUTY CHIEF		
2				9	COO		
3				10	CITY ATTORNEY	<i>[Signature]</i>	10/8/08
4	LIAISON OFFICE			11	ORIGINATING DEPARTMENT	<i>[Signature]</i>	10/5/08
5				DOCKET COORD: _____ COUNCIL LIAISON: _____			
6				<input checked="" type="checkbox"/> COUNCIL PRESIDENT <input type="checkbox"/> SPOB <input type="checkbox"/> CONSENT <input checked="" type="checkbox"/> ADOPTION <input type="checkbox"/> REFER TO: _____ COUNCIL DATE: 10/20/08			
7							

11. PREPARATION OF:  RESOLUTION(S)  ORDINANCE(S)  AGREEMENT(S)  DEED(S)

1. An ordinance amending Chapter 2, Article 2, Division 32, Section 22.3224, relating to Contractor Standards.  
 2. An ordinance amending Chapter 2, Article 2, Division 42, Sections 22.4205, 22.4215, 22.4225, 22.4230, and 22.4235 relating to the Living Wage Ordinance.

11A. STAFF RECOMMENDATIONS: Adopt the ordinances.

12. SPECIAL CONDITIONS:

COUNCIL DISTRICT(S): ALL  
 COMMUNITY AREA(S): ALL  
 ENVIRONMENTAL IMPACT: This activity is not a "project" and therefore is not subject to CEQA per CEQA Guidelines section 15060(c)(3).  
 HOUSING IMPACT: NONE  
 OTHER ISSUES: NONE

CITY ATTORNEY DIGEST

ORDINANCE NUMBER O-\_\_\_\_\_ (NEW SERIES)

DATE OF FINAL PASSAGE \_\_\_\_\_

EFFECTIVE DATE \_\_\_\_\_

AN ORDINANCE AMENDING CHAPTER 2, ARTICLE 2, DIVISION 32, OF THE SAN DIEGO MUNICIPAL CODE BY AMENDING SECTION 22.3224 RELATING TO CONTRACTOR STANDARDS.

This ordinance makes changes to Chapter 2, Article 2, Division 32 of the City of San Diego Municipal Code by amending section 22.3224 relating to Contractor Standards. These amendments are designed to enhance the effectiveness of the City's various ordinances related to contracting by establishing procedures for public determinations of non-responsibility and other mechanisms for ensuring contractor compliance with all local, state and federal laws.

This ordinance contains a notice that a full reading of this ordinance is dispensed with prior to its final passage, since a written or printed copy will be available to the City Council and the public a day prior to its final passage.

This ordinance shall take effect and be in force on the thirtieth day from and after its final passage.

A complete copy of the Ordinance is available for inspection in the Office of the City Clerk of the City of San Diego, 2nd Floor, City Administration Building, 202 C Street, San Diego, CA 92101.

SRS:pev  
10/03/08  
10/15/08 COR.COPY  
10/30/08 REV.  
Or.Dept:City Atty  
O-2009-49

C00411

ORDINANCE NUMBER O-\_\_\_\_\_ (NEW SERIES)

DATE OF FINAL PASSAGE \_\_\_\_\_

AN ORDINANCE AMENDING CHAPTER 2, ARTICLE 2, DIVISION 32, OF THE SAN DIEGO MUNICIPAL CODE BY AMENDING SECTION 22.3224 RELATING TO CONTRACTOR STANDARDS.

WHEREAS, Chapter 2, Article 2, Division 32 of the City of San Diego Municipal Code sets forth general procedures for services, goods, and consultant contracts; and

WHEREAS, on July 9, 2008, the Budget and Finance Committee voted to forward amendments to Chapter 2, Article 2, Division 32, Section 22.3224 ("Contractor Standards") to the full City Council for consideration, in conjunction with various amendments to the City's Living Wage Ordinance, codified at Chapter 2, Article 2, Division 42; and

WHEREAS, the City Council finds that these amendments to Chapter 2, Article 2, Division 32, Section 22.3224, will enhance the effectiveness of the City's various ordinances relating to contracting by establishing procedures for public determinations of non-responsibility and other mechanisms for ensuring contractor compliance with all local, state and federal laws;

NOW, THEREFORE,

BE IT ORDAINED, by the Council of the City of San Diego, as follows:

