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MEMORANDUM OF LAW

DATE: October 18, 2016

TO: Gail Granewich, City Treasurer

FROM: City Attorney

SUBJECT: Applicability of Earned Sick Leave and Minimum Wage Ordinance to Public Agency Employees; Private Businesses on Public Agency Land; Employees Traveling Through the City, and Businesses Located on Federal Enclaves

INTRODUCTION

On July 11, 2016, the Earned Sick Leave and Minimum Wage Ordinance (Ordinance) went into effect in the City of San Diego (City). The Ordinance amends the San Diego Municipal Code (Municipal Code) to require employers to provide earned sick leave and minimum wage to employees working in the geographic boundaries of the City. The City Council (Council) amended the Ordinance in August 2016 to designate the Office of the City Treasurer (Treasurer) as the enforcement office and to provide enforcement provisions as well as further clarification. This amendment went into effect on September 2, 2016. Since the Ordinance has been in effect, your Office has received questions from the public about the application of the Ordinance in various circumstances.

In general, the Ordinance applies to any individual who (1) performs at least two hours of work in a work week within the geographic boundaries of the City, and (2) qualifies as an employee entitled to payment of California minimum wage, consistent with the California Labor Code and accompanying Industrial Welfare Commission regulations.[1] The Ordinance does not

[1] Pursuant to San Diego Municipal Code section 39.0104, the Ordinance clarifies that it does not apply to individuals who are permitted by California law to be paid at less than the state minimum wage, as set forth in California Labor Code sections 1191 or 1191.5. It also does not apply to individuals employed under a publically subsidized summer or short-term youth employment program; or any student employee, camp counselor, or program counselor as defined in California Labor Code section 1182.4. The Ordinance also does not apply to individuals who are employed as independent contractors under the Labor Code.

expressly exempt any individuals who satisfy these two conditions, but federal and state law limit its application. This Memorandum provides a general overview of the applicability of the Ordinance.

QUESTIONS PRESENTED

1. Does the Ordinance apply to the following individuals:

    a. Public employees, such as employees of the federal, state, county and school districts?

    b. Private businesses located on property owned by the San Diego Unified Port District or the San Diego County Airport Authority?

    c. In-Home Support Services (IHSS) workers who work within the City's boundaries?

    d. Private employees, including contractors, working on federal enclaves?[2]

2. Does an individual driving through the City for work-related purposes trigger the application of the Ordinance?

SHORT ANSWERS

1a. No, the Ordinance does not apply to public employees of a government agency with statutory or constitutional authority to set or establish employee compensation. Although the Council intended the Ordinance to apply to all employees working in the boundaries of the City, the sovereign powers doctrine bars the City from interfering with the sovereign power of a public agency to set employee compensation. The federal government, State of California (state), County of San Diego (County), San Diego Unified Port District (Port District), San Diego County Airport Authority (Airport Authority), and public school districts have the authority to set employee compensation and, as such, need not comply with the Ordinance.

1b. Generally, yes. However, the Ordinance will not apply to a private business performing a governmental function on behalf of the Port District or Airport Authority.

1c. Likely no. The application of the Ordinance to IHSS workers working within the City's boundaries likely interferes with the sovereign power of the state to set IHSS worker compensation. IHSS workers are not civil service public employees, but the state legislature has the exclusive authority to set the hourly wage of IHSS workers pursuant to a collective bargaining process.

1d. No. The City does not have jurisdiction over existing federal enclaves to enforce the Ordinance.

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[2] A federal enclave is a parcel of property ceded by a state to the federal government. U.S. Const. art. I, § 8, cl. 17.

2. Generally, yes, so long as the driver performs at least two hours of work in a week of a calendar year within the geographic boundaries of the City for an "employer" and the driver is an "employee" as these terms are defined under the Ordinance. The amount of time spent driving within the City counts towards the amount of hours worked in the City if an employee is driving at the direction of his or her employer. However, if the employer or employee is a not a resident of California (i.e., a nonresident), there are legal concerns that may prohibit the City from enforcing the Ordinance depending on the circumstances, which would need to be evaluated on a case-by-case basis. This Office provided guidance on this issue in a memorandum dated June 6, 2014, entitled "Enforcement of Local Minimum Wage on Nonresident Employers" (June 2014 Memo). *See* Attachment 1.

ANALYSIS

I. THE CITY MAY ENFORCE THE ORDINANCE TO THE EXTENT IT DOES NOT CONFLICT WITH FEDERAL OR STATE LAW AND DOES NOT INTERFERE WITH THE GOVERNMENTAL FUNCTION OF A PUBLIC ENTITY.

The City Council adopted the Ordinance in accordance with the City's police power to protect the health and safety of workers working within the City. San Diego Municipal Code § 39.0103; Cal. Const. Art. XI, § 7 ("A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.") The police power of a local government to make and enforce ordinances for protection of public health and safety is as broad as the police power that may be exercised by the state legislature. *Ventura v. City of San Jose*, 151 Cal. App. 3d 1076 (1984); *Richeson v. Helal*, 158 Cal. App. 4th 268 (2007). But the City's police power is not without limits. Local legislation is void to the extent it conflicts with general state law or intrudes upon the sovereign activities of public agencies. *O'Connell v. City of Stockton*, 41 Cal. 4th 1061, 1067 (2007); *Board of Trustees v. City of Los Angeles*, 49 Cal. App. 3d 45, 49 (1975).

Generally, the Ordinance is not preempted because both state and federal law permit local agencies to enforce more stringent labor laws.[3] *See* 29 U.S.C. § 218(a) (no provision of the Fair Labor Standards Act preempts another state or municipal law from "establishing a minimum wage higher than the minimum wage established under [the FLSA]. . . ."); Cal. Lab. Code § 1205(b) ("Nothing in this part shall be deemed to restrict the exercise of local police powers in a more stringent manner.") However, these federal and state provisions do not act as any form of consent by the federal or state government to be subject to local wage regulations.[4]

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[3] However, the Railway Labor Act, National Labor Relations Act, National Bank Act, Deregulation Act and Railroad Unemployment Insurance Act may preempt the Ordinance from applying to certain employees whose jobs are inextricably intertwined with interstate commerce. *See Am. Hotel & Lodging Ass'n v. City of Los Angeles*, --- F.3d.--- 2016 WL 4437618, at *5 (9th Cir. 2016) (city's minimum wage was not preempted by the NLRA); *but see AT&T Services, Inc. v. Peterson*, 163 F. Supp. 3d 583, 586 (D. Minn. 2016) (Labor Management Rights Act preempted state personal sick leave law because the court had to interpret the parties' collective bargaining agreement to determine whether the employer violated the state law).

