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## MEMORANDUM OF LAW

**DATE:** December 17, 2015

**TO:** Ron Villa, Deputy Chief Operating Officer

**FROM:** City Attorney

**SUBJECT:** Application of Proposed Living Wage Ordinance Amendments to the City's Existing Emergency Medical Services Contract

### INTRODUCTION

The San Diego City Council (City Council) desires to amend the City of San Diego's (City) Living Wage Ordinance (LWO) so that it covers emergency medical technicians and paramedics. In the past, these positions were exempt from the LWO's requirements. Given that the City recently entered into a five-year emergency medical services (EMS) contract with Rural/Metro, Inc., which includes the provision of emergency medical technician and paramedic services, the City desires to know if the proposed LWO amendments would affect this current EMS contract.

### QUESTION PRESENTED

Will the proposed LWO amendment covering emergency medical technicians and paramedics affect the City's current EMS contract with Rural/Metro?

### SHORT ANSWER

No. There is currently no express language in the draft ordinance or its supporting materials making the proposed LWO amendments apply to the existing EMS contract; absent such language the proposed LWO ordinance amendments could only apply if the existing EMS contract is amended or if the City enters into a new EMS contract. Even if such language was included, retroactive application of the LWO to the existing EMS contract may violate the Contracts Clause of the United States Constitution.

### ANALYSIS

This Office was asked to analyze whether the proposed LWO amendments will affect the City's current EMS contract with Rural/Metro. On October 26, 2015, a draft of the proposed LWO amendments was provided for legal review. (See Attachment One.)

The City recently entered into a five-year contract with Rural/Metro for the provision of emergency medical ambulance services. Rural/Metro employs emergency medical technicians and paramedics to fulfill this contract. Emergency medical technicians and paramedics were exempt from the requirements of the LWO in the past. The City Council now desires to amend the LWO to cover emergency medical technicians and paramedics. This memorandum first examines the general principles of enforcing retroactive laws using the provided draft proposed LWO amendments. The next section analyzes whether any intended retroactive application of the proposed LWO amendments to the current EMS contract would survive a constitutional challenge.<sup>1</sup>

## I. GENERAL RETROACTIVITY PRINCIPLES.

It is an “almost universal rule that statutes are addressed to the future, not to the past.” *Winfree v. Nor. Pac. Ry. Co.*, 227 U.S. 296, 301 (1913). Indeed, “in the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature or the voters must have intended retroactive application.” *Evangelatos v. Superior Court*, 44 Cal. 3d 1188, 1209 (1988). The California Supreme Court added “[a]mbiguous statutory language will not suffice to dispel the presumption against retroactivity, rather ‘a statute that is ambiguous with respect to retroactive application is construed . . . to be unambiguously prospective.’” *Quarry et al. v. Doe I*, 53 Cal. 4th 945, 955 (2012), quoting *Myers v. Phillip Morris Companies, Inc.*, 28 Cal. 4th 828, 841 (2002).

The draft ordinance provided, expressly states that the proposed LWO amendments will not apply retroactively to the City’s current EMS contract. As long as this language remains, the proposed LWO amendments will not alter either parties’ contractual rights under that contract. Based on the cases cited above, even if this language were removed, statutes do not apply retroactively unless it is “very clear” and unambiguous that they are meant to do so. *See Evangelatos*, 44 Cal. 3d at 1209; and *Quarry et al.*, 53 Cal. 4th at 955. There is currently no language in either the draft proposed LWO ordinance or its supporting background materials that shows a very clear intent or unambiguous desire to apply these amendments retroactively to the existing EMS contract. However, if the City Council inserts language showing a retroactive intent then a separate analysis must be done of the proposed LWO ordinance and its effect on the EMS contract.

