

**Office of
The City Attorney
City of San Diego**

**MEMORANDUM
MS 59**

(619) 236-6220

DATE: March 13, 2017

TO: Councilmember Barbara Bry, District 1

FROM: City Attorney

SUBJECT: Response to Memo from Council District 1 regarding Enforcement of the City of San Diego Earned Sick Leave and Minimum Wage Ordinance

In your memorandum dated February 7, 2017, you asked the Office of the City Attorney several questions related to enforcement of the City of San Diego Earned Sick Leave and Minimum Wage Ordinance (Ordinance) as well as the Partnership Agreement Between the City of San Diego and the California Labor Commissioner's Office (Cooperative Agreement), which is enclosed as Attachment A. For purposes of this memorandum, the California Labor Commissioner's Office will be referred to as the "State." Your questions and this Office's responses are set forth below.

1. Does the Cooperative Agreement obligate the State to enforce the Ordinance on behalf of the City?

No. The Cooperative Agreement¹ grants permission to the State to enforce the Ordinance, but does not legally obligate either party to conduct enforcement. It sets forth that, where appropriate and to the extent allowable under law, the City and the State *may* do the following:

- a. Conduct joint investigations periodically in the State of California, if the opportunity provides.
- b. Coordinate their respective enforcement activities and assist each other with enforcement.
- c. Refer potential violations of State and local wage laws to each other.

¹ As of the date of the memorandum, the State has not executed the Cooperative Agreement. The responses in this memorandum are based on the language of the boilerplate Cooperative Agreement used by the State and provided to the City Treasurer. We assume that the City and State will execute it with no revisions as the State has already informed this Office that they will not modify the Cooperative Agreement.

2. What is the practical effect of the Cooperative Agreement on enforcement of the Ordinance?

The Cooperative Agreement provides a means for the City and State to collaborate with each other to promote compliance with the Ordinance and State labor laws. Currently, the City Treasurer's Office handles enforcement of the Ordinance's earned sick leave and noticing provisions. The City Treasurer's Office refers enforcement of the Ordinance's minimum wage and retaliation provisions to the State. The State may, upon request from a local entity, issue a citation against an employer for a violation of any applicable local minimum wage law if the local entity has not cited the employer for the same violation. Cal. Lab. Code § 1197.1(h). The State may also penalize employers who retaliate against employees for reporting such violations to the City. Cal. Lab. Code § 1102.5(b).

Both the City and the State retain their full enforcement authority over their respective minimum wage and earned sick leave laws.

3. Does the City Attorney's Office have authority to enforce the Ordinance?

Yes, but not in the same capacity as the City Treasurer's Office, which is defined in the San Diego Municipal Code (Municipal Code) as the Enforcement Office. Pursuant to Municipal Code section 39.0113, the City Treasurer's Office has the full authority to implement and enforce the Ordinance, which includes the authority to do all of the following:

- a. Access the workplace of any employer or employee during workplace hours to examine and audit all relevant records;
- b. Issue subpoenas;
- c. Interview witnesses at or away from the workplace and to investigate all matters necessary or appropriate to determine whether there is a violation of the Ordinance;
- d. Promulgate and issue administrative regulations;
- e. Issue a Notice of Violation as well as a Notice and Order to an employer;
- f. Conduct an informal settlement conference and impose civil penalties as a condition to settle an alleged violation; and,
- g. Schedule an administrative enforcement hearing to be conducted by an independent hearing officer to resolve disputes.

The City Attorney's authority to enforce the ordinance is limited to filing a civil complaint in state court against an employer on behalf of the City, which is essentially the same remedy available to an aggrieved employee. Any person claiming harm from a violation of the Ordinance, including the City, may file a lawsuit in civil court to enforce the Ordinance. SDMC § 39.0112. The potential relief includes, but is not limited to, payment to an employee of withheld back wages, damages payable to an employee for an employer's denial of the use of

accrued earned sick leave, payment of liquidated damages to an employee equal to double back wages withheld, civil penalties between \$500 and \$1,000 per violation payable to the City, as well as recovery of reasonable attorneys' fees and costs. As explained further below, the Ordinance does not currently permit the City Attorney's Office to function as the designated Enforcement Office.

4. What additional resources does the City Attorney's Office need to receive in order to investigate and enforce the Ordinance?