[4] A 2015 case from the Supreme Court of Washington found that the city of SeaTac's local initiative to raise minimum wage to $15-per-hour applies to the Seattle-Tacoma Airport, even though the airport is owned and operated by the Port of Seattle, a separate public entity. *See Filo Food, LLC v. City of SeaTac*, 183 Wash. 2d 770

The state and arms of the state, such as school districts, enjoy sovereign immunity from local regulations, absent express consent to waive such immunity. *Laidlaw Waste Systems Inc. v. Bay Cities Services Inc.*, 43 Cal. App. 4th 630, 635 (1996). Other public agencies, such as cities and counties, are similarly excluded from local regulations that infringe on their sovereign governmental powers. *Johnson v. Arvin-Edison Water Storage Dist.*, 174 Cal. App. 4th 729, 738 (2009).[5] The purpose of sovereign immunity and the sovereign powers doctrine is to protect public entities from interference with their governmental function and purpose. *Regents of University of California v. Superior Court*, 17 Cal. 3d 533, 536 (1976). A public entity engages in "sovereign activity" immune from local regulation only in situations in which the public entity is operating in its governmental capacity, not its proprietary capacity. *Bame v. City of Del Mar*, 86 Cal. App. 4th 1346, 1356 (2001).

Whether a public entity is operating in its governmental or proprietary capacity depends on the "nature of the activity" in question, not who performed the activity or its location. *Rhodes v. City of Palo Alto*, 100 Cal. App. 2d 336, 341 (1950). As discussed below, a public entity acts in its governmental capacity when it acts to further the central purpose for which it was created. *Bame*, 86 Cal. App. 4th at 1356. A public entity acts in its proprietary capacity, generally, when it competes in the open market for services. *Guidi v. State of California*, 41 Cal. 2d 623, 627 (1953) (The state acts in its proprietary capacity when its acts "do not differ from those of private enterprise."). Thus, the Ordinance will infringe on a public entity's sovereign powers only if its application interferes with a governmental function of the public entity.

A. The Ordinance Does Not Apply to Public Entities Who Have Authority to Set Employee Compensation.

By definition, the Ordinance applies to those employees who qualify for California minimum wage. SDMC § 39.0104(b). Public employees are subject to the California minimum wage as prescribed in the Industrial Welfare Commission wage orders. As such, the Ordinance would apply to public employees absent law that would dictate otherwise. *See Sheppard v. North Orange County Regional Occupational Program*, 191 Cal. App. 4th 289, 299–300 (2010) (absent constitutional authority to the contrary, state minimum wage applies to employees of political subdivisions of the state); *Wells v. One2One Learning Foundation*, 39 Cal. 4th 1164, 1192 (2006) (governmental agencies are subject to legislation that applies to any "person" but are excluded if application of the legislation would infringe upon sovereign governmental powers).

Although public entities must comply with California minimum wage law, it does not follow that they also must comply with the Ordinance. The California Constitution grants the legislature specific authority to set a general minimum wage. Cal. Const. art. XIV, § 1. The City does not share this same constitutional authority. Instead, the City must use its general

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(2015). The court held that the local minimum wage did not interfere with the Port of Seattle's legislative authority to "operate" the airport free from interference from other municipalities." *Id.* at 789-790. Further, unlike California, Washington's minimum wage law mandates state agencies, such as the Port of Seattle, to comply with any federal, state or local law that is more favorable to employees. *Id.* at 792.

[5] The Regents of the University of California and charter cities and counties have constitutional immunity from local regulations that conflict with their plenary authority over internal and municipal affairs. *See Goldbaum v. Regents of University of California*, 191 Cal. App. 4th 703, 714-715 (2011); Cal. Const. art. XI § 11(a).

police power to enforce local wage laws, which is similar to the state legislature's police power to set state overtime and meal and rest break laws. *Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129 (1976). Thus, cases that interpret the limit of the state legislature's police power to set overtime and meal and rest break laws provide guidance on the limits of the City's police power.

Courts have exempted public entities from state labor laws that conflict with their sovereign powers. In *Johnson v. Arvin-Edison Water Storage Dist.*, 174 Cal. App. 4th 729 (2009), water storage district employees filed a class action against the district alleging failure to comply with California overtime and meal and rest break laws. The court used the following logic to hold that applying these state wage laws would infringe on the district's sovereignty.

> One of the statutory powers granted to the District to enable it to accomplish its purposes is the power to set employees' compensation. (Wat. Code §§ 39059, 43152, subd. (c).) [California Labor Code] Sections 510 [overtime] and 512 [meal and rest breaks] address matters of employee compensation. [Citation.] Accordingly, sections 510 and 512 would affect the District's power to accomplish its purposes and thus would infringe upon its sovereign powers. Therefore, the trial court correctly concluded that the District was exempt from the requirements of sections 510 and 512.

Id. at 739.

Similar to the water storage district in *Johnson*, the state, County, Port District, Airport Authority and public school districts all have statutory or constitutional authority to set employee compensation.[6] *See* Cal. Const., art. IV, § 12(e) (state legislature has authority to set salaries of state employees); Cal. Const. art. XI, § 1(b) (county has authority to "provide for the number, compensation, tenure, and appointment of employees"); Cal. Harb. & Nav. Code, App. 1, § 73 ("the salaries of the officers and employees shall be fixed by the board by ordinance"); Cal. Pub. Util. Code § 170015(h) (airport authority board of directors "shall adopt policies for the operation of . . . personnel policies," which includes the authority to set compensation); Cal. Education Code § 45022 ("The governing board of any school district shall fix and order paid the compensation of persons in public school service. . .") Therefore, the Ordinance does not apply to employees working for these public entities because it would interfere and infringe on the entities' sovereign authority to set employee compensation.

B. Private Businesses Located on a Public Entity's Property Must Comply with the Ordinance Unless Performing a Governmental Function.

