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MEMORANDUM OF LAW

DATE: November 30, 2016

TO: Gail Granewich, City Treasurer

FROM: City Attorney

SUBJECT: Interpretation of San Diego Municipal Code Section 39.0105(g)

INTRODUCTION

The City of San Diego's Earned Sick Leave and Minimum Wage ordinance, as set forth in San Diego Municipal Code (SDMC) sections 39.0101-39.0116 (Ordinance), requires employers to provide specified paid sick leave and minimum wage to employees working in the geographic boundaries of the City. The City Council (Council) adopted the Ordinance in 2014, the Ordinance was then subject to a referendum and approved by the voters in June 2016.

On July 11, 2016, the Council considered an implementing ordinance to clarify ambiguities and establish an enforcement office. As part of the implementing ordinance, the Council added the following language to section 39.0105(g) (Section (g)) of the Ordinance:

An Employer who provides greater paid time off, either through a contract, collective bargaining agreement, employment benefit plan, or other agreement, than that required by this Division, is deemed to be in compliance even if the Employer utilizes an alternative methodology for calculation of, payment of, and use of Earned Sick Leave or other paid time off that can be used as Earned Sick Leave.

The Ordinance, in its current form, took effect on September 2, 2016. The City Treasurer has asked this Office to analyze the meaning and effect of Section (g).

QUESTIONS PRESENTED

1. What is the meaning of the term "greater paid time off" as used in Section (g)?
2. Can an employer provide "greater paid time off" by providing more than 40 hours of paid holidays in a benefit year?

3. What is meant by the phrase “alternative methodology for calculation of, payment of, and use of Earned Sick Leave,” as used in Section (g)?

SHORT ANSWERS

1. To provide “greater paid time off,” as used in Section (g), an employer must provide more generous compensated leave than that required under the Ordinance. The Ordinance requires employers to provide “Earned Sick Leave,” which is paid leave that accrues at a specified rate, is compensated at an employee’s regular rate of pay, and may be used for specific enumerated purposes. Compensated leave qualifies as “greater paid time off” if it meets the minimum accrual, compensation and use requirements of Earned Sick Leave and also (1) accrues at a faster rate, (2) is compensated at a higher rate, or (3) is allowed to be used for more purposes than those enumerated in the Ordinance. If an employer’s paid time off (PTO) policy provides an enhanced benefit in one or more of these three categories and otherwise complies with the minimum requirements for the remaining two categories, then the employer’s PTO policy will qualify as “greater paid time off . . . than that required by this Division,” as that term is used in Section (g).

2. No. A PTO policy that provides for more than 40 hours of paid holidays in a benefit year does not qualify as “greater paid time off” than that required by the Ordinance because paid time off for holidays is fixed on certain dates and cannot be used for a sick day or any of the other permitted purposes for Earned Sick Leave.

3. Employers who provide “greater paid time off” than required by the Ordinance may use alternative methods for the accrual, payment and use of Earned Sick Leave, provided such methods do not frustrate the purpose of the Ordinance or lead to an absurd result.

ANALYSIS

I. A COURT WILL APPLY THE RULES OF STATUTORY CONSTRUCTION TO INTERPRET THE ORDINANCE.

An ordinance is a local law adopted with the legal formality of a statute. *City Firefighters, Local 145, AFL-CIO v. Board of Admin.*, 206 Cal. App. 4th 594, 607 (2002) (citations omitted). In interpreting an ordinance, a court will use the rules of statutory construction. The primary task of these rules is to determine the intent of the Council so as to effectuate the purpose of the law. *Kane v. Hurley*, 30 Cal. App. 4th 859, 862 (1994); *Crespin v. Kizer*, 226 Cal. App. 3d 498, 509 (1990).

To ascertain legislative intent, a court will look to the “plain and common-sense meaning” of the words of the statute. *Flannery v. Prentice*, 26 Cal. 4th 572, 577 (2001). If the plain meaning of the statute’s text does not resolve the interpretation question, a court will then consider extrinsic sources such as legislative history, public policy, settled rules of statutory construction, and an examination of the evils to be remedied and the legislative scheme encompassing the statute in question. *Day v. City of Fontana*, 25 Cal. 4th 268, 272, (2001); *People v. Connor*, 115 Cal. App. 4th 669, 678 (2004). A court will “select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting

rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.” *People v. Jenkins*, 10 Cal. 4th 234, 246 (1995).

