PUBLIC JUSTICE CENTER

September 16, 2020

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

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

Dear President and City Council Members:

We write to respectfully disagree with the analysis of City Council Bill 20-0544 ("the Bill") by the Baltimore City Law Department ("the Report") and to request that the Council do the same.

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 is in effect in both Los Angeles and Oakland,[1] as well as a bill that has passed both chambers of the California legislature is awaiting the signature of Governor Newsom.[2]

The Report concludes that the Bill (i) "contravenes the Contracts Clause of the United States Constitution," (ii) impermissibly "create[s] a private cause of action," and (iii) may conflict with the federal Uniformed Soldiers and Sailors Relief Act." We disagree.

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[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.

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] In fact, since 1930s, the Supreme Court has only struck down one law affecting private contracts, and the law in that case was a far cry from the Bill at issue here. *Allied Structural Steel Co v. Sannaus*, 438 U.S. 234 (1978).[5]

Just 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. In short, challenges are subject to "rational basis review," or the lowest level of scrutiny. 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 even implicate the Contracts Clause because it 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 a mere offer to hire a laid off worker does not affect any existing contract. Indeed, what the D.C. federal appeals court said in relation to a challenge to a

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

[4] *Id*.

[5] In *Allied Structural*, the terms of a company pension plan, an existing contract, with its employees permitted the company to terminate those pension contracts at any point. Minnesota then passed a law effectively forcing the company to make pension payments by paying a "pension funding charge" if a company terminated their contracts or closed the office. The Court found that the law substantially impaired the existing contracts and abrogated the terms allowing termination at any point by forcing the company to make significant financial pension payments.

worker retention bill is equally true here: "*there is no existing contractual relationship to be 'impaired,' to say nothing of 'substantially' so.*" Wash. Serv. Contractors Coal. v. Dist of Columbia, 54 F.3d 811, 818 (1995).

The Report reached a contrary conclusion, adopting the analysis not of the Los Angeles City Attorney (which approved a similar bill) but of a memo submitted to the Los Angeles City Council by an entity representing the interests of large corporations working to "create a better legal climate for California employers."[6] The 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." The Report 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."

In addition to the fact that the Bill does not implicate the Contracts Clause for the reasons explained, the Report'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 Report 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. That reasoning is not persuasive.

III. The "Freedom of Contract" theory has been repudiated by the Supreme Court and, in any event, is a Due Process issue, not a Contracts Clause issue

The Report's attempted revival of, and apparent reliance on, the long-discredited "freedom of contract" theory should 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.).[7] But the *Lochner* era ended more than 80 years ago when the Supreme Court upheld the constitutionality of minimum wage legislation. *See West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937). Writing for the Court in 1992, Justice O'Connor explained the demise of "freedom of contract."

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[6] *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.

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

Explaining that *Lochner* and its progeny reflected a commitment to laissez-faire that invalidated social welfare legislation, she wrote:

> Fourteen years later, *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, (1937), signaled the demise of *Lochner*. In the meantime, the Depression had come and, with it, the lesson that seemed unmistakable to most people by 1937, that the interpretation of contractual freedom . . . rested on fundamentally false factual assumptions about the capacity of a relatively unregulated market to satisfy minimal levels of human welfare. . . . The facts upon which the earlier case had premised a constitutional resolution of social controversy had proven to be untrue, and history's demonstration of their untruth not only justified but required the new choice of constitutional principle that *West Coast Hotel* announced.

Planned Parenthood v. Casey, 505 U.S. 833, 861-62 (1992).

The reliance on "freedom of contract" is misplaced not only because the concept has been repudiated, however. Freedom of contract is not a concept stemming from the Contracts Clause. Rather, it is a concept associated with the Due Process Clause, substantive economic due process.

IV. The Report relies on case law that is readily distinguished or inapposite

In support of its mistaken conclusion, the 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 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 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).[8] 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).

The 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

[8] Only one of these involved impairments with private contracts, as opposed to public contracts where the government is a party.

executive order imposing certain quarantine restrictions on out-of-state visitors, upholding its validity. The case therefore stands for the opposite of what the Report cites it for.

V. The reasoning of the Report, if accepted, would invalidate myriad constitutional laws and ordinances

If accepted, the 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 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 Report's reasoning would invalidate myriad valid workplace protections and advance an analysis that the Supreme Court has warned against.[9]

VI. Other cities have enacted similar ordinances over the same arguments made here, and have not been subsequently challenged

It is worth noting that the City Councils of Los Angeles and Oakland—presented with the same arguments adopted in the Report there—correctly rejected the faulty conclusion that a bill like City Council Bill 20-0544 would violate the U.S. Constitution. Those ordinances have been in effect for months without challenge.

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

The Law Department Memo 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 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

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[9] The 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 Report cites it for. The Report's reliance on *Bayley's Campground* is further evidence of the serious problems with its analysis and conclusions.

Baltimore City's Displaced Service Worker Protection Ordinance, which the Law Department approved.[10] This objection is similarly baseless.

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

The Report also suggests that the Bill "may conflict with the federal Uniformed Soldiers and Sailors Relief Act," (USSRA) 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 Memo 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. It is "not impossible to comply with both [the bill] and the USSRA," which is required in order to find conflict preemption, because an employer could, if the situation arose, offer employment to the service member whose position was made vacant *when they left for service* as well as offer to hire a former employee *laid off due to the pandemic* Accordingly, the Bill does is not preempted by the USSRA because it does not "clearly stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." H&R Block E. Enters. v. Raskin, 591 F.3d 718, 723 (4th Cir. 2010) (internal quotations omitted); Anderson v. Sara Lee Corp., 508 F.3d 181, 191-92 (4th Cir. 2007)

For the foregoing reasons, we respectfully disagree with the analysis of the Report, and request that the City Council do the same.

Thank you in advance for your consideration of these issues.

Very truly yours,

Sally Dworak-Fisher

[10] *See* 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.