The Ordinance expressly applies to private businesses, and state and federal laws permit the City to enforce more stringent wage laws against such businesses within its boundaries. *See* 29 U.S.C. § 218(a); Cal. Lab. Code § 1205(b). The presence of a private business located on property governed by the state, Port District or Airport Authority does not exempt the business from the Ordinance. *City of Los Angeles v. A.E.C. Los Angeles*, 33 Cal. App. 3d 933, 940 (1973); *Board of Trustees v. Los Angeles*, 49 Cal. App. 3d 45, 49 (1975) (the boundaries of a state

[6] This is not an exhaustive list. Many other districts – for example healthcare districts and community college districts – also have statutory or constitutional authority to set employee compensation. Cal. Health & Safety Code §§ 32000-32492; Cal. Educ. Code §§ 70900-70902.

agency are not enclaves free from all local regulation). As discussed below, private businesses only share the immunity of the public entity they are located on if they are performing a governmental, as opposed to a proprietary, function for that entity.

Generally, revenue producing activity, such as leasing property to a private vendor or retailer, is proprietary in nature and not immune from local regulation. *Id.* at 50; *Los Angeles Athletic Club v. Board of Harbor Commissioners of Los Angeles*, 130 Cal. App. 376, 386 (1933). In the *Board of Trustees* case, the court permitted the City of Los Angeles to enforce its local permit and fee requirements against a private operator who leased land owned by a state university to run a circus. *Board of Trustees*, 49 Cal. App. 3d. at 50. The court reasoned that the state acted in its proprietary capacity when it leased part of its property for "shows, fairs, exhibitions, swapmeets and circuses" because such events had "no relation" to the governmental function of the university to provide education. *Id.* at 47, 50. As such, the court declined to extend the state university's sovereign immunity to the private entrepreneur. *Id.* at 50; *see also Regents of University of California v. Superior Court*, 17 Cal. 3d 533, 537 (1976) (no sovereign protection from state usury law when "the University is acting in a capacity no different from a private university, corporation, or individual investing in a similar manner."); *Guidi*, 41 Cal. 2d at 627 ("(T)he state is acting in a proprietary capacity when it enters into activities . . . to amuse and entertain the public.").

In contrast, in *Bame v. City of Del Mar*, the court found that a state institution, the 22nd District Agricultural Association (District), was engaged in a governmental function when it rented space to a private event coordinator to fulfill its government purpose. *Bame*, 86 Cal. App. 4th at 1357. In that case, the City of Del Mar tried to assess fees and taxes on events conducted at the Del Mar Fairgrounds. The fairgrounds are maintained and operated by the District, which was created for the purpose of "holding fairs, expositions and exhibitions." *Id.* at 1351. In this circumstance, the court reasoned that the District acted in its governmental capacity when it leased its land to a private entity because the lease fulfilled the central purpose of the District to hold "fairs, expositions and exhibitions." *Id.* at 1357. Thus, the District's immunity from local taxes and fees extended to the private entity performing the District's governmental function. *Id.*

Applying the Ordinance to private employers located on property regulated by the Port District or Airport Authority will likely not affect the government function of these public entities because the Ordinance only regulates the terms and conditions of employment between the private employers and their employees. *See* Cal. Harb. & Nav. Code App. 1; Cal. Pub. Util. Code §§ 170000-170084. However, sovereign immunity may apply when the Port District or Airport Authority contracts with a private business to perform a governmental function. For example, the Airport Authority has the "exclusive responsibility to study, plan, and implement any improvements, expansion, or enhancements at San Diego International Airport." Cal. Pub. Util. Code § 170048(a). Any private business that contracts with the Airport Authority to study, plan, or implement any improvements, such as a consulting firm, may be exempt from the Ordinance as such work directly relates to a governmental function of the Airport Authority. *See Laidlaw Waste Systems Inc.*, 43 Cal. App. 4th at 638-39.

As issues or circumstances present themselves, this Office is able to further assist the Treasurer to help determine the applicability of the Ordinance to specific businesses located at the Port or Airport.

C. Application of the Ordinance to IHSS Workers Likely Infringes on the Sovereign Powers of the State.

The IHSS program is a state welfare program designed to avoid institutionalization of incapacitated persons. *See* Cal. Welf. & Inst. Code §§ 12300-12351. It provides supportive services to aged, blind, or disabled persons within the home of their choosing. The program compensates those persons who provide services to a qualifying person. *Id.* The California Department of Social Services promulgates regulations that implement the program, and local county welfare departments administer the program consistent with those regulations. *Guerrero v. Superior Court*, 213 Cal. App. 4th 912, 921 (2013). The County has established a public authority to administer in-home support services (Public Authority).[7] San Diego County Admin. Code, article IIIb.

IHSS workers are typically not classified employees of any public agency.[8] The state, County, Public Authority, and private recipient may all be joint employers[9] in various limited capacities. *See Id.* at 951 (the County of Sonoma and its corresponding Public Authority were joint employers of the IHSS workers for purposes of complying with California minimum wage and overtime laws); Cal. Welf. & Inst. Code § 12301.6(c)(1) (recipients of IHSS services act as employers to the extent they "retain the right to hire, fire, and supervise the work of any [IHSS] personnel providing services to them."). However, only the state has the authority to set IHSS worker compensation.

The courts look to the state's constitution and laws to determine whether a state agency has authority to set employee compensation. *See Johnson*, 174 Cal. App. 4th at 739 (state overtime and meal and rest break laws did not apply because the water storage district had express statutory authority to set employee compensation); *Curcini v. County of Alameda*, 164 Cal. App. 4th 629 (2008) (state overtime and meal and rest break provisions did not apply because a charter county had constitutional authority to set compensation); *County of Sonoma v. Superior Court*, 173 Cal. App. 4th 322 (2009) (statute governing arbitration of labor disputes improperly interfered with county's constitutional authority to set employee compensation). In 2012, the state legislature approved legislation that designated the California In-Home Support Services Authority (Statewide Authority) as the sole employer of record for collective bargaining, payroll, unemployment insurance, and workers' compensation purposes. Cal. Gov't Code § 110000-110036; Cal. Welf. & Inst. Code §§ 12301.6(i), 12302.2, 12302.25(a). Additionally, if the Statewide Authority and an IHSS union reach an impasse on wages and exhaust all avenues to resolve the dispute, the California legislature has the final authority to determine whether to approve the Statewide Authority's last, best, and final offer. *See* Cal. Gov't Code § 110032. The state's exclusive authority to collectively bargain with IHSS workers and

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[7] The County may deliver IHSS services under the IHSS program by (1) directly hiring classified personnel to perform the services, (2) contracting with a city, county, health district, nonprofit, proprietary agency or individual, or (3) making direct payments to the recipient for purchase of services. Cal. Welf. & Inst. Code § 12302. The County may also elect to establish, by ordinance, a public authority to provide for the delivery of in-home supportive services. *Id.* at § 12301.6(a)(2).

