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MEMORANDUM OF LAW

DATE: March 16, 2015

TO: Honorable Mayor and City Council

FROM: City Attorney

SUBJECT: Effective and Operational Dates of Referended Earned Sick Leave and Minimum Wage Ordinance

INTRODUCTION

On August 18, 2014, the San Diego City Council (City Council) adopted an ordinance amending the San Diego Municipal Code (Municipal Code or SDMC) to provide earned sick leave and a minimum wage (Ordinance). The Ordinance's stated purposes included "ensur[ing] that employees who work in the City receive a livable minimum wage and the right to take earned, paid sick leave to ensure a decent and healthy life for themselves and their families." The Ordinance included increases to the minimum wage in San Diego to $9.75 beginning on January 1, 2015 and $10.50 beginning on January 1, 2016, with further increases thereafter. The Ordinance also required employers to provide five days of earned, paid sick leave per year beginning to accrue on April 1, 2015. Opponents filed a referendary petition against the Ordinance on September 16, 2014, thereby suspending it. The petition gained sufficient signatures to qualify for direct submission to the voters. The City Council then voted to submit the matter to the electorate at a special election in June 2016. City officials have been asked whether, if adopted by the voters, the wage increases and earned sick leave would apply retroactively.

QUESTION PRESENTED

If the Ordinance is adopted by voters in June 2016, are the wage increases and earned sick leave retroactive to the dates set forth in the ordinance?

SHORT ANSWER

No. The Ordinance was suspended on September 16, 2014, the date the referendary petition was filed, and will remain suspended until such time that a majority of voters in the June 2016 special election adopt the Ordinance. SDMC §§ 27.1130, 27.1139, 27.1140. If adopted by the voters, the Ordinance will become effective after the City Council's resolution declaring the results of that election. SDMC § 27.1140. The minimum wage of $10.50 an hour that would have been in effect in June 2016 if the Ordinance had not been suspended, as well as the right to begin to accrue earned paid sick leave, would commence on the date specified in the City Council's resolution (see footnote 2). Further dates, deadlines and requirements for employers and the City specified in the Ordinance would continue prospectively from that point forward.

BACKGROUND

On July 28, 2014, the City Council passed an Earned Sick Leave and Minimum Wage ordinance [San Diego Ordinance O-20390] (Ordinance) for employees working in the City of San Diego. The Mayor vetoed the Ordinance on August 8, 2014. On August 18, 2014, the City Council overrode the Mayor's veto and August 18, 2014 became the date of final passage. In accordance with state and local law allowing a referendary period, the Ordinance stated it "shall take effect and be in full force on the thirtieth day from and after its passage."

The Ordinance directed that earned sick leave (one hour for every 30 hours worked) would begin to accrue "at the commencement of employment or on April 1, 2015, whichever is later, and an Employee is entitled to begin using Earned Sick Leave on the ninetieth calendar day following commencement of his or her employment or on July 1, 2015, whichever is later. After the ninetieth calendar day of employment or after July 1, 2015, whichever is later, such Employee may use Earned Sick Leave as it is accrued."

The Ordinance also directed that employers must pay employees in the City a minimum wage starting on the following dates: January 1, 2015, $9.75; January 1, 2016, $10.50; January 1, 2017, $11.50; and January 1, 2019, and each year thereafter, an increase in an amount corresponding to the prior year's increase, if any, in the cost of living.[1]

The Ordinance also required the City to publish bulletins announcing the adjusted Minimum Wage for the upcoming year and to publish notices for employers to post in the workplace by April 1 in 2015 and each year thereafter.

The Ordinance required employers to create contemporaneous written or electronic records documenting their employee's wages earned and use of Earned Sick Leave and to retain them for a period of three years. Failure to do so would create a "rebuttable presumption" that the employer has violated the Ordinance, exposing the employer to a civil penalty for each violation of up to, but not to exceed, $1,000 per violation, which would be levied by an

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[1] California's statewide minimum wage is codified in Labor Code section 1182.12, which states, "Notwithstanding any other provision of this part, on and after July 1, 2014, the minimum wage for all industries shall be not less than nine dollars ($9) per hour, and on and after January 1, 2016, the minimum wage for all industries shall be not less than ten dollars ($10) per hour."

Enforcement Office which the City Council would designate and authorize to implement and enforce the Ordinance.

