CITY OF BALTIMORE

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July 15, 2020

The Honorable President and Members
of the Baltimore City Council
Room 409, City Hall
100 N. Holliday Street
Baltimore, Maryland 21202

Re: Mayor and City Council Bill 20-0544 – Baltimore City COVID-19 Laid Off Employees Right of Recall

Dear President and City Council Members:

The Law Department has reviewed City Council Bill 20-0544 for form and legal sufficiency. The bill would add a Subtitle 19A (COVID-19 Laid Off Employees Right of Recall) to Article 11 (Labor and Employment) of the City Code. The bill attempts to require certain employers to make offers of employment to certain of their former employees if the employer begins rehiring. The bill deems employees whose employment was terminated after March 5, 2020 to be "laid-off." Those "laid-off" employees must be offered any similar job for which the employer seeks to hire. If the employer is alleged to have violated this rule, the employer could be investigated by the Baltimore City Wage Commission. After investigation of the matter, the Wage Commission could require reinstatement of the employee by the employer. The Wage Commission could also force the employer to pay the "laid-off" employee certain back wages and can fine the employer.

Unconstitutional Violation of the Contracts Clause

This bill appears to be very similar to a law recently enacted in Los Angeles, California. *See* COVID-19 Right of Recall, 2020 Los Angeles Ord. 186602 (signed March 4, 2020). As the attached report from the California Employment Law Council highlights, there are many legal issues with this type of legislation. In fact, most of the case law cited within that report is from the Fourth Circuit, the federal circuit in which Baltimore City sits.

The Law Department generally concurs with the conclusions in that report: a law that mandates that an employer rehire a previously terminated worker is an unconstitutional impairment of the employer/employee freedom of contract. In short, if the employee was at-will before being terminated, this law would change that pre-existing arrangement and make rehiring now a condition of that previously agreed upon employment arrangement. *See, e.g.*, *Garris v. Hanover Insurance Company*, 630 F.2d 1001, 1005-06 (4th Cir. 1980) (citing several Supreme Court cases).

Maryland is an at-will employment state. *Porterfield v. Mascari II, Inc.*, 374 Md. 402, 421-22 (2003) ("The employment at-will doctrine long has been part of the common law of Maryland. *McCullough Iron Co. v. Carpenter*, 422 67 Md. 554, 11 A. 176 (1887). Its major premise is that an employment contract is of indefinite duration, unless otherwise specified, and may be terminated legally at the pleasure of either party at any time."). While there are both statutory and judicially created exceptions to this rule, they must be constitutional.

This bill would be an unconstitutional impairment to the pre-existing employment arrangement and would not survive a legal challenge on this basis, even in the face of a global pandemic. During the early 20th Century, the Supreme Court noted that the government may "safeguard the public health and the public safety" in the face of disease epidemics. *Jacobson v. Commonwealth*, 197 U.S. 11, 25 (1905). However, while that police power is broad, the Supreme Court explained that the "mode or manner in which those results are to be accomplished is within the discretion of the state, subject, of course, so far as Federal power is concerned, only to the condition that no rule prescribed by a state, nor any regulation adopted by a local governmental agency acting under the sanction of state legislation, shall contravene the Constitution of the United States, nor infringe any right granted or secured by that instrument." *Id*.; *accord* 100 Md. Op. Atty. Gen. 160, 171 (2015) ("Although we conclude that the Governor has statutory authority to set allocation criteria for ventilators during a pandemic, he must exercise that authority within constitutional boundaries.").

On May 29, 2020, a Federal District Court cited the Supreme Court's *Jacobson* case because it recognizes that a state's police power "might go so far beyond what was reasonably required for the safety of the public, as to authorize or compel the courts to interfere for the protection of such persons." *Baylee's Campground Inc. v. Mills*, No. 2:20-cv-00176-LEW, 2020 WL 2791797, *7 (D. Me. May 29, 2020) (not yet reported in F.Supp. 3d) (citing *Jacobson*, 197 U.S. at 28).

Just as that recent COVID related law was struck down in Maine for going beyond what is required for safety during the pandemic, so too does this bill. This bill's requirement that an employer hire one person instead of another person does not further safety during a pandemic. It is fundamentally different than those laws that courts have held permissibly impair contracts during a pandemic.

The public interest in secure housing justified temporary impairments to private leases like the bar to rental increases that was deemed necessary during a previous pandemic. *Block v. Hirsh*, 256 U.S. 135, 157 (1921); *accord Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242, 247 (1922) ("the letting of buildings for dwelling purposes with a public interest sufficient to justify restricting property rights in them.") The Supreme Court in *Block* noted that while the landlord's right to some additional rent was impaired, it amounted to merely a temporary rate control that prevented the landlord from exacting additional profit during an emergency but did not fundamentally and permanently alter the contract between the parties. The Supreme Court held that existing contracts can be impaired when doing so would further a public interest "not for the mere advantage of particular individuals but for the protection of a basic interest of society." *Home Bldg. & Loan Assoc. v. Blaisdell*, 290 U.S. 398 (1934).

This bill would advantage one employee over another in a permanent alteration of the contractual relationship between employer and former employee. Instead of being a temporary measure that suspends the rights of parties to a contract during an emergency (such as the rent increase moratorium in *Block*, *supra* or extending the time for mortgage foreclosure redemption in *Blaisdell*, *supra*), this bill would permanently create a new contract term between the employer and former employee. Therefore, this bill goes far beyond permissible interference with a contract during an emergency and Courts would likely hold that it impermissibly contravenes the Contracts Clause of the United States Constitution making it unconstitutional.

Impermissibly creates a Private Cause of Action without General Assembly Authority

This bill seeks to have the Wage Commission act as a quasi-judicial forum where terminated employees can ask that they be granted the remedy of being rehired. Local governments in Maryland have no authority to create a private cause of action. *See McCrory Corp. v. Fowler*, 319 Md. 12, 20 (1990) ("In Maryland, the creation of new causes of action in the courts has traditionally been done either by the General Assembly or by [the Maryland Court of Appeals] under its authority to modify the common law of this State."); *accord Shabazz v. Bob Evans Farms, Inc.*, 163 Md.App. 602, 636–37 (2005); *Edwards Sys. Tech. v. Corbin*, 379 Md. 278, 287–94 (2004); *H.P. White Lab., Inc. v. Blackburn*, 372 Md. 160, 167–71 (2002).