[8] IHSS workers are entitled to State minimum wage and, as such, fall within the intended reach of the Ordinance. *Guerrero*, 213 Cal. App. 4th at 957.

[9] "Joint employment occurs when two or more persons engage the services of an employee in an enterprise in which the employee is subject to the control of both." *In–Home Supportive Services v. Workers' Comp. Appeals Bd.*, 152 Cal. App. 3d 720, 732 (1984).

resolve an impasse on wages shows that the state *does* have the ultimate sovereign power to set wages and that application of the Ordinance would necessarily interfere with the state's power to control its treasury. *See Dugan v. Rank*, 372 U.S. 609, 620 (1963) (Sovereign immunity bars any action that "would expend itself on the public treasury or domain, or interfere with the public administration. . .").[10]

II. THE ORDINANCE DOES NOT APPLY WITHIN FEDERAL ENCLAVES.

"A federal enclave is land over which the federal government exercises legislative jurisdiction." *Taylor v. Lockheed Martin Corp.*, 78 Cal. App. 4th 472, 478 (2000). An enclave is created when a state cedes jurisdiction over land within its borders to the federal government and Congress accepts that cession. U.S. Const. art. I, § 8, cl. 17. These enclaves include military bases, federal facilities, and even some national forests and parks. The California Lands Commission can provide guidance on whether a parcel of property falls within a federal enclave.

When an area becomes a federal enclave, Congress assumes legislative power over that area. *Lockhart v. MVM, Inc.*, 175 Cal. App. 4th 1452, 1457 (2009). Any state or local law which was in effect at the time the land was ceded, and which is not inconsistent with federal law, will continue to apply within the enclave unless Congress declares otherwise. *Id.* at 1458. Congress may also expressly permit a state or local law to apply to a federal enclave. *Id.*

Here, the Ordinance was not in existence at the time any federal enclaves within the City were ceded by the state, and Congress has not expressly consented to application of the Ordinance. Thus, the Ordinance will not apply to any work performed by a private or public employee or contractor within the boundaries of a federal enclave.

III. AN EMPLOYER MUST GENERALLY COMPLY WITH THE ORDINANCE FOR EMPLOYEES DRIVING WITHIN THE CITY AT THE EMPLOYER'S DIRECTION.

The Ordinance applies to an employee required by his or her employer to drive or otherwise travel in San Diego for work purposes. For this discussion, it is important to distinguish between time spent driving that an employer specifically compels and controls versus an ordinary commute that employees take on their own. Under California law, the former is considered to be "hours worked" and therefore compensable time, while the latter is not. *See* Opinion Letter of Department of Industrial Relations, Division of Labor Standards Enforcement (DLSE), dated February 16, 1994, entitled "Opinion Regarding Travel Time and Unsolicited

[10] A recent unpublished decision questioned whether the power to engage in collective bargaining equates to authority to set wages. *Woodruff v. County of San Diego In-Home Support Services*, 2014 WL 2861431 (June 24, 2014). However, the reasoning of *Woodruff* likely does not apply here because the case analyzed the IHSS situation in San Diego County as of 2008, but in 2012 the state legislature amended the governance structure of IHSS. *Woodruff*, at *7, n.8. The *Woodruff* case also suggested that a joint employment relationship between the private recipient of IHSS services and the public entity administering the service may obligate the public entity to comply with laws that would apply to private recipient employer, but this reasoning is faulty. *Id.* at *16. The state, not the private recipient, has the sole authority to set IHSS worker compensation. The private recipient has no obligation to comply with the Ordinance or provide any wages. SDMC § 39.0104(c). Thus, even if the state was subject to the obligations of the private recipient, this would not require the state to comply with the Ordinance. Moreover, the case is unpublished and thus has no precedential authority or value.

Opinion Regarding On-Call Time and Recoverable Expenses," at 3.[11] Pursuant to California Code of Regulations, Title 8, section 11150(2)(H), "'hours worked' means the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so."

An ordinary commute generally encompasses the amount of time it takes for an employee to get to or from his or her normal work site if such employee generally works at a fixed location. Such travel time is not considered hours worked because the employee is not subject to the control of the employer during such period. *See Morillion v. Royal Packing Co.*, 22 Cal. 4th 575, 587 (2000). Pursuant to federal law, "[a]n employee who travels from home before his regular workday and returns to his home at the end of the workday is engaged in ordinary home to work travel which is a normal incident of employment. This is true whether he works at a fixed location or at different job sites. Normal travel from home to work is not compensable." 29 C.F.R. § 785.35.

If an employee begins and ends his or her work shift at the same location, the ordinary commute from work back home is not compensable. *Id.* However, if an employee ends his or her work shift at a different location than where the shift began, and such arrangement is purely for the benefit of the employer, then the employee's travel time to the employee's starting work location is compensable.[12] *Id* at 7.

Likewise, if an employee is required to drive or otherwise travel in San Diego by his or her employer for work purposes, then the employer is obligated to comply with the Ordinance if the employee works at least two hours in any given week within the geographic boundaries of the City. *Id.*; *See* SDMC § 39.0104. In these situations, whether the driving or travel was done during normal work hours is irrelevant. *See* Opinion Letter of DLSE, dated February 21, 2002, entitled "Whether Time Spent Traveling on an Out-of-Town Business Trip Constitutes 'Hours Worked,'" at 1-2.

Some examples where the provisions of the Ordinance are triggered may include where an employee is a delivery driver or is required to drive to and within San Diego to attend a meeting or a training within City limits.

