

Office of the City Manager

SUPPLEMENTAL AGENDA MATERIAL

Meeting Date: May 6, 2014

Item Number: B

Item Description: Increase to the Minimum Wage in Berkeley

Supplemental/Revision Submitted By: Zach Cowan, City Attorney

“Good of the City” Analysis:

The analysis below must demonstrate how accepting this supplement/revision is for the “good of the City” and outweighs the lack of time for citizen review or evaluation by the Council.

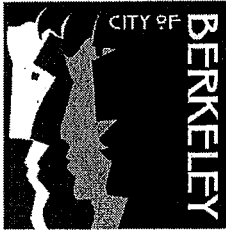
The Council will be considering whether to adopt a minimum wage ordinance on May 6, 2014. A number of questions have been asked as to whether a “tipped wage credit” may legally be included in the ordinance. The attached supplemental report provides the answer to that question and the legal analysis supporting it. It is important that the Council have this answer before acting on the ordinance.

Consideration of supplemental or revised agenda material is subject to approval by a two-thirds vote of the City Council. (BMC 2.06.070)

A minimum of **42 copies** must be submitted to the City Clerk for distribution at the Council meeting. This completed cover page must accompany every copy.

Copies of the supplemental/revised agenda material may be delivered to the City Clerk Department by 12:00 p.m. the day of the meeting. Copies that are ready after 12:00 p.m. must be delivered directly to the City Clerk at Council Chambers prior to the start of the meeting.

Supplements or Revisions submitted pursuant to BMC § 2.06.070 may only be revisions of the original report included in the Agenda Packet.



Office of the City Manager

ACTION CALENDAR

May 6, 2014

To: Honorable Mayor and Members of the City Council

From: Christine Daniel, City Manager

Submitted by: Zach Cowan, City Attorney

Subject: Increase to the Minimum Wage in Berkeley

RECOMMENDATION

Consider the advice below as to the legality of including a tipped wage credit in the proposed minimum wage ordinance.

FISCAL IMPACTS OF RECOMMENDATION

None.

CURRENT SITUATION AND ITS EFFECTS

The Council is considering whether or not to adopt a minimum wage ordinance, and has inquired whether a tipped wage credit is permissible.

BACKGROUND

During Labor Commission proceedings on the proposed minimum wage ordinance, the City Attorney's office was asked whether a tipped wage credit would be permissible. The City Attorney advised that a tipped wage credit would not be legal under California law.

Subsequently, the City Attorney's office retained outside counsel to advise it on various issues related to the minimum wage ordinance. One question that was asked of outside counsel was: "Can the City consider a tipped wage credit as part of the Ordinance?"

After analyzing this issue, outside counsel concluded that under California law a tipped wage credit would be illegal. The supporting analysis is excerpted below.

Pursuant to California Labor Code Section 351, "[n]o employer or agent shall . . . deduct any amount from wages due an employee on account of a gratuity, or require an employee to credit the amount, or any part thereof, of a gratuity against and as a part of the wages due the employee from the employer." [FN1: California Lab. Code § 351.]

The legislative history of California Labor Code Section 351 provides that the legislative intent "was to ensure that employees, not employers, receive the full benefit of gratuities that patrons intend for the sole benefit

of those employees who serve them.” [FN2: *Leighton v. Old Heidelberg, Ltd.* (1990) 219 Cal. App. 3d 1062, 1068.] The California Supreme Court interpreted that the Legislature declared tips belong to the employee.[FN3: *Henning v. Industrial Welfare Com.* (1988) 46 Cal. 3d 1262, 1278.]

Given that the legislative intent behind Labor Code Section 351 was to ensure that employees receive the full benefit of a gratuity payment or a tip, it is likely that a tipped wage credit, even against a local minimum wage, would violate the law. The purpose of the statute is to ensure that employees receive the gratuity given freely and voluntarily to them. We believe that a tipped wage credit against a local minimum wage would violate the purpose as stated by the Legislature and supported by the California Supreme Court. Although no common law is on point, including that credit into the Ordinance would subject it to legal risk of challenge.

Accordingly, it continues to be the City Attorney’s advice that a tipped wage credit would not be permissible.

ENVIRONMENTAL SUSTAINABILITY

There are no identifiable environmental effects or opportunities associated with the subject of this report.

RATIONALE FOR RECOMMENDATION

See “Background”.

ALTERNATIVE ACTIONS CONSIDERED

N/A

CONTACT PERSON

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