Sent via U.S.P.S. to City Hall and by email to individual recipients

August 31, 2020

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

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

Dear President and City Council Members:

We write to express our deep concern and disagreement with report analyzing City Council Bill 20-0544 ("the Bill") submitted to the Baltimore City Council by the Baltimore City Law Department ("the Law Department Report"). The Law Department Report's legal analysis misstates how the law would apply to the Bill, and for the reasons explained below, we recommend that the City Council disregard it. We further recommend that the City Council consider investigating how and why the Law Department submitted an analysis containing such egregious misstatements of the law.

I. Background

The Bill requires certain employers to offer re-employment to certain former employees who were laid off after the imposition of the COVID-19 state of emergency and establishes procedures to accomplish that goal through the Wage Commission. The Bill is similar to legislation that Los Angeles and Oakland have adopted,[1] as well as a bill that has passed both chambers of the California legislature and will soon be sent to Governor Newsom.[2]

[1] City of Los Angeles COVID-19 Right to Recall Ordinance, Ordinance No. 186602 (adopted May 20, 2020), available at: https://clkrep.lacity.org/onlinedocs/2020/20-0147-S15_ORD_186602_06-14-2020.pdf; Oakland Travel and Hospitality Worker Right to Recall Ordinance, Ordinance No. 13607 (adopted July 21, 2020), available at https://oakland.legistar.com/LegislationDetail.aspx?ID=4579935&GUID=19C49E87-982D-4B24-A4D0-5EFB633A3A9B.

[2] The California bill, AB-3216, passed the state's Assembly on June 18, 2020, and Senate on August 30, 2020. *See* AB-3216, *Unemployment: rehiring and retention: state of emergency*, History page, available at https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB3216.

The Law Department Report erroneously concludes that the Bill (i) "contravenes the Contracts Clause of the United States Constitution," (ii) impermissibly "create[s] a private cause of action," (iii) may conflict with the federal Uniformed Soldiers and Sailors Relief Act," and (iv) is likely also unlawful for "a host of other[]" reasons the Report fails to explain.

II. The Bill does not implicate the Contracts Clause because it would simply require *an offer of employment to former employees* and would not impair pre-existing contracts

The Contracts Clause of the U.S. Constitution provides that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts[.]" U.S. Const. Art. I § 10. This clause "restricts the power of States to disrupt contractual arrangements," though "not all laws affecting pre-existing contracts violate the Clause." *Sveen v. Melin*, 138 S. Ct. 1815, 1821 (2018). The Contracts Clause "does not limit the ability of the government to regulate the terms of future contracts; *it applies only if a state or local government is interfering with the performance of existing contracts*."[3] Even when applied to existing contracts, it is extraordinarily rare for a contract to violate the Contracts clause. "Since 1937, the [Supreme] Court's deference to government economic regulation has resulted in the contracts clause rarely being used to invalidate state and local laws."[4]

Two years ago in *Sveen*, the U.S. Supreme Court reiterated the test for determining whether a state or local law violates the Contracts Clause. First, a court asks whether the law has substantially impaired a contractual relationship, an inquiry examining whether and how "the law undermines the contractual bargain, interferes with a party's reasonable expectations, and prevents the party from safeguarding or reinstating his rights." 138 S. Ct. at 1822. If the court finds that these "factors show a substantial impairment, the inquiry turns to the means and ends of the legislation," and "whether the state law is drawn in an 'appropriate' and 'reasonable' way to advance 'a significant and legitimate public purpose.'" *Id*. (internal citations omitted). In *Sveen*, the Court applied this test and held that the Contracts Clause did not invalidate the state law at issue.

Here, the Bill does not implicate the Contracts Clause because the Bill does not impair any pre-existing contractual relationship. There is no contractual or even quasi-contractual relationship between an employer and a former employee—only a former relationship. Even if a former employment relationship was contractual in nature, ***it is impossible to impair the obligation of a contract that no longer exists***. In short, the Contracts Clause has nothing to do with the Bill because hiring laid off workers does not involve pre-existing contracts.

The Law Department Report reached a contrary conclusion, adopting the analysis not of the Los Angeles City Attorney (which approved a similar bill) but of a memorandum submitted to the Los Angeles City Council by the "California Employment Law Council"—an entity representing the interests of large corporations working to "create a better legal climate for

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[3] Erwin Chemerinsky, *Constitutional Law — Principles and Policies* 682 (6th ed. 2019) (emphasis added).