Section 1. That Chapter 2, Article 2, Division 32, of the San Diego Municipal Code is amended by amending Section 22.3224 to read as follows:

**§ 22.3224 Contractor Standards**

- (a) Prior to awarding a *contract* greater than \$50,000, the City shall make a determination that the *bidder* has the capability to fully perform the

000412

contract requirements and the business integrity to justify the award of public tax dollars. Among the factors to be considered are: (1) financial resources, including financial sufficiency under California Labor Code Section 2810; (2) technical qualifications; (3) experience; (4) material, equipment, and expertise necessary to carry out the work; (5) a satisfactory record of performance; and (6) a satisfactory record of compliance with applicable statutes and regulations.

- (b) As part of its bid, proposal, or other application for a *contract*, a *bidder* will be required to submit a response, under penalty of perjury, that will seek to determine if the *bidder* meets the standards set forth in paragraph (a) of this Section.
  
- (c) During the term of a *contract*, the contractor shall comply with all applicable local, state and federal laws, including health and safety, labor and employment, and licensing laws, that affect the employees, worksite or performance of the *contract*. Each contractor shall notify the Purchasing Agent within fifteen calendar days upon receiving notification that a government agency has begun an investigation of the contractor that may result in a finding that the contractor is or was not in compliance with said laws, or that there has been a finding by a government agency or court of competent jurisdiction of a violation of such laws by the contractor. Initiation of an investigation is not, by itself, a basis for a determination of non-responsibility by an awarding authority.

- (d) Upon *award*, amendment, renewal, or extension of a *contract*, contractors shall complete a Pledge of Compliance attesting under penalty of perjury to compliance with this section. Contractors shall ensure that their subcontractors whose subcontracts are greater than \$50,000 in value complete a Pledge of Compliance attesting under penalty of perjury to compliance with this section.
- (e) Violations of this Article may be reported to the City Manager who shall investigate such complaint. Whether based upon such complaint or otherwise, if the City has determined that the contractor has violated any provision of this Article, the City shall issue a written notice to the contractor that the violation is to be corrected within ten calendar days from receipt of notice. In the event the contractor has not corrected the violation, or taken reasonable steps to correct the violation within ten calendar days, then the City Manager may do one or both of the following:
- (1) Declare a material breach of the *contract* and exercise its contractual remedies thereunder, which are to include but not be limited to termination of the *contract*; or
  - (2) Declare the contractor to be non-responsible in accordance with the procedures set forth in subsection (f) of this section.
- (f) Before declaring a contractor non-responsible, the City Manager shall notify the contractor of the proposed determination of non-responsibility, serve a summary of the information upon which the determination is

based, and provide the contractor with an opportunity to be heard in accordance with applicable law. Upon request, the contractor is entitled to a hearing before the City's Budget and Finance Committee. At such hearing, the contractor will be allowed to rebut adverse information and to present evidence that the contractor has the necessary quality, fitness and capacity to perform the work. The Budget and Finance Committee shall make a determination upholding or rejecting the City Manager's declaration, and shall forward its determination to the City Council for review and approval or rejection. A determination by the City Council shall be final and constitute exhaustion of the contractor's administrative remedies.

- (g) The Purchasing Agent shall maintain a list of contractors that have been determined to be non-responsible by the City. After two years from the date the contractor has been determined to be non-responsible, the contractor may request removal from the list by the City Manager. If the contractor can satisfy the City Manager that the contractor has the necessary quality, fitness, and capacity to perform work in accordance with the criteria set forth in subsection (a) of this section, its name shall be removed from the list. Unless otherwise removed from the list by the City Manager, names shall remain on the list for five years from the date of declaration of non-responsibility.

(h) This section applies to all *contracts, Consultant agreements, Maintenance Contracts and Public Works Contracts.*

Section 2. That a full reading of this ordinance is dispensed with prior to its final passage, a written or printed copy having been available to the City Council and the public a day prior to its final passage.

Section 3. That this ordinance shall take effect and be in force on the thirtieth day from and after its final passage.

APPROVED: MICHAEL J. AGUIRRE, City Attorney

By \_\_\_\_\_  
Sanna R. Singer  
Deputy City Attorney

SRS:pev  
10/03/08  
10/15/08 COR.COPY  
10/30/08 REV.  
Or.Dept:City Atty  
O-2009-49

I hereby certify that the foregoing Ordinance was passed by the Council of the City of San Diego, at this meeting of \_\_\_\_\_.