In contrast, the Wage Commission has been given General Assembly authority for its functions with respect to minimum and prevailing wages. City Charter, Art. II, § (4) (prevailing wage), § (27) (minimum wage); *City of Baltimore v. Sitnick*, 254 Md. 303, 310 (1969) (minimum wage laws are exercises of police power).[1] Since there is no similar authority given in the area of employee recall, the Wage Commission could not be given the power to demand that employers reinstate employees under this bill as it would amount to granting a private cause of action by the former employee.

Federal Preemption

As noted in the attached legal analysis, this law may conflict with the federal Uniformed Soldiers and Sailors Relief Act. 38 USC § 4302. That federal law requires reinstatement of deployed members of the armed services. It is unclear how an employer would comply with this requirement if the former employee and a returning member of the military were both eligible for rehire.

Conclusion

For the foregoing reasons, and likely a host of others that were not treated in this report due to a lack of adequate time before the hearing, the Law Department cannot approve the bill for form and legal sufficiency.

[1] The Baltimore Community Relations Commission ("BCRC"), housed with the Wage Commission in the City's Office of Civil Rights, is authorized by Federal Equal Employment Opportunity laws to act as a local arm of the Federal Equal Employment Opportunity Commission ("EEOC") as a Fair Employment Practices Agency. *See* 42 USC § 2000e-5(c), (d); Worksharing Agreement between the CRC and the EEOC.

Very truly yours,

Ashlea Brown
Hilary Ruley

cc: Dana P. Moore, Acting City Solicitor
Matthew Stegman, Mayor's Office of Government Relations
Elena DiPietro, Chief Solicitor, General Counsel Division
Victor Tervala, Chief Solicitor

Communication from Public

Name:	California Employment Law Council
Date Submitted:	04/17/2020 01:53 PM
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Comments for Public Posting:	Please see the attached letter from the California Employment Law Council.

CELC
CALIFORNIA EMPLOYMENT LAW COUNCIL

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April 17, 2020

Los Angeles City Council
John Ferraro Council Chamber
Room 340, City Hall
200 North Spring Street
Los Angeles, CA 90012

Re: Comment related to Article 4-72J-A—"COVID-19 Right Of Recall"

Councilmembers:

The California Employment Law Council ("CELC")[1] submits this letter opposing the Los Angeles City Council's proposal to create recall rights for workers within the city terminated for economic reasons. The proposed ordinance violates core constitutional principles; runs counter to several federal and state laws; and is extremely vulnerable to abuse.[2]

The CELC recognizes these are unprecedented times, and that resolving the problems left in COVID-19's wake requires out-of-the-box thinking. However, the answer is not to further weaken the city's largest private employers—many of which already face an uncertain future—with this type of burdensome, novel, and largely untested law. A law that could drag the city into lengthy, prolonged litigation over the ordinance's enforceability at a time Los Angeles should be focusing on recovery. And make no mistake—this law is ripe for legal challenge.[3]

[1] The California Employment Law Council is a non-profit organization that works to promote a better legal climate for California employers. Our members include many of California's largest and most significant employers. Senior-level in-house counsel and human resources professionals from these companies participate in and guide CELC activities. A select number of leading law firms in the area of management-employment law also participate as associate members.

[2] The CELC wishes to note that the severability provision would not rescue the ordinances absent proof the council would have passed it without the unconstitutional portions. *See Long Beach Lesbian & Gay Pride, Inc. v. City of Long Beach*, 14 Cal. App. 4th 312, 327 (1993) ("[S]everability of an unconstitutional portion of a statute requires the mechanical qualification of verbal separability, and, ultimately a judgment whether the enacting body would have enacted the remaining portions without the invalid one.").

[3] However, understanding that the council may nonetheless decide to enact this type of law, the CELC has attached several proposed amendments to make the ordinance more palatable to employers and reduce the risk of litigation.

I. THE PROPOSED ORDINANCE VIOLATES THE CALIFORNIA AND UNITED STATES CONSTITUTIONS

A. The Proposed Ordinance Completely Upsets A Foundational Understanding That Underlies Nearly Every Employment Agreement In California, Thereby Violating The Contracts Clause.

Any law that—like this ordinance—substantially impairs pre-existing, contractual obligations violates the contract clauses of both the federal and California constitutions. *Teachers' Ret. Bd. v. Genest*, 154 Cal. App. 4th 1012, 1026 (2007); *Local 101 of Am. Fed'n & Mun. Emples. v. Brown*, 2017 U.S. Dist. LEXIS 130988, at *21 (N.D. Cal. Aug. 16, 2017) ("[T]he party asserting a Contract Clause claim must establish" (1) "that a change in law impairs the contractual relationship" and (2) "that the impairment is substantial.").[4]

The proposed ordinance creates a novel, long-lasting, retroactive right. Neither state nor local law recognizes such a broad statutory right of recall, or a cause of action for violating that right. Indeed, it is extraordinarily rare for *any* government to pass this type of legislation. And, when they do, it is often struck down as violating the contracts clause.