## II. CONTRACTS CLAUSE ANALYSIS.

Even if a legislature intends to apply a new statute to an existing contract, it may not be legal to do so if that statute would impair pre-existing contract obligations. The United States Constitution declares that “[n]o State shall enter into any . . . Law impairing the Obligations of Contracts.” U.S. Const. art. I, § 10. The California Constitution also says “[a] . . . law impairing the obligation of contracts may not be passed.” Cal. Const. art. 1, § 9. Courts follow a specific

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<sup>1</sup> Our Office published a memorandum earlier this year dealing with a similar retroactivity issue regarding earned sick leave and minimum wage. City Att’y MOL No. 2015-5 (Mar. 16, 2015). That memorandum, however, dealt with an issue where an ordinance had a specific effective date earlier than the ordinance’s potential enactment. Therefore, that memorandum covers a slightly different and broader issue than this memorandum. Still, many of the issues discussed here parallel this earlier memorandum, although the focus here is on the existing EMS contract and how the proposed LWO amendments may affect it.

analysis to determine if a statute impairing pre-existing contractual rights violates these constitutional clauses.

The threshold question is “whether the [government] law has, in fact, operated as a substantial impairment of a contractual relationship.” *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978). Courts have examined the level the contract was impaired and have held that “total destruction of contractual obligations” is not needed to find substantial impairment. *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983). The level of impairment determines the “level of scrutiny to which the legislation will be subjected.” *Id.* Courts also “are to consider whether the industry the complaining party has entered has been regulated in the past.” *Id.*

If a regulation is a substantial impairment, then the government, “in justification, must have a significant and legitimate public purpose behind the regulation . . . such as the remedying of a broad and general social or economic problem.” *Energy Reserves Group, Inc.*, 458 U.S. at 411-412. This ensures that a government, in applying a law retroactively to a contract, “is exercising its police power, rather than providing a benefit to special interests.” *Id.* at 412.

The final “inquiry is whether the adjustment of ‘the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation’s] adoption.’” *Energy Reserves Group, Inc.*, 458 U.S. at 412, quoting *United States Trust Co. v. New Jersey*, 431 U.S. 1, 22 (1977).

Would the proposed LWO amendments substantially impair the City’s contract with Rural/Metro if the City intended those amendments to apply to the existing EMS contract? This is a difficult question to answer since the City does not have complete access to Rural/Metro’s business records. Courts have found that limiting monies received by one party to a contract is not necessarily substantial impairment of that contract. *Energy Reserves Group, Inc.*, 458 U.S. at 411 (restricting a party to “reasonable gains” expected from a contract was not substantial impairment). Rural/Metro has also stated that it does pay its employees a living wage, which may mean that the proposed LWO amendments would not impair the City and Rural/Metro’s contractual relationship if they are passed. In addition, wages and emergency medical services are both heavily regulated by the state and federal governments, so additional regulation can reasonably be expected. However, without more facts, it is impossible to tell if the proposed LWO amendments create a substantial impairment for Rural/Metro. If there is no substantial impairment, then the legislation would stand. However, if substantial impairment is found, our analysis would proceed to the next test.

If the proposed LWO amendments create a substantial impairment, the City would need to show a significant and legitimate public purpose behind the proposed LWO amendments to apply them to the existing EMS contract. While no court has specifically held that living wage ordinances constitute a significant and legitimate public purpose, courts have found a significant and legitimate public purpose in similar ordinances involving the prompt payment of wages and government provided housing for disadvantaged individuals. *See Ex Parte Trombley*, 31 Cal. 2d 801,809 (1948); *and Hall v. Butte Home Health, Inc.*, 60 Cal. App. 4th 308,322 (1997).

The Federal Government and California have also long regulated wages via minimum wage laws. The proposed LWO amendments would set a minimum wage for emergency medical technicians and paramedics. Therefore, it is likely that the proposed LWO amendments would have a significant and legitimate public purpose.