ELIZABETH S. MALAND  
City Clerk

By \_\_\_\_\_  
Deputy City Clerk

Approved: \_\_\_\_\_  
(date)

\_\_\_\_\_  
JERRY SANDERS, Mayor

Vetoed: \_\_\_\_\_  
(date)

\_\_\_\_\_  
JERRY SANDERS, Mayor

OLD LANGUAGE: ~~STRIKEOUT~~  
 NEW LANGUAGE: DOUBLE UNDERSCORED

ORDINANCE NUMBER O-\_\_\_\_\_ (NEW SERIES)

DATE OF FINAL PASSAGE \_\_\_\_\_

AN ORDINANCE AMENDING CHAPTER 2, ARTICLE 2,  
 DIVISION 32, OF THE SAN DIEGO MUNICIPAL CODE BY  
 AMENDING SECTION 22.3224 RELATING TO  
 CONTRACTOR STANDARDS.

§ 22.3224 **Contractor Standards**

- (a) Prior to awarding a *contract* ~~for Services~~ greater than \$50,000, the City shall make a determination that the *bidder* has the capability to fully perform the contract requirements and the business integrity to justify the award of public tax dollars. Among the factors to be considered are: (1) financial resources, including financial sufficiency under California Labor Code Section 2810; (2) technical qualifications; (3) experience; (4) material, equipment, and expertise necessary to carry out the work; (5) a satisfactory record of performance; and (6) a satisfactory record of compliance with applicable statutes and regulations.
- (b) As part of its bid, proposal, or other application for a *contract* ~~for Services~~, a *bidder* will be required to submit a response, under penalty of perjury, that will seek to determine if the *bidder* meets the standards set forth in paragraph (a) of this Section.
- (c) During the term of a *contract* ~~for Services~~, the contractor shall comply with all applicable local, state and federal laws, including health and

000418

safety, labor and employment, and licensing laws, that affect the employees, worksite or performance of the *contract*. Each contractor shall notify the Purchasing Agent within fifteen calendar days upon receiving notification that a government agency has begun an investigation of the contractor that may result in a finding that the contractor is or was not in compliance with said laws, or that there has been a finding by a government agency or court of competent jurisdiction of a violation of such laws by the contractor. Initiation of an investigation is not, by itself, a basis for a determination of non-responsibility by an awarding authority.

(d) Upon *award*, amendment, renewal, or extension of a *contract*, contractors shall complete a Pledge of Compliance attesting under penalty of perjury to compliance with this section. Contractors shall ensure that their subcontractors whose subcontracts are greater than \$50,000 in value complete a Pledge of Compliance attesting under penalty of perjury to compliance with this section.

(e) Violations of this Article may be reported to the City Manager who shall investigate such complaint. Whether based upon such complaint or otherwise, if the City has determined that the contractor has violated any provision of this Article, the City shall issue a written notice to the contractor that the violation is to be corrected within ten calendar days from receipt of notice. In the event the contractor has not corrected the violation, or taken reasonable steps to correct the violation within ten calendar days, then the City Manager may do one or both of the following:

- (1) Declare a material breach of the contract and exercise its contractual remedies thereunder, which are to include but not be limited to termination of the contract; or
- (2) Declare the contractor to be non-responsible in accordance with the procedures set forth in subsection (f) of this section.
- (f) Before declaring a contractor non-responsible, the City Manager shall notify the contractor of the proposed determination of non-responsibility, serve a summary of the information upon which the determination is based, and provide the contractor with an opportunity to be heard in accordance with applicable law. Upon request, the contractor is entitled to a hearing before the City's Budget and Finance Committee. At such hearing, the contractor will be allowed to rebut adverse information and to present evidence that the contractor has the necessary quality, fitness and capacity to perform the work. The Budget and Finance Committee shall make a determination upholding or rejecting the City Manager's declaration, and shall forward its determination to the City Council for review and approval or rejection. A determination by the City Council shall be final and constitute exhaustion of the contractor's administrative remedies.
- (g) The Purchasing Agent shall maintain a list of contractors that have been determined to be non-responsible by the City. After two years from the date the contractor has been determined to be non-responsible, the

contractor may request removal from the list by the City Manager. If the contractor can satisfy the City Manager that the contractor has the necessary quality, fitness, and capacity to perform work in accordance with the criteria set forth in subsection (a) of this section, its name shall be removed from the list. Unless otherwise removed from the list by the City Manager, names shall remain on the list for five years from the date of declaration of non-responsibility.

