

PAUL E. COOPER
EXECUTIVE ASSISTANT CITY ATTORNEY

MARY T. NUESCA
ASSISTANT CITY ATTORNEY

GREGORY J. HALSEY
DEPUTY CITY ATTORNEY

OFFICE OF

THE CITY ATTORNEY

CITY OF SAN DIEGO

JAN I. GOLDSMITH

CITY ATTORNEY

1200 THIRD AVENUE, SUITE 1620
SAN DIEGO, CALIFORNIA 92101-4178
TELEPHONE (619) 236-6220
FAX (619) 236-7215

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REPORT TO THE BUDGET COMMITTEE

LOCAL MINIMUM WAGE ENFORCEMENT ORDINANCE

INTRODUCTION

On June 7, 2016, the voters of the City of San Diego (City) approved the Earned Sick Leave and Minimum Wage Ordinance¹ (Ordinance) amending the San Diego Municipal Code (SDMC or Municipal Code) to require employers to provide earned sick leave and minimum wage to employees working in the City. As this Office has previously advised, the Ordinance will not apply retroactively and will go into effect upon the San Diego City Council (Council) approving a resolution certifying the election results that approved the Ordinance. *See* City Att’y MOL No. 2015-5 (Mar. 16, 2015).

The Ordinance requires the Council to adopt an implementing ordinance that will “establish a system to receive and adjudicate complaints and to order relief in cases of violations.” SDMC §39.0112(b). This Office seeks direction from the Council to develop the parameters of an implementing ordinance, consistent with Municipal Code section 39.0112(b). Upon review of similar enforcement ordinances from other California cities and counties, this Office has identified issues the Council may want to consider in determining the parameters of an implementing ordinance.

I. THE COUNCIL DESIGNATES THE ENFORCEMENT OFFICE, THE MAYOR ENFORCES THE ORDINANCE

The Ordinance directs the Council to designate an “Enforcement Office” that “will have full authority to implement and enforce this Division as set forth in an implementing ordinance . . .” SDMC §39.0112(a)-(b). In accordance with San Diego Charter (Charter) section 26 and 26.1, the Council may designate a new Department or an existing Department as the Enforcement Office.² Under either scenario, the Mayor will have the authority and discretion to

¹ San Diego Ordinance O-20390 (Aug. 18, 2014), not yet codified in Municipal Code.

² The Council may also enter into a partnership agreement with the California Labor Commissioner’s Office to assist in enforcing the Ordinance. Cal. Lab. Code § 558(c) (“In a jurisdiction where a local entity has the legal authority to issue a citation against an employer for a violation of any applicable local overtime law, the Labor Commissioner,

enforce, including the right to promulgate and issue administrative regulations that give controlling direction regarding enforcement. Charter § 265(b)(2).

Under the Strong Mayor form of government, the Mayor holds all executive authority, power, and responsibility previously conferred upon the City Manager. San Diego Charter §§ 260, 265. The Charter expressly grants the Mayor administrative and executive authority distinct from the Council. San Diego Charter §§ 28, 265. Executive or administrative authority is the authority to see that laws are executed and enforced. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952).

Any action taken by the City to delegate authority must comply with the Charter as the City's supreme law. *See* Cal. Const. art. XI, §§ 3(a) and 5(a). The Mayor is ultimately responsible for the performance of the administrative services, and has the right and obligation to oversee their performance. The Council cannot remove these powers and responsibilities from the Mayor, or change the distribution of power or authority provided by the Charter. *Hubbard v. City of San Diego*, 55 Cal. App. 3d 380 (1976). Enforcement of the Ordinance falls directly within the purview of the Mayor's powers, as set forth in the Charter. As such, the Council cannot use an ordinance to take away or infringe on these powers.

Some Enforcement Office issues the Council may consider include:

- Whether to institute mandatory minimum penalties for violations of the Ordinance or authorize the Enforcement Office to use its discretion to negotiate settlements with employers for unpaid penalties.
- Whether to allow the Enforcement Office to proactively investigate and audit employers without receiving a complaint of wrongdoing.
- Whether to authorize the Enforcement Office to contract with community based organizations to assist in education and outreach.

II. THE COUNCIL MUST ESTABLISH A SYSTEM TO RECEIVE AND ADJUDICATE COMPLAINTS

The Council must adopt an implementing ordinance that will establish a system to receive and adjudicate complaints. SDMC §39.0112(b). This Office seeks direction on the parameters of this administrative system and process.

