



City of Long Beach

Working Together to Serve

Office of the City Attorney

DATE: October 18, 2016

TO: Honorable Mayor and Members of the City Council

FROM: Michael J. Mais, Assistant City Attorney *MJM*

SUBJECT: City Attorney's Legal Authority to Enforce State Minimum Wage Laws

PRIVILEGED ATTORNEY-CLIENT COMMUNICATION

On September 6, 2016, as part of the City's budget process, the City Council made a "one-time" allocation of \$475,000 to the City Attorney's Office for the purpose of engaging in enforcement activities related to State minimum wage laws (Senate Bill 3-effective January 1, 2017). On September 13, 2016, again, as part of the budget process, Council requested that the City Attorney "report back" to the Council as to how the funds allocated to the City Attorney's office for wage enforcement would be spent before any funds were used.

On September 6, 2016, the Council made a determination to follow the state minimum wage scheduled increases as set forth in Senate Bill 3, rather than adopting a local minimum wage ordinance. As such, employees who have wage related grievances would look to State law for enforcement options. The typical avenues available to an employee would be a civil action filed by the employee in Superior Court, or an administrative action filed by the employee with the California Labor Commissioner who is the Chief of the Division of Labor Standards Enforcement in the State.

In making a determination as to any possible role the City Attorney's office could have in effective enforcement of the State minimum wage laws, the City Attorney's Office engaged outside counsel for a legal opinion. A copy of that opinion is attached for your consideration. Essentially, the City Attorney's office cannot take any active role in the enforcement of State minimum wage laws because administrative remedies would be processed through existing State agencies (i.e., the State Labor Commissioner), and the City's Charter precludes the City Attorney's office from representing private individuals in legal matters, including legal actions processed through the State court systems or State administrative agencies.

In light of the above determination, the City Attorney's office cannot legally expend the funds allocated to it at the September 6, 2016 Council meeting for "effective minimum wage enforcement," and it is the recommendation from the City Attorney that the funds allocated be returned to the general fund, or re-allocated to another Department for minimum wage related educational purposes.

If you have any questions, please contact Assistant City Attorney Michael Mais as extension 8-2230.

MJM:kjm
A16-02508
Attachment

CONFIDENTIAL

MEMORANDUM

Privileged & Confidential Communication

TO: Michael J. Mais, Assistant City Attorney,
City of Long Beach

FROM: Bill Shaeffer

DATE: September 30, 2016

FILE NO.: 061576-0046

RE: City's Legal Authority to Enforce State Minimum Wage Laws

You have asked our opinion on whether or not the City of Long Beach ("City") has the legal authority to enforce in any manner the State minimum wage laws, or whether the activity is the sole responsibility of the State through the Department of Industrial Relations.

Our answer and analysis are as follows:

1. Question presented:

Does the City of Long Beach have the legal authority to enforce in any manner the State minimum wage laws, or whether that activity is the sole responsibility of the State through the Department of Industrial Relations?

2. Short Answer:

No; enforcement by the City Attorney's Office is not permitted. The City Charter defines the powers and duties of the City Attorney's Office, and those powers and duties do not include enforcement of the State minimum wage laws on behalf of those employees who work for private or public sector employees in the City of Long Beach.

3. Analysis:

a. The State minimum wage laws:

(1) SB1342 Authorizes the City to Issue Subpoenas to Enforce Local Wage Laws.

At the outset, it is important to emphasize that the City has not adopted its own local Minimum Wage Ordinance requiring the City or any public or private sector employer doing business within the City of Long Beach or entering into contracts with the City of Long Beach for goods and services, to comply with the State minimum wage statutes currently in effect or as amended.

In the event the City elects to pass its own local Minimum Wage Ordinance applying the State minimum wage laws to those public and private sector employers doing business within the City of Long Beach or engaging in contracts with the City of Long Beach – to the extent permitted by law – the recently enacted Senate Bill No. 1342 applies. SB1342 establishes Government Code section 53060.4, effective January 1, 2017. SB1342 authorizes the Long Beach City Council to delegate to a City official or department head its authority to issue subpoenas and to report non-compliance thereof to the Judge of the Los Angeles Superior Court, in order to enforce any local law or ordinance, including, but not limited to local wage laws.

(2) State Minimum Wages.

Pursuant to Labor Code section 1182.12, effective January 1, 2016, the minimum wage for all industries shall not be less than \$10.00 per hour.