ANALYSIS

I. AS A CHARTER CITY, SAN DIEGO HAS ADOPTED ITS OWN PROCEDURES FOR REFERENDUM.

In both the California Constitution and the San Diego Charter (Charter), the powers of initiative and referendum are reserved by the people. Cal. Const. art. II, § 9; Charter § 23. California courts have recognized the referendum as the means by which the electorate is entitled, as a power reserved by it under our state Constitution, to approve or reject measures passed by a legislative body. *Yesson v. San Francisco Mun. Transp. Agency,* 224 Cal. App. 4th 108, 116-18, 168 (2014), *reh'g denied* (Feb. 26, 2014), citing Cal. Const. art. II, §§ 9, subd. (a), 11, & art. IV, § 1; *Associated Home Builders etc., Inc. v. City of Livermore,* 18 Cal. 3d 582, 591 (1976); *Empire Waste Management v. Town of Windsor,* 67 Cal. App. 4th 714, 717 (1998); *Lindelli v. Town of San Anselmo,* 111 Cal. App. 4th 1099, 1108 (2003).

The California Constitution grants broad authority to charter cities like San Diego to establish procedures for their own elections. Article XI, section 5(a) of the California Constitution provides that a charter city may "make and enforce all ordinances and regulations in respect to municipal affairs," and that "[c]ity charters adopted pursuant to this Constitution shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith." Cal. Const. art. XI, § 5; *DeVita v. County of Napa,* 9 Cal. 4th 763, 783 (1995).

Article XI, section 5(b) of the California Constitution grants plenary authority to charter cities to provide for the "conduct of city elections." San Diego Charter section 23 states, in part:

> . . . referendum may be exercised on any ordinance passed by the Council except an ordinance which by the provisions of this Charter takes effect immediately upon its passage . . . The Council shall include in the election code ordinance required to be adopted by Section 8, Article II, of this charter, an expeditious and complete procedure for the exercise by the people of the initiative, referendum and recall . . .

Charter section 23 requires the City Council to include in the election code a referendum process, which is set forth in Municipal Code sections 27.1101 through 27.1140. Municipal Code section 27.1101 states, "Any legislative act, except acts making the annual tax levy, making the annual appropriations, calling or relating to elections, or relating to emergency measures, shall be subject to the referendum process." Thus, the Ordinance was subject to referendary challenge.

On September 16, 2014, opponent Betsy Ann Kinner submitted and filed a referendary petition against the Ordinance with the City Clerk, thereby suspending it pursuant to Municipal Code section 27.1130(a). The City Clerk submitted the referendary petition to the San Diego County Registrar of Voters (Registrar of Voters) for signature verification. The Registrar of Voters conducted a legally required verification and found the petition to contain the valid

signatures of more than five percent of the City's registered voters at the last general election, sufficient to qualify the measure for direct submission to the voters. Charter § 23 and SDMC § 27.1130.

On October 16, 2014, the City Clerk certified that the referendary petition was sufficient and qualified and published a Report (No. 14-08), stating, "From the point that the petition was accepted as filed, Ordinance O-20390 [was] suspended per Municipal Code section 27.1130(a)." On October 20, 2014, in compliance with Municipal Code section 27.1125, the City Clerk presented the petition and a certification of the sufficiency of its signatures to the City Council. The City Council then had ten business days to reconsider the legislative act, and either (1) grant the referendary petition to repeal the Ordinance; or (2) adopt a resolution of intention to submit the matter to the voters. Charter § 23 and SDMC § 27.1131.

On October 20, 2014, the City Council unanimously decided [Resolution R-309274] not to repeal the Ordinance, but to submit the referendary petition to the electorate at a special election to be held in June 2016.

II. THE ORDINANCE IS SUSPENDED UNTIL IT IS ADOPTED OR REJECTED BY A MAJORITY OF VOTERS.

"An essential component of the referendum power is the ability to stay legislation until voters have had the opportunity to approve or reject it." *Yesson,* 224 Cal. App. 4th at 117. "[U]nder the mandate of article II of the state Constitution, the filing of a valid referendum challenging a statute normally stays the implementation of that statute until after the vote of the electorate. The statute takes effect only if approved by the voters." *Assembly of State of Cal. v. Deukmejian*, 30 Cal. 3d 638, 656-57 (1982).

The Ordinance has been suspended since September 16, 2014. Municipal Code section 27.1130 states that the filing of a referendary petition suspends the referended legislative act:

> **§27.1130 Suspension of Referended Legislative Act**
>
> (a) If a referendary *petition* has been accepted as filed, the referended legislative act shall be suspended until the date on which the City *Clerk* issues a certification of the *petition's* insufficiency; or, if the *petition* is found to be sufficient, the legislative act shall be suspended until it is adopted by the *voters* and becomes effective in accordance with Sections 27.1139 and 27.1140.