A. The Council May Use Existing Administrative Procedures In The Municipal Code

The Council may elect to use existing procedures in the Municipal Code to receive and adjudicate complaints. The Municipal Code already authorizes an Enforcement Office to use the following administrative procedures and processes:

pursuant to a request from the local entity, may issue a citation against an employer for a violation of any applicable local overtime law if the local entity has not cited the employer for the same violation.”)

Receipt of Complaints and Investigation:

- The Enforcement Office will receive and investigate complaints. (§11.0210)
- A Director or designated Enforcement Official may enter upon any property or premises to ascertain whether the provisions of the Municipal Code are being obeyed, and to make any examinations and surveys as may be necessary in the performance of their enforcement duties. (§12.0104)
- If refused access to inspect records or premises, the Enforcement Official may seek an administrative inspection warrant pursuant to the procedures provided in California Code of Civil Procedure Sections 1822.50 through 1822.59. (§12.0104)
- The City Manager may develop and authorize policies and procedures relating to the use of subpoena power, as necessary to conduct administrative enforcement.³ (§12.0402)

Notice of Violation and Administrative Hearing:

- Upon a showing of a violation by a preponderance of the evidence, the Enforcement Official may issue a Notice of Violation (NOV) and serve this NOV on the employer. (§11.0301; 12.0103).
- Upon a timely request for a hearing, the Enforcement Official may request the City Manager to appoint an Enforcement Hearing Officer and to schedule a hearing. (§12.0403).
- The Enforcement Hearing Officer may continue the hearing, request the appearance of any party, and subpoena witnesses, documents and other evidence as needed to decide the issues. (§12.0404-12.0407).
- The City bears the burden of proof to demonstrate by a preponderance of the evidence to the Enforcement Hearing Officer that the employer violated the Municipal Code. (§12.0408).

Appeal of the Administrative Enforcement Order:

- Upon conclusion of the hearing, the Enforcement Hearing Officer will issue an Administrative Enforcement Order. (§12.0411).
- The employer may seek judicial review of the Administrative Enforcement Order, consistent with California Government Code section 53069.4. (§12.0412).

³ The Council has the authority to use any “appropriate auxiliary to the legislative function” to implement and enforce the Ordinance. *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927). This includes the power to issue subpoenas. *City of Vacaville v. Pitamber*, 124 Cal. App. 4th 739, 748 (2004); Cal. Gov’t. Code § 37104 (“The legislative body may issue subpoenas requiring attendance of witnesses or production of books or other documents for evidence or testimony in any action or proceeding pending before it.”). The Council may delegate this subpoena power to a City administrative Department or head because neither the California Constitution nor the Charter prohibits such delegation. *Brovelli v. Superior Court*, 56 Cal. 2d 524, 529 (1961) (“There is no constitutional objection to a system under which the heads of departments of government may compel the production of evidence for purposes of investigation . . .”). However, the Council may not delegate subpoena power to a local board or commission without amending the Charter. *See Dierssen v. Civil Serv. Commission of City & County of San Francisco*, 43 Cal. App. 2d 53, 61 (1941) (reversed on other grounds) (the California Constitution does not automatically confer subpoena power on local boards and commissions, nor does it require a city to so provide in their charter; however, the California Constitution empowers charter cities to so provide in their charter).

The Council may, as part of the implementing ordinance, reference these existing Municipal Code provisions or establish supplemental or additional provisions. As a point of reference, other cities and counties⁴ in California have employed the following similar procedures to govern the imposition, enforcement, collection, and administrative review of a local minimum wage ordinance:

- (1) An Enforcement Office investigates an alleged violation;
- (2) The Enforcement Office may use subpoena power to require the production of relevant records at a reasonable time and place;
- (3) Upon a finding of a violation, the Director or Head of the Enforcement Office issues a wage order violation to the employer;
- (4) The employer may request a reconsideration of the wage order violation from the Director or Head of the Enforcement Office;
- (5) If the reconsideration is denied, the employer may appeal the wage order violation to an impartial hearing officer;
- (6) The hearing officer decides whether the wage order violation is supported by a preponderance of the evidence;
- (7) If the hearing officer upholds the wage order violation, the employer may appeal to the State Superior Court for review, consistent with Government Code section 53069.4.