In *Garris v. Hanover Ins. Co.*, for example, the Fourth Circuit Court of Appeals struck down a South Carolina statute restricting the reasons why an insurance company can terminate an agent. 630 F.2d 1001 (4th Cir. 1980). The agent and insurance company previously agreed that either party could unilaterally terminate their contract with sixty-days' notice. *Id.*, at 1003. But, when the insurance company exercised that right, the agent sued, alleging he was terminated for a statutorily-barred reason. *Id.* The Fourth Circuit concluded the contract clause preempted the agent's claim, explaining "the right of unilateral termination upon sixty days notice for which [the company] bargained must be accounted a critical feature of its total contractual relationships with its agents." *Id.*, at 1006. The statute "severely modified" that right, making "every termination subject to costly and disruptive legal challenges with no guarantee that even 'rightful' terminations would be so adjudged in the always chancey litigation process." *Id.*

The Fourth Circuit does not stand-alone. When West Virginia made it illegal for insurance companies to terminate agents absent good cause, the state's Supreme Court struck the law down for violating the contracts clause. *Shell v. Metro. Life Ins. Co.*, 181 W. Va. 16 (1989). Noting that, as there "was never any attempt to regulate" a "right to hire and fire" workers in that industry, the court concluded "it [could] hardly be said that the parties here could reasonably have foreseen the creation of a 'good cause' prerequisite to termination . . . at the time the contract was executed." *Id.*, at 23; *see also Birkenwald Distrib. Co. v. Heublein, Inc.*, 55 Wash. App. 1, 6 (1989) (finding a statewide ordinance requiring wine suppliers notify wholesale distributors sixty-days before terminating a contract did not apply to any contracts entered into prior to the law's enactment as, prior to it, suppliers had "an *express*, albeit unwritten, right to terminate [a contract] at will").

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[4] The California Supreme Court never considered whether the successorship ordinance at-issue in *Cal. Grocers* violated the contracts clause. *Cal. Grocers Ass'n v. City of L.A.*, 52 Cal. 4th 177 (2011). This is likely because the Grocery Worker Retention law only briefly extended pre-existing agreements between a predecessor employer and the worker; and thus it did not "substantially impair" any contracts. However, as this section discusses, the proposed COVID-19 ordinance is far broader.

The Council's proposed ordinance is just as burdensome and violative as the statutes struck down in *Garris* and *Shell*. Prior to this ordinance, there was no statutory right to recall; or a cause of action for violating that right. Quite the opposite—under California law, and absent an agreement otherwise, all "employment may be terminated at the will of either party on notice to the other." Cal. Lab. Code § 2922. California employers thus have a statutory right to terminate an employee for any non-protected reason. And "the declared public policy of this state" favors that right, as evinced by the plain language of the statute. *Hejmadi v. AMFAC, Inc.*, 202 Cal. App. 3d 525, 544-45 (1988).

Accordingly, this is not a minor impairment—it shifts a foundational understanding of the nature of employment in this state. *See Ross v. Berkeley*, 655 F. Supp. 820, 828 (N.D. Cal. 1987) ("[s]ignificant among" the factors bearing on the impairment's substantiality "is whether the state has restricted plaintiffs 'to gains [they] reasonably expected from the contract'") (*quoting Energy Reserves Grp. v. Kan. Power & Light Co.*, 459 U.S. 400, 411 (1983)). Nearly every employment agreement in California either impliedly or expressly recognizes the at-will nature of the relationship.[5] Employers hired assuming that, if the viability of their business was threatened, they could lay off those workers *without* granting them a possible cause of action. But, as in *Garris*, this ordinance severely modifies that contractual right, making "every termination subject to costly and disruptive legal challenges with no guarantee that even 'rightful' terminations would be so adjudged." 630 F.2d at 1006.

B. The Proposed Ordinance Abrogates A Fundamental Right Of Displaced Workers Outside Of Los Angeles In Favor Of Those Within The City, Violating The Equal Protection Clause.

The Council's proposed right of recall does not "simply preserve[], temporarily, the status quo" by returning displaced workers to their prior positions. *Cal. Grocers Ass'n.*, 52 Cal. 4th at 206. Anyone unlucky enough to work outside of the city must take a back seat all workers subject to recall who are arguably qualified for any job that opens at their prior employer. And that hiring prohibition lasts for *years*—not just the duration of the pandemic. Those who fall outside the city thus have their fundamental right to pursue work abrogated in favor of those inside of Los Angeles. *See Lucchesi v. City of San Jose*, 104 Cal. App. 3d 323, 333 n.9 (1980) ("[T]he courts of this state have characterized employment as a fundamental interest under the California Constitution," and as such "the state may not arbitrarily foreclose any person's right to pursue an otherwise lawful occupation.").

Since the Council designed this ordinance to benefit workers within Los Angeles to the detriment of those outside of the city, it will violate the constitutional guarantee of equal protection under

[5] This is, of course, not the only contract impaired by the proposed right of recall. Unions fought to include specific seniority and recall rights in the agreements they negotiated with companies because no such rights existed—rights that may be expressly at-odds with the bumping and 10-day notice rules in the Ordinance. And, more recently, several businesses have offered severance packages to employees impacted by the pandemic with the understanding they would not be re-hired.

the law unless it survives strict scrutiny.[6] United States Const. Amend. 14; Cal. Const., Art. I § 7; *see also Sanchez v. City of Modesto*, 145 Cal. App. 4th 660, 686 (2006) ("[S]trict scrutiny under the equal protection clause can be triggered by a classification used to burden a fundamental right.").[7]

"Strict scrutiny requires the Government to prove that the restriction on a constitutional right furthers a compelling interest and is narrowly tailored to achieve that interest." *Duncan v. Becerra*, 366 F. Supp. 3d 1131, 1159 (S.D. Cal. 2019). "A restriction is not narrowly tailored if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve." *In re Nat'l Sec. Letter v. Sessions*, 863 F.3d 1110, 1124 (9th Cir. 2017) (internal quotation omitted).

The ordinance forwards two goals—"ensure fair employment practices during the economic upheaval" created by the pandemic, and "reduce the demand on government-funded social services." And there are a myriad of ways to serve those goals *without* creating a discriminatory right of recall. Los Angeles could mimic Congress and create a loan program to help businesses keep workers on payroll. Or it could create a job training and placement program to help workers impacted by the pandemic. But what it cannot do is pass an overly broad, discriminatory ordinance that forces workers outside of Los Angeles to forgo gainful employment for the benefit of workers inside the city.