This would bring us to the final Contracts Clause inquiry. It requires us to examine whether the proposed LWO amendments alteration of Rural/Metro's rights and responsibilities is based on "reasonable conditions" and is of a "character appropriate" to the City's public purpose in adopting the legislation. See *Energy Reserves Group, Inc.*, 458 U.S. at 412, quoting *United States Trust Co. v. New Jersey*, 431 U.S. 1, 22 (1977). This question is difficult to answer. The City and Rural/Metro entered into the EMS contract in July of 2015 and the City Council stated that the LWO did not apply to the extended contract. However, the issue of extending the City's LWO to emergency medical technicians and paramedics has existed since the passing of the LWO, so its passage may not be unexpected. If a court found that the proposed LWO amendments imposed reasonable conditions on the EMS contract that were of an appropriate character, then the proposed LWO amendments would apply retroactively if the City Council specifically wished them to do so.

Unfortunately, the Contracts Clause analysis leads to an unsatisfactory conclusion regarding any intended application of the proposed LWO amendments to the current EMS contract. Not enough is known about the impact the proposed LWO amendments will have on the existing EMS contract, especially regarding Rural/Metro's ability to provide EMS with possible increases in its personnel costs. The City must be aware, though, that even an express attempt at retroactively applying the proposed LWO amendments to the EMS contract may fail.

Regardless, the proposed LWO amendments, as currently drafted, would not require a Contracts Clause analysis since there is no language specifically applying those amendments to the existing EMS contract. The analysis in this section would only apply if the City attempted to expressly affect the exiting EMS contract through the proposed LWO amendments.

## CONCLUSION

The current version of the proposed LWO amendments cannot apply to the City's pre-existing contract with Rural/Metro as there is no clear and unambiguous language that the City Council intends to do so and any attempt may be struck down by a court for violating constitutional contracts clauses. The express language in the proposed LWO amendment recitals prevents these amendments from applying retroactively to the EMS contract.

This memorandum is based upon a review of draft material provided on October 26, 2015. (See Attachment One.) Therefore, if the proposed LWO amendments are changed after that date, this analysis may become void. Any changes to the proposed LWO amendments should be submitted to this Office for further review on this issue.

Additionally, the above analysis would not apply if any amendments or extensions are made to the City's current EMS contract with Rural/Metro after the proposed LWO amendments go into effect. The proposed LWO currently states that it would apply to "any service contract, including any applicable subcontract that is entered into, awarded, amended, renewed, or

extended.” Attachment One, § 22.4210(a)(1). Should the City and Rural/Metro wish to amend or extend the current five-year EMS contract after the adoption of these proposed LWO amendments, emergency medical technicians and paramedics employed under the EMS contract would need to be paid a Living Wage.

JAN I. GOLDSMITH, CITY ATTORNEY

By /s/ Noah Brazier  
Noah J. Brazier  
Deputy City Attorney

NJB:hm  
ML-2015-20  
Doc. No. 1146348\_10  
Attachment One: Proposed Living Wage Ordinance Amendments

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

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

AN ORDINANCE AMENDING CHAPTER 2, ARTICLE 2, DIVISION 42 OF THE SAN DIEGO MUNICIPAL CODE BY AMENDING SECTIONS 22.4205, 22.4210, 22.4215, 22.4220, AND 22.4225 ALL RELATED TO THE CITY OF SAN DIEGO'S LIVING WAGE ORDINANCE.

WHEREAS, the City's Living Wage Ordinance (LWO) has been in effect since 2005; and

WHEREAS, the purpose of the LWO is to ensure that businesses with whom the City contracts provide their employees with a living wage, health benefits or payments toward the costs of health insurance, and compensated leave, thus creating jobs that help keep employees and their families out of poverty; and

WHEREAS, service workers in the medical field are currently exempt from the LWO; and

WHEREAS, the LWO does not currently require covered employees to be paid the cash value of compensated leave for service contracts that last one calendar day or less; and

WHEREAS, the state has enacted the Healthy Workplaces, Healthy Families Act of 2014 requiring three days of paid sick leave for eligible employees (Assem. Bill 1522 (2013-2014 Reg. Sess.)), and

WHEREAS, the City wishes to amend the LWO to increase clarity, ensure consistency with state law, ensure payment of compensated leave to covered employees, and broaden coverage of the LWO to include service workers in the medical field; and

WHEREAS, these revisions are not intended to apply retroactively to existing contracts;  
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, 22.4210, 22.4215, 22.4220, and 22.4225, to read as follows:

**§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:

*Affordable Care Act through City Manager* [No change in text.]