(h) This section applies to all *contracts, Consultant agreements, Maintenance Contracts and Public Works Contracts.*

SRS:pev  
10/03/08  
10/15/08 COR.COPY  
10/30/08 REV.  
Or.Dept:City Atty  
O-2009-49

## CITY ATTORNEY DIGEST

ORDINANCE NUMBER O-\_\_\_\_\_ (NEW SERIES)

DATE OF FINAL PASSAGE \_\_\_\_\_

EFFECTIVE DATE \_\_\_\_\_

AN ORDINANCE AMENDING CHAPTER 2, ARTICLE 2, DIVISION 42, OF THE SAN DIEGO MUNICIPAL CODE IS AMENDED BY AMENDING SECTIONS 22.4205, 22.4215, 22.4225, 22.4230, AND 22.4235, ALL RELATING TO THE LIVING WAGE ORDINANCE.

This ordinance makes changes to Chapter 2, Article 2, Division 42 of the San Diego Municipal Code by amending sections 22.4205, 22.4215, 22.4225, 22.4230, and 22.4235 relating to the Living Wage Ordinance. The City's Living Wage Ordinance has been in force since 2005, and the Council has studied its implementation. The Budget and Finance Committee has held multiple hearings on Living Wage Ordinance implementation issues, and has forwarded proposed revisions for consideration of the full Council. These amendments are designed to enhance enforcement and clarify provisions of the Living Wage Ordinance, in order to advance the purposes it was intended to serve.

This ordinance contains a notice that a full reading of this ordinance is dispensed with prior to its final passage, since a written or printed copy will be available to the City Council and the public a day prior to its final passage.

The amendments to Section 22.4230 shall take effect and be in force on the thirtieth day from and after the ordinance's final passage. The remainder of the amendments shall take effect and be in force on January 1, 2010.

000422

(O-2009-50-a REV.)

A complete copy of the Ordinance is available for inspection in the Office of the City Clerk of the City of San Diego, 2nd Floor, City Administration Building, 202 C Street, San Diego, CA 92101.

SRS:pev  
10/03/08  
10/15/08 COR. COPY  
10/30/08 REV.  
Or.Dept:City Atty  
O-2009-50-a

000423

ORDINANCE NUMBER O-\_\_\_\_\_ (NEW SERIES)

DATE OF FINAL PASSAGE \_\_\_\_\_

AN ORDINANCE AMENDING CHAPTER 2, ARTICLE 2, DIVISION 42, OF THE SAN DIEGO MUNICIPAL CODE IS AMENDED BY AMENDING SECTIONS 22.4205, 22.4215, 22.4225, 22.4230, AND 22.4235, ALL RELATING TO THE LIVING WAGE ORDINANCE.

WHEREAS, the City's Living Wage Ordinance has been in force since 2005, and the Council has studied its implementation; and

WHEREAS, the Council finds that enhanced enforcement and clarification will advance the purposes that the original Living Wage Ordinance was intended to serve; and

WHEREAS, the Budget and Finance Committee has held multiple hearings on Living Wage Ordinance implementation issues and has forwarded proposed revisions for consideration of the full Council; and

WHEREAS, the Council finds that revision of the Living Wage Ordinance is necessary to effectuate its purposes; NOW THEREFORE.

BE IT ORDAINED, by the Council of the City of San Diego, as follows:

Section 1. That Chapter 2, Article 2, Division 42, of the San Diego Municipal Code is amended by amending sections 22.4205, 22.4215, 22.4225, 22.4230, and 22.4235 to read as follows:

**§22.4201 Purpose and Intent**

[No change in text.]

**§22.4202 Citation**

[No change in text.]

**§22.4205 Definitions**

Each word or phrase that is defined in this division appears in the text of this division in italicized letters. For purposes of this division, the following definitions shall apply:

*Business through City* [No change in text.]

