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August 7, 2020

Via Electronic Mail and U.S. Mail

Dana P. Moore, Acting City Solicitor
Hilary Ruley, Chief Solicitor, General Counsel Division
Ashlea Brown, Assistant City Solicitor
Department of Law
City of Baltimore
100 N. Holliday Street
Suite 101, City Hall
Baltimore, MD 21202

Re: Bill 20-0544,
Baltimore COVID-19 Laid Off Employees Right of Recall

Dear Acting City Solicitor Moore, Chief Solicitor Ruley, and Assistant City Solicitor Brown:

We represent UNITE HERE Local 7 and have been asked to respond to a July 15, 2020 memorandum from the Department of Law concerning Bill 20-0544, Baltimore COVID-19 Laid Off Employees Right of Recall (the "Recall Ordinance"). We have been asked to respond because our firm has been closely involved in the adoption of similar ordinances in California cities, including Los Angeles and Oakland, and with the State of California's consideration of a near identical statute (State Bill AB 3216).

The Department's July 15 memo expresses concern that adoption of the Recall Ordinance would violate the Contracts Clause of the U.S. Constitution by impairing the "at-will employment arrangement" between employers and workers covered by the Ordinance. While we understand that the Law Department's memo was produced under significant time pressure, the conclusion it reaches is incorrect. The Recall Ordinance does not impair any at-will employment relationship. Even if it did, the City's decision to require the re-hiring of workers laid off as a result of the COVID-19 pandemic is squarely

within its police power and passes the lenient Contracts Clause test that applies to such actions. Indeed, if the Law Department's memo were correct, then nearly every employment law that limited an employer's right to discharge an employee (or limited its discretion in hiring) would be unconstitutional, including anti-discrimination laws, WARN Act notification requirements, and anti-retaliation laws.

The July 15 memo's conclusion that the Recall Ordinance violates Maryland law because it creates a private right of action is also off-base. The Recall Ordinance would not create a private *judicial* cause of action; the Wage Commission would enforce the Ordinance administratively, something that is consistent with state law, as the Law Department has previously recognized.

The July 15 memo appears to rely on a letter sent to the Los Angeles City Attorney's Office by an employer lobbying organization opposed to an ordinance similar to the Recall Ordinance. But that memo did not prove convincing to the City Attorney's Office in Los Angeles, and the employer organization has taken no action to challenge the Los Angeles COVID-19 Recall Ordinance legally, even though that ordinance has been in effect since May.

The Recall Ordinance is constitutional and does not create a private judicial cause of action. The Law Department should withdraw the July 15 memo.

The Recall Ordinance Would Support the Economic Security of Workers Laid-Off Due to the COVID-19 Crisis and Assist in the City's Economic Recovery

The Recall Ordinance addresses the crisis facing hospitality and building services workers as a result of the economic crisis brought about by the COVID-19 pandemic. In addition to being a public-health crisis, the pandemic has brought about an *economic* crisis on a scale unsurpassed since the Great Depression. Visit Baltimore's CEO estimates that the impact of the COVID-19 pandemic on the hotel industry is 10 times what the impact of 9/11 was. Many Baltimore hotels laid off staff, including the Renaissance Baltimore Harbor Place Hotel, which laid off 212 workers in March, the Sheraton Inner Harbor, which laid off 135 workers. The COVID-19 pandemic has also caused many businesses to move to remote work arrangements, leading to large-scale layoffs in the commercial building services sector. And with sporting events, conventions, and other large-scale gatherings prohibited, workers providing services at such venues have also faced large-scale dislocation.

The Recall Ordinance would address this *economic* crisis by requiring that as businesses are able to safely reopen and demand returns, they first rehire their laid-off former employees. The purpose of the Recall Ordinance is to provide these laid-off employees with the economic security of knowing that they have a right to be hired to their previous jobs when the economy rebounds, to allow them to plan their lives and budgets with greater confidence, and to provide an orderly means of returning the local labor market to health when rehiring occurs. Although the economic crisis facing workers in the hospitality, commercial building services, and event center industries is related to the ongoing public-health crisis, it is distinct and requires its own remedies.