However, Senate Bill 3 was approved by the Governor on April 4, 2016 and results in significant increases for the state minimum wage effective January 1, 2017. SB3 amends Labor Code section 1182.12 in relevant part to increase the minimum wage for any employer who employs twenty-six (26) or more employees to \$10.50 per hour from January 1, 2017 to December 31, 2017, with successive increases thereafter reaching \$15.00 per hour for the period January 1, 2023 until adjusted thereafter by the lessor of the CPI or 3.5%.

Note: The City is the subject of a class action lawsuit, *Marquez v. City of Long Beach*, LASC Case No. BC623334 which seeks, in part, a declaration

that the state minimum wage statute, Labor Code section 1182.12 and the attendant Wage Orders, apply to the City. The City has demurred to the Complaint on the grounds that as a charter city, the state minimum wage laws do not apply. *Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296, 317; Article XI, § 5(b), California Constitution (charter cities have plenary authority on compensation paid to their employees).

b. Enforcement of Minimum Wage statutes:

For private sector employers, the wages, hours and working conditions of employees are generally governed by Labor Code section 1171, *et seq.* These provisions apply to men, women and minors employed in any occupation, trade or industry, whether their compensation is measured by time, piece or otherwise, but do not include any individual employed and outside sales or in a national service program that is carried out with federal assistance. Labor Code section 1171; *see Sullivan v. Oracle Corp.* (2011) 51 Cal.4th 1191, 1206 (Labor codes overtime provisions applied to work performed in California for California-based employer by employees who reside outside California.)

If the employer fails to pay wages in the amount, time, or manner required by contract or by statute, except for those employees covered by a collective bargaining agreement, the employee has two principal options. The employee may seek judicial relief by filing an ordinary civil action against the employer for breach of contract and/or for the wages prescribed by statute. Labor Code §§ 218, 1194. The employee may also seek administrative relief by filing a wage claim with the California Labor Commissioner, who is the Chief of the Division of Labor Standards Enforcement (DLSE). In such a case, the employee pursues a special statutory scheme codified in Labor Code §§ 98-98.8, commonly known as a Berman Hearing. *Smith v. Rae-Venter Law Group* (2002) 29 Cal.4th 345, 350, *superseded by statute on other grounds*, 2003 Stats. Ch. 93 § 1 (amending Labor Code section 98.2(c)). Supersession by statute recognized in *Sampson v. Parking Service 2000 Com., Inc.* (2004) 117 Cal.App.4th 212, 218, n. 5.

The Labor Code Private Attorney General's Act of 2004 (PAGA), Labor Code §§ 298-2699.5, also permits employees to pursue actions against their employers for any civil penalty that would otherwise be assessed and

collected by the Labor and Workforce Development Agency (LWDA) or any of its departments, agencies or employees.

c. The City Charter does not permit the City Attorney's Office to enforce the State Minimum Wage laws on behalf of employees who are not employed by City.

(1) The City's Charter operates as an instrument of limitation and restriction.

The provisions of California Constitution Article XI, § 3(a), authorize the adoption of a city charter and provide that such a charter has the force and effect of state law. City Charters act as instruments of limitation and restriction on the broad power of charter cities over matters of municipal affairs. *City of Glendale v. Trondsen* (1957) 48 Cal.2d 93, 98.

As the court further explained in *City of San Diego v. Shapiro* (2014) 228 Cal.App.4th 756:

“The charter represents the supreme law of the city, subject only to conflicting provisions in the federal and state constitutions and to preemptive state law. The charter operates as an instrument of *limitation and restriction* on the exercise of power over all municipal affairs which the city is assumed to possess. It is well settled that a charter city may not act in conflict with its charter. Any act that is violative of or not in compliance with the charter is void. The provisions of the city's charter thus supersede all municipal laws, ordinances, rules or regulations inconsistent therewith and an ordinance or resolution violative of or not in compliance with the city charter is void.” *Id.* at 789 (citations, quotations and alterations omitted) (original emphasis).

“The provisions of a charter are the law of the State and have the force and effect of legislative enactments.” Article XI, § 3, California Constitution.

(2) The Charter Defined Powers of the City Attorney.

Section 603 of the City of Long Beach Charter concerns POWERS AND DUTIES OF THE CITY ATTORNEY. Charter Section 603 provides in relevant part as follows:

“The City Attorney shall have the following powers and duties:

(a) To be the sole and exclusive legal advisor of the City, the City Council and all City commissions, committees, officers and employees with reference to all of their functions, powers and duties under this Charter, State and Federal law;

...