*City facility* means any of the following facilities that are owned, operated, managed, or leased by the *City*:

(a) through (c) [No change in text.]

(d) San Diego Convention Center;

(e) San Diego City Concourse; or

(f) Civic Theatre, including the portion of the Civic Center Plaza directly adjacent to the Civic Theatre when theatre-related activities are held there. This subsection is not intended to extend to the Living Wage Ordinance to other structures located in the Civic Center Plaza.

*City facility agreement* means an agreement between the *City* and a *business* for the lease, use, or management of a *City facility* that generates \$350,000 or more in

annual gross receipts to the *business*. *City facility agreement* includes (a) subleases or other agreements for use of the *City facility* for 30 days or more in any calendar year; and (b) subcontracts and concession agreements for *services* at the *City facility* with a combined annual value of payments in excess of \$25,000 for any single subcontractor or concessionaire, and with a term of more than 90 days.

*City facility employer* [No change in text.]

*City Manager* [No change in text.]

*Covered employee* means any individual employed on a full-time, part-time, temporary, or seasonal basis by (a) a *service contractor* with regard to any hours worked in performance of a *service contract*; (b) a *financial assistance recipient* who works at least 20 hours a month at the site that is the subject of the *financial assistance agreement* or at least 20 hours a month on the program that is the subject of the *financial assistance agreement*; or (c) a *City facility employer* with regard to any hours worked at a *City facility*. *Covered employee* does not include: (a) individuals who, in addition to wages, receive academic credit for their work from an accredited educational institution; or (b) individuals who participate in job training and education programs that have as their express purpose the provision of basic job skills or education.

*Covered employer through Health benefits rate* [No change in text.]

*Service contract* means a contract between the *City* and a *business* with a

combined annual value of payments in excess of \$25,000, and any applicable subcontracts or franchises, to furnish *services*. For the purpose of this division, *service contract* includes all contracts for *services* provided through the managed competition program under Charter section 117(c).

*Service contractor* [No change in text.]

*Services* means the following types of employment activities and any other non-managerial, non-supervisory, or non-professional services that are consistent with the intent of this division and designated in a *City facility agreement*, *financial assistance agreement*, or *service contract*:

(a) through (f) [No change in text.]

(g) Janitorial, custodial, street cleaning and housekeeping;

(h) through (n) [No change in text.]

(o) Ticket takers;

(p) [No change in text.]

(q) Waste collection and waste disposal, including recycling;

(r) Right-of-way maintenance; and

(s) Water and wastewater maintenance.

§22.4210      **Applicability of Living Wage Ordinance**

[No change in text.]

§22.4215      **Exemptions.**

- (a)      Except for *City facility agreements*, the following contracts are exempt from the requirements of this division:
- (1) through (3)      [No change in text.]
- (4)      contracts for public works construction;
- (5) and (6)      [No change in text.]
- (7)      contracts for professional services, as described in California Labor Code Section 515(a), such as design, engineering, financial, technical, legal, banking, medical, management, operating, advertising, or other services.
- (8)      [No change in text.]
- (b)      [No change in text.]
- (c)      The definitions of *service contract*, *financial assistance agreement*, or *City facility agreement* shall be liberally interpreted so as to further the policy objectives of this division. The *City Manager* shall establish procedures to implement this section.

**§22.4220 Payment of Living Wage and Provision of Benefits**

[No change in text.]

**§22.4225 Reporting and Notification Requirements**

(a) through (c) [No change in text.]

(d) Each *covered employer* shall file with the *City Manager* an annual report documenting compliance with this division. The *covered employer* will maintain records documenting compliance for at least three years, but will not be required to maintain such records for more than seven years, after the *City's* final payment on the *service contract, financial assistance agreement, or City facility agreement*; such records shall be made available to the *City* upon request. The records to be maintained shall include all wage records, proof of payment for health benefits, employee name, address, date of hire, job classification, rate of pay, cost and amount paid for health benefits, hours worked in each pay period, and paid and unpaid time off (accrued and used).

(e) *Businesses* shall post a notice to employees informing them of their rights under this division, and any applicable exemptions from the wage rate requirements of this division. The poster must be at the site of work, or a site frequently accessed by workers, in a prominent and accessible place where it can easily be seen by workers.