II. STATE AND FEDERAL LAWS PREEMPT SEVERAL OF THE ORDINANCE'S PROVISIONS.

A. The Labor Management Relations Act Would Preempt Many Claims Brought Under This Ordinance As Establishing A Violation Could Require Courts To Interpret A Collective Bargaining Agreement.

The ordinance creates a rebuttable presumption that any worker laid-off after March 4, 2020, was terminated for "economic" or "non-disciplinary reasons," without further defining either phrase. But these phrases are terms-of-art in many collective bargaining agreements. Indeed, those

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[6] While the California Supreme Court in *Cal. Grocers* held the Grocery Worker Retention Ordinance did not violate the equal protection clause, it only examined claims that the ordinance invalidly discriminated based on the *employer's* use of customer memberships, overall size, industry, and the terms of its collective bargaining agreement. 52 Cal. 4th at 209. It never considered an equal protection argument forwarded by *workers* displaced by the ordinance.

[7] Normally, "[r]ational basis review . . . applies to [an] Equal Protection Clause claim based on non-resident status." *Spencer v. Lunada Bay Boys*, 2020 U.S. App. LEXIS 9609, at *7 (9th Cir. Mar. 27, 2020). However, the ordinance does not discriminate based on residence—it turns on where an employee actually performed their work. But, even if rational basis was the appropriate standard, the ordinance would still fall. Rational basis review, while deferential, "is not [] toothless." *Mathews v. Lucas*, 427 U.S. 495, 510 (1976). The challenged "classification must bear some fair relationship to a legitimate public purpose." *Griffiths v. Superior Court*, 96 Cal. App. 4th 757, 776 (2002). And that relationship must "find some footing in the realities of the subject addressed by the legislation." *Heller v. Doe*, 509 U.S. 312, 321 (1993). The right of recall does not meet the ordinance's two goals—to (1) "ensure fair employment practices during the economic upheaval" created by the pandemic and (2) "reduce the demand on government-funded social services." Instead, it effectively forces employers to discriminate against workers outside of the city in favor of workers inside of it, thereby harming the statewide economy and putting pressure on its social welfare system.

agreements often define "disciplinary" and "for cause" termination because the standards are vague and amorphous. As a result, employers hoping to rebut the ordinance's presumption for any unionized worker must prove for-cause termination under the collective bargaining agreement—particularly when there are multiple reasons for terminating a worker. That, in turn, requires courts to interpret the collective bargaining agreement. And federal labor law preempts any claim that "is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985); *Jones v. Bayer Healthcare LLC*, 2008 U.S. Dist. LEXIS 61737, at *11 (N.D. Cal. Aug. 12, 2008) (dismissing a claim that "require[d] the Court to interpret provisions of the CBA, such as those regarding termination for cause" as "preempted by the LMRA.").

B. California Labor Code Section 2922 Creates "At-Will" Rights That Preempt The Proposed Ordinance.[8]

California Labor Code section 2922 states "employment, [with] no specified term, may be terminated at the will of either party on notice to the other." California employers thus have a statutory right to terminate an employee for any non-protected reason. And, as noted above, "the declared public policy of this state" favors that right. *Hejmadi*, 202 Cal. App. 3d at 544-45. This ordinance cannot co-exist with section 2922.

Nothing limits the recall right to workers terminated during the pandemic. Instead, as drafted, employers would have to re-offer work to *any* worker laid-off for economic reasons between March 4, 2020, until March 4, 2022; effectively abrogating every employer's right to terminate employees for non-disciplinary reasons. And, since cities cannot pass laws that duplicate, contradict, or enter into an area fully occupied by state law, the ordinance is preempted. *Sherwin-Williams Co. v. City of L.A.*, 4 Cal. 4th 893, 898 (1993).

[8] While the application is slightly limited, the council's proposed ordinance also directly conflicts with the Uniformed Services Employment and Reemployment Rights Act and National Banking Act. USERRA obligates employers to return service members to a position they would have been in had they not been deployed. An obligation that "supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter . . . including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit." 38 U.S.C. § 4302. The Ordinance creates a potential conflict between laid off workers and service members—both of whom would be entitled to reinstatement—because it requires employers offer every laid-off worker *any* position that becomes available for which that worker is qualified, and gives preferential treatment based on seniority. It would thus limit the right to reinstatement created by USERRA for any role that would have gone to a returning service-member but for the ordinance. As for federal banking law, it empowers banks to employ and "dismiss at pleasure" its "officers, employees and agents." *Inglis v. Feinerman*, 701 F.2d 97, 98 (9th Cir. 1983). Employing and dismissing workers "at pleasure" is akin to "at will" employment. *See Mueller v. First Nat'l Bank*, 797 F. Supp. 656, 663 (C.D. Ill. 1992) ("Congress intended the 'at pleasure' language to mean 'at will' as applied in the common law."). This ordinance violates that principle by forcing banks to rehire anyone it terminated for non-disciplinary reasons.

C. The Ordinance Invalidly Shifts The Burden Of Proving An Essential Fact To The Employer, And Is Thus Preempted By California Evidence Code § 500.

Under California Evidence Code § 500, "a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." A worker asserting a claim under the proposed Ordinance must prove an employer (1) with which they worked for more than six months; (2) terminated them on or after March 4, 2020; (3) due to a "lack of business, a reduction in work force or other economic, non-disciplinary reason." The worker—not the employer—must bear the burden of proof for each essential fact.

But the ordinance's rebuttable presumption impermissibly shifts that evidentiary burden. Under it, the *employer* must prove it terminated a Worker for disciplinary reasons. Thus, the ordinance does not simply shift the burden of producing evidence. *See Rental Hous. Ass'n of N. Alameda Cnty. v. City of Oakland*, 171 Cal. App. 4th 741, 758 (2009) (burden-shifting ordinances are only preempted where there is an "invalid presumption affecting the burden of proof rather than a presumption affecting the burden of producing evidence."). It requires employers prove that a presumed fact—that it terminated a Worker for economic reasons— *does not exist*. Cal. Evid. Code § 606 ("The effect of a presumption affecting the burden of proof is to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact."). *Fisher v. City of Berkeley*, 37 Cal. 3d 644, 698 (1984) (noting that, while California Evidence Code § 500 does not apply where "otherwise provided by law . . . the Legislature deliberately excluded [local] ordinances from those sources of law that may change the traditional allocation of the burden of proof."). And "municipal governments have no authority to depart from the common law of evidence." *Fisher v. City of Berkeley*, 37 Cal. 3d 644, 698 (1984).

