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*Deputy Commissioner  
from the  
Public*

**TO:** Honorable Curren D. Price, Jr.      **DATE:** May 4, 2015

Chair of the Economic  
Development Committee -  
City of Los Angeles

**FILE**      CF # 14-1371  
**NO.:**      CF # 14-1371 S2

**FROM::**

Nicole A. Legrottaglie  
Mark. S. Spring

**COPIES  
TO:**

Honorable Mayor,  
Councilmembers and City  
of Attorney of the City of  
Los Angeles, Jot Condie,  
Matt Sutton, Adena  
Tessler

**RE:**      Minimum Wage Ordinance and CA Labor Code Section 351

**A. Issue**

The California Restaurant Association has asked us to prepare for you a short legal memorandum summarizing our opinions concerning the arguments asserted in the recent April 15, 2015 letter from the CLIAWA to Los Angeles city officials regarding "Legality of Tip Credits and Total Compensation Proposal" ("the Letter").

**B. Short Answer**

The legal opinions set forth in the Letter from the CLIAWA are not well founded. They are not based on actual precedential authority but instead rely on misinterpretations and improper expansions of the holdings of the California Supreme Court in *Henning v. IWC*. In some ways, the statements made in the Letter contradict the California Supreme Court opinion in *Henning*.

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We believe that the memorandum we provided to the CRA in May 2014 regarding the legality of the total compensation model "PMWO" offers the correct and proper analysis regarding the legality of a total compensation model ordinance enacted by a municipality such as Los Angeles.

Below are some of the primary issues we have with the opinions set forth in the Letter:

### **C. Response to the Letter**

*There Is No Relevant Legal Opinion Holding That Section 351 of the Labor Code Restricts a Municipality's Power in Any Way - The Assertions .*

The Letter incorrectly states that California law requires that Labor Code section 351 would apply with equal force to a municipal attempt to authorize an alternative minimum wage greater than the state minimum wage. There is simply no persuasive authority supporting this position. It is an opinion made without legal support.

First, it is important to note that California law, and specifically Labor Code 351, does not expressly prohibit laws, ordinances or regulations of any type. That language of the statute is directed at the acts of employers and their agents, not the acts of governments.

In *Henning*, the California Supreme Court of California addressed the narrow issue of whether the IWC "two-tier" state minimum wage system containing a lower, alternative state minimum wage for certain employees who customarily receive tips, is barred by section 351 of the Labor Code. Under the IWC "two-tier" system, the IWC had instituted a system by which there were two separate minimum wages: one statewide minimum wage for tipped employees and a second higher statewide minimum wage for non-tipped employees. We will not repeat the detailed analysis of the *Henning* case that we provided in our May 2014 memorandum. However, it is important to point out the specific language of *Henning* that addressed the California Supreme Court's understanding of the intent of Labor Code section 351. The California Supreme Court expressly held that the purpose of section 351 was to "eliminate the authority of the Industrial Welfare Commission to permit employers to credit tips against the wages of employees and thereby to require employers to pay employees at least the minimum wage regardless of the amount of tips the employees receive." *Henning v. IWC*, 46 Cal. 3d 1263, 1279 (1988) [emphasis added]. The arguments set forth in the Letter of course ignores this language.

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Instead of citing to the applicable language of the California Supreme Court, the Letter digs up some unpublished trial court ruling from thirteen years ago from a law and motion matter (demurrer) about a Berkeley ordinance to support its position. The fact that this is the primary authority, and only judicial opinion cited by the Letter to support its position on this issue, demonstrates the weakness in their argument. Any first year law student knows that trial court opinions, particularly those made in law and motion rulings, which are typically done with limited inquiry and under extreme time pressures, are unpersuasive and have absolutely no precedential value whatsoever. For this reason, they cannot even be cited in a court of law and are given zero weight if cited. Moreover, even if the city officials of Los Angeles were thinking of giving this language, lifted from a 13 year old law and motion calendar ruling, any value whatsoever (which they should not), they should note that there is nothing in the Letter indicating whether or not the tip credit at issue in Berkeley back in 2002 put the tipped employees minimum wage above or below the state minimum wage once applied. If the tip credit there created a situation where the local ordinance allowed for tipped employees to receive wages below the state minimum wage, it would be entirely distinguishable from the proposals being made in Los Angeles currently, even if it had some precedential value.