Of course, the economic crisis facing workers in Baltimore is not unique. Two other cities, Los Angeles and Oakland, California, have responded by adopting ordinances similar to the Recall Ordinance.[1] Many other cities are considering similar measures. The State of California is considering adopting a similar measure on a state-wide basis.[2]

After the Los Angeles COVID-19 Recall Ordinance was introduced in April, an employer lobbyist organization called the California Employment Law Council ("CELC") sent a letter to the Los Angeles City Council, threatening that adoption of the Ordinance would violate the law. The letter made many legally unfounded claims (including that the Ordinance would violate the Contracts Clause). The Los Angeles City Attorney reviewed the letter, found it to be legally unsupported and approved adoption of the proposed ordinance. Notwithstanding the CELC's various threats, no employer (or employer organization) has challenged Los Angeles' COVID-19 Recall Ordinance.

The Recall Ordinance Would Not Violate the Contracts Clause

The Contracts Clause provides that "[n]o state shall ... pass any ... Law impairing the Obligation of Contracts," U.S. Const. art. I, § 10, cl. 1, thereby "restrict[ing] the power of States

[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] See AB 3216, available at https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB3216. AB 3216 has passed California's Assembly and is under consideration in the State Senate.

to disrupt contractual arrangements," *Sveen v. Melin*, —— U.S. ——, 138 S.Ct. 1815, 1821 (2018). But while the text of the Contract Clause is "facially absolute," the Supreme Court has long held that "its prohibition must be accommodated to the inherent police power of the State 'to safeguard the vital interests of its people.' " *Energy Reserves Group, Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 410 (1983) (quoting *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 434 (1934)); *Chrysler Corp. v. Kolosso Auto Sales, Inc.*, 148 F.3d 892, 894 (7th Cir. 1998) (Posner, J.) ("It has been a long time, however, since the contracts clause was interpreted literally.").

Whether a regulation violates the Contract Clause is governed by a three-step inquiry: "The threshold inquiry is 'whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.' " *Id.* at 411, 54 S.Ct. 231 (quoting *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978)).

If this threshold inquiry is met, the court must inquire whether "the State, in justification, [has] a significant and legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem." *Id.* at 411–12 (citation omitted). Finally, the court must inquire "whether the adjustment of 'the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption.' " *Id.* at 412–13 (quoting *United States Trust Co. v. New Jersey*, 431 U.S. 1, 22 (1977)).

In conducting this analysis, courts apply a highly deferential standard in reviewing economic regulation affecting purely private contracts. "Unless the State itself is a contracting party, 'as is customary in reviewing economic and social regulation, . . . courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.' " *Id.* at 412–13 (quoting *United States Trust Co.*, 431 U.S. at 22–23) (footnote omitted); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 506, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987); *Ass'n of Surrogates & Supreme Court Reporters Within City of New York v. State of N.Y.*, 940 F.2d 766, 771 (2d Cir. 1991) ("[L]egislation which impairs the obligations of *private* contracts is tested under the contract clause by reference to a rational-basis test[.]"); *Chicago Bd. of Realtors, Inc. v. City of Chicago*, 819 F.2d 732, 737 (7th Cir. 1987) (where government is not a party to the contract, courts assess whether the government adopted a law that it "rationally could have believed would lead to improved public health and welfare"); *Lyon v. Agusta S.P.A.*, 252 F.3d 1078, 1086 (9th Cir. 2001) ("[T]he Supreme Court has not blanched when settled *economic expectations* were upset, as long as the legislature was pursuing a rational policy.").

The Recall Ordinance does not impair any existing contractual relationship, much less impair one substantially, so the Contracts Clause is not implicated. The July 15 memo argues that the Recall Ordinance would impair covered employees' and employers' "at-will" employment arrangement. But that is not an accurate reading of the Recall Ordinance.