This Office currently provides legal advice as requested by the City Treasurer's Office. To date, this Office has drafted legal memoranda interpreting the Ordinance, reviewed template forms for legal sufficiency, and assisted with responses to inquiries from employers and employees. The need for this day-to-day advice is anticipated to increase as the City Treasurer's Office further ramps up their enforcement activity.

We anticipate that this Office will also assist the City Treasurer's Office with investigation and enforcement including subpoenas, settlement agreements, administrative hearings, and the enforcement of judgments against employers.

This Office will likely need additional resources depending on which model the City Treasurer uses to enforce this Ordinance. There are three potential enforcement models: ²

- a. The City Attorney's Office works collaboratively with the City Treasurer's Office;
- b. The City Attorney's Office works mostly independently from the City Treasurer's Office; or,
- c. The City Attorney's Office is designated as the Enforcement Office under the Ordinance, which would require an amendment to the Ordinance.

Each of the above models will be discussed in turn.

a. City Attorney's Office Working Collaboratively with City Treasurer's Office

This collaborative approach would be the most effective in investigating and enforcing the Ordinance as currently written. By working collaboratively, this Office would be able to take advantage of the City Treasurer's authority under the Ordinance to fully investigate violations of

² Regardless of the enforcement model, under Charter section 40, the City Attorney's Office already has the obligation to provide legal advice and support to the City Treasurer's Office. While the City Attorney's Office is an independent department, the City Attorney's determination on whether to use enforcement model (a) or (b) would be made with input from the City Treasurer's Office.

the Ordinance as set forth in more detail under our response to Question No. 3 above.

A model for collaborative enforcement involving this Office is the one currently used for code violations enforced by the City's Code Enforcement Division (CED). Currently, code violation complaints are fully investigated by CED inspectors. On a regular basis, CED staff meets with our Office's Code Enforcement Unit (CEU) attorneys to determine which cases should be referred for civil or criminal enforcement by CEU. To the extent that CED inspectors believe that administrative remedies such as monetary fines are sufficient to address a particular code violation, they retain the matter and issue administrative citations or a notice of violation. Where the violations are more egregious or require a court order to achieve compliance, the CEU attorneys take charge of the case and file a civil or criminal complaint in court.

Similarly, the City Treasurer's Office could conduct investigations related to violations of the Ordinance, meet with this Office on a regular basis, and refer cases that warrant enforcement in civil court rather than through the administrative hearing process to this Office.

b. City Attorney's Office Working Mostly Independently from the City Treasurer's Office

As stated in Section 3 above, the City Attorney's Office has the authority to enforce the Ordinance to the same extent as any aggrieved employee. The Office would not have the full range of authority prescribed in the Ordinance to conduct investigations and gather information before filing an action. Generally, the only recourse for investigation by the City Attorney's Office-- other than an employer's voluntary compliance to agree to be investigated by the City Attorney's own investigators-- is the use of the civil discovery process, which can be costly and time-consuming and would necessarily require that a lawsuit first be filed.

c. The City Attorney's Office as the Designated Enforcement Office

To have the full range of authority to conduct investigations and gather information under the Ordinance, the City Council would need to amend the Municipal Code, to include the City Attorney Office as an "Enforcement Office." Municipal Code section 39.0104 only includes the City Treasurer's Office, or other office or department under the authority of, and designated by, the Mayor to enforce the Ordinance. The City Attorney's Office is an independent office that is not under the authority of the Mayor. San Diego Charter § 40. It therefore could not be designated by the Mayor as the Enforcement Office.

Resources Needed

The resource needs of this Office depend upon the enforcement model used and the level of enforcement activity. Since the Ordinance is newly enacted, this Office does not have sufficient information to determine exactly which resources are necessary to investigate and enforce the Ordinance. At the minimum, we need at least one litigation attorney position and one investigator to conduct investigation and enforcement. If enforcement efforts significantly accelerate, the Office will need one or more additional advisory attorney positions to advise the City Treasurer's Office. More resources are needed if the Office assumes an independent investigation and enforcement role, or is designated as the Enforcement Office under the Ordinance.

To provide some context, it appears that the City of Los Angeles uses an enforcement model similar to the collaborative approach where the Office of Wage Standards acts as the primary enforcement office and the City Attorney's Office provides litigation and advisory attorney support. Specifically, the City Attorney's Office in Los Angeles received funding for two full-time attorneys and one or two support staff for its local minimum wage and earned sick leave enforcement efforts. The Office of Wage Standards has an additional 25 full-time staff, including five full-time investigators. The Treasurer's Office can better advise on its anticipated needs.

