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May 4, 2015

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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 regarding the proposal for establishing a local minimum wage in the City of Los Angeles (City).¹ On April 10, 2015, we submitted a letter describing the City's authority to incorporate a "total compensation" method within local wage legislation. As described in that letter, the City may regulate wages pursuant to its police powers. The City is authorized to exercise these powers, as long as it enacts a local wage ordinance that is more stringent than the state minimum wage. Thus, the inclusion of a total compensation method for certain employee sectors of the economy is within the City's recognized powers.

We are aware that the Coalition of Low-Wage and Immigrant Worker Advocates (CLIWA) also submitted a letter regarding these issues. CLIWA challenges the total compensation method by relying on purported authorities which have no precedential value. For instance, CLIWA argues that Labor Code Section 351 would apply with equal force were a municipality to attempt to allow a tip credit system. To support this argument, CLIWA points to dicta from a demurrer order issued by the Alameda County Superior Court. (*Roberts v. RUI One Corp.*, Case No. 2002-049644, Alameda County Superior Court, Order re Demurrer to First Amended Complaint, pg. 6). While CLIWA argues that a snippet from this order is controlling authority, of course it is not as a demurrer is designed to test the sufficiency of a pleading—not the merits of the issues. Furthermore, a thorough reading of the order actually damages CLIWA's argument. The Court reasoned there was no basis to limit the scope of Labor Code

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

Section 351 to attempts by the employer to credit tips against the state minimum wage because the Berkeley Living Wage Ordinance (Berkeley LWO) was entirely silent on tips. In fact, the Court implied that if the Berkeley LWO included language on tips, it may have reached a different result. Further still, the order specifically recognized that the *Henning* case addressed state minimum wage laws and the ordinance at issue was enacted by a municipality. CLIWA's reliance on dicta from this order is misguided and uninformative. In addition, the order provides no guidance to the discussion on a total compensation model.

CLIWA also cites a memorandum issued by the San Diego City Attorney dated July 9, 2014 on the "Application of California Labor Code Section 351 to a Local Minimum Wage Ordinance." CLIWA uses this memorandum to support its argument that Section 351 prohibits a total compensation method. However, CLIWA fails to recognize that in the same memorandum the San Diego City Attorney states that "...beyond a direct tip credit, it is unclear the impact of Section 351 on other alternatives such as a two tiered minimum wage ordinance, total compensation model or exception for tipped employees. Adoption of any of these models could result in adjudicating new law in the State of California." (San Diego City Attorney Memorandum, pg. 2).

Finally, CLIWA predictably relies on excerpts from *Henning v. Industrial Wage Com.* (1988) 46 Cal.3d 1262. As you are well aware, the *Henning* case dealt with the establishment of a state minimum wage by the state's Industrial Wage Commission and did not involve or consider local wage ordinances which set total compensation levels higher than the state minimum wage. We do not refute that tips belong to an employee nor do we disagree that the Interstate Wage Commission was not permitted to allow an employer to obtain the benefit of such tips by paying a tipped employee a lower state minimum wage than he would be obligated to pay if the employee did not receive the tips. As we explained in our earlier letter, wages and total compensation are not the same and should not be treated as such.

Under the total compensation method, tips received by an employee unquestionably belong to the employee. Consistent with Section 351 and *Henning*, the employer is still obligated to pay the employee the state minimum wage without any offset for the tips received. The City is empowered to determine what components are included within the definition of total compensation, as long as the state minimum wage requirements are met. As such, the inclusion of documented gratuities in the definition of a total compensation method, does not violate Section 351 or the holding in *Henning*. To say otherwise would be to impose an unlawful limit on the powers of the municipal corporation.

It is apparent from CLIWA's letter, that it recognizes the City's authority to enact municipal wage ordinances. However, rather than embracing that authority to address the unique structure of certain service industries, CLIWA seeks to set an

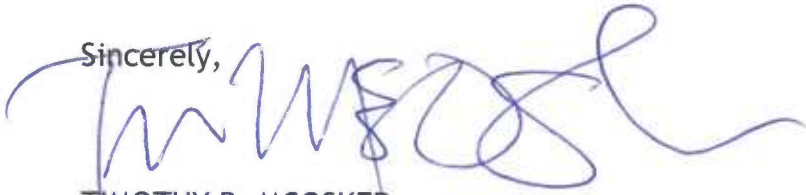
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artificial barrier to the City's authority by misconstruing the application of California Labor Code Section 351 and the applicable case law.

We encourage the City to recognize the extent of its police powers and consider legislation that includes a total compensation model for certain sectors of the economy. 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