[4] *Id*.

California employers."[5] Referring to that memo, the Law Department Report concludes that "a law that mandates that an employer rehire a previously terminated worker is an unconstitutional impairment of the employer/employee freedom of contract." It reasons that "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." The Law Department Report's conclusion is logically inscrutable and legally indefensible, and its analysis is unmoored from established precedent.

As an initial matter, the Law Department's analysis is logically flawed. It suggests that the Bill would, if enacted, revive an employment relationship between a former employer and former employee—*a relationship that no-longer exists*—and retroactively impose new conditions on that non-existent relationship. Having concluded that impairing such a phantom relationship would interfere with some "freedom of contract" that supposedly existed previously between the parties, the Law Department concludes that the Bill would be unconstitutional. In short, the analysis concludes that the Bill retroactively revives and simultaneously imposes new conditions on an employment relationship that no longer exists. The City Council should reject this illogical analysis and its strained conclusion.

Further, the Law Department's revival of, and apparent reliance on, the dangerous and discredited "freedom of contract" theory is disturbing and must be rejected. "Freedom of contract" between employer and employee is an archaic concept represented by the 115-year-old Supreme Court case of *Lochner v. New York*, 198 U.S. 45 (1905). *Lochner* held that a law that limited the number of hours an employer could require an employee to work violated the Due Process Clause of the Fourteenth Amendment and was therefore unconstitutional. Over the next 30 years, the Supreme Court invalidated many laws that protected employees under the theory that they impaired the "freedom" of the employer to contract with employees for almost any term or condition of employment (long hours, low pay, etc.).[6] But the *Lochner* era ended more than 80 years ago when the Supreme Court overruled *Lochner* and upheld the constitutionality of minimum wage legislation. *See West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937) ("What is this freedom? The Constitution does not speak of freedom of contract."). The Law Department Report's reliance on "freedom of contract" under the Contracts Clause as a basis for attacking the Bill's constitutionality is flawed both because (i) "freedom of contract" is a concept associated with the Due Process Clause, not the Contracts Clause, and (ii) the concept has been discredited and is largely irrelevant to modern jurisprudence.

In support of its mistaken conclusion, the Law Department Report cites *Garris v. Hanover Ins. Co.*, 630 F.2d 1001 (4th Cir. 1980), a decision of the U.S. Court of Appeals for the Fourth Circuit, which has jurisdiction over Maryland, and notes that *Garris* cited "several Supreme

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[5] *See* California Employment Law Council homepage, caemploymentlaw.org. The membership roster of the California Employment Law Council is available at http://caemploymentlaw.org/upload/CELC%20Membership%20Roster.pdf, and includes such corporations as AT&T, Broadcom, Inc., Northrop Grumman Corporation, and Wells Fargo Bank.

[6] Erwin Chemerinsky, *Constitutional Law — Principles and Policies* 658 (6th ed. 2019).

Court cases." ***But* Garris *is irrelevant because it involved a state law that affected existing contracts—limiting the reasons insurance companies could cancel contracts with insurance agents—whereas the Bill does not affect (let alone impair) existing contracts***. Further, the "several Supreme Court cases" *Garris* cites and the Law Department Report references are the two *and only* Supreme Court cases in the last 90 years to invalidate a state or local law for violating the Contracts Clause: *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977) and *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978). Neither has any bearing on the Bill's constitutionality. *See United States Trust*, 431 U.S. at 1 (invalidating a state law that impaired the state's contractual obligation to bondholders); *Allied Structural Steel*, 438 U.S. at 234 (holding unconstitutional a state law as applied to a particular employer because it impaired the employer's contractual pension obligations).

