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 directlyor indirectly through anyother person, including through the services of a temporaryemployment 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 narrowlydefines "employers" subject to the local minimum wage as follows:

> "Employer" shall mean anyperson, including corporate officers or executives, as defined in Section 18 of the California Labor Code, who: 1) directlyor 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 Cityof Eureka or assigns an Employee or Employees to performwork within the geographic boundaries of the City.

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

These ordinances lessen the likelihood of a constitutional challenge because theycondition 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.

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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).