Here, the Ordinance was suspended on September 16, 2014, when the referendary petition was filed. SDMC § 27.1130(a). The Ordinance will remain suspended until adopted or rejected by a majority of voters. SDMC §§ 27.1130; 27.1139.

San Diego's City's Elections Ordinance also states that if there is no controlling provision in San Diego's election laws, state elections law may be relied upon for guidance. SDMC § 27.0106(d). California Elections Code section 9235 states that if a petition protesting the adoption of an ordinance is properly submitted to elections officials and filed by the City

Clerk, "the effective date of the ordinance shall be suspended and the legislative body shall reconsider the ordinance." California Elections Code section 9241 states, "If the legislative body does not entirely repeal the ordinance against which the petition is filed, the legislative body shall submit the ordinance to the voters, . . . The ordinance shall not become effective until a majority of the voters voting on the ordinance vote in favor of it." [Emphasis added.]

On October 16, 2014, the City Clerk certified that the referendary petition was sufficient and qualified for submittal to the voters. SDMC § 27.1130(c). On October 20, 2014, the City Council voted unanimously to submit the matter to the voters in a special election in June 2016. The Ordinance will therefore remain suspended until such time that it is adopted by a majority of voters at a special election in June 2016.

III. IF ADOPTED BY THE VOTERS IN JUNE 2016, NO PART OF THE ORDINANCE BECOMES EFFECTIVE UNTIL AFTER THE CITY COUNCIL DECLARES THE RESULTS OF THAT ELECTION.

A. Effective Date.

"The power of referendum is simply *not* the power to *repeal* a legislative act . . . . Under current article II, section 9 [of the state Constitution], 'The referendum is the power of the electors to approve or reject statutes . . . .' . . .The power is to determine whether a legislative act should *become* law. . . . It is not to determine whether a legislative act, once effective, should be repealed [¶]In accord with this view of the referendum power, neither state statutes nor local ordinances subject to referendum go into effect during the time permitted for the filing of a referendum petition. . . . Thus, 'A prime purpose of deferment of the effective date of ordinances is to preserve the right of referendum.'" *Yesson,* 224 Cal. App. 4th at 117, citing *Midway Orchards v. County of Butte,* 220 Cal. App. 3d 765, at 780–81 (1990) (emphasis in original). "A legislative act subject to referendum cannot be effective before the power of referendum can be exercised." *Id.*, citing *Midway Orchards,* at 781–82.

Municipal Code section 27.1130(c) states: "If the City Clerk issues a certification of the referendary *petition's* sufficiency, the referended legislative act shall become effective in accordance with sections 27.1139 and 27.1140." Municipal Code section 27.1139 states that, "Except as provided in the California Constitution or the San Diego City Charter, a referended legislative act shall be adopted by majority vote." Municipal Code section 27.1140 states:

> A referended legislative act which has received the requisite number of affirmative votes for adoption shall be deemed adopted on the date the City *Council* adopts its resolution declaring the results of the *election.* The legislative act shall be effective ten calendar days after the date the resolution is adopted unless an earlier date is specified in the resolution following the special election.

The filing of the referendary petition on September 16, 2014 suspended the Ordinance and will prevent it from taking effect – if at all – until after the vote is held in June 2016. SDMC §§ 27.1130, 27.1140; Cal. Elec. Code § 9241; *In re Stratham,* 45 Cal. App. 436, 439-40 (1920);

Cal. Const. art. II, § 10(a); *Assembly v. Deukmejian,* 30 Cal. 3d 638, 654–57 (1982). If the voters adopt the Ordinance in the June 2016 special election, the suspended Ordinance will not go into effect until ten days after the Council adopts its resolution declaring the results of that election unless an earlier date (within the ten day period) is specified in the City Council's resolution declaring the results of the special election.[2] SDMC § 27.1140.

B. Any operative dates will commence on or after the effective date.

[T]he operative date is the date upon which the directives of the statute may be actually implemented. The effective date [of a statute] is considered that date upon which the statute came into being as an existing law. *People v. McCaskey* 170 Cal. App. 3d 411, 416 (1985); *Preston v. State Bd. of Equalization*, 25 Cal. 4th 197, 222-24 (2001), *disapproved of by City of Boulder v. Leanin' Tree, Inc.*, 72 P.3d 361 (Colo. 2003).