Municipal Code section 39.0101 expressly declares the purpose and intent of the Ordinance:

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

Section (g) should be construed to give effect to the purpose and intent of the Ordinance as stated in the law itself.¹

II. THE DEFINITION OF “GREATER PAID TIME OFF” AS USED IN SECTION (G) IS CLEAR FROM THE TEXT OF THE ORDINANCE.

The meaning of “greater paid time off,” as used in Section (g), is clear from the text itself. Section (g) excuses employers who provide “greater paid time off . . . than that required by this Division”² from select provisions of the Ordinance. SDMC § 39.0105(g). To determine whether a benefit is “greater” than that required by a law, a court would look to what that law requires.

The paid time off required by the Ordinance is Earned Sick Leave, which is defined as, “accrued increments of compensated leave provided by an *Employer* to an *Employee* as a benefit of the employment for use by the *Employee* during an absence from the employment because of a qualifying medical condition or event, as specified in section 39.0106 of this Division.” SDMC § 39.0104. The Ordinance defines how an employee accrues Earned Sick Leave, the rate at which the leave must be compensated, and the specific instances for which the employee must be allowed to use the leave. SDMC §§ 39.0105(b)-(e), 39.0106. These three provisions of Earned Sick Leave – accrual, compensation, and use – form the foundation of the earned sick leave benefit. The definition of Earned Sick Leave necessarily entails more than just paid time off work, it is paid time off that (1) accrues at a specified rate, (2) is compensated at an employee’s regular rate of pay, and (3) may be used for specific enumerated purposes.

To provide “greater paid time off” than required by the Ordinance, an employer must provide compensated leave³ that either (1) accrues at a faster rate, (2) is compensated at a higher rate, or (3) is allowed to be used for more purposes than those enumerated in the Ordinance. If an employer’s paid time off (PTO) policy provides an enhanced benefit in one or more of these

¹ The reference materials provided to the Council at the hearing to approve the Ordinance express similar legislative intent. See Attachments 1 and 2.

² “Division,” means Division 1 of Chapter 3, Article 9.

³ This compensated leave must be provided through a contract, collective bargaining agreement, employment benefit plan or other agreement. SDMC § 39.0105(g).

three categories, and otherwise complies with the minimum standards for the remaining categories, then the employer's PTO policy will qualify as "greater paid time off . . . than that required by this Division." SDMC § 39.0105(g).

An employer may satisfy the accrual provision of the Ordinance by either front loading 40 hours of Earned Sick Leave at the beginning of every benefit year or allowing Earned Sick Leave to accrue at a rate of no less than 1 hour every 30 hours worked. SDMC § 39.0105(b)-(c). Thus, an employer's PTO policy accrues at a faster rate than Earned Sick Leave only if the employer front loads more than 40 hours of paid time off per benefit year or allows paid time off to accrue at a rate faster than 1 hour of paid time off every 30 hours worked. SDMC § 39.0105(b)-(c). For example, if an employer allows paid time off to accrue at a rate of 1 hour for every 20 hours worked, and otherwise complies with the minimum compensation and use requirements of the Ordinance, then an employer will have provided "greater paid time off," as that term is used in Section (g).

To qualify as paid time off that is compensated at a higher rate than Earned Sick Leave, an employer must provide paid time off that is paid at a higher rate than the employee's regular rate of pay for that work week. *See* SDMC § 39.0105(e). Likewise, an employer's PTO policy provides for greater use of paid time off than that required in the Ordinance if the paid time off can be used for more purposes than those enumerated in the Ordinance. *See* SDMC § 39.0106.

III. PAID HOLIDAYS DO NOT QUALIFY AS "GREATER PAID TIME OFF" BECAUSE THEY CANNOT BE USED FOR THE SAME PURPOSES AS EARNED SICK LEAVE.

Providing an employee with paid holidays does not qualify as "greater paid time off . . . than that required by this Division" because it restricts the use of paid time off to designated days and, as such, does not meet the minimum use requirements of Earned Sick Leave which require an employer to allow an employee to use the paid time off for a sick day or any other purpose defined in the law.⁴ Additionally, allowing paid holidays to replace an employer's requirement to provide Earned Sick Leave would defeat the central purpose of the Ordinance, which is to provide workers with "time off from work to take care of their own health needs or the health needs of members of their families." SDMC § 39.0101. Taking paid time off only on designated holidays does not allow employees to take paid days off at their convenience to handle personal or family health issues.

⁴ If an employer provides more than 40 hours of holiday time at the beginning of each benefit year that may be used for any reason at the discretion of the employee, then such leave may qualify as "greater paid time off," provided the leave is compensated at no less than an employee's regular rate of pay and allowed to be used for the same events as Earned Sick Leave.