Regardless of the type of enforcement and complaint processing system the Council adopts, the City's enforcement must comport with procedural due process provisions of the federal and state Constitutions. U.S. Const. 14th Amend; Cal. Const. art. I, § 7, subd. (a). At a minimum, the City must provide adequate notice of a financial penalty and opportunity for a fair hearing to challenge the violation in front of an impartial decision-maker. *Today's Fresh Start, Inc. v. Los Angeles County Office of Ed.* 57 Cal. 4th 197, 212 (2013); *Morongo Band of Mission Indians v. State Water Res. Control Bd.*, 45 Cal. 4th 731, 737 (2009). Beyond this, the City is free to craft any such procedural protections as the particular situation demands. *Gilbert v. Homar*, 520 U.S. 924, 930 (1997).

Additionally, investigative subpoenas⁵ issued by an administrative agency must comply with the following threefold test: "(1) the inquiry must be one that the agency demanding production is authorized to make; (2) the demand must not be too indefinite; and (3) the information sought must be relevant." *Board of Med. Quality Assurance v. Hazel Hawkins Mem'l Hosp.*, 135 Cal. App. 3d 561, 565 (1982); *Stiger v. Flippin*, 201 Cal. App. 4th 646, 656-657 (2011).

⁴ These include: Berkeley, Emeryville, Los Angeles (City and County), Mountain View, Oakland, Palo Alto, Richmond, Sacramento, San Francisco, San Jose, Santa Clara, Santa Monica, Long Beach and Sunnyvale.

⁵ Investigative subpoenas are subpoenas issued without instituting a formal proceeding or filing any charges against the entity from whom the records are sought.

III. THE COUNCIL MAY ADD ADDITIONAL REMEDIES AS NECESSARY TO ENFORCE THE EARNED SICK LEAVE MINIMUM WAGE ORDINANCE

Currently, the Ordinance provides the following penalties: (1) any violation of the Ordinance may be subject to a civil penalty of up to \$1,000, per violation; and (2) failure to comply with the notice and posting requirements may be subject to a civil penalty of \$100 per employee who was not given appropriate notice, up to a maximum of \$2,000. SDMC § 39.0112(d). The Ordinance also provides a private right of action for all legal and equitable relief, including back wages, liquidated damages, injunctive relief, reinstatement, and reasonable attorney's fees. SDMC § 39.0112(c).

Instead of assigning the same civil penalty for "any violation" of the Ordinance, the Council may carve out exact violations and assign specific civil penalties to these specific violations. For example, other cities and counties have specified unique fines for each of the following violations:

- Failure to post bulletin and notices
- Failure to provide employee, at time of hire, notice of employer's name, address, and telephone number
- Failure to allow access for inspection of books and records
- Failure to maintain payroll records or retain payroll records for three years
- Retaliation for exercising rights
- Failure to pay an employee all wages owed

The Council may also add additional penalties that facilitate compliance with the Ordinance. Such additional penalties may include:

- Additional damages or penalties for retaliation
- Additional damages or penalties (continuing violations) for each day an employer fails to remedy a noticed violation

IV. OTHER CLARIFICATIONS TO CONSIDER

This Office has received numerous questions and concerns from local businesses and attorneys representing clients in the community. The Council has the authority to use the implementing ordinance to revise, clarify or amend the existing Ordinance. *See* Cal. Const., art. 2, § 10(c) (legislature "may amend or repeal referendum statutes.") This Office has identified the following areas that would benefit from further clarification from the Council so that businesses, civic organizations, employers, and employees have consistent and clear guidance regarding implementation of the law.

Allow Employers to Cap the Accrual of Earned Sick Leave:

The Council may want to amend the accrual language in the Ordinance to permit an employer to "cap" earned sick leave accrual. The Ordinance requires employers to provide employees, at a minimum, 1 hour of paid sick leave for every 30 hours worked. SDMC §39.0105(b). Employers may cap the *usage* of earned sick leave at 40 hours a year, "but

employers must allow employees to *continue to accrue* Earned Sick Leave” based on this formula. SDMC § 39.0105(g) (emphasis added). This “continue to accrue” language prohibits employers from capping accrual of earned sick leave, even though the use of such leave is limited to 40 hours per year. This creates some uncertainty. For example, employers, including the City, who have combined sick leave and vacation leave into general paid time off (PTO) or annual leave may be prohibited from capping the accrual of PTO because any cap on accrual would act as a cap on the accrual of sick leave.⁶ Also, this provision may prohibit employers from “front loading” 5 days of sick leave at the start of every benefit year because, in effect, front loading caps an employee’s ability to accrue more than 5 days of sick leave each year.