In situations where an employee does not generally work from a fixed location, such as may be the case with a repair technician that goes from site-to-site to repair machines under a service contract, the travel time is compensable when it is being done at the request of the employer and the employer exercises a substantial level of control over the employee during such time. *See Morillion*, 22 Cal. 4th at 587. In *Morillion*, the employer required its employees to travel to its agricultural work site on its buses, such that the employees were under the

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[11] The opinions of the DLSE are instructive because the City's minimum wage law is based on the State's minimum wage law and the State Labor Commissioner has the ability to enforce local minimum wage laws. SDMC § 39.0104; Cal. Lab. Code § 1197.1(h).

[12] Employers may establish a different pay scale for travel time versus regular work time, but in no event can such compensation for travel time be less than the higher of California or San Diego minimum wage. *Id.*; SDMC § 39.0107(b)(4).

employer's control while they were on the bus. *Id.* The Court cited the inability to run errands during the employee's commute as indicative of the employer's control over the employee's time. *Id.*

Similarly, travel that involves a substantial distance from the assigned work place to a distant work site to report to work on a short-term basis is compensable travel time. *See* Opinion Letter of DLSE, dated April 22, 2003, entitled "Travel Time Pay for Employee with Alternative Worksites," at 2.

However, in the case of training held in or within a reasonable distance of the area where the employee is usually employed, there is no requirement that the travel time be compensated so long as the time actually spent in training is compensated. *See* Opinion Letter of DLSE, dated February 16, 1994, entitled "Opinion Regarding Travel Time and Unsolicited Opinion Regarding On-Call Time and Recoverable Expenses," at 7.

In addition, an employee's commute is not typically compensable even "when the employee commutes in a vehicle that is owned, leased, or subsidized by the employer." Cal. Lab. Code § 510(b). However, the travel time may be compensable if it is properly classified as "hours worked." In some instances, the provision of employer-provided transportation to an employee may require the employer to compensate the employee for time spent travelling before or after regular work hours. *See Rutti v. Lojack Corporation, Inc.* 596 F.3d 1046, 1061 (9th Cir. 2010). Such is the case where the employee is subject to the control of the employer. *Id.* In the *Rutti* case, the court found that compensation was owed where a Lojack employee "was *required* to drive the company vehicle, could *not* stop off for personal errands, could *not* take passengers, was required to drive the vehicle *directly* from home to his job and back, and could *not* use his cell phone while driving except that he *had* to keep his phone on to answer calls from the company dispatcher." *Id.* at 1061-62. However, the California Court of Appeal has held that no compensation was owed by Disneyland to its employees for travel time on an employer-provided shuttle where the employees were free to choose alternate means of transportation to work. *Overton v. Walt Disney Co.*, 136 Cal. App. 4th 263, 270-72 (2006).

In the event that a particular employer or employee is not a resident of California, additional analysis will need to be conducted on a case-by-case basis to determine whether such employer is legally bound to comply with the Ordinance. As set forth in the June 2014 Memo, there are a number of legal issues to consider,[13] including: (1) the burden on interstate commerce

[13] Another legal issue that would have to be considered (which was not discussed in the June 2014 Memo) is whether a California court would have jurisdiction to enforce the Ordinance against an out-of-state employer. A court would look to whether such employer had sufficient minimum contacts in California so as to render the exercise of jurisdiction over them by the California courts consistent with traditional notions of fair play and substantial justice. *See Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). There are essentially two ways for a California court to assert jurisdiction over an out-of-state employer: (1) the employer's affiliations with California are so continuous and systematic as to render them essentially at home in California; or, (2) with regard to claims related to the employer's activities or contacts in California, the employer purposefully directed its activities or consummated a transaction within California or otherwise purposefully avails itself of the privilege of conducting activities in California so as to invoke the benefits and protections of California law. Once it is established that the out-of-state employer purposefully availed itself of the privilege of conducting activities in California and the claim arose out of those activities in California, the burden would shift to the out-of-state employer to present a compelling

versus the local benefits of the Ordinance; (2) extraterritoriality—specifically, how greatly the Ordinance interrupts an employer's otherwise lawful conduct outside the City's boundaries and whether the City can justify that such disruption is an appropriate exercise of the City's police power; and (3) conflict of law, which would require a court to determine which state's laws apply if there is a conflict between the Ordinance and a similar law in another state. In order to resolve a conflict of law, a court "evaluates and compares the nature and strength of the interest of each jurisdiction in the application of its own law... and then ultimately applies the law of the state whose interest would be the more impaired if its law were not applied." *Sullivan v. Oracle Corp.*, 51 Cal. 4th 1191, 1202 (2011) (citations and internal quotations omitted).

Based on the foregoing, the applicability of the Ordinance to non-resident employers and employees would have to be analyzed on a case-by-case basis. This Office will provide further legal analysis as needed.

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case that the exercise of jurisdiction would not be reasonable. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477-78 (1985).

CONCLUSION

The Ordinance applies, generally, to all individuals who perform at least two hours of work within the geographic boundaries of the City and qualify for payment of California minimum wage. The Ordinance was passed pursuant to the City's constitutional police powers and although these powers are co-extensive with the state, they are not without limit. The Ordinance is inapplicable to the extent it is preempted or interferes with the governmental purpose or function of a public entity. Pursuant to these principles, the Ordinance will generally not apply to public employees and private businesses performing a governmental function on behalf of a federal, state or local government agency. Further, the Ordinance will not apply to work performed within federal enclaves. Lastly, the Ordinance generally applies to individuals driving through the City if an employee is driving at the direction of his or her employer. If the employer or employee is a nonresident of California, however, there are legal concerns that may prohibit the City from enforcing the Ordinance which would need to be evaluated on a case-by-case basis.

JAN I. GOLDSMITH, CITY ATTORNEY

By /s/ Gregory J. Halsey
Gregory J. Halsey
Deputy City Attorney

By /s/ Kenneth So
Kenneth So
Deputy City Attorney

GJH:KS:sc
ML-2016-16
Doc. No.: 1369922
Attachment 1: City Att'y MS 2014-11 (June 6, 2014)
cc: Mayor Kevin Faulconer
Scott Chadwick, Chief Operating Officer

Office of
The City Attorney
City of San Diego

MEMORANDUM
MS 59

(619) 236-6220

DATE: June 6, 2014

TO: Todd Gloria, Council President

FROM: City Attorney

SUBJECT: Enforcement of Local Minimum Wage on Nonresident Employers

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INTRODUCTION

You have requested that this Office review a draft ordinance entitled "City of San Diego Earned Sick Days and Minimum Wage Ordinance," (Ordinance) to identify any significant legal challenges that could prevent the City from enforcing the Ordinance. This Ordinance, if approved, would add to the San Diego Municipal Code to raise minimum wage for employees working in the City of San Diego (City) and provide employees with paid sick leave.