This Office would be happy to further discuss this matter and answer any additional questions that you may have.

MARA W. ELLIOTT, CITY ATTORNEY

By /s/ Kenneth So
Kenneth So
Deputy City Attorney

KS:jdf
MS-2017-3
Doc. No.: 1443677_3
Attachment

cc: Honorable Mayor Kevin Faulconer
Lori Zapf, Councilmember
Chris Ward, Councilmember
Myrtle Cole, Council President
Mark Kersey, Councilmember
Chris Cate, Councilmember
Scott Sherman, Councilmember
David Alvarez, Councilmember
Georgette Gomez, Councilmember

PARTNERSHIP AGREEMENT
BETWEEN
CITY OF SAN DIEGO
AND
THE CALIFORNIA LABOR COMMISSIONER'S OFFICE

This Agreement is made and entered into by and between CITY OF SAN DIEGO (hereinafter referred to as City of San Diego) and the California Labor Commissioner (hereinafter referred to as "Labor Commissioner"), together collectively referred to as "the agencies" or "the parties."

With the specific and mutual goals of providing clear, accurate, and easy-to-access outreach to employers, employees, and other stakeholders, and of sharing resources and enhancing enforcement by conducting joint investigations and sharing information consistent with applicable law, the parties agree to enter into this partnership.

THEREFORE, IT IS MUTUALLY AGREED THAT:

Purpose

The agencies recognize the value of establishing a collaborative relationship to promote compliance with laws of common concern in the State of California. The agencies are forming this partnership to more effectively and efficiently communicate and cooperate on areas of common interest, to share training materials, to provide employers and employees with compliance assistance information, to conduct joint investigations and share information as appropriate towards the goal of protecting the wages, safety, and health of California's workforce.

Agency Responsibilities

CITY OF SAN DIEGO is responsible for administering and enforcing local minimum wage. Nothing in this agreement limits the City of San Diego's enforcement of these and other local laws conferred as the part of the City of San Diego's police powers.

The California Labor Commissioner's Office is the California executive branch Division charged with enforcing provisions of the California Labor Code and Industrial Welfare Commission Orders to ensure a just day's pay in every workplace in the State and to promote economic justice through robust enforcement of labor laws. By combating wage theft, protecting workers from retaliation, and educating the public, the Labor Commissioner puts earned wages into workers' pockets and helps level the playing field for law-abiding employers.

Nothing in this agreement limits the Labor Commissioner's enforcement authority.

Contacts

- The agencies will designate a contact person responsible for coordinating the partnership activities.
- The agencies will designate a representative to meet annually to review areas of mutual concern and the terms and conditions of the partnership.

Enforcement

Where appropriate and to the extent allowable under law,

- The agencies may conduct joint investigations periodically in the State of California, if opportunity provides.
- The agencies may coordinate their respective enforcement activities and assist each other with enforcement.
- The agencies may make referrals of potential violations of each other's statutes.

Effect of Agreement

- This agreement does not authorize the expenditure or reimbursement of any funds. Nothing in this agreement obligates the parties to expend appropriations or enter into any contract or other obligation.
- By entering into this partnership, the agencies do not imply an endorsement or promotion by either party of the policies, programs, or services of the other.
- Nothing in this agreement is intended to diminish or otherwise affect the authority of either agency to implement its respective statutory functions.
- This agreement contains all the terms and conditions agreed upon by the parties. Upon execution of this agreement, no other understandings regarding the subject matter of this agreement, oral or otherwise, shall be deemed to exist. This agreement is not intended to confer any right upon any private person or other third party.
- Nothing in this agreement will be interpreted as limiting, superseding, or otherwise affecting the parties' normal operations. This agreement also does not limit or restrict the parties from participating in similar activities or arrangements with other entities.
- This agreement will be executed in full compliance with the California Public Records Act, the California Information Practices Act and any other applicable federal and California state laws.

Exchange of Information

- It is the policy of the Labor Commissioner to cooperate with other government agencies to the fullest extent possible under the law, subject to the general limitation that any such cooperation must be consistent with the Labor Commissioner's own statutory obligations and enforcement efforts. It is the Labor Commissioner's view that an exchange of information in cases in which both entities are proceeding on basically the same matter is to our mutual benefit. There is a need for the Labor Commissioner to provide information to other law enforcement bodies without making a public disclosure.

