CITY OF BALTIMORE

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Mayor

DEPARTMENT OF LAW
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September 13, 2019

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

Re: City Council Bill 19-0377 – Whistleblower Rights and Responsibilities

Dear President and City Council Members:

The Law Department has reviewed City Council Bill 19-0377, as amended by Councilman Dorsey, dated August 27, 2019, for form and legal sufficiency. The bill prohibits retaliation against whistleblowers for making covered disclosures. It establishes complaint procedures for whistleblowers and authorizes the Office of the Inspector General to investigate whistleblower complaints. The bill establishes judicial and appellate review and requires training for supervisors and employees. It mandates that the Office of the Inspector General create rules and regulations relating whistleblower complaints. The bill also provides for a special effective date.

As an initial matter, the Law Department notes that, as a matter of public policy, no City employee today can suffer a personnel action as a reprisal for disclosing information for any of the following activities: a violation of law or regulation; gross mismanagement; waste of funds; abuse of authority; or for allegations involving substantial or specific danger to public health or safety. *See*, City Code Art. 1, § 8-1. This protection extends to at-will employees who normally can be subject to any personnel action including termination for any reason or for no reason, unless the action is constitutionally barred. *See*, 16B McQuillin Mun. Corp. § 46:80.50 (3d ed.) ("An at-will employee may not be terminated "(1) for refusing to violate the law or any well-established and clear mandate of public policy as expressed in the constitution, statutes, regulations promulgated pursuant to statute, or rules created by a governmental body or (2) for reporting wrongdoing or violations of law to superiors or public authorities"). The current protection, however, does not extend to employees of "affiliated entities," as that term is defined in the amendments. Nor does the current law expressly provide for the Office of the Inspector General to investigate allegations of employment reprisals - that is, for "whistleblowing – although the Inspector General is authorized today to investigate these matters. *See*, City Charter, Art. X, § 3(b). Council Bill 19-0377 would expand the law to include them.

"Affiliated Entities"

While there is no question that the Mayor and City Council may regulate the behavior of City employees, the regulation of employees of an "affiliated entity" are a different matter. The employer-employee relationship in private employment is the product of a contract. *See*, 3 McQuillin Mun. Corp. § 12:1 (3d ed.)(" The employer-employee relationship in public employment is the product of law, —constitutional, legislative and decisional—rather than the product of a contract as in private employment."). Thus, the initial legal concern with the bill is the effect of Article 1, § 10 of the U.S. Constitution, known as the Contract Clause.

The Contract Clause limits the ability of state and local legislation to interfere in the contracts of private parties. *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 17 (1977) ("It long has been established that the Contract Clause limits the power of the States to modify their own contracts as well as to regulate those between private parties."). Legislative interference, however, is situationally permissible. In particular, the Supreme Court holds that state and local governments exercise broad discretion when interfering with contracts between employer and employees. *See e.g., West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 393 (1937) ("In dealing with the relation of employer and employed, the Legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations...." To this end, the Mayor and City Council used police power to lawfully interfere with contractual employment relationships when Baltimore adopted its minimum wage law. *See, City of Baltimore v. Sitnick*, 254 Md. 303, 309–10 (1969) ("We start with the recognition of the general proposition that Baltimore City, as a municipal corporation, had the authority under its police powers to establish by ordinance minimum wage regulations"). With these principles in mind, the Law Department concludes that, through the use of police power, Council Bill 19-0377 can lawfully regulate the private employment relationships that exist in a 501(c)(3) entity such as the Baltimore Development Corporation that is named in the bill.

Turning to the Baltimore City Parking Authority ("BCPA"), this entity is a product of both State and local legislation. State law permits local governments to create parking authorities. Md. Local Govt § 18-104. Moreover, the parking authorities have the powers granted them by local law, consistent with the State enabling act. Md. Local Govt § 18-108. The Mayor and City Council of Baltimore exercised the powers granted by the enabling act and created the Baltimore City Parking Authority, the provisions of which are now found in Article 31, Subtitle 13. That subtitle specifically states that the "Authority is not an agency of the Mayor and City Council of Baltimore, and its officers and employees are not agents or employees of the Mayor and City Council of Baltimore." City Code, Art. 31 § 13-6. Nonetheless, this provision does not bar subsequent local legislation from overturning this prohibition. *See*, State v. Graves, 19 Md 351 (1863) ("The corporation cannot abridge its own legislative powers."). Furthermore, nothing in the State enabling act would prohibit the provisions of Council Bill 19-0377 from taking effect. The Law Department therefore concludes that the bill may lawfully affect the behavior of employees of the Baltimore City Parking Authority.

Like the Baltimore City Parking Authority, the South Baltimore Gateway Community Impact District Management Authority is something of a special case. The Authority is a creature of the City, created pursuant to Article II, § 69 of the City Charter. The delegation of authority found in that section, however, states that the Authority is not an agent of the Mayor and City Council or of the State. Art. II, § 69(e). The ordinance that implements the Charter provision repeats this constraint, stating also that the officers and employees of the Authority are not agents of the City or State. City Code, § 19-5(a). Nonetheless, the Law Department concludes that Council Bill 19-0377 may regulate the Authority's through the exercise of the City's police power. The Authority is not a State entity. The Authority is not a City entity. It is an "other-type" of entity, subject to and regulated by this legislation in the same way a private employer can be regulated by it. The Law Department therefore concludes that the bill may lawfully affect the South Baltimore Gateway Community Impact District Management Authority.

§ 8-9 Rules and Regulations

This section requires the Inspector General to adopt rules and regulations to carry-out this subtitle and file them with the Department of Legislative Reference. As a point of clarity, this provision will allow the IG to establish rules applicable to how whistleblowing must be handled in the agencies affected by the bill.

The Law Department sees no legal obstacles to the passage of this Council Bill 19-0377 and is prepared to approve it for form and legal sufficiency.

Sincerely,

Victor K. Tervala
Chief Solicitor

cc: Andre M. Davis, City Solicitor
Nicholas Blendy, MOGR
Matt Stegman, Mayor's Legislative Liaison
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