This Memorandum provides an overview of the most significant legal issues associated with enforcing the Ordinance on nonresident employers[1] with employees who temporarily work within the City's limits. This Memorandum is not intended to address every possible legal argument, but only those that this Office has identified as the strongest.

The Ordinance seeks to protect employees working within the geographic boundaries of the City by regulating their employers, regardless of where their employers are physically located. As drafted, the Ordinance would apply to a nonresident employer who sends an employee to the City for a business meeting, convention, or any other temporary work assignment. The Ordinance would also protect those employees who work full time in the City as a telecommuter for a nonresident employer.

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[1] Nonresident employers include out-of-state or out-of-city employers. This includes employers who are incorporated or headquartered out-of-state or who do not regularly conduct business within the City's geographical boundaries.

QUESTION PRESENTED

Can the City enforce the Ordinance on nonresident employers with employees working within the geographic boundaries of the City?

SHORT ANSWER

To enforce the Ordinance on nonresident employers whose employees work within the City's limits, the City may have to overcome challenges based on the dormant Commerce Clause, the prohibition against extraterritoriality, and conflict of laws. Whether the City will overcome these legal challenges will depend on the strength of the City's legitimate reasons for enforcement, the burden this enforcement may have on interstate commerce, and the unique factual circumstances in each particular case.

ANALYSIS

We have been unable to find any authority directly on point regarding the enforcement of a municipal minimum wage ordinance on nonresident employers. However, it is important to note that, to date, no court has upheld or overturned any municipal minimum wage or paid sick leave ordinance in California. San Francisco's minimum wage and paid sick leave ordinance has been enforced, without dispute, since 2004.

The strongest legal challenges against the enforcement of the Ordinance on nonresident employers whose employees work within the City include: the dormant Commerce Clause, the prohibition against extraterritoriality, and conflict of laws.

I. THE DORMANT COMMERCE CLAUSE LIMITATION

The Commerce Clause of the United States Constitution empowers Congress to "regulate commerce with foreign nations, and among the several states." U.S. Const. art. I, § 8. This clause impliedly limits the power of state and local governments to enact laws affecting interstate commerce. *See Healy v. Beer Institute*, 491 U.S. 324, 326 n.1 (1989). This implied limitation on state and local powers is referred to as the "dormant" Commerce Clause.

The dormant Commerce Clause prohibits state and local laws that regulate "commerce occurring wholly outside the boundaries of a State." *Healy*, 491 U.S. at 336. The "central rationale" of the dormant Commerce Clause "is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent." C *& A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994).

Whether a local law violates the dormant Commerce Clause depends on how the local law regulates interstate commerce. When a local law "directly regulates or discriminates against interstate commerce . . . [courts] have generally struck down the [law] without further inquiry." *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 579 (1986). But when a local law "regulates even-handedly to effectuate a legitimate local public interest,

and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Although there is no bright line separating these two categories of regulation, "[i]n either situation the critical consideration is the overall effect of the statute on both local and interstate activity." *Brown–Forman*, 476 U.S. at 579.

A local law "discriminates" against interstate commerce when it provides favorable treatment to in-state economic interests and burdens out-of-state economic interests. *Pacific Merchant Shipping Assn. v. Voss*, 12 Cal. 4th 503, 517 (1995). "Such discrimination may take any of three forms: first, the state statute may facially discriminate against interstate or foreign commerce; second, it may be facially neutral but have a discriminatory purpose; third, it may be facially neutral but have a discriminatory effect." *Id.*

Although no California court has identified minimum wage as a nondiscriminatory law,[2] the California Supreme Court recently recognized California's overtime law as nondiscriminatory. In *Sullivan v. Oracle Corp.*, 51 Cal. 4th 1191 (2011), the Court found that California's overtime requirement does not discriminate against out-of-state workers temporarily working in California because it "regulates even-handedly to effectuate the legitimate local public interest . . . [such as] protecting health and safety, expanding the job market, and guarding against the evils of overwork." *Id.* at 1201.

The enforcement and regulation of California's overtime law closely mirrors that of the Ordinance. Both are facially neutral and regulate even-handedly across all industries without a discriminatory purpose or effect against out-of-state economic interests. Thus, by analogy, the Ordinance likely does not "discriminate" against interstate commerce. Its effect on interstate commerce is likely "incidental" and, therefore, permissible unless the "burdens of the [ordinance] . . . so outweigh the putative benefits as to make the [ordinance] unreasonable or irrational." *Alaska Airlines, Inc. v. City of Long Beach*, 951 F.2d 977, 983 (9th Cir. 1991).

A. A State Or Local Law Cannot Excessively Burden Interstate Commerce

Whether a court will tolerate the burden the proposed minimum wage law imposes on interstate commerce will "depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Pike*, 397 U.S. at 142.

The decision in *Air Transport Ass'n of America v. City and County of San Francisco*, 992 F. Supp. 1149 (N.D. Cal. 1998) (*Air Transport*) illustrates the degree by which a local ordinance may burden interstate commerce. In *Air Transport*, a group of airline trade organizations challenged a provision of the San Francisco Administrative Code section 12B.1(b) that requires contractors with the city to apply nondiscriminatory benefit packages to employees of "any of

[2] The Washington Supreme Court held that Washington's state Minimum Wage Act was nondiscriminatory, did not violate the dormant Commerce Clause, and could be applied to interstate truckers who drove through the state. *Bostain v. Food Exp., Inc.*, 159 Wash. 2d 700, 718-19 (2007).