D. The Ordinance Creates A Right That Arises Out Of Contract, Which Bars An Award For Punitive Damages.

Punitive damages are only available "for the breach of an obligation not arising from contract." Cal. Civ. Code § 3294. Yet the council's ordinance would allow courts to award punitive damages for a claim that *could not* exist absent an underlying employment contract. Laid off workers, after all, could only sue a company for which they previously worked. This ordinance, then, is effectively imposing an additional obligation—a "right of recall"—on pre-existing employment contracts. And "when a statute imposes additional obligations on an underlying contractual relationship, a breach of the statutory obligation is a breach of contract that will not support tort damages beyond those contained in the statute." *Brewer v. Premier Golf Props., LP*, 168 Cal. App. 4th 1243, 1255 (2008) (holding "claims for unpaid wages and unprovided meal/rest breaks arise from rights based on [an] employment contract," and thus did not allow for a punitive damages award).

III. THE PROPOSED ORDINANCE CANNOT BE RESCUED BY *CALIFORNIA GROCERS ASSOCIATION V. CITY OF LOS ANGELES.*

In *Cal. Grocers Ass'n v. City of L.A.*, the California Supreme Court upheld the Grocery Worker Retention Ordinance—a Los Angeles ordinance that similarly impinged an employer's right to hire-and-fire workers at will. But that law never spawned the problems that will inevitably flow from the proposed COVID-19 ordinance.

The Grocery Worker ordinance limited the hiring and firing rights of any company that bought a grocery store over 15,000 square-feet for just ninety-days—not two years. *Cal. Grocers,* 52 Cal. 4th at 187. During that time, the new owner could only hire from a list of workers who had at least six-months of employment with the prior owner; and could only discharge those workers for cause. *Id.* At the end of the 90-days, it had to evaluate each employee's performance and "consider" offering them continued employment. *Id.* But it did "not require that anyone be retained." *Id.* Nor did it continue operating after the initial, three-month transitionary period. *Id.* As the Court explained, "it simply preserves, temporarily, the status quo, whatever that might be." *Id.*, at 206.

Because the ordinance was fairly narrow, the Court's review was limited to just three arguments: whether the ordinance (1) was preempted by a statewide food-safety law; (2) violated the equal protection clause by discriminating based on a grocery store's use of customer memberships, overall size, industry, and the terms of its collective bargaining agreement; and (3) "impermissibly intrude[s] on successorship determinations that Congress intended to leave free of local regulation," which would trigger preemption under the National Labor Relations Act. *Id.*, at 188–208. And its answer to each of those questions was "no."

The COVID-19 Citywide Worker Retention Ordinance, in contrast, does not "simply preserve" the status quo for ninety days. It lasts for at least two years. As noted above, it upends an understanding of at-will employment that forms the foundation of nearly every pre-existing employment agreement in California. And it does much more than require employers re-hire laid-off workers—they get preferential treatment, to the detriment of workers outside of the city, for *any* job that opens up for which they could become qualified with training.

Moreover, it forwards an enforcement provision that is unlike anything the Grocery Worker Retention Ordinance put forth. It does not just recognize a private enforcement right. It creates a yet-untested—and, in the CELC's opinion, invalid—procedure that will likely force courts to interpret the "disciplinary" termination provisions in collective bargaining agreements; improperly shifts the burden of proving essential facts onto the employer; and purportedly permits worker to collect punitive damages on a right that arises out of a contract.

Cal. Grocers would thus stand inapposite in any litigation challenging the COVID-19 Recall ordinance.

IV. THE PROPOSED ORDINANCE VIOLATES PUBLIC POLICY.

A. The Ordinance Unnecessarily Complicates Company Operations At A Time When Employers Should Be Trying To Return To Normal.

The ordinance only covers employers with over $5,000,000 in gross receipts. In other words, the city's largest employers. And certain provisions are incredibly onerous, requiring employers review entire personnel files and determine whether any worker laid-off within a two-year period could fill an open-role before it hires a single person. The purpose behind this ordinance is, supposedly, to smooth the economic turmoil this pandemic created. Yet much of it does nothing but complicate operations while the city's largest employers try to get back to business-as-normal.

B. There Is No Need To "Protect" The Jobs Of Essential Workers—They Are Still Working During The Pandemic.

The council wrote this ordinance to protect workers impacted by the pandemic. However, "essential" workers are typically not impacted—they are, in fact, still working. Thus, there is no reason to include businesses offering essential services. Those companies are not laying-off workers. But they would still have to comply with the law for any workers they do lay off within the ordinance's effective dates; even if the "non-disciplinary" reason for discharge had nothing to do with the pandemic.

C. The Ordinance Would Clog A Court System That Is Already Expecting An Onslaught Of New Cases.

Los Angeles's court system already faces a heavy backlog of cases. And that caseload is only set to worsen, as COVID-19 forced many courts to postpone hearings, conferences, and trials. This ordinance only adds to the problem by incentivizing attorneys and laid-off workers to sue some of Los Angeles's largest employers anytime an open position comes up. A better approach to private enforcement is to grant the City Attorney power to take complaints, investigate violations, and levy fines. Companies would then be able to take corrective action. If they refuse to comply, the City Attorney can bring an action to enforce the fines assessed.

D. The Ordinance Violates California's Strong Public Policy Favoring Settlement.

California recognizes a strong public policy favoring settlements, and thus a "settlement agreement is considered presumptively valid." *Vill. Northridge Homeowners Ass'n v. State Farm Fire & Cas. Co.*, 50 Cal. 4th 913, 930, (2010). However, the ordinance makes it unlawful for workers to waive "any or all provisions of this article." It is not clear whether that includes a waiver of claims through settlement, which is otherwise presumptively valid. If it did, though, it would violate California policy favoring settlement.