IV. EMPLOYERS WHO PROVIDE GREATER PAID TIME OFF THAN REQUIRED BY THE ORDINANCE MAY USE ALTERNATIVE METHODS FOR THE CALCULATION, PAYMENT, AND USE OF EARNED SICK LEAVE, PROVIDED SUCH METHODS DO NOT FRUSTRATE THE PURPOSE OF THE ORDINANCE OR LEAD TO AN ABSURD RESULT.

Section (g) provides that those employers who offer “greater paid time off” than required by the Ordinance may be “deemed to be in compliance even if the *Employer* utilizes an alternative methodology for calculation of, payment of, and use of *Earned Sick Leave* or other paid time off that can be used as *Earned Sick Leave*.” SDMC § 39.0105(g). The phrase “alternative methodology” is not defined, but it implies that there are existing methods or procedures for the “calculation of, payment of, and use of” Earned Sick Leave in the Ordinance. To determine whether an alternative method is consistent with the intent of the Council, a court will look first to see whether the employer offers “greater paid time off,” as defined above, and then analyze whether the alternative method for the calculation, payment or use of Earned Sick Leave frustrates the purpose of the Ordinance or leads to an absurd result. *People v. Belleci*, 24 Cal. 3d 879, 884 (1979).

1. Alternative Method for the Calculation of Earned Sick Leave

The plain meaning of the term “calculate” is to “to judge the amount or value of something by using information.” Cambridge Online Dictionary, calculation, <http://dictionary.cambridge.org/us/dictionary/english/calculate?q=CALCULATION> (last visited Nov. 14, 2016). A calculation method would identify the information to be used and how to use that information to determine the amount of something. Thus, an alternative method “for calculation of . . . Earned Sick Leave” would be a calculation method that uses different information and/or uses information differently than that required in the Ordinance for judging the *amount* of Earned Sick Leave.

The Ordinance establishes two methods for determining the *amount* of Earned Sick Leave. First, Earned Sick Leave must accrue at a rate of no less than 1 hour every 30 hours worked. SDMC § 39.0105(b). Second, an employer may satisfy the accrual provision of the Ordinance by providing at least 40 hours of Earned Sick Leave at the beginning of every benefit year. SDMC § 39.0105(c).

An employer cannot take advantage of Section (g) by setting the rate of accrual at less than 1 hour every 30 hours worked because Section (g) only applies if an employer provides “greater paid time off” than required by the Ordinance and, as explained above, paid sick leave that accrues at less than 1 hour every 30 hours worked does not qualify as “greater paid time off” under the Ordinance. For the same reasons, a PTO policy that front loads less than 40 hours of Earned Sick Leave every year would also not be an acceptable alternative method for calculation of Earned Sick Leave. However, an employer could use an alternative method for the calculation of Earned Sick Leave if that method results in an employee receiving more Earned Sick leave than required by the Ordinance.

2. Alternative Method for the Payment of Earned Sick Leave

The method for “payment” described in the Ordinance is the requirement that Earned Sick Leave be paid at a rate no less than the employee’s regular rate of pay for the workweek in which the leave was used. SDMC § 39.0105(e). An acceptable alternative method for payment under the Ordinance must result in the employee being paid at least the employee’s regular rate of pay, because anything less would frustrate the purpose of the Ordinance. For example, if an employer pays all Earned Sick Leave as \$10.50/hour when an employee’s regular rate of pay is \$21/hour, the employee would be paid only half of the wages that the employee otherwise would have earned had the employee worked that day. This lower payment does not meet the minimum payment requirements of the Ordinance for Earned Sick Leave and, therefore, would not be an acceptable alternative method.

The California paid sick leave law⁵, however, provides another method for calculating the “regular rate of pay” that the Council did not expressly add to the Ordinance – specifically, an employer may determine the regular rate of pay for non-exempt employees by “dividing the employee’s total wages, not including overtime premium pay, by the employee’s total hours worked in the full pay period of the prior 90 days of employment.” Cal. Lab. Code §246(k)(1)(2). This alternative method provides employers and employees a more stable basis from which to calculate an employee’s regular rate of pay, which is particularly important for commissioned employees whose regular rate of pay can greatly fluctuate week to week.

