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VIA E-MAIL AND FIRST CLASS MAIL

Honorable Mike Feuer
City Attorney
City of Los Angeles
200 N. Main Street
Los Angeles, CA 90012

Re: **Proposed Establishment of Minimum Wage in the City of Los Angeles Council File No. 14-1371**

City Attorney Feuer,

This office represents a group of local restaurants with respect to the City of Los Angeles ("City") proposal for establishing a local minimum wage.[1] This letter describes the authority of the City to incorporate within the local legislation a "total compensation" method for certain employee sectors of the economy.

Last year was a very active period for the discussion of a minimum wage policy for the City. In October 2014, the City Council passed a motion requesting the City Attorney, with the assistance of the Chief Legislative Analyst ("CLA") and the Chief Administrative Officer ("CAO"), to draft an ordinance establishing a minimum wage for all private employees working in the City. The motion also directed the CLA and CAO to procure an independent study of minimum wage policies and issues to further educate and inform the Council during deliberations. On October 21, 2014, Councilmembers Mitch O'Farrell and Bob Blumenfield introduced a motion, seconded by Councilmembers Paul Kerkorian, Nury Martinez and Felipe Fuentes, which instructed the CLA and CAO to, among other things, evaluate the allowance of counting total taxable compensation towards the minimum wage. As the City continues to engage in discussions pertaining to increases in wages, the question of how to deal with the unique nature of the restaurant industry requires careful attention. Early discussions surrounding employee income have focused almost exclusively on wages, as opposed to total compensation. Unfortunately, this narrow view does not accurately capture the restaurant industry's payment structure and has not been adequately accounted for in those discussions.

[1] The local restaurateurs have formed a coalition of over 250 (to date) local businesses, known as "Small Restaurants for Fair Wages."

For example, some stakeholders may take the position that gratuities received by restaurant employees cannot be considered in the discussion of the City minimum wage because *state* law prohibits it. These stakeholders may point to California Labor Code Section 351 ("Section 351") which provides that:

> No employer or agent shall collect, take, or receive any gratuity or a part thereof that is paid, given to, or left for an employee by a patron, or deduct any amount from wages due an employee on account of a gratuity, or require an employee to credit the amount, or any part thereof, of a gratuity against and as a part of the wages due the employee from the employer. Every gratuity is hereby declared to be the sole property of the employee or employees to whom it was paid, given, or left for. An employer that permits patrons to pay gratuities by credit card shall pay the employees the full amount of the gratuity that the patron indicated on the credit card slip, without any deductions for any credit card payment processing fees or costs that may be charged to the employer by the credit card company. Payment of gratuities made by patrons using credit cards shall be made to the employees not later than the next regular payday following the date the patron authorized the credit card payment.

The California Supreme Court ruled that Section 351 barred the Industrial Wage Commission from establishing a "two tier" minimum wage that set a lower *state* minimum wage for tipped employees, than for non-tipped employees. *Henning v. Industrial Wage Com.* (1988) 46 Cal.3d 1262.

Reliance on Section 351 with respect to a local wage ordinance discussion, where the municipality desires to increase local wages over the *state* minimum, would be misplaced. There is no case law or other authority that applies Section 351 to municipal wage ordinances. This is not surprising, because all of the case law involving the application of Section 351 involves an employer's obligation to pay a *state* minimum wage. In those cases, the application of Section 351 prohibits tip credits that lessen an employer's obligation to pay the *state* minimum. As we all know, no employer may pay an employee an amount below the *state* minimum wage. In addition, no local ordinance can circumvent the *state* law to authorize a lower wage than mandated by the *state*.

However, a City ordinance establishing a higher *local* wage is not expressly restricted by either Section 351 or the applicable case law, as long as the employee is receiving at least the *state* minimum wage. Article XI, Section 7 of the California Constitution provides that a "...city may make and enforce with its limits all local police, sanitary and other ordinances not in conflict with general laws. The authority

to regulate wages falls within a municipalities police power. *RUI One Corp v. City of Berkeley*, (9th Cir. 2004) 371 F.3d 1137, 1150. In addition, California Labor Code Section 1205(b) ("Section 1205(b)") authorizes a municipality to exercise its local police powers in this arena provided it does so in a more "stringent manner" than the state. Thus, pursuant to Section 1205(b), a city has the authority to enact a *local* minimum wage ordinance as long as it is higher (more stringent) than the *state* minimum wage. This same authority supports the inclusion of a total compensation definition in the local ordinance for certain employee sectors that have a wage base at or above the *state* minimum.

Also relevant in a discussion regarding the application of Section 351 is the original intent of the law. As stated in Labor Code Section 356, the purpose of Section 351 is "to prevent fraud upon the public in connection with the practice of tipping..." which would arguably occur when an employer takes the tip without informing the patron who left the tip that the employee will not benefit from that gratuity. Equally important are the changes that have occurred since the passing of Section 351. The dynamic of the entire restaurant industry has changed dramatically since this law was last amended in the 1970s. In particular, the manner in which tips are recorded and reported has shifted from mostly cash left on the table to amounts added in a credit card payment. Further, restaurant employers are required to report and withhold tax on tip amounts in accordance with Internal Revenue Service ("IRS") regulations. The tips are included in the calculation of workers' compensation and other mandated programs. These documented and taxed tipped amounts are the only amounts that should be accounted for in a total compensation model.

As stated above, Section 351 was not adopted with municipal wage ordinances in mind, therefore there is no reason to use it to artificially set barriers that limit the police powers of the City. Rather, we can embrace this opportunity to recognize the changes in gratuities in the restaurant industry and establish a fair and reasonable program within the existing legal structure. Within the existing legal framework and pursuant to the authority of Section 1205(b), the City can lawfully establish a *local* minimum total compensation level for certain gratuity earning restaurant workers that differs from the *local* minimum wage established for other workers and industries, as long as each are at or above the *state* minimum wage. Under the total compensation method, a restaurant employee is guaranteed a minimum compensation level which takes into account documented compensation received from gratuities. For purposes of illustration, let's say that the minimum compensation level is set at "X." X would consist of the *state* minimum wage and documented gratuities recognized as compensation by the IRS. In the event the employee's total compensation does not equal X, the employer would be responsible for making up the difference so that the employee is paid a total compensation of X. Only those gratuities that are documented on the employee's pay check in accordance with the

IRS reporting standard can be counted towards the total compensation, thus ensuring the integrity of the total compensation level.

In conclusion, as demonstrated above, the City may regulate wages pursuant to its police powers. The City is authorized to exercise those powers as long as it does so in a manner that is more stringent than the *state* wage limit. The enactment of the total compensation method for certain employee sectors of the economy is within the City's recognized powers. By utilizing the total compensation method for certain restaurant employees, the City can exercise its police power to meet its goal of providing working Angeleno's a higher level of income, while at the same time recognizing the unique structure of the restaurant industry and the important role it plays in the economy of the City.

For all of these reasons, we respectfully advise that the City enact legislation which provides certain sectors of the economy with a minimal level of total compensation which incorporates the *state* minimum wage and documented gratuities as described above. We look forward to participating in continued discussions regarding this important issue.

Sincerely,

TIMOTHY B. MCOSKER
of GLASER WEIL FINK HOWARD AVCHEN & SHAPIRO LLP

TBM:cp

cc: Mayor Eric Garcetti
City Council President Herb Wesson and Honorable Members of the Los Angeles City Council