"The law is established in California that a statute has no force whatever until the date it takes effect; that until the time arrives when it is to become effective the statute is inoperative for any purpose and all acts purporting to have been done under it prior to its effective date are void." *Kennelly v. Lowery*, 64 Cal. App. 2d 903, 904-05 (1944) (citations omitted). "In the usual situation, the effective date and the operative date are one and the same; however, the power to enact laws includes the power to fix a future date on which the act will become operative. (*See* 2 Sutherland Statutory Construction (4th ed. 1973) § 33.07, pp. 11–12)." *Estate of Rountree*, 141 Cal. App. 3d 976, 980 (1983).

Here, the City Council intended a series of future operative dates for minimum wage increases and earned paid sick leave to commence once the Ordinance was in effect. These prospective dates included a minimum wage increase to $10.50 starting on January 1, 2016, as well as the right to accrue earned paid sick leave starting on April 1, 2015, with the right to use such sick leave commencing ninety days later. If adopted by a majority of voters during the June 2016 special election, the City Council will adopt a resolution establishing the effective date. SDMC § 27.1140. The operative date for the minimum wage increase to $10.50 per hour (which would have been operative on January 1, 2016 if the Ordinance had not been suspended) will be

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[2] Municipal Code Section 27.1130 provides that a referended legislative act is suspended until it is adopted by the voters and becomes effective in accordance with sections 27.1139 [majority vote] and 27.1140. The title of section 27.1140 is "Effective Date of Referended Legislative Act Following Special Election." [Emphasis added.] Section 27.1140 states: "The legislative act shall be effective ten calendar days after the date the resolution is adopted unless an earlier date is specified in the resolution ['declaring the results of the election']." Section 27.1140 clearly envisioned an effective date after the special election. Where there is any question or ambiguity regarding the plain meaning of a statute, the language must be construed in the context of the statutory framework as a whole and the language should be read to conform to the spirit of the enactment. *Conrad v. Medical Bd. Of California*, 48 Cal. App. 4th 1038, 1046 (1996). The only reasonable statutory interpretation of the term "earlier date" in section 27.1140 in the context of the section's title and the suspension of the referended legislative act in section 27.1130 is the City Council may specify an effective date less than ten days after the special election, but only within the ten day period following their resolution declaring the results of that election.

the effective date as set forth in that resolution.[3] The right to accrue earned, paid sick leave (which would have been operative on April 1, 2015 if the Ordinance had not been suspended, with the right to use such sick leave commencing ninety days later) will also become operative on the effective date, with the right to use such sick leave commencing ninety calendar days later. Future operative dates will become operative thereafter, as specified in the Ordinance.

IV. ABSENT AN EXPRESS RETROACTIVITY PROVISION, THE ORDINANCE IS NOT RETROACTIVE UNLESS IT IS CLEAR THAT THE CITY COUNCIL OR THE VOTERS INTENDED A RETROACTIVE APPLICATION

New statutes are presumed to operate only prospectively absent some clear indication that the legislature intended otherwise. *Rope v. Auto-Chlor Sys. of Washington, Inc.*, 220 Cal. App. 4th 635, 646 (2013), *review denied* (Jan. 29, 2014), *citing Elsner v. Uveges,* 34 Cal. 4th 915, 936 (2004). "[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly . . . . For that reason, the 'principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.'" *Id., citing McClung v. Employment Development Dept.* 34 Cal. 4th 467, 475 (2004).

In construing statutes, there is a presumption against retroactive application unless the legislature plainly has directed otherwise by means of "express language of retroactivity *or* . . . other sources [that] provide a clear and unavoidable implication that the Legislature intended retroactive application." *Quarry v. Doe I*, 53 Cal. 4th 945, 955 (2012), citing *McClung,* 34 Cal. 4th at 475.

To overcome the strong presumption against retroactivity, the legislature must show clear and unavoidable intent to have the statute retroactively impose liability for actions not subject to liability when taken. *Rope,* 220 Cal. App. 4th, at 646. "Requiring clear intent assures that [the legislative body] itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits." *Id., citing McClung,* 34 Cal. 4th, at 476. Requiring a legislature to make clear its intent to apply a statute retroactively "helps ensure that [the legislature] itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness." *Landgraf v. USI Film Products*, 511 U.S. 244, 268 (1994).