V. PROPOSED AMENDMENTS.

Attached as Appendix A is a draft of the ordinance reflecting the CELC's proposed amendments to address some of the issues outlined above. The CELC has also taken the liberty of preparing draft motions to amend specific portions of the ordinance, to which any council member may append their name; these are attached as Appendix B. The CELC submits these proposals without waiving any argument as to the ordinance's unconstitutionality, which it maintains likely invalidates the ordinance in its entirety, but instead to guide the council as to how it may draft the ordinance to reduce the risk of legal challenge.

Thank you for your time and consideration.

Raymond W. Bertrand
PAUL HASTINGS LLP
On Behalf of the California Employment Law Council

James P. de Haan
PAUL HASTINGS LLP
On Behalf of the California Employment Law Council

APPENDIX A

Proposed Amendments to Draft Ordinance

ORDINANCE NO. _____

An ordinance adding Article 4-72J-A to Chapter XX of the Los Angeles Municipal Code subjecting certain businesses in Los Angeles to recall provisions for certain workers laid off during the COVID-19 pandemic.

THE PEOPLE OF THE CITY OF LOS ANGELES DO ORDAIN AS FOLLOWS:

Section 1. A new Article 4-72J-A is added to Chapter XX of the Los Angeles Municipal Code to read as follows:

ARTICLE 4-72J-A

COVID-19 RIGHT OF RECALL

SEC. 200.30. PURPOSE.

As a result of the COVID-19 pandemic and "Safer at Home" declarations by California Governor Gavin Newsom and Los Angeles Mayor Eric Garcetti, issued to protect the public health and welfare, many workers in the City of Los Angeles are facing significant job and economic insecurity. To ensure fair employment practices during the economic upheaval resulting from the pandemic and to reduce the demand on government-funded social services, the City hereby enacts legal protections for workers laid off due to the pandemic.

SEC. 200.31. DEFINITIONS.

The following definitions shall apply to this article:

A. **"City"** means the City of Los Angeles.

B. **"Employer"** means any person or entity who employs a Worker who works within the geographic boundaries of the ~~in the~~ City, and who earned gross receipts in 2019 exceeding $5,000,000. Employer excludes entities whose work has been or is deemed essential by the State Public Health Officer to supporting critical infrastructure.

C. **"Laid Off Worker"** means any Worker who (i) has a Length of Service with the Employer for six months or more; (ii) performed all of his or her work for the Employer within the geographic boundaries of the City; ~~and~~ (iii) was most-recently separated involuntarily ~~whose most recent separation~~ from active employment with~~by~~ the Employer ~~occurred~~ on or after ~~March 4, 2020~~the date this Ordinance becomes effective; ~~,~~ and (iv) would have continued working for the Employer but-for ~~resulted from~~ a lack of business, a reduction in work force, or another economic, non-disciplinary reason. ~~This ordinance creates a rebuttable presumption that any termination occurring on or after March 4, 2020, was due to a non-disciplinary reason.~~

Commented [A1]: *See* CELC letter, section IV(A), discussing policy reasons for excluding essential businesses.

Commented [A2]: *See* CELC letter, section I (c), discussing the preemptive effect of Cal. Evid. Code § 500.

D. **"Length of Service"** means the total of all periods of time during which a Worker has been in active service, including periods of time when the Worker was on leave or vacation.

E. **"Worker"** means any person who (i) does not act as a manager, supervisor, or confidential employee; ~~, and who~~(ii) is not required to possess an occupational license; or (iii) is not a union represented member covered by a collective bargaining agreement.

SEC. 200.32. RIGHT OF RECALL.

A. Priority for Laid Off Workers. An Employer shall offer in writing, to the last known address of every Laid Off Worker, any position which is or becomes available after the effective date of this article for which the Laid Off Worker is qualified. A Laid Off Worker is qualified - and must be offered a position in the order below - if the Laid Off Worker ~~: (1)~~ held the same ~~or similar~~ position at the same site of employment at the time of the Laid Off Worker's most recent involuntary separation from active service with the Employer~~; or (2) is or can be qualified for the position with the same training that would be provided to a new worker hired into that position~~. If more than one Laid Off Worker is entitled to preference for a position pursuant to a right created by this Article, the Employer shall offer the position to the Laid Off Worker with the greatest length of service with the Employer at the employment site.

B. Time Limit. A Laid Off Worker who is offered a position pursuant to this article shall be given no less than ten days from the date of the mailed offer in which to accept or decline the offer. A Laid Off Worker's failure to respond within 10 days is a declination of the offer for employment.

SEC. 200.33. ENFORCEMENT

A. ~~A Laid Off Worker~~The Los Angeles City Attorney may, upon the request of a Laid Off Worker, institute an investigation of any Employer alleged to have violated this article. The Laid Off Worker must first submit a Notice of Non-compliance on the City Attorney, and serve the same on the Employer. The Employer may then notify the City Attorney within 45 days as to whether it will agree to comply, or if it disputes the Complaint. If the Employer disputes the Complaint, the City Attorney will conduct a reasonable investigation into the allegations in the Complaint.

~~A.~~B. If, at the end of a reasonable investigation, the City Attorney finds the Employer violated this article, the City Attorney may (i) assess that Employer a fine of $10,000; and/or (ii) require that Employer institute hiring and reinstatement rights pursuant to this article.

~~B.~~C. If the Employer disputes the City Attorney's findings, the City Attorney may bring an action in the Superior Court of the State of California to enforce its findings~~against an Employer~~ for violations of this article. The Court may then award the City Attorney any penalties the City Attorney previously assessed. ~~and may be awarded:~~

~~Hiring and reinstatement rights pursuant to this article.~~

Commented [A3]: *See* CELC letter, section (a), discussing how the ordinance unconstitutionally effects pre-existing contractual arrangements, such as collective bargaining agreements; and section II(a) examining the preemptive effect of federal labor law.