(c) To attend to all suits, matters and proceedings in which the City may be legally interested;

...

(f) To investigate and enforce on behalf of the City all provisions of this Charter, of the general law applicable to municipal corporations, and of the ordinances of the City, in all courts in the State of California, except criminal cases.”

(3) The City Charter does not authorize or permit the City Attorney’s Office to prosecute wage disputes or enforce the State minimum wage laws on behalf of those who are not employed by the City.

Safe Life Caregivers v. City of Los Angeles (2016) 243 Cal.App.4th 1029, 1046 “the courts must always look first to the express language of the law to ascertain its meaning.” *Id.* (citations and alterations omitted).

(a) Private party wage disputes do not concern the functions, powers and duties of the City.

In the instance matter, Section 603 of the City Charter does not authorize or permit the City Attorney’s Office to prosecute wage disputes or enforce the state minimum wage laws on behalf of those who are not employed by the City. In such an event, the non-City employee becomes the client of the City Attorney’s Office instead of the City, City Council, officers and employees. The City Attorney’s Office will not be representing the City,

the City Council and officers of the City and employees in any of their respective functions, powers and duties under the City Charter, state and federal law. Rather, the City Attorney will be representing non-City employees in wage disputes with their individual employers over payment of minimum wages. These non-City employers may be located throughout the state, or the nation, but these non-City employers have employees working within the City of Long Beach.

(b) Private Wage Disputes by Non-City Employees against their Employer do not Constitute any Investigation and Enforcement on behalf of the City.

Similarly, the City Attorney's Office will not be investigating and enforcing on behalf of the City the provisions of general law applicable to municipal corporations, and the ordinances of the City as required by Charter Section 603. Instead, the City Attorney's Office will be enforcing or attempting to enforce, general wage laws regarding minimum wages applicable to non-City employees as individuals, rather than general laws applicable to the City as a Charter City.

(c) The City Attorney's Primary Client is the City Which Cannot Be Divided as a Result of the Creation of an Attorney-Client-Privilege with Non-City Attorneys in their Wage Disputes.

Requiring the City Attorney's Office to substitute non-City employees as the client of the City Attorney's Office has dramatic consequences to the City which are clearly contrary to Charter Section 603. The City Attorney and its clients stand in the fiduciary relationship of the very highest character, which binds the attorney to the most conscientious fidelity to the client. *Lee v. State Bar* (1970) to Cal.3d 927, 939. The most fundamental quality of the attorney-client relationship is the absolute and complete fidelity owed by the attorney to his or her client. *Flatt v. Superior Court (Daniel)* (1994) 9 Cal.4th 275, 289. A lawyer's duty of loyalty goes beyond the scope of the California Rules of Professional Conduct requirements. "It is . . . an attorney's duty to protect his client in every possible way, and it is a violation of that duty for him to assume a position adverse or antagonistic to his client without the latter's free and intelligent consent By virtue of this rule, an attorney is precluded from assuming any relation which would prevent him from devoting his entire energies to his client's interests." *Santa Clara County Counsel Attorneys Ass'n v. Woodside* (1994) 7 Cal.4th 525, 548 (internal quotes omitted).

The duty of loyalty is the primary value at stake in conflict of interest situation. *Jeffry v. Pounds* (1977) 67 Cal.App.3d 6, 10-11. An attorney's duty of loyalty to an existing client is not generally capable of being divided. *Flatt v. Superior Court, supra*, 9 Cal.4th at 282.

Accordingly, the City Attorney's exclusive duty of loyalty is to the City, the City Council, and the officers and employees of the City with reference to all of their respective functions, powers and duties under the City Charter, state and federal law. The City Attorney's duty of loyalty to the City cannot be divided, and an inherent conflict arises by the City Attorney's Office undertaking wage and hour disputes on behalf of non-City employees.

4. Conclusion

Based on the foregoing, although non-City employees are not required to pursue only administrative remedies through the State's Division of Labor Standards and Enforcement in a Berman Hearing, City Charter Section 603 operates as an instrument of limitation and restriction on the exercise of the powers of the City Attorney. Charter Section 603 does not authorize the City Attorney's Office to prosecute, investigate, or otherwise enforce the State wage laws regarding minimum wages on behalf of non-City employees. Any attempt to do so is void, resulting in any investigation or enforcement effort by the City Attorney's office to be challenged on that ground by the non-City employer(s).