000429

§22.4230

**Enforcement**

- (a) A *covered employee* claiming a violation of this division shall have the right to file an action against an employer in the appropriate court within one year after discovery of the alleged violation. The court may award any employee who files suit pursuant to this subdivision, the following:
- (1) through (3) [No change in text.]
  - (4) For a willful violation of this division, a court shall award as a penalty up to treble the amount of monies to be paid as damages.
  - (5) The court shall award reasonable attorney's fees and costs to an employee who prevails in any such private action and to an employer who so prevails if the employee's suit is found to be frivolous.
- (b) A *business* is prohibited from any retaliation against an employee who alleges non-compliance with this division or cooperates with an investigation regarding compliance with this division. A *business* shall not discharge, reduce in compensation, or otherwise discriminate against any employee for complaining with regard to the *business's* practices with respect to this division, for opposing any practice proscribed by this division, for participating in proceedings related to this division, for seeking to enforce his or her rights under this division by any lawful

means, or for otherwise asserting rights under this division. Any such employee may report any alleged retaliation to the *City Manager*.

- (c) A *covered employee* claiming a violation of the division may file a complaint with the *City*. The *City* shall investigate and address any alleged violation of this division's requirements, and shall convey the results of the investigation to the complainant within 60 days, with reasonable 30-day extensions. 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 to recover damages from the *City* by any person, including but not limited to an aggrieved employee.
- (d) Whether based upon a complaint or otherwise, where the *City Manager* has determined that a *covered employer* has violated this article, the *City Manager* shall issue a written notice to the *covered employer* that the violation is to be corrected within thirty days. In the event that the *covered employer* has not demonstrated to the *City Manager* within such period that it has substantially cured any material violation, the *City Manager* shall then do one or more of the following:
- (1) Declare a material breach of the *service contract, financial assistance agreement, or City facility agreement* and exercise its contractual remedies thereunder, which are to include, but not be limited to, termination of the *service contract, financial assistance agreement, or City facility agreement* and the return of monies paid

by the *City* for services not yet rendered.

- (2) Institute proceedings under Article 2, Chapter 2, Division 8 to debar the *covered employer* from future *City* contracts for three years or until all penalties and/or restitution have been fully paid, whichever occurs last.
- (3) Request a determination of non-responsibility under Article 2, Chapter 2, Division 32.
- (4) Request that the City Attorney bring a civil action against the *covered employer* seeking any legal remedies, including but not limited to:
  - (i) Where applicable, payment to the *covered employee* of all unpaid wages and/or health premiums prescribed by this division; and/or
  - (ii) A fine payable to the *City* in the amount of up to one hundred dollars (\$100) for each violation for each day the violation remains uncured.

(e) and (f) [No change in text.]

**§22.4235 Administration**

(a) and (b) [No change in text.]

(c) On July 1 of each year, or as soon thereafter as is practicable, the *City*

*Manager* shall submit an annual report to the City Council generally describing the effects of the City of San Diego Living Wage Ordinance upon the *City*.

**§22.4240      Collective Bargaining Agreements**

[No change in text.]

**§22.4245      Severability**

[No change in text.]

Section 2. That a full reading of this ordinance is dispensed with prior to its final passage, a written or printed copy having been available to the City Council and the public a day prior to its final passage.

Section 3. The amendments to Section 22.4230 shall take effect and be in force on the thirtieth day from and after the ordinance's final passage. The remainder of the amendments shall take effect and be in force on January 1, 2010.

APPROVED: MICHAEL J. AGUIRRE, City Attorney

By

Sanna R. Singer  
Deputy City Attorney

SRS:pev  
10/03/08  
10/15/08 COR.COPY  
10/30/08 REV.  
Or.Dept:City Atty  
O-2009-50-a

I hereby certify that the foregoing Ordinance was passed by the Council of the City of San Diego, at this meeting of \_\_\_\_\_.