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[3] The operative date for the first minimum wage increase to $10.50 would be the effective date specified in the City Council resolution, as discussed in footnote 2. Notwithstanding the fact that the Ordinance was originally passed prior to the first scheduled minimum wage increase on January 1, 2015, nothing in the recitals or legislative record of the Ordinance indicates the intent to delay the operational date of the increased minimum wage by a set number of days after its effective date. Any challenge that would seek to delay the operative date for the start of the minimum wage increase until after its effective date following the referendum is inconsistent with the law cited here in Section III and likely to fail.

A. The Ordinance contains no express language of retroactivity.

It is clear from its language that the Ordinance was intended to operate prospectively. It was first passed by the City Council on July 28, 2014; on August 18, 2014, a City Council supermajority overcame a mayoral veto. Absent a sufficient referendary petition, the Ordinance would have become effective 30 calendar days later on September 17, 2014. SDMC § 27.1130(b). However, the Ordinance contained operative dates for minimum wage increases beginning on January 1, 2015 and earned, paid sick leave beginning on April 1, 2015. The language of the Ordinance clearly envisioned future operative dates, after its intended effective date. While "no talismanic word or phrase is required to establish retroactivity" the language must include an "unequivocal and inflexible statement" that the legislative act will operate retroactively. *Myers v. Philip Morris Companies, Inc.*, 28 Cal. 4th 828, 842-43 (2002). Here, there is no clear, unequivocal and inflexible language in the Ordinance stating that the imposition of these requirements on employers will apply retroactively. The subject of retroactive application was neither anticipated nor addressed in the language of the Ordinance.

B. There is no clear and unavoidable indication that prospective voters intend to impose retroactive obligations on employers.

A retroactive or retrospective law is one which affects rights, obligations, acts, transactions and conditions which are performed or exist prior to the adoption of the statute. *Amaral v. Cintas Corp. No. 2*, 163 Cal. App. 4th 1157, 1197 (2008). Requiring clear intent assures that the legislative body itself or the voters have affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits. *McClung,* 34 Cal. 4th at 476.

> Just as federal courts apply the time-honored legal presumption that statutes operate prospectively 'unless Congress has clearly manifested its intent to the contrary' (*Hughes Aircraft Co. v. U.S. ex rel. Schumer, supra,* 520 U.S. at p. 946, 117 S.Ct. 1871), so too California courts comply with the legal principle that unless there is an 'express retroactivity provision, a statute will *not* be applied retroactively unless it is *very clear* from extrinsic sources that the Legislature . . . must have intended a retroactive application' (*Evangelatos, supra,* 44 Cal. 3d at p. 1209, italics added). California courts apply the same "general prospectivity principle" as the United States Supreme Court. (*Id.* at p. 1208). Under this formulation, a statute's retroactivity is, in the first instance, a policy determination for the Legislature and one to which courts defer absent "some constitutional objection" to retroactivity. (*Western Security Bank v. Superior Court* (1997) 15 Cal. 4th 232, 244.) But "a statute that is ambiguous with respect to retroactive application is construed . . . to be unambiguously prospective." (*I.N.S. v. St. Cyr, supra,* 533 U.S. at pp. 320–321, fn. 45, 121 S.Ct. 2290; *Lindh v. Murphy* (1997) 521 U.S. 320, 328, fn. 4, ["'retroactive' effect

> adequately authorized by a statute" only when statutory language was "so clear that it could sustain only one interpretation"].)

Myers, 28 Cal. 4th at 841.

The mandates were supposed to phase in for employers over time, with the first raise in the minimum wage starting on January 1, 2015 and the start of accrued, paid leave on April 15, 2015. The Ordinance required the City to publish bulletins, notices and templates for employers by April 1, 2015, April 1, 2016, and thereafter.

Further, the Ordinance would require employers to create contemporaneous written or electronic records recording their employee's wages earned and use of earned sick leave and to retain those records for a period of three years. Failure to do so would expose the employer to a civil penalty, which would be levied by an Enforcement Office designated and authorized by the City Council. Nothing in the language of the ordinance or legislative history reveals a "clear intent" to impose these obligations retroactively.

V. A REVIEWING COURT WOULD LIKELY REJECT RETROACTIVITY AS A STATUTORY CONSTRUCTION LEADING TO ABSURD RESULTS

When the statutory language is clear and unambiguous there usually is no need for further construction, and courts adopt the plain, or literal, meaning of that language. . . . However, the "plain meaning" rule is not absolute. (*Lungren v. Deukmejian, supra,* 45 Cal. 3d [727] at p. 735, 248 Cal.Rptr. 115, 755 P.2d 299.) If the literal meaning of a word or sentence, when considered in the context of a statute, is contrary to the legislative intent apparent in the statute, its literal construction will not be adopted. (*Dyna–Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386–1387; *Bob Jones University v. United States* (1983) 461 U.S. 574, 586, [a well-established canon of statutory construction provides that literal language should not defeat the plain purpose of the statute].) Similarly, a literal construction of statutory language that leads to absurd results may be disregarded for a construction that furthers the legislative intent apparent in the statute. (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal. 3d 208, 245, 149 Cal.Rptr. 239, 583 P.2d 1281.) *In re Marriage of Evans*, 229 Cal. App. 4th 374, 380 (2014).