The Recall Ordinance does not place a restriction on a covered employer's ability to terminate an employee under the state's at-will employment doctrine. It requires that when a business *hires* for open positions after the effective date of the Ordinance, it *offer employment* to former employees who have been laid-off for non-disciplinary reasons as a result of the COVID-19 pandemic. The Recall Ordinance does not proscribe or punish an employer's decision to terminate employment in the past by laying off workers. Not does it mandate that an employer re-hire a laid-off worker on anything other than an at-will basis. The requirement that an employer *hire* a laid-off worker does not impair any existing contract.

The July 15 memo does not cite any case involving a law even remotely similar to the Recall Ordinance. (And, as explained below, the cases it does rely on do not support its position.) However, the federal appeals court for the District of Columbia Circuit rejected application of the Contracts Clause to a remarkably similar law. In *Washington Serv. Contractors Coal. v. D.C.*, 54 F.3d 811, 818 (D.C. Cir. 1995), the federal appeals court rejected a Contracts Clause challenge to a "worker-retention ordinance" that Washington D. C. adopted. The worker-retention ordinance was nearly identical to the City's Displaced Service Workers Protection Ordinance, Baltimore City Code § 18.1 *et seq*., which has been in effect since 2017 and whose constitutionality the Law Department has recognized. Like that Baltimore ordinance, the D.C. worker-retention ordinance required a new building services contractor to rehire the employees of its predecessor, and was intended—like the Recall Ordinance—to promote job security and economic stability. The D.C. Circuit flatly rejected the argument that requiring an employer to *hire* an employee could impair any existing contractual right: "Appellees' claim that the [Displaced Worker Protection Act] requires them to 'establish and maintain' employment relationships is therefore clearly not cognizable under the Contracts Clause. . . . [T]here is no existing contractual relationship to be 'impaired,' to say nothing of 'substantially' so." *Washington Serv. Contractors Coal. v. D.C.*, 54 F.3d 811, 818 (D.C. Cir. 1995); see also *Rhode Island Hosp. Ass'n v. City of Providence ex rel. Lombardi*, 775 F. Supp. 2d 416, 434 (D.R.I.), *aff'd*, 667 F.3d 17 (1st Cir. 2011) (rejecting Contracts Clause challenge to worker-retention ordinance giving displaced hotel workers a preferential hiring right). No precedent exists for the idea that a limitation on an employer's discretion in *hiring an employee* impairs an *existing contract.*

Even if the Recall Ordinance substantially impaired any existing at-will contractual relationships, which it does not, the City Council clearly has a rational basis for adopting it, and the Ordinance is consistent with the many other limitations on the at-will employment doctrine under local, state, and federal regulations.

The Recall Ordinance is being proposed in response to an economic emergency and targets those industries that are particularly hard-hit by the economic wake of the COVID pandemic. It is intended to be time-limited in its application, and it does not, as the July 15 memo suggests, lead to a "*permanent* alteration of the contractual relationship between employer and former employee." Requiring employers to re-hire former employees displaced as a result of the COVID-19 pandemic serves the critical purpose of preserving stability in key sectors of Baltimore's labor market. The Recall Ordinance creates an orderly way for rehiring to take place once the economy rebounds, allows laid-off workers to plan their financial affairs with greater confidence (and thus supports the local economy by creating greater consumer confidence), provides greater economic security for workers in hard-hit industries (thus reducing the likelihood of their ongoing reliance on public programs), and keeps local workers tied to their former jobs.[3] There is clearly a "significant and legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem. *Energy Reserves Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 412 (1983).

Contrary to the July 15 memo, the rehiring right in the Recall Ordinance does not lead to any "permanent alteration" of employment relationships. Once rehired, covered employees remain at-will, unless they (or their collective-bargaining representatives) contract with the employer for something different.