Further, unlimited paid sick leave accrual is inconsistent with the accrual provisions in the California Healthy Workplaces, Healthy Families Act of 2014, which allows employers to cap an employee’s total accrual of paid sick leave at 48 hours or 6 days. Cal. Lab. Code §246(j)⁷. Likewise, the three other cities in California that enforce a local paid sick leave law all permit an employer to cap paid sick leave accrual. The City of Oakland and the City and County of San Francisco permit employers to cap the accrual of an employee’s paid sick leave at 40 hours for small businesses⁸ and 72 hours for all other employers. Oakland Municipal Code § 5.92.030; San Francisco Administrative Code § 12W.3. The City of Santa Monica permits employers to cap the accrual of paid sick leave at 32 hours for small businesses⁹ and 40 hours for all other employers. Santa Monica Municipal Code Chapter 4.62.025.¹⁰

To avoid confusion and misapplication, this Office recommends that Council consider adding a provision to Section 39.0105(g) that permits employers to “cap” paid sick leave accrual at a certain reasonable hour limit or allow for earned sick leave to be front loaded at the beginning of every benefit year.

Geographic Boundary Limitation:

The provisions of the Ordinance only apply during those hours when an employee works within the City’s geographic boundaries. *See* SDMC § 11.0104 (“This Code shall refer only to the omission or commission of acts within the territorial limits of the City of San Diego and to that territory outside of this City over which the City has jurisdiction or control by virtue of the Constitution, Charter or any law, or by reason of ownership or control of property.”) Although an individual need only work two hours in the City limits in a calendar week to *qualify* as an “employee,” this Ordinance cannot be enforced to require employers to provide local minimum wage and paid sick leave accrual for those hours worked outside the City’s geographic boundaries. This Office recommends that the Council consider adding additional language in the Ordinance to clarify this geographic boundary limitation.

⁶ It is to the detriment of employees to dissuade employers from combining sick leave and annual leave into PTO because an employer cannot take away earned PTO and must pay out such leave upon the termination of employment. Cal. Lab. Code §227.3. Earned sick leave does not share this same protection.

⁷ Not yet codified, see Sen. Bill 3 (2015-2016 Reg. Sess.)

⁸ Defined as a business with 10 or few individuals working for compensation in a workweek.

⁹ Defined as employers with 26 or fewer employees.

¹⁰ Not yet codified.

Preemptions and Exemptions:

The Ordinance applies to individuals who (1) perform at least two hours of work within the geographic boundaries of the City; and (2) qualify as employees entitled to minimum wage under the California minimum wage law. SDMC § 39.0104. The Ordinance does not apply to independent contractors; employees working under a special license issued under California Labor Code sections 1191 or 1191.5; individuals employed in a publically subsidized summer or short-term youth employment program; or any student employee, camp counselor, or program counselor of a camp as defined in California Labor Code section 1182.4.

The Council may consider exempting additional employers or employees. For example, other cities and counties in California have adopted the following exemptions:

Government Agencies: Three cities (the City of Palo Alto, the City of Santa Clara and the City of Santa Monica) have exempted from their local minimum wage ordinance all state, federal and county agencies, including school districts. Palo Alto Municipal Code Ch. 4.62.040; Santa Clara Municipal Code Ch. 3.20.040; Santa Monica Municipal Code Ch. 4.62.030.

Collective Bargaining Agreement Waiver: Seven cities and counties (City of El Cerrito, City of Emeryville, City of Palo Alto, City of Santa Monica, City of San Jose, City of Santa Clara and the City and County of San Francisco) have permitted any or all portions of their local minimum wage or paid sick leave ordinance to be waived in a collective bargaining agreement. These municipalities all use language similar to the following: “To the extent required by federal law, all or any portion of the applicable requirements of this article may be waived in a bona fide collective bargaining agreement, provided that such waiver is explicitly set forth in such agreement in clear and unambiguous terms.” San Francisco Administrative Code §12R.8.

Regardless, enforcement of the Ordinance will be subject to any applicable preemption consistent with state and federal law. Preemption will vary based on specific circumstances, but some areas of potential preemption include, the Railway Labor Act, the Airline Deregulation Act and the National Bank Act. Acknowledging preemption in the Ordinance will help contribute to better compliance and easier enforcement.

CONCLUSION

The Ordinance requires the Council to set forth an implementing ordinance to establish a system to receive and adjudicate complaints and to order relief in cases of violations. SDMC §39.0112(b). This Office seeks direction from the Council to develop the parameters of this implementing ordinance. Once such direction is provided, this Office can draft an implementing ordinance for the Council's further consideration.

JAN I GOLDSMITH, CITY ATTORNEY

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

GJH:sc:jdf

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cc: Honorable Mayor
Scott Chadwick, Chief Operating Officer