Nothing in *Henning* or any other published opinion addresses the issue of whether section 351 in any way restricts the authority of municipalities. As the San Diego City Attorney indicated, "no court has interpreted how Section 351 may impact a municipality's ability to enact a minimum wage ordinance." Thus, the claims made in this letter that section 351 of the Labor Code prohibits a municipality from enacting any type of minimum wage ordinance that in any way provides for a different minimum wage for tipped employees are pure speculation by the authors and are not legally sound.

*Contrary to the Arguments of the Letter, Henning Actually Indicates That A Municipality Can Enact an Ordinance that Provides for a Lower Minimum Wage for Tipped Employees, As Long as Such Wage is At or Above the State Minimum Wage.*

*Henning* stated that the purpose of section 351 was to "eliminate the authority of the Industrial Welfare Commission to permit employers to credit tips against the wages of employees and thereby to require employers to pay employees at least the minimum wage regardless of the amount of tips the employees receive." *Id. at 1279.* Obviously the Court was referring to the state minimum wage because there were no local minimum wages at issue. The express language of the California Supreme Court opinion in *Henning* demonstrates that as long as the municipality is not creating an ordinance that would allow tipped employees to receive a wage that is below the state minimum wage, section 351 is not applicable and does not act to prohibit such regulation.

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*The California Supreme Court Opinion in Henning Also Makes it Clear that Alternative Systems Such as a Total Compensation Model or Other Wage Program that Do Not Utilize a Direct Tip Credit May Be Perfectly Acceptable.*

The Letter attempts to persuade the Los Angeles city officials that *Henning* interprets section 351 to bar any type of minimum wage, whether enacted statewide or by a municipality, that in any way might result in a different minimum wage between tipped and non-tipped employees and that only a single minimum wage for all employees would be upheld. This argument also holds no water after a careful reading of *Henning*.

*Henning* merely held that the two tiered system proposed by the IWC that provided that tipped employees in the state would have a lower minimum wage than the state minimum wage for all other employees is a violation of section 351. In ruling that the two-tiered minimum wage system adopted by the IWC in 1987 was a violation of section 351, the California Supreme Court was careful to limit its holding to the restrictions placed by the legislative history on the IWC and the prohibition of only a two-tiered statewide wage that provided tipped employees with a direct tip credit. The Court stated that “the IWC is generally not required to fix a single minimum wage for all employees. We cannot agree however that section 351 does not bar the ‘two-tier’ minimum wage system at issue here.” *Id.* at 1277. [emphasis added]. The Letter’s attempt to push the ruling of *Henning* beyond these limits is simply contrary to the Court’s language addressing the scope of its opinion. Moreover, contrary to the arguments expressed in the Letter, the California Supreme Court expressly contemplated alternatives to the two tiered minimum wage system proposed by the IWC and expressed its opinion that “a single minimum wage for all employees” is not required by section 351 and such alternatives, like the total compensation model, are likely perfectly proper.

As you know, our May 2014 memorandum explains in detail why the model currently being proposed is very likely to be found to be proper and not in any way prohibited or restricted by section 351 of the Labor Code. The total compensation model (a) is not a two tiered minimum wage that creates one wage for all non-tipped employees and another lower minimum wage for all tipped employees, (b) does not create a tip credit in any way and instead simply sets a ceiling on which employees are covered or not covered by the separate municipal minimum wage and therefore simply shapes the jurisdiction of the applicability of the municipal ordinance based on their total compensation (which is far broader than tips), and (c) expressly requires that all employees, tipped or not tipped, must always be paid at least the state minimum wage.

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We have thoroughly reviewed the Letter and its arguments. We find it unconvincing. Our opinion continues to be that *Henning* and Labor Code section 351 do not restrict a ballot initiative or local minimum wage ordinance constructed under a total compensation model whereby employees whose total compensation exceeds a certain level are excluded from the scope of the local minimum wage, but still subject to federal and state minimum wage regulations.