[3] Many economists have pointed to European countries' labor policy responses to the COVID-19 pandemic, which generally keep workers tied to their former employers, as being better designed than those in the U.S. because they will allow for a speedier recovery. See, e.g., Chloe Taylor, "European approach to pandemic better for the economy than US measures, Nobel laureate says," CNBC (May 26, 2020) (citing 2010 Nobel laureate in economics Christopher Pissarides: "The European approach will help the economy better because it's keeping workers and their employers attached to each other, and that will call for a more speedy recovery when the time is ready[.]"); Fernandino Guigliano, "Why Europe's in Better Shape Than the U.S.," Bloomberg (July 5, 2020) (as a result of European countries' active labor-market policies, "[a]s the economy restarts, businesses aren't having to go through the long and costly process of rehiring workers.").

The July 15 memo suggests that a finding of a temporary emergency is necessary to support the Contracts Clause's public-purpose test, but the Supreme Court has long held "that the public purpose need not be addressed to an emergency or temporary situation." *Energy Reserves*, 459 U.S. at 412.[4] Notwithstanding the fact that the City Council *could* adopt a longer-term limitation on employers' right to hire, the Recall Ordinance is intended as a temporary measure, to address unprecedented economic circumstances. Employers who rehire laid-off employees are not required to retain those workers for any period of time. And the Recall Ordinance itself is intended to remain in effect only so long as the economic emergency created by the COVID-19 pandemic (and its lingering effects in the labor market) remains. See Recall Measure, §19A-12 (requiring report to Council by March 4, 2022 to assess ongoing need for the ordinance).

The July 15 memo's analysis is also flawed because employers covered by the Recall Ordinance are already subject to many statutory limitations on the at-will employment relationship. *Energy Reserves Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983) ("In determining the extent of the impairment, we are to consider whether the industry the complaining party has entered has been regulated in the past."); *Veix v. Sixth Ward Bldg. & Loan Ass'n*, 310 U.S. 32, 38 (1940) ("When he purchased into an enterprise already regulated in the particular to which he now objects, he purchased subject to further legislation upon the same topic"). Even if the Recall Ordinance impaired at-will employment rights in some way, which it does not, the at-will employment relationship is already subject to many restrictions, including prohibitions against discriminatory firing; whistleblower laws that prevent retaliatory termination; federal and Maryland WARN Acts, which impose severe penalties for mass layoffs that are not preceded by adequate notice; federal labor law rights against termination for supporting a union; and common-law doctrines prohibiting termination in violation of public policy. Commercial property services and event-center businesses in Baltimore are already subject to the Displaced Service Worker Protection Ordinance, which requires re-hiring of a predecessor's employees. Under these circumstances, any additional limitations on at-will employment relationships imposed by the Recall Ordinance do not upset any employer's reasonable expectation to an unregulated right to terminate at will. Cf. *Garris*, 630 F.2d at 1007 (mere fact that insurance business was subject to state licensing scheme did not create an

[4] To the extent that the Fourth Circuit understood the Contracts Clause as requiring that a regulation that substantially impairs an existing contract to be adopted in response to a temporary emergency, the Supreme Court repudiated that understanding in *Energy Reserves*, 459 U.S. at 412. Cf. *Garris v. Hanover Ins. Co.*, 630 F.2d 1001, 1008-09 (4th Cir. 1980). In any case, the Recall Ordinance does not substantially impair any existing contract and is being proposed to address a temporary emergency.

expectation that specific terms of an insurance agency relationship would be regulated, when that contract term had never previously been regulated). Perhaps for this reason, *no court* has ever held that a statutory limitation on the at-will employment relationship violated the Contracts Clause.

The July 15 memo relies on *Garris v. Hanover Insurance Company*, 630 F.2d 1001 (1980), but that case involved very different circumstances. The state law in question reformed state auto insurance law by establishing a mandatory duty for insurers and their agents to accept insurance applications at uniform rates set by the State. The law also prohibited insurers from terminating insurance agency relationships for two specific reasons: (1) because of the volume of insurance business placed by the agent with the insurer as a result of the statutory coverage mandate; and (2) because of the volume of insurance placed by the agent that the insurer determined needed to be reinsured. *Id*. at 1003. In an as-applied, rather than a facial, challenge, the Fourth Circuit held that this targeted prohibition on terminating an insurance agency relationship substantially impaired Hanover Insurance Company's contract with the plaintiff, because that contract permitted termination of an agent for any reason. *Ibid*.