Further, the reasoning set out in the Law Department Report has been rejected by the Supreme Court. If accepted, the Law Department Report's reasoning would prevent states and localities from enacting nearly any bill that protects employees in nearly any way, because those protections would affect the "at-will" employment status of the employee. But states and localities regularly pass legislation protecting workers without implicating the Contracts Clause; as just one example, state and local anti-discrimination laws limit the reasons for which an employer may fire an "at-will" employee. The Supreme Court has specifically cautioned against the understanding of the Contracts Clause applied in the Law Department Report, reasoning that "read[ing] every workplace regulation into the private contractual arrangements of employers and employees would expand the definition of contract so far that the constitutional provision would lose its anchoring purpose." *General Motors Corp. v. Romein*, 503 U.S. 181, 190 (1992). In short, the Law Department Report's reasoning would invalidate myriad valid workplace protections and advance an analysis that the Supreme Court has warned against.[7]

Finally, it is worth noting that the City Councils of Los Angeles and Oakland—presented with the same specious, corporate-funded arguments relied upon by the Law Department here—correctly rejected the faulty conclusion that a bill like City Council Bill 20-0544 would violate the U.S. Constitution. The City Council here should do the same.

III. The Bill does not impermissibly create a private cause of action

The Law Department Report also concludes that the Bill impermissibly creates a private cause of action. This conclusion is based on a misreading of case law. It is true that the Court

[7] The Law Department Report's citation and reliance on *Bayley's Campground Inc. v. Mills*, No. 2:20-cv-00176-LEW, 2020 U.S. Dist. LEXIS 94296 (D. Me. May 29, 2020) is also confounding. The Report reasons that "[j]ust 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." But in *Bayley's Campground*, a federal court in Maine *rejected* a business challenge to the Maine Governor's executive order imposing certain quarantine restrictions on out-of-state visitors, upholding its validity. The case therefore stands for the opposite of what the Law Department Report cites it for. The Report's reliance on *Bayley's Campground* is further evidence of the serious problems with its analysis and conclusions.

of Appeals has held that, with some exceptions, "[i]n Maryland, the creation of new causes of action *in the courts* has traditionally been done either by the General Assembly or by" the courts under their authority to modify state common law. *McCrory Corp. v. Fowler*, 319 Md. 12, 20 (1990) (emphasis added). But the Bill does not create a new cause of action "in the courts." Rather, it creates an administrative remedy under the Wage Commission, similar to Baltimore City's Displaced Service Worker Protection Ordinance, which the Law Department approved.[8] This objection is similarly baseless.

IV. The Bill is not preempted by the Uniformed Soldiers and Sailors Relief Act

The Law Department Report also suggests that the Bill "may conflict with the federal Uniformed Soldiers and Sailors Relief Act," which in some circumstances requires reinstatement of deployed members of the armed services, and cites that law's preemption provision, 38 U.S.C. § 4302. *See also* 38 U.S.C. § 4313 (setting out reemployment rights for eligible individuals). The Law Department Report suggests that "[i]t 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." But by definition, someone who seeks to exercise their federal reemployment rights under the Uniformed Soldiers and Sailors Relief Act is returning to a position made vacant by a period of service, not because of the pandemic; accordingly, there is no conflict to preempt. Even if there were such a conflict in an individual case, this speculative, attenuated concern does not come close to preempting the Bill outright, and no court would hold that the Bill is facially preempted by this law.

V. The City Council should consider investigating how the Law Department came to submit to it such unsound and unsupported legal advice

The Public Justice Center does not typically submit letters like this one. But the Law Department Report contains so many egregious misstatements of law, and is so disconnected from settled precedent, that we feel compelled to suggest an investigation into how and why such a report came to be. Even a cursory review of the arguments in the California Employment Law Council's memorandum, which the Law Department adopted, reveals that those arguments are not just wrong, but fanciful—demonstrating the risk of uncritically adopting an interested party's analysis. We fully understand and appreciate that the Law Department operates under serious time constraints. Yet its function is too important to sacrifice sound legal analysis for expediency. The City Council cannot do its job if it cannot trust the accuracy of the Law Department's analyses. Accordingly, we suggest the City Council investigate how the Law Department came to submit its flawed Report and whether appropriate systems are in place to ensure that this situation is remedied and not repeated.

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[8] *See* Law Department Report re Bill No. 17-0048 (May 15, 2017), available at https://baltimore.legistar.com/LegislationDetail.aspx?ID=3011997&GUID=2371995A-7167-403E-8B4A-B01BB95E8058.

If you would like to talk further about any of the issues raised in this letter, we can be reached by email at rodwind@publicjustice.org and dworak-fishers@publicjustice.org.

Very truly yours,

David Rodwin

Sally Dworak-Fisher

cc: Dana P. Moore, Acting City Solicitor
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