[the] contractor's operations elsewhere in the United States." *Id.* at 1157.[3] In effect, this provision requires every employer who has a contract with San Francisco to provide nondiscriminatory benefit packages to its employees anywhere in the United States. *Id.* at 1162. Although the challenged ordinance did regulate conduct outside the city's boundaries, the Court found that it did not excessively burden interstate commerce in violation of the dormant Commerce Clause because San Francisco's "local interest in dissociating the City from discrimination justifies the minor burden of requiring companies to modify discriminatory benefit plans . . . ." *Id.* at 1165.[4]

The ordinance in *Air Transport*, however, is distinct from the Ordinance. In *Air Transport*, the challenged ordinance was enacted under San Francisco's authority to contract and only affected those employers in a contractual relationship with the City of San Francisco. Here, the Ordinance is proposed under the City's police powers and will affect all employers with employees working in the City limits, regardless of whether they have a contract with the City. Although there is no case law on point, it is likely that the across-the-board application of the Ordinance to every worker who works at least two hours in the City's limits impacts interstate commerce to a greater degree than San Francisco's ordinance in *Air Transport*.

Conversely, the City may argue that its local interest in enforcing the Ordinance is greater than San Francisco's interest in *Air Transport*, and the stronger the local interest, the more that local law may appropriately burden interstate commerce. Arguably, the City has a greater interest in the Ordinance because it affects all employees working in the City and is proposed to safeguard workers' health and safety. However, there is no case law directly addressing whether these factors increase a City's local interest in enforcement.

One court has found California's minimum wage to substantially burden interstate commerce in at least one circumstance. In *Fitz-Gerald v. Skywest Airlines, Inc.*, 155 Cal. App. 4th 411 (2007), the court held – with little analysis – that California's minimum wage law, as applied to flight attendants for a regional airline, violated the dormant Commerce Clause because it substantially burdened interstate commerce by disrupting "stable relations between labor and management in the national transportation industry." *Id.* at 422. But this decision does not provide much guidance here because it concerned a specific scenario involving flight attendants covered under the Railway Labor Act.[5]

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[3] San Francisco Administrative Code section 12B.1(b) requires that "every City contract incorporate language whereby the prime contractor agrees that it will not discriminate in the provision of employee benefit during the term of the contract." *Air Transport*, 992 F. Supp. at 1157.

[4] The *Air Transport* Court did find that this provision of the challenged ordinance violated the dormant Commerce Clause's prohibition against extraterritorial regulation. *Air Transport*, 992 F. Supp. at 1164. Even if a local law is facially neutral and does not excessively burden interstate commerce, it may still violate the dormant Commerce Clause if it impermissibly regulates out-of-state conduct. *See BMW of North America, Inc. v. Gore*, 517 U.S. 559, 573 (1996) (a State cannot penalize "conduct that was lawful where it occurred and that had no impact on [the State] or its residents").

[5] The Railway Labor Act, National Bank Act, and Deregulation Act may exempt certain employees whose job is inextricably intertwined with interstate commerce from being subject to the Ordinance.

Ultimately, to analyze whether the Ordinance violates the dormant Commerce Clause, a court would conduct a fact based analysis to weigh the local benefits against the burden on interstate commerce. The more the burden on interstate commerce outweighs the putative local benefits, the more likely a court would find that the local law violates the dormant Commerce Clause. Thus, any adjustments that lessen the burden on interstate commerce increase the likelihood of the Ordinance surviving a constitutional challenge.

B. How Other Municipalities Have Lessened The Burden On Interstate Commerce

We have reviewed local minimum wage ordinances proposed or enacted by other California municipalities to evaluate how they combat potential constitutional challenges. The two examples below highlight a potentially effective method.

The City of San Jose's minimum wage ordinance lessens the burden on interstate commerce by narrowing the definition of "employer." Specifically, San Jose Municipal Code Chapter 4.100, section 4.100.030, subsection C, provides:

> "Employer" shall mean any person, including corporate officers or executives, as defined in Section 18 of the California Labor Code, who directly or indirectly through any other person, including through the services of a temporary employment agency, staffing agency or similar entity, employs or exercises control over the wages, hours or working conditions of any Employee *and who is either subject to the Business License Tax Chapter 4.76 of the Municipal Code or maintains a facility in the City.*

San Jose Municipal Code § 4.100.030(C) (emphasis added).

Likewise, the City of Eureka's proposed minimum wage ordinance also narrowly defines "employers" subject to the local minimum wage as follows:

> "Employer" shall mean any person, including corporate officers or executives, as defined in Section 18 of the California Labor Code, who: 1) directly or indirectly through any other person, including through the services of a temporary employment agency, staffing agency or similar entity, employs or exercises control over the wages, hours or working conditions of any Employee; and 2) is either subject to Business License Tax Chapter 110 of the Municipal Code of the City of Eureka or assigns an Employee or Employees to perform work within the geographic boundaries of the City.

City of Eureka, Eureka Fair Wage Act Ordinance (Nov. 4, 2014 Ballot).

These ordinances lessen the likelihood of a constitutional challenge because they condition the enforcement of a local minimum wage on an identifiable link between the employer and the municipality. This link narrows the field of employers subject to the local minimum wage to include primarily those employers the municipality has the greatest interest in regulating. This lessened burden on nonresident employers coupled with the increase in the municipality's interest in enforcement greatly enhances the likelihood that the ordinance would defeat a constitutional challenge.

II. THE PROHIBITION AGAINST EXTRATERRITORIALITY

Local governments may not regulate beyond their boundaries. Article XI, section 7 of the California Constitution provides: "A county or city may make and enforce within its limits all local police, sanitary, and other ordinances and regulations not in conflict with general laws." Cal. Const. art. XI, § 7.

Courts and the Office of the Attorney General have interpreted this provision to mean that "the police powers of cities and counties granted under the Constitution do not extend beyond their territorial limits." 74 Op. Cal. Att'y. Gen. 211 (1991); *City of Oakland v. Brock*, 8 Cal. 2d 639, 641 (1937) ("[a] municipal corporation has generally no extraterritorial powers of regulation.") But courts will not invalidate every local law with extraterritorial *effects*, "municipalities may exercise certain extraterritorial powers when the possession and exercise of such powers are essential to the proper conduct of the affairs of the municipality." *Ex Parte Blois*, 179 Cal. 291, 296 (1918); *see City of South Pasadena v. Pasadena Land & Water Co.*, 152 Cal. 579 (1908), (California Supreme Court affirmed the power of a municipality to exercise extraterritorial power to construct and maintain a system of waterworks outside of its boundaries in order to ensure a supply of water for its inhabitants.)

