



July 7, 2010

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



Re: City Council Bill 10-0505 – Living Wage for Major Retailer Employees

Dear President and City Council Members:

The Law Department has reviewed City Council Bill 10-0505 for form and legal sufficiency. The bill would require retailers that employ at least two people in the City and that have annual gross sales (including sales of parent companies) exceeding ten million dollars exclusive of excise taxes, to pay at least the Living Wage Rate (hereinafter the “Rate”) to all employees except those who make more than \$50,000 in management or professional roles. The Rate is equal to that set by the Board of Estimates for City service contracts. *See City Code, Art. 5, Section 26-16.* This rate is tied to the Poverty Index. *See City Code, Art. 5, Section 26-1(b).* The bill would allow the affected employers to take a credit of up to \$2 an hour for the payment of certain benefits. It would also impose notice requirements on the effected retailers.

The City has the power to establish a minimum wage under its broad police powers. *Mayor and City Council v. Sitnick*, 254 Md. 303, 309-10 (1969). The City must take care not to conflict with state minimum wage laws. *Id.* at 323-324; *see also* 1965 Op. City Sol 61, 65 (upholding City’s minimum wage law). In this instance, there is no conflict with Maryland law but rather a permissible “supplementation of the State law.” *Sitnick*, 254 Md. at 324.

The bill does not violate Equal Protection Clause of the United States Constitution because when a suspect class such as race or gender is not involved, a classification by the legislature is presumed valid “if any state of facts reasonably may be conceived to justify it.” *McGowan v. State of Maryland*, 366 U.S. 420, 425-26 (1961). The City Council provides for such a set of facts in the bill’s recitals.

Moreover, it is permissible to target large employers in only one industry because Courts have recognized that “legislatures are permitted the ‘leeway to approach a perceived problem incrementally.’” *Retail Industry Leaders Ass’n v. Fielder*, 435 F.Supp.2d 481, 500 (D.Md. 2006)(holding that just because a Maryland law targets only Wal-Mart is not sufficient grounds for violation of the Equal Protection Clause). Government need not make the unrealistic choice of enacting comprehensive regulation or none at all. *Martin v. City of Struthers*, 319 U.S. 141,

153-54 (1943); accord *Chicago Allis Manufacturing v. Metropolitan Sanitary District of Greater Chicago*, 288 N.E.2d 436, 443 (1972)(upholding ordinance prohibiting discharge of waste by large industrial plants, but not regulating smaller or non-industrial discharge).

Finally, the bill does not conflict with the federal Employee Retirement Income Security Act ("ERISA") because it allows employers to achieve the minimum level of compensation through a combination of benefits and wages. See e.g., *Burgio v. New York State Department of Labor*, 107 F.3d 1000, 1010-11 (2nd Cir 1997)(citations omitted); see also *California Div. of Labor Standards Enforcement v. Dillingham*, 519 U.S. 316, 334 (1997) (holding California's prevailing wage act is not preempted by ERISA); c.f. *Retail Industry Leaders Ass'n v. Fielder*, 435 F.Supp.2d at 495 (Maryland's Fair Share Act preempted by ERISA because it mandated spending a certain amount on health benefits alone).

As there are no legal impediments to the bill, the Law Department approves it for form and legal sufficiency.

Very truly yours,


Hilary Ruley
Assistant Solicitor

cc: Honorable Councilmember Mary Pat Clarke, 14th District
George Nilson, City Solicitor
Angela C. Gibson, Mayor's Legislative Liaison
Elena DiPietro, Chief Solicitor
Ashlea Brown, Special Assistant Solicitor
Terese Brown, Assistant Solicitor