A literal reading of the Ordinance, applying all of the dates and requirements therein retroactively, would lead to absurd results that would likely be seen by a reviewing court as contrary to the legislative intent to provide employers with fair notice. Employers in the City would be immediately out of compliance with the Ordinance, with an obligation to calculate and pay a differential for any hourly wage paid below $9.75 beginning January 1, 2015 and below $10.50 beginning January 1, 2016. The City would not have complied with its requirement to provide bulletins to employers announcing the new wages and leave policies that would have been due on April 1, 2015 and 2016. Employers would be instantly out of compliance with the requirement to create contemporaneous written or electronic records documenting their employee's wages earned and sick leave accrued. Employers would be immediately subject to $1,000 fines per violation, which would be authorized to be levied by an Enforcement Office which had not yet been designated or authorized by the City Council. Their 2015 state and

federal tax returns could require amendment. These would be absurd results, never contemplated by the City Council.

Therefore, it is more likely that a reviewing court would not apply the literal dates in the Ordinance, as that would lead to absurd results. Consistent with the overall drafting of the Ordinance, which adopts a phased-in approach along with notice to employers and employees, a court is more likely to apply the dates prospectively only. Based on the lack of express retroactivity language, and that any ambiguity favors a finding of no retroactivity, and the likelihood that retroactivity would lead to absurd results, this Office concludes that the Ordinance, if adopted, will only operate prospectively.

VI. POTENTIAL CONSTITUTIONAL CONCERNS IF THE ORDINANCE, ONCE ADOPTED, IS APPLIED RETROACTIVELY

It is a "well-established principle that statutes will be interpreted to avoid constitutional difficulties." *Frisby v. Schultz*, 487 U.S. 474, 474-475 (1988). This section briefly[4] examines key provisions of the California and United States constitutions that may be the basis for legal challenges if the Ordinance is applied retroactively. As discussed below, there are additional reasons the Ordinance, if adopted, is unlikely to be found retroactive by a court.

A. Retroactive application of the Ordinance may violate the contracts clauses of the United States and California constitutions.

"No State shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. Const. art. I, § 10, cl. 1. "Although the text of the Contract Clause is 'facially absolute,' the Supreme Court has long held that 'its prohibition must be accommodated to the inherent police power of the State 'to safeguard the vital interests of its people.'" *RUI One Corp. v. City of Berkeley*, 371 F.3d 1137, 1147 (9th Cir. 2004), quoting *Home Bldg. & Loan Ass'n v. Blaisdell,* 290 U.S. 398, 434 (1934). "The power to regulate wages and employment conditions lies clearly within a state's or a municipality's police power." *Id.* at 1150.

The United States Supreme Court has interpreted the federal contracts clause using a three-step analysis. *Barrett v. Dawson*, 61 Cal. App. 4th 1048, 1054-55 (1998), *citing Energy Reserves v. Kansas Power & Light* (1983) 459 U.S. 400, 410–412. The first and threshold step is to ask whether there is any impairment at all, and, if there is, how substantial it is. *Energy Reserves,* 459 U.S. at 411. If there is no "substantial" impairment, that ends the inquiry. If there is substantial impairment, the court must next ask whether there is a "significant and legitimate public purpose" behind the state regulation at issue. *Id.* at 411–412. If the state regulation passes that test, the final inquiry is whether means by which the regulation acts are of a "character appropriate" to the public purpose identified in step two. *Id.* at 412, 418 [characterizing third step as "means chosen" to "implement" legislative "purposes"].[5]

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[4]This section is intended to provide an overview of potential constitutional concerns, not an in-depth analysis of all potential challenges, should the Ordinance be applied retroactively.

[5] The California Supreme Court has not differentiated between federal and state contract clause analysis in major cases, including *Calfarm Ins. Co. v. Deukmejian,* 48 Cal. 3d 805 (1989) [addressing a variety of challenges to Proposition 103's regulation of insurers]; *see Barrett,* 61 Cal. App. 4th at 1056.