*Compensated leave* means any paid leave for illness, vacation, or personal need provided by a *covered employer* to a *covered employee*, but does not include paid holidays that are provided by a *covered employer* under the *covered employer's* established policy.

*Covered employee through 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 (o) [No change in text.]

(p) Warehouse workers;

(q) [No change in text.]

(r) Right-of-way maintenance;

(s) Water and wastewater maintenance; and

(t) Service workers in the medical field, including emergency medical technicians and paramedics.

*Unfair immigration-related practice through Willful violation* [No change in text.]

**§22.4210 Applicability of Living Wage Ordinance**

(a) This Division shall apply to:

(1) any *service contract*, including any applicable subcontract, that is entered into, awarded, amended, renewed, or extended.

Compliance with this Division is required during the term of the *service contract*.

(2) through (4) [No change in text.]

(b) *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.

(c) [No change in text.]

**§22.4215 Exemptions**

(a) The following contracts are exempt from the requirements of this Division:

(1) through (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. The exemption for professional medical contracts shall not extend to *service contracts* for emergency medical personnel, including emergency medical technicians and paramedics;

(8) [No change in text.]



- (b) *City facility agreements* are not exempt from the requirements of this Division.
- (c) The following *businesses*, even if otherwise qualified as a *covered employer*, are exempt from the requirements of this Division:
- (1) [No change in text.]
  - (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 *covered employee*.
  - (d) [No change in text.]

## §22.4220

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

- (a) through (b) [No change in text.]
- (c) *Covered employers* must provide to each *covered employee* a minimum of eighty hours per year of *compensated leave*. *Compensated leave* must vest as accrued, in accordance with applicable state law and *covered employer* policies. Part-time employees must accrue *compensated leave* at a rate proportional to full-time employees. A *covered employee*, working under a *service contract* to provide *services* for the *City* of one day or less, must be paid additional wages in an amount equal to the proportional rate of *compensated leave*, in lieu of receipt of *compensated leave*.
- (d) *Covered employees* must be eligible to use accrued days off after the first six months of employment or consistent with employer policy, whichever is earlier.

- (e) *Covered employers* must also permit *covered employees* to take a minimum of eighty hours of uncompensated leave per year to be used for the illness of the *covered employee* or a member of his or her immediate family, when the *covered employee* has exhausted all accrued *compensated leave*.
- (f) This section does not mandate the accrual from year to year of uncompensated leave.
- (g) The *City* will provide *covered employers* with credit toward the total amount of *compensated leave* required under this Division for the paid sick leave they must provide under the California Healthy Workplaces, Healthy Families Act of 2014.
- (h) [No change in text.]

§22.4225 **Reporting and Notification Requirements**

- (a) [No change in text.]
- (b) Each *covered employer* must notify *covered employees* at the time of hire and must annually distribute a notice with the first paycheck to occur after July 1 to its *covered employees* of the requirements of this Division, the possible availability of health insurance coverage under the *Affordable Care Act*, and the possible availability of the Earned Income Tax Credit.
- (c) through (e) [No change in text.]

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

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

APPROVED: JAN I. GOLDSMITH, City Attorney

By \_\_\_\_\_  
Lara E. Easton  
Deputy City Attorney

LEE:cfq  
06/19/2015  
Or.Dept:P&C  
Doc. No.: 1046783\_2

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) KEVIN L. FAULCONER, Mayor

Vetoed: \_\_\_\_\_  
(date) KEVIN L. FAULCONER, Mayor