The decision in *Burns Int. Sec. Services Corp. v. County of Los Angeles*, 123 Cal. App. 4th 162 (2004), addresses a municipal ordinance with acceptable extraterritorial effects. In *Burns*, the court held that a county ordinance requiring companies contracting with the county to offer up to five days of compensation to all full-time employees while serving on a jury was not invalid despite its extraterritorial effect. The county argued that the ordinance was necessary because private companies were increasingly reducing or eliminating paying employees' salaries while they served on juries, thus reducing the number of potential jurors and increasing the burden on the county and other employers who do make those payments. The court reasoned that this justification showed that the county was *not* seeking "to enlarge its powers or regulate outside its boundaries," or to force employers to change their behavior outside the county. *Id.* at 172. Further, the remedies provided by the ordinance were effective only within the county's territorial boundaries. *Id.*

Here, the Ordinance could have an extraterritorial effect because it requires employers located outside of the City to pay a heightened minimum wage and provide paid leave benefits to workers who temporarily or permanently work inside the City limits. However, similar to the dormant Commerce Clause analysis, whether these extraterritorial effects impermissibly regulate conduct outside the City's boundaries will depend on how greatly this ordinance interrupts an employer's otherwise lawful conduct outside the City's boundaries and whether the City can justify that such disruption (if any) is an appropriate exercise of the City's police power.

III. APPLYING CONFLICT OF LAW ANALYSIS

Assuming that the Ordinance does not violate the dormant Commerce Clause and does not improperly regulate beyond the City's authority, if an employer challenges the application of the

proposed minimum wage law to its out-of-state[6] workers working in the City, a court will conduct a "conflict of law" analysis to determine whether to apply the local minimum wage.

The "conflict of law" analysis (also termed the governmental interest analysis) is a test a court uses to determine which law applies when the parties contend that different laws apply. If a court finds that there is a true conflict between the laws, it "evaluates and compares the nature and strength of the interest of each jurisdiction in the application of its own law . . . and then ultimately applies the law of the state whose interest would be the more impaired if its law were not applied." *Sullivan v. Oracle Corp.*, 51 Cal. 4th 1191, 1202 (2011) (citations omitted) (internal quotations omitted).

The California Supreme Court recently applied this test in *Sullivan v. Oracle Corp.*, 51 Cal. 4th 1191 (2011). In *Sullivan*, Oracle, a corporation headquartered in California, challenged the application of California's overtime law to three of its non-resident employees who temporarily worked in California. Over a three-year period, the three employees worked a total of 74, 110, and 20 days, respectively, in California. *Id.* at 1195. Oracle argued that the law of these employee's resident states, Colorado and Arizona, should apply during the time they worked in California. The Court disagreed, however, and found that California had the strongest interest in having its overtime law apply because not applying it would "completely sacrifice, as to those employees, the state's important public policy goals of protecting health and safety and preventing the evils associated with overwork." *Id.* at 1205. Also, the Court downplayed Colorado's and Arizona's "general interest in providing hospitable regulatory environments to businesses" because their "interest is not perceptibly impaired by requiring a California employer to comply with California overtime law for work performed here." *Id.* at 1206.

The decision in *Sullivan* should not be interpreted to mean that California's overtime provisions always apply to every out-of-state worker who works any amount of time – no matter how brief – in California. The Court narrowed its holding to these circumstances where the workers had worked in California, for a California employer, for "entire days and weeks." *Id.* at 1200. Indeed, the Court has previously intimated that California's wage laws may not apply to "nonresident employees [who] enter California temporarily during the course of the workday." *Tidewater Marine W., Inc. v. Bradshaw,* 14 Cal. 4th 557, 578 (1996). Therefore, although the *Oracle* decision recognized the strength of a local jurisdiction's interest in enforcing its own labor laws on out-of-state workers, it should not be interpreted broadly to disregard the interest that the out-of-state worker's home state has in applying its wage laws.[7]

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[6] The conflict of law analysis would likely not apply in a case where out-of-city worker was a California resident because the California legislature has explicitly permitted local jurisdictions to exercise their police powers to establish labor laws more strict than California's state labor laws. *See* Cal. Lab. Code § 1205(b).

[7] Procedurally, the City must establish personal jurisdiction over any out-of-state employer in order to enforce the Ordinance in California court. Due process permits state courts to exercise personal jurisdiction over nonresidents who have "minimum contacts" with the forum state. "Minimum contacts" means the relationship between the nonresident and the forum state is such that the exercise of jurisdiction does not offend "traditional notions of fair

Whether a court would allow the Ordinance to protect out-of-state workers temporarily working in the City will depend on whose interest – the City's or the worker's home state's – would be most impaired if its law were not applied. Case law suggests that the longer an out-of-state worker works in the City, the greater the interest the City has in applying its local labor laws.

CONCLUSION

There are three significant legal issues that could impact the ability of the City to enforce the Ordinance on nonresident employers whose employees work within the City's limits. These include: the dormant Commerce Clause, the prohibition against extraterritoriality, and the conflict of laws analysis. The legal analysis associated with each of these legal challenges is very fact intensive, and the outcome may vary on a case by case basis. Nevertheless, generally, the stronger the City's legitimate reasons for enforcing the Ordinance and the less this Ordinance burdens interstate commerce, the more likely a court will permit the City to enforce this ordinance on nonresident employers whose employees temporarily or permanently work within the City's geographical boundaries.

JAN I. GOLDSMITH, CITY ATTORNEY

By /s/ Gregory J. Halsey
Gregory J. Halsey
Deputy City Attorney

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Doc. No.: 790914
MS-2014-11

cc: Mayor Kevin Faulconer
All Councilmembers

play and substantial justice" under the U.S. Constitution's Fourteenth Amendment Due Process Clause. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (citations omitted); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985). Traditional factors that can establish "minimum contacts" between an employer incorporated and headquartered out-of-state and California include: purposefully conducting business in California, the presence of evidence and witnesses in California, the absence of an alternative forum where the claim could be litigated, and the costs and burdens to the litigants of bringing or defending the action in California rather than elsewhere. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).