A reviewing court could find that the employment relationships are contracts that are substantially impaired by retroactive application of the Ordinance. *See RUI,* 371 F.3d at 1147, *citing Gen. Motors Corp. v. Romein,* 503 U.S. 181, 186 (1992) (quoting *Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234 at 244). Employers would be obligated to compute and pay minimum wage differentials and earned sick leave up to a year and a half retroactively, new requirements which were not terms of the employment contracts in effect at the time. The Ordinance states a number of public purposes that a court could see as significant and legitimate, including "ensur[ing] that employees who work in the City receive a livable minimum wage and the right to take earned, paid sick leave to ensure a decent and healthy life for themselves and their families." However, a court could find retroactive application of the Ordinance to be an inappropriate means to achieve those ends, especially in light of the language of the Ordinance, which clearly envisioned future operative dates, after its original intended effective date, which would have only affected the employment contracts in the future. Thus, a reviewing court could find retroactive application of the Ordinance to be a substantial and unconstitutional impairment of the obligation of contracts.

B. Retroactive application of the Ordinance may violate the due process clauses of the United States and California constitutions.

"Article I, section 7 of the California Constitution and the 14th Amendment of the United States Constitution guarantee the right of due process. Retrospective application of a statute is constitutional as long as it does not deprive a person of a substantive right without due process of law." *In re Marriage of Buol,* 39 Cal. 3d 751, 756 (1985).

"Retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions. For this reason, '[t]he retroactive aspects of [economic] legislation, as well as the prospective aspects, must meet the test of due process': a legitimate legislative purpose furthered by rational means." *Gen. Motors Corp.* 503 U.S. at 191, *citing Pension Benefit Guaranty Corporation v. R. A. Gray & Co.*, 467 U. S. 717, 730 (1984).

Determining if a retroactive initiative violates due process entails a weighing of a variety of factors. The court will consider: "[1] the significance of the state interest served by the law; [2] the importance of the retroactive application of the law to the effectuation of that interest; [3] the extent of reliance upon the former law; [4] the legitimacy of that reliance; [5] the extent of actions taken on the basis of that reliance; and [6] the extent to which the retroactive application of the new law would disrupt those actions." *Yoshioka,* 58 Cal. App. 4th at 983, *citing In re Marriage of Bouquet,* 16 Cal. 3d 583, 592 (1976).

Potential employer plaintiffs could be expected to claim extensive and legitimate reliance on the state minimum wage and sick leave laws that were in effect during 2015 and half of 2016. Retroactive application of the Ordinance would result in significant and complex impacts on employers, including the requirement to compute and pay retroactive minimum wage differentials, the requirement to compute and provide retroactive earned sick leave, and the requirement to create written or electronic records of wages and earned sick leave a year and a half retrospectively. There could also be significant and unanticipated tax consequences for employers, including a requirement to file amended state and federal tax returns for 2015; and

additional unintended consequences for employers and employees for unemployment insurance, workers compensation, Social Security, Medicare, and other similar programs.

C. Retroactive application of the Ordinance may violate the takings clauses of the United States and California constitutions.

The Takings Clause of the Fifth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, *Chicago, B. & Q.R. Co. v. City of Chicago,* 166 U.S. 226 (1897), provides: "[N]or shall private property be taken for public use, without just compensation." The California Constitution similarly provides: "Private property may be taken or damaged for a public use . . . only when just compensation . . . has first been paid to, or into court for, the owner." Cal. Const. art. I, § 19.[6]

"[A] taking should be upheld as consistent with the Public Use Clause as long as it is 'rationally related to a conceivable public purpose.'" *MHC Fin. Ltd. P'ship v. City of San Rafael*, 714 F.3d 1118, 1129 (9th Cir. 2013). "The concept of the public welfare is broad and inclusive," in "deference to legislative judgments in this field." *Kelo v. City of New London*, 545 U.S. 469, 480-81 (2005). If the public use requirement is satisfied, the Court must determine whether a "taking" of constitutional dimension has occurred and, if so, whether the government provided just compensation. *Brown v. Legal Found. Of Wash.*, 538 U.S. 216 at 231-32, 235-36 (2003); *First English Evangelical Lutheran Church of Glendale v. Cnty. of L.A.*, 482 U.S. 304, 314 (1987).