- Exchange of such information pursuant to this agreement is not a public disclosure under the Public Records Act.
- Confidential Information means information that may be exempt from disclosure to the public or other unauthorized persons under state and federal statutes. *See, e.g.,* 18 U.S.C. 1905 (Trade Secrets Act) and 5 U.S.C. 552a (Privacy Act of 1974). Examples of Confidential Information that may be shared under this agreement includes, but is not limited to: the identities or statements of persons who have given information to the parties in confidence or under circumstances in which confidentiality can be implied; any information identifying specific individuals in statements from employees that were obtained under these conditions; internal opinions and recommendations of local or state personnel, including (but not limited to) investigators and supervisors; information or records covered by the attorney-client privilege and the attorney-work-product privilege; information that identifies or describes a specific individual; individually identifiable health information; and confidential business information and trade secrets.
- Confidential Unemployment Compensation (UC) information, as defined in 20 CFR 603.2(b), means any unemployment compensation information, as defined in 20 CFR 603.20), required to be kept confidential under 20 CFR 603.4 or its successor law or regulation.
- When Confidential Information is exchanged it shall be accessed and used by the recipient party solely for the limited purposes of carrying out specific activities pursuant to this agreement as described herein, and in no event shall such information be disclosed by the recipient party without the written authority of the other party or a court order.
- In addition to the requirements above, Confidential Unemployment Compensation Information may be exchanged only subject to the confidentiality requirements of 20 CFR 603.4, the California Unemployment Insurance Code (e.g., Sections 322, 1094, and 1095) and related regulations, and any other applicable laws.
- In addition to the requirements above, Confidential Information shared under this agreement may be exchanged only subject to (a) the applicable provisions of California law, including but not limited to, the Information Practices Act (Civil Code Section 1798 et seq.), the Evidence Code (e.g., Sections 950 and 1040), the Labor Code (e.g., Sections 6209, 6314 and 6322), and the Unemployment Insurance Code (e.g., Sections 322, 1094, and 1095) and (b) the terms and conditions of any confidentiality agreements that may exist under which Confidential Information has been obtained by the Labor Commissioner.
- The exchange of Confidential Information and Confidential Unemployment Compensation Information under this agreement is purely voluntary, and no obligation to exchange such information is created by this agreement.
- The agencies agree that any documents and information obtained through investigatory subpoenas, interrogatories, and depositions under California Government Code sections 11181 et seq, must be kept confidential. In the event that there is a public proceeding such as a hearing or a trial, in which Confidential Information provided to the Labor Commissioner by the local agency or to the local agency by the Labor Commissioner, such confidential information may be used or testimony of agencies employees sought, the agencies require that they notify each other. In addition such information can be provided to the Attorney General, or other law enforcement agency that agrees to maintain the confidentiality of the documentation. If confidential information is provided to the Attorney General or other law enforcement agency, the disclosing agency must notify the agency that originally obtained the confidential information.

- Subject to the foregoing constraints:
- The agencies agree to exchange information on laws and regulations of common concern to the agencies, to the extent practicable.
- The agencies will establish a methodology for exchanging investigative leads, complaints, and referrals of possible violations, to the extent allowable by law and policy.
- The agencies will exchange information (statistical data) on the incidence of violations in specific industries and geographic areas, if possible.

Outreach and Education

- When appropriate and feasible, the agencies agree to coordinate, conduct joint outreach presentations, and prepare and distribute publications of common concern for the regulated community.
- The agencies agree to provide a hyperlink on each agency's website linking users directly to the outreach materials in areas of mutual jurisdiction and concern.
- The agencies agree to jointly disseminate outreach materials to the regulated community, when appropriate.
- All materials bearing the agencies name, logo, or seal must be approved in advance by the agency.

Resolution of Disagreements

Disputes arising under this Agreement will be resolved informally by discussions between Agency Points of Contact, or other officials designated by each agency.

Period of Agreement

This agreement becomes effective upon the signing of both parties, and will expire 3 years from the effective date. This agreement may be modified or added to in writing by mutual consent of both agencies. The agreement may be cancelled by either party by giving thirty (30) days advance written notice prior to the date of cancellation. Renewal of the agreement may be accomplished by written agreement of the parties.

This agreement is effective as of the ____ day of _____, 2016.

City of San Diego

California Labor Commissioner's Office

By: _____

By: : _____