It does not frustrate the purpose of the Ordinance to interpret “alternative methodology for payment of earned sick leave,” to mean that an employer can use this alternative method of calculating an employee’s regular rate of pay as defined in state law. Additionally, this alternative method comports with the Council’s stated legislative intent “to make the method of awarding earned sick leave more consistent with newly approved state law...” Attachment 1.⁶ Thus, it is the opinion of this Office that an employer who provides “greater paid time off” than that required by the Ordinance may calculate an employee’s “regular rate of pay” in a manner consistent with California paid sick leave law, as an alternative method under Section (g).

3. Alternative Method for the Use of Earned Sick Leave

Employers must permit employees to use Earned Sick Leave for those reasons expressly enumerated in Municipal Code section 39.0106. It is not clear what an acceptable alternative method for the use of Earned Sick Leave would be. However, any alternative method for the use of Earned Sick Leave must not frustrate the purpose of the Ordinance or lead to an absurd result. As such, a method that restricts the use of Earned Sick Leave to anything less than those reasons enumerated in section 39.0106 would not be an acceptable alternative method under Section (g) because it would violate the use provisions of the Ordinance that form the foundation of Earned

⁵ The Healthy Workplaces, Healthy Families Act of 2014. Cal. Lab. Code §246.

⁶ The statutory history of the Ordinance provides insight into the Council intent to establish a method for payment. In its original form, the Ordinance required employers to compensate “Earned Sick Leave at the same hourly rate or other measure of compensation as the Employee earns from his or her employment at the time the Employee uses the Earned Sick Leave.” San Diego Ordinance O-20390 (July 28, 2014). This language was changed in the implementing ordinance to be more consistent with state law, which permits a non-exempt employee to be paid at the “regular rate of pay for the workweek in which the employee uses paid sick time.” SDMC § 39.0105(e).

Sick Leave, and which must be satisfied to qualify for Section (g). On the other hand, a method that expands the uses for Earned Sick Leave would likely be acceptable. This Office is available to provide further guidance on this issue on a case-by-case basis.

CONCLUSION

An employer's PTO policy provides "greater paid time off" than required by the Ordinance if the policy meets the minimum accrual, compensation and use requirements of Earned Sick Leave and provides a more generous benefit in at least one of these three categories. An employer who provides "greater paid time off" than required by the Ordinance may use alternative methods for the accrual, payment and use of Earned Sick Leave, provided such methods do not frustrate the purpose of the Ordinance or lead to an absurd result.

JAN I. GOLDSMITH, CITY ATTORNEY

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

GJH:sc

ML-2016-18

Doc. No. 1395219

Attachment 1: Committee Action Sheet re: Earned Sick Leave and Minimum Wage
Implementing Ordinance, June 22, 2016.

Attachment 2: June 16, 2016, Letter from Councilmember Todd Gloria's Office to the Members
of the Budget and Government Efficiency Committee.

cc: Kevin L. Faulconer, Honorable Mayor
Scott Chadwick, Chief Operating Officer
Sherri Lightner, Council President
City Councilmembers
Andrea Tevlin, Independent Budget Analyst

COMMITTEE ACTION SHEET

ATTACHMENT 1

COUNCIL DOCKET OF _____

☐ Supplemental ☐ Adoption ☐ Consent ☐ Unanimous Consent

R -

O -

Earned Sick Leave and Minimum Wage Implementing Ordinance

☒ Reviewed ☐ Initiated By B&GE On 6/22/15 Item No. 1

RECOMMENDATION TO:

Motion by Councilmember Gloria to:

1. Direct the City Attorney's Office to work with the District Three Office to draft an implementing ordinance inclusive of the policy direction in the June 16, 2016 memorandum, with additional policy direction to make the method of awarding earned sick leave more consistent with newly approved state law to allow for both the accrual and front loading of sick leave as long as it is structured to ensure no reduction in benefit to the employee, and bring the ordinance directly to Council for consideration on the date the Council approves the Earned Sick Leave and Minimum Wage Ordinance certifying resolution in July; and

2. Direct the Mayor's Office to take the steps necessary to enter into a partnership agreement with the California Labor Commissioner's Office in order to establish a collaborative relationship to promote compliance with the law.

Second by Councilmember Cole.

VOTED YEA: Gloria, Cole, Cate, Sherman

VOTED NAY: None

RECUSED:

NOT PRESENT: None

OTHER:

COUNCIL COMMITTEE CONSULTANT 



**OFFICE OF COUNCILMEMBER TODD GLORIA
COUNCIL DISTRICT THREE**

M E M O R A N D U M

DATE: June 16, 2016

TO: Honorable Members of the Budget & Government Efficiency Committee

FROM: Councilmember Todd Gloria, Third Council District *Todd Gloria*

SUBJECT: Earned Sick Leave and Minimum Wage Implementing Ordinance

On June 7, 2016, San Diego voters affirmed the City Council's decision to provide five earned sick days and increased wages for hard working San Diegans. The next step to responsibly comply with this voter mandate is to expeditiously develop a strong implementing ordinance to enforce and administer this policy. As such, my office has been working closely with the City Attorney's Office to review best practices for enforcing earned sick and minimum wage laws in California, which have informed the recommendations set forth in this memorandum.