ELIZABETH S. MALAND  
City Clerk

By \_\_\_\_\_  
Deputy City Clerk

Approved: \_\_\_\_\_  
(date)

\_\_\_\_\_  
JERRY SANDERS, Mayor

Vetoed: \_\_\_\_\_  
(date)

\_\_\_\_\_  
JERRY SANDERS, Mayor

OLD LANGUAGE: ~~STRIKEOUT~~  
 NEW LANGUAGE: DOUBLE UNDERSCORE

ORDINANCE NUMBER O-\_\_\_\_\_ (NEW SERIES)

DATE OF FINAL PASSAGE \_\_\_\_\_

AN ORDINANCE AMENDING CHAPTER 2, ARTICLE 2, DIVISION 42, OF THE SAN DIEGO MUNICIPAL CODE IS AMENDED BY AMENDING SECTIONS 22.4205, 22.4215, 22.4225, 22.4230, AND 22.4235, ALL RELATING TO THE LIVING WAGE ORDINANCE.

**§22.4201 Purpose and Intent**

[No change in text.]

**§22.4202 Citation**

[No change in text.]

**§22.4205 Definitions**

Each word or phrase that is defined in this division appears in the text of this division in italicized letters. For purposes of this division, the following definitions shall apply:

*Business and City* [No change in text.]

*City facility* means any of the following facilities that are owned, operated, managed, or leased by the *City*:

(a) through (c) [No change in text.]

(d) San Diego Convention Center; or

(e) San Diego City Concourse; or

(f) Civic Theatre, including the portion of the Civic Center Plaza directly adjacent to the Civic Theatre when theatre-related activities are held there. This subsection is not intended to extend to the Living Wage Ordinance to other structures located in the Civic Center Plaza.

*City facility agreement* means an agreement between the *City* and a *business* for the lease, use, or management of a *City facility* that generates \$350,000 or more in annual gross receipts to the *business*. *City facility agreement* includes (a) subleases or other agreements for use of the *City facility* for 30 days or more in any calendar year; and (b) subcontracts and concession agreements for *services* at the *City facility* with a combined annual value of payments in excess of \$25,000 for any single subcontractor or concessionaire, and with a term of more than 90 days.

*City facility employer* [No change in text.]

*City Manager* [No change in text.]

*Covered employee* means any individual employed on a full-time, part-time, temporary, or seasonal basis by (a) a *service contractor* with regard to any hours worked in performance of a *service contract*; (b) a *financial assistance recipient* who works at least 20 hours a month at the site that is the subject of the *financial assistance agreement* or at least 20 hours a month on the program that is the

subject of the *financial assistance agreement*; or (c) a *City facility employer* with regard to any hours worked at a *City facility*. *Covered employee* does not include: (a) individuals who, in addition to wages, receive academic credit for their work from an accredited educational institution; ~~and~~ or (b) individuals who participate in job training and education programs that have as their express purpose the provision of basic job skills or education.

*Covered employer through Health benefits rate* [No change in text.]

*Service contract* means a contract between the *City* and a *business* with a combined annual value of payments in excess of \$25,000, ~~and with a term of more than 90 days,~~ and any applicable subcontracts or franchises, to furnish *services*. For the purpose of this division, *service contract* includes all contracts for *services* provided through the managed competition program under Charter section 117(c).

*Service contractor* [No change in text.]

*Services* means the following types of employment activities and any other non-managerial, non-supervisory, or non-professional services that are consistent with the intent of this division and designated in a *City facility agreement*, *financial assistance agreement*, or *service contract*:

(a) through (f) [No change in text.]

(g) Janitorial, custodial, street cleaning and housekeeping;

000428

(h) through (n) [No change in text.]

(o) Ticket takers; and

(p) [No change in text.]

(q) Waste collection and waste disposal, including recycling;

(r) Right-of-way maintenance; and

(s) Water and wastewater maintenance.

**§22.4210 Applicability of Living Wage Ordinance**

[No change in text.]

**§22.4215 Exemptions.**

(a) Except for *City facility agreements*, the following contracts are exempt from the requirements of this division:

(1) through (3) [No change in text.]

(4) contracts for public works construction, ~~recycling or solid waste~~ management franchises;

(5) and (6) [No change in text.]

(7) contracts for professional services, as described in California Labor Code Section 515(a), such as design, engineering, financial, technical, legal, banking, medical, management, operating,

advertising, or other professional services.

(8) [No change in text.]

(b) [No change in text.]

(c) The definitions of *service contract*, *financial assistance agreement*, or *City facility agreement* shall be liberally interpreted so as to further the policy objectives of this division. The *City Manager* shall establish procedures to implement this section.