Commented [A4]: *See* CELC letter, section (a), discussing how the ordinance unconstitutionally effects pre-existing contractual arrangements, such as voluntary termination agreements; section I(b) examining how the broad recall provision unconstitutionally discriminates against out-of-city workers; and section IV(a), regarding the reduction of economic harm to businesses.

Commented [A5]: The CELC proposes this amendment to clarify otherwise vague procedural requirements.

Commented [A6]: *See* CELC Letter, section IV(c), discussing alternative enforcement procedures to avoid clogging the court system.

~~1.~~

~~All actual damages (including, but not limited to, lost pay and benefits) suffered by the Laid Off Worker and for statutory damages in the sum of $1,000, whichever is greater.~~

~~2.~~

~~Punitive damages pursuant to California Civil Code Section 3294.~~

~~3.~~

~~Reasonable attorneys' fees and costs, as determined by the court, if the Laid Off Worker is the prevailing party in the action.~~

~~C.~~D. Notwithstanding any provision of this Code, or any other ordinance to the contrary, no criminal penalties shall attach for violation of this article.

SEC. 200.34. EXEMPTION FOR ~~COLLECTIVE BARGAINING~~PRE-EXISTING STATUTORY AND CONTRACTUAL RIGHTS~~AGREEMENT~~.

~~All of the~~No provision~~s~~ of this article~~, or any part of, may be~~ will apply to ~~expressly waived~~any employee covered by a valid ~~in a~~ collective bargaining agreement; nor will any provision of this article modify, expand, or abridge any recognition of "at-will employment," "bumping rights," seniority-hiring rights, or rights of recall that (i) exist under state or Federal law; or (ii) were created by contracts entered into before the date this Ordinance becomes effective. ~~, but only if the waiver is explicitly set forth in the agreement in clear and unambiguous terms. Unilateral implementation of terms and conditions of employment by either party to a collective bargaining relationship shall not constitute, or be permitted to constitute, a waiver of all or any of the provisions of this article.~~

SEC. 200.35. NO WAIVER OF RIGHTS.

Except ~~for~~ through an agreement to settle a Worker's claims against his or her Employer~~, a collective bargaining agreement provision made pursuant to Section 200.34~~, any waiver by a Laid Off Worker of any or all provisions of this article shall be deemed contrary to public policy and shall be void and unenforceable. Other than in connection with the bona fide negotiation of a ~~collective bargaining~~settlement agreement, any request by an Employer to a Worker to waive rights given by this article shall constitute a violation of this article.

SEC. 200.36. SEVERABILITY.

If any subsection, sentence, clause or phrase of this article is for any reason held to be invalid or unconstitutional by a court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this article. The City Council hereby declares that it would have adopted this article and each and every subsection, sentence, clause and phrase thereof not declared invalid or unconstitutional, without regard to whether any portion of the article would be subsequently declared invalid or unconstitutional.

Commented [A7]: *See* CELC Letter, section I (d), explaining punitive damages are never available breaching a statutory obligation arising out of a contract, which is what this ordinances creates.

Commented [A8]: *See* CELC letter, section (a), discussing how the ordinance unconstitutionally effects pre-existing contractual arrangements.

Commented [A9]: *See* CELC letter, section I(a), examining how the ordinance unconstitutionally effects pre-existing contractual arrangements, such as those in settlement agreements; and section IV(d), discussing California's strong public policy favoring settlement.

SEC. 200.37. EXPIRATION OF ORDINANCE.

Due to the extraordinary effects on employment resulting from the COVID-19 pandemic, this article shall be in effect until the earlier of either (i) March 4, 2021~~2~~, unless the City Council takes an action to extend this article prior to January 20, 2021; or (ii) the end of the State of Emergency declared by Governor Newsom on March 4, 2020~~2~~.

Sec. 2. **Urgency Clause.** The City Council finds and declares that this ordinance is required for the immediate protection of the public peace, health, and safety for the following reason: The State of California and the City of Los Angeles have declared a state of emergency due to the COVID-19 pandemic. Residents are subject to "stay at home" orders and certain businesses must reduce services or close. Workers in the City of Los Angeles are losing employment as a result of layoffs or closures, affecting their ability to feed and shelter their families. The pandemic also increases the threat to the safety of these workers and their families if workers' incomes are reduced or eliminated now or for the foreseeable future, along with health benefits and the means to seek medical assistance. Because of the immediate threat of economic hardship for workers in the City, this ordinance must become effective as soon as possible. For all these reasons, the ordinance shall become effective upon publication pursuant to Los Angeles Charter Section 253.

Sec. 3. The City Clerk shall certify to the passage of this ordinance and have it published in accordance with Council policy, either in a daily newspaper circulated in the City of Los Angeles or by posting for ten days in three public places in the City of Los Angeles: one copy on the bulletin board located at the Main Street entrance to the Los Angeles City Hall; one copy on the bulletin board located at the Main Street entrance to the Los Angeles City Hall East; and one copy on the bulletin board located at the Temple Street entrance to the Los Angeles County Hall of Records.

Approved as to Form and Legality

MICHAEL N. FEUER, City Attorney

By_____

Date _____

File No. ----------

The Clerk of the City of Los Angeles hereby certifies that the foregoing ordinance was passed by the Council of the City of Los

Commented [A10]: The CELC proposes this amendment to make compliance less onerous on employers and so its effective dates better-align with the emergency it purportedly addresses. It will also help address the policy arguments in the CELC letter, section IV(a), regarding the reduction of economic harm to businesses.

Angeles, **by a vote of not less than three-fourths** of all its members.

CITY CLERK

_____

Ordinance Passed_____

MAYOR

_____

Approved_____

APPENDIX B

Draft Motions To Amend Discrete Sections

Of Proposed Ordinance

MOTION

I HEREBY MOVE that Council AMEND the Communication from the City Attorney and Ordinances relative to providing a right of recall and job protections to workers laid off during the Coronavirus disease 2019 (COVID-19) pandemic as follows:

AMEND the Ordinance adding Article 4-72j-A via interlineation as follows:

SEC. 200.31. DEFINITIONS.