The implementing ordinance should build upon Section 39.0112 of the San Diego Earned Sick and Minimum Wage Ordinance - Implementation, Enforcement and Remedies, and include the following provisions:

- Establish and designate the Enforcement Office in the appropriate City department or office (options include the Office of the City Treasurer, the Purchasing and Contracting Department, or the creation of a new office);
- Require the Enforcement Office to report annually to the City Council to summarize activity, report on quantitative performance metrics, and recommend areas for improvement in the administration and enforcement of this policy;
- Provide clear noticing policies in multiple languages so that workers will be made well aware of their rights and will be more likely to report non-compliant employers;
- Establish a system to receive complaints in writing, online and by telephone in multiple languages, as well as a system to adjudicate complaints and order relief in cases of violations;
- Ensure complainant's confidentiality is maintained unless disclosure of such complainant's identity is necessary or required for resolution of the investigation;
- Establish a public hearing process for appeals and mandate non-discretionary fines to ensure a transparent and fair public process;
- Establish the authority for the Enforcement Office to collaborate and/or contract with community-based organizations and other government agencies on community outreach and enforcement strategies;
- Establish the authority for the Enforcement Office to refer cases to other agencies when state or federal laws appear to be violated;

- Establish the authority for the Enforcement Office to conduct proactive investigations and compliance reviews, particularly for businesses or industries with high rates of wage theft;
- Include higher fines for employers who repeatedly violate the sick leave and minimum wage requirements;
- Establish strong anti-retaliation measures, including:
 - A fine of \$1,000 payable to the employee per retaliation violation and a civil penalty \$1,000 per retaliation violation;
 - a fine of \$3,000 payable to the employee and a civil penalty of \$3,000 for an employer who retaliates via unlawful discharge from employment; and
 - Higher additional civil penalties for repeat offenders;
- Establish the authority for the Enforcement Office to issue subpoenas, examine and review employment records and workplaces, and interview current and former employees; and
- Establish the authority for the City to revoke or suspend business licenses, permits, registration certificates or other appropriate forms of leverage until a wage violation is remedied to increase compliance and encourage prompt repayment. Licenses or permits should be revoked permanently for employers with three or more separate violations.
- Consideration should also be given to:
 - Include wage theft as a reason to rescind contracts with the City, debar contractors, and prohibit contractors from renting City-owned space; and
 - Establish the authority to file a lien on an employer's property who refuses to pay a citation for unpaid wages.

I request the Budget & Government Efficiency Committee direct the City Attorney's Office to work with my office to draft an implementing ordinance inclusive of this policy direction, and bring it directly to Council for consideration on the date the Council approves the Earned Sick Leave and Minimum Wage Ordinance certification resolution in July.

Additionally, I request the Budget & Government Efficiency Committee direct the Mayor's Office to take the steps necessary to enter into a partnership agreement with the California Labor Commissioner's Office (Attachment 3) in order to establish a collaborative relationship to promote compliance with the law. This agreement will facilitate the provision of clear, accurate and easy-to-access outreach to employers, employees, and other stakeholders, and allow for sharing resources and enhancing enforcement by conducting joint investigations.

I appreciate the consideration of my Council colleagues, and look forward to working with the City Attorney to develop a responsible implementing ordinance.

TG/jl

Attachments:

1. San Diego Earned Sick Leave and Minimum Wage Ordinance (O-2016-56)
2. Enforcing City Minimum Wage Laws in California: Best Practices and City-State Partnerships, October 2015
3. Partnership Agreement between [Local Agency] and the California Labor Commissioner's Office
4. San Francisco Minimum Wage Ordinance and Sick Leave Ordinance
5. Los Angeles County Wage Enforcement Ordinance

June 16, 2016

cc: Honorable Mayor Kevin Faulconer
 Honorable City Attorney Jan Goldsmith
 Council President Sherri Lightner
 Andrea Tevlin, Independent Budget Analyst
 Liz Maland, City Clerk
 Scott Chadwick, Chief Operating Officer
 Stacey LoMedico, Assistant Chief Operating Officer
 Marshall Anderson, Director of Council Affairs