There are two categorical situations in which takings claims arise: One is a *per se*, or pure, taking, where the government exercises its eminent domain powers to acquire property for some public use. See, *e.g.*, *Kelo v. City of New London* (concerning the ability of a municipal government to condemn a private residence in furtherance of an economic-development plan). The other, a regulatory taking, occurs where governmental action disproportionately burdens the interests of a few—limiting use of real property, for example, in a way that significantly interferes with use of the property. *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 123–24 (1978). Money constitutes private property for the purposes of the Takings Clause. *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998) (the Court found that interest income is private property that cannot be taken subject to a statutory scheme).

In *Penn Central Transportation Company v. City of New York*, the Supreme Court advanced a three-factor test for determining whether a regulatory action of the government constitutes a taking for purposes of the Takings Clause. *Penn Central,* 438 U.S. at 123-24. The Court considers (1) the economic impact of the regulation on the plaintiff; (2) the extent to which

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[6] "Because the California Constitution requires compensation for damage as well as a taking, the California clause '"protects a somewhat broader range of property values" than does the corresponding federal provision. . . .' Aside from that difference, California courts have construed the clauses congruently. . . . Thus courts have analyzed takings claims under decisions of both the California and United States Supreme Courts." *Monks v. City of Rancho Palos Verdes*, 167 Cal. App. 4th 263, 294 (2008), *as modified on denial of reh'g (Oct. 22, 2008).*

the regulation interferes with the plaintiff's identifiable investment-backed expectations; and (3) the character of the governmental action. *Id.* at 124.

In 1998, the United States Supreme Court examined the provisions of the Coal Act of 1992, which would have had assigned to Eastern Enterprises, a former mining company, the obligation to fund benefit plans for an additional 1000 employees who had worked for the company prior to 1966. *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998). Writing for a four justice plurality, Justice Sandra Day O'Connor concluded that the Penn Central Test was applicable. *Id.* at 528–29 (1998) (O'Connor, J., plurality opinion). Justice O'Connor declared that "[o]ur decisions . . . have left open the possibility that legislation might be unconstitutional if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience." *Id.*[7]

Retroactive application of the Ordinance could invite a constitutional challenge on regulatory takings grounds. Applying the *Penn Central* factors, a reviewing court could find, (1) a requirement to pay wage differentials and earned sick leave a year and a half retroactively imposes a severe economic burden on employers; (2) this requirement interferes with employers' identifiable investment-backed expectations; and (3) the character of the government action is substantially disproportionate to the employers' experience. Thus, retroactive application of the Ordinance could be seen by a reviewing court as a regulatory taking of private property for a public purpose without just compensation.

VII. HOW THE ORDINANCE WILL APPLY IF ADOPTED BY THE VOTERS

If adopted by the voters, the Ordinance will pick up where it would have been on the effective date specified in the City Council resolution declaring the results of the special election: a minimum wage of $10.50 per hour, with scheduled increases thereafter; the beginning of the accrual of earned paid sick leave as of that date; and the right to begin using such sick leave 90 days later. Employers would be required to document wages and sick leave starting on that date. The City would be required to begin producing bulletins, notices and templates for employers, beginning 90 days after that date and thereafter. The City Council would be required to designate an Enforcement Office; civil penalties could only be levied against violations of the Ordinance from the effective date forward.

CONCLUSION

The California Constitution and City Charter reserve power to City voters to exercise their right to the referendum of a legislative act of the City Council. The Charter requires a process for voters to exercise this power. The Municipal Code implements this Charter requirement, providing detailed procedures for referending a legislative act. The Ordinance was

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[7] Justice Anthony Kennedy provided the fifth vote in favor of Eastern Enterprises, but his concurring opinion stated the retroactive provisions of the Coal Act violated the United States Constitution's Due Process Clause, not the Takings Clause. *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998) (Kennedy, J., concurring in judgment and dissenting in part) ("Both stability of investment and confidence in the constitutional system, then, are secured by due process restrictions against severe retroactive legislation.").

suspended on September 16, 2014, when the referendary petition was filed, and will remain suspended until such time that a majority of voters in the June 2016 special election adopt the Ordinance. Based on the lack of express retroactivity language, the lack of "clear intent" to apply it retroactively, and the likelihood that retroactivity would lead to absurd results, this Office concludes that the Ordinance, if adopted, will only operate prospectively. It will become effective only after the City Council's resolution declaring the results of that election. It would become operative at the same time; the minimum wage of $10.50 an hour that would have been in effect in June 2016 and the right to begin to accrue earned paid sick leave would commence at that time. Further dates, deadlines and requirements for employers and the City specified in the Ordinance would continue prospectively from that point on. Any attempt to apply the Ordinance retroactively may invite constitutional challenges.

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