The Fourth Circuit could discern no public purpose in the statute's protection of insurance agents from termination on the two grounds targeted. Id. at 1010. Nor was the statute part of any larger pattern of regulated limitations on the right of insurers to terminate insurance agents representing them. *Id*. at 1007. Nor did the statute involve the alteration of contractual relationships during a temporary emergency. *Id*. at 1008-09. The case says nothing about the constitutionality of an ordinance that does not impair any existing contractual relationships, is addressed to the profound public harm caused by the current economic crisis, is time-limited in its application and addresses an emergency situation, does not result in any permanent economic relationship between employer and former employee, and allegedly limits a contractual right (at-will employment) that is already the subject of many regulated limitations.[5]

The July 15 memo's Contracts Clause arguments against the Recall Ordinance are mistaken and should be withdrawn.

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[5] The July 15 memo also cites *Baylee's Campground, Inc. v. Mills*, No. 2:20-cv-00176-LEW, 2020 WL 2791797, *7 (D. Me. May 29, 2020), but that case is inapplicable. The case did not involve a Contracts Clause challenge. Instead, the district court *rejected* challenges to Maine's 14-day quarantine for out-of-state visitors claiming that the quarantine violated constitutional rights to due process and travel.

The Recall Ordinance Would Not Create a Private, Judicial Cause of Action

The July 15 memo's second argument is that the Recall Ordinance impermissibly creates a "new cause[] of action in the courts." This argument is puzzling because the Recall Ordinance does not create any private judicial cause of action. It would have the Wage Commission administer complaints about violations of the Recall Ordinance.

It is true that even home-rule cities do not have authority to create new *judicial* causes of action. But it is equally true that such cities have authority to create *administrative remedies*. See *McCrory Corp. v. Fowler*, 319 Md. 12, 20, 570 A.2d 834, 838 (1990) ("It is true that the field has not been preempted by the State, and that home rule counties have concurrent authority to provide administrative remedies not in conflict with state law."); *Edwards Sys. Tech. v. Corbin*, 379 Md. 278, 290, 841 A.2d 845, 852 (2004) ("*McCrory Corp. v. Fowler* concerned the validity of a Montgomery County ordinance which created a new *circuit court* cause of action by one who had been discriminated against in violation of the Montgomery County Code."); *id* at 291 ("The *McCrory* opinion then pointed out that chartered counties could enact anti-discrimination ordinances, could authorize *adjudicatory administrative proceedings* to enforce such ordinances, and could provide for traditional judicial review actions to review the administrative decisions.").[6]

The Recall Ordinance would create an administrative complaint system overseen by the Wage Commission. This is no different from the Wage Commission's role in enforcing the Displaced Service Worker Protection Ordinance administratively. See Baltimore City Code, § 18-7. The Law Department reviewed this scheme when the DSWPO was adopted in 2017 and, correctly, found no issue with this scheme. See City Solicitor Letter to Council re Bill No. 17-0048 (May 15, 2017). The July 15 memo's questioning of an identical enforcement scheme for the Recall Ordinance is inexplicable.

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[6] The July 15 memo states that the Recall Ordinance would create a "quasi-judicial" forum with the Wage Commission. But no case that the July 15 memo cites (and none we are aware of) distinguishes between permissible, municipal administrative proceedings to enforce employment rights and administrative proceedings that are deemed "quasi-judicial." Maryland's prohibition is against cities creating private causes of action *in the courts*, not against creating administrative enforcement schemes that have attributes that are similar to those in the courts (such as the calling of witnesses and the presentation of evidence).

CONCLUSION

We appreciate the opportunity to weigh in on this important piece of legislation. If there are further questions about the legal matters discussed in this letter, we are happy to address them.

Thank you for your time and consideration.

Sincerely,

Paul L. More

cc: Honorable Councilmember Kristerfer Burnett
Roxie Herbekian, President, UNITE HERE Local 7