The following definitions shall apply to this article:

B. **"Employer"** means any person or entity who employs a Worker who works within the geographic boundaries of~~in~~ the City, and who earned gross receipts in 2019 exceeding $5,000,000.

C. **"Laid Off Worker"** means any Worker who (i) has a Length of Service with the Employer for six months or more; (ii) performed all of his or her work for the Employer within the geographic boundaries of the City; and (iii) whose most recent, involuntary separation from active employment by the Employer occurred on or after March 4, 2020, and resulted from a lack of business, a reduction in work force or other economic, non-disciplinary reason. This ordinance creates a rebuttable presumption that any separation occurring on or after March 4, 2020, was due to a non-disciplinary reason.

PRESENTED BY _____

SECONDED BY _____

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SEC. 200.32. RIGHT OF RECALL.

A. Priority for Laid Off Workers. An Employer shall offer in writing, to the last known address of every Laid Off Worker, any position which is or becomes available after the effective date of this article for which the Laid Off Worker is qualified. A Laid Off Worker is qualified - and must be offered a position in the order below - if the Laid Off Worker: (1) held the same or similar position at the same site of employment at the time of the Laid Off Worker's most recent involuntary separation from active service with the Employer; or (2) is or can be qualified for the position with the same training that would be provided to a new worker hired into that position. If more than one Laid Off Worker is entitled to preference for a position, the Employer shall offer the position to the Laid Off Worker with the greatest length of service with the Employer at the employment site.

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The following definitions shall apply to this article:

E. **"Worker"** means any person who (i) does not act as a manager, supervisor or confidential employee; (ii) is not covered by a collective bargaining agreement at the time of separation;~~,~~ or~~and~~ (iii) ~~who~~ is not required to possess an occupational license.

~~**SEC. 200.34. EXEMPTION FOR COLLECTIVE BARGAINING AGREEMENT.**~~

~~All of the provisions of this article, or any part of, may be expressly waived in a collective bargaining agreement, but only if the waiver is explicitly set forth in the agreement in clear and unambiguous terms. Unilateral implementation of terms and conditions of employment by either party to a collective bargaining relationship shall not constitute, or be permitted to constitute, a waiver of all or any of the provisions of this article.~~

SEC. 200.35. NO WAIVER OF RIGHTS.

~~Except for a collective bargaining agreement provision made pursuant to Section 200.34, A~~any waiver by a Laid Off Worker of any or all provisions of this article shall be deemed contrary to public policy and shall be void and unenforceable. ~~Other than in connection with the bona fide negotiation of a collective bargaining agreement, a~~Any request by an Employer to a Worker to waive rights given by this article shall constitute a violation of this article.

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SEC. 200.33. ENFORCEMENT.

A. ~~A Laid Off Worker~~The Los Angeles City Attorney may, upon the request of a Laid Off Worker, institute an investigation of any Employer alleged to have violated this article. The Laid Off Worker must first submit a Notice of Non-compliance on the City Attorney, and serve the same on the Employer. The Employer may then notify the City Attorney within 45 days as to whether it will agree to comply, or if it disputes the Complaint. If the Employer disputes the Complaint, the City Attorney will conduct a reasonable investigation into the allegations in the Complaint.

~~A.~~B. If, at the end of a reasonable investigation, the City Attorney finds the Employer violated this article, the City Attorney may (i) assess that Employer a fine equal to the greater of either (1) all actual damages (including, but not limited to, lost pay and benefits) suffered by the Laid Off Worker, or (2) statutory damages in the sum of $1,000; and/or (ii) require that Employer institute hiring and reinstatement rights pursuant to this article.

~~B.~~C. If the Employer disputes the City Attorney's findings, the City Attorney may bring an action in the Superior Court of the State of California to enforce its findings~~against an Employer~~ for violations of this article. The Court may then award the City Attorney any penalties the City Attorney previously assessed. ~~and may be awarded:~~

~~Hiring and reinstatement rights pursuant to this article.~~

~~1.~~

~~All actual damages (including, but not limited to, lost pay and benefits) suffered by the Laid Off Worker and for statutory damages in the sum of $1,000, whichever is greater.~~

~~2.~~

~~Punitive damage, pursuant to California Civil Code Section 3294.~~

~~3.~~

~~Reasonable attorneys' fees and costs, as determined by the court, if the Laid Off Worker is the prevailing party in the action.~~

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AMEND the Ordinance adding Article 4-72j-A via interlineation as follows:

SEC. 200.33. ENFORCEMENT.

A. Before a~~A~~ Laid Off Worker may bring an action ~~in the Superior Court of the State of California~~ against an Employer for violations of this article, the Laid Off Worker must serve on the Employer written notice detailing its alleged non-compliance with the Ordinance. If the Employer does not correct the noted deficiencies within thirty days, the Laid Off Worker may file an action under this Ordinance and may be awarded:

1. Hiring and reinstatement rights pursuant to this article.

2. All actual damages (including, but not limited to, lost pay and benefits) suffered by the Laid Off Worker and for statutory damages in the sum of $1,000, whichever is greater.

~~3. Punitive damage, pursuant to California Civil Code Section 3294.~~

~~4.~~3. Reasonable attorneys' fees and costs, as determined by the court, if the Laid Off Worker is the prevailing party in the action.

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SEC. 200.35. NO WAIVER OF RIGHTS.

Except for a collective bargaining agreement provision made pursuant to Section 200.34, or through an agreement to settle a Worker's claims against his or her Employer, any waiver by a Laid Off Worker of any or all provisions of this article shall be deemed contrary to public policy and shall be void and unenforceable. Other than in connection with the bona fide negotiation of (i) a collective bargaining agreement or (ii) a settlement agreement, any request by an Employer to a Worker to waive rights given by this article shall constitute a violation of this article.

PRESENTED BY _____

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