**§22.4220 Payment of Living Wage and Provision of Benefits**

[No change in text.]

**§22.4225 Reporting and Notification Requirements**

(a) through (c) [No change in text.]

(d) Each *covered employer* shall file with the *City Manager* an annual report regarding documenting compliance with this division. The *covered employer* will maintain records documenting compliance for at least three years, but will not be required to maintain such records for more than seven years, after the *City's* final payment on the *service contract*, *financial assistance agreement*, or *City facility agreement*; such records shall be made available to the *City* upon request. The records to be maintained shall include all wage records, proof of payment for health benefits, employee name, address, date of hire, job classification, rate of

pay, cost and amount paid for health benefits, hours worked in each pay period, and paid and unpaid time off (accrued and used).

- (e) Businesses shall post a notice to employees informing them of their rights under this division, and any applicable exemptions from the wage rate requirements of this division. The poster must be at the site of work, or a site frequently accessed by workers, in a prominent and accessible place where it can easily be seen by workers.

#### §22.4230 Enforcement

- (a) A covered employee claiming a violation of this division shall have the right to file an action against an employer in the appropriate court within one year after discovery of the alleged violation. The court may award any employee who files suit pursuant to this subdivision, the following:
- (1) through (3) [No change in text.]
  - (4) For a willful violation of this division, a court ~~may~~shall award as a penalty up to treble the amount of monies to be paid as damages.
  - (5) The court ~~may~~shall award reasonable attorney's fees and costs to an employee who prevails in any such private action and to an employer who so prevails if the employee's suit is found to be frivolous.
- (b) A business is prohibited from any retaliation against an employee who

alleges non-compliance with this division or cooperates with an investigation regarding compliance with this division. A business shall not discharge, reduce in compensation, or otherwise discriminate against any employee for complaining with regard to the business's practices with respect to this division, for opposing any practice proscribed by this division, for participating in proceedings related to this division, for seeking to enforce his or her rights under this division by any lawful means, or for otherwise asserting rights under this division. Any such employee may report any alleged retaliation to the *City Manager*.

- (c) A *covered employee* claiming a violation of the division may file a complaint with the *City*. The *City* ~~may, in its sole discretion, shall~~ investigate and address any alleged violation of this division's requirements, and shall convey the results of the investigation to the complainant within 60 days, with reasonable 30-day extensions. 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.
- (d) ~~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. Whether based upon a complaint or otherwise, where the *City Manager* has determined that a~~

covered employer has violated this article, the City Manager shall issue a written notice to the covered employer that the violation is to be corrected within thirty days. In the event that the covered employer has not demonstrated to the City Manager within such period that it has substantially cured any material violation, the City Manager shall then do one or more of the following:

- (1) Declare a material breach of the service contract, financial assistance agreement, or City facility agreement and exercise its contractual remedies thereunder, which are to include, but not be limited to, termination of the service contract, financial assistance agreement, or City facility agreement and the return of monies paid by the City for services not yet rendered.
- (2) Institute proceedings under Article 2, Chapter 2, Division 8 to debar the covered employer from future City contracts for three years or until all penalties and/or restitution have been fully paid, whichever occurs last.
- (3) Request a determination of non-responsibility under Article 2, Chapter 2, Division 32.
- (4) Request that the City Attorney bring a civil action against the covered employer seeking any legal remedies, including but not limited to:

000443

(i) Where applicable, payment to the *covered employee* of all unpaid wages and/or health premiums prescribed by this division; and/or

(ii) A fine payable to the *City* in the amount of up to one hundred dollars (\$100) for each violation for each day the violation remains uncured.

(e) and (f) [No change in text.]

**§22.4235 Administration**

(a) and (b) [No change in text.]

(c) On July 1, ~~2007~~ of each year, or as soon thereafter as is practicable, the *City Manager* shall submit a an annual report to the City Council generally describing the effects of the City of San Diego Living Wage Ordinance upon the *City*.

**§22.4240 Collective Bargaining Agreements**

[No change in text.]

**§22.4245 Severability**

[No change in text.]

SRS:pev  
10/03/08  
10/15/08 COR. COPY  
10/30/08 REV.

C00444

(O-2009-50-a REV.)

Or.Dept:City Atty  
O-2009-50-a