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ORDINANCE NUMBER O- 20706 (NEW SERIES)

DATE OF FINAL PASSAGE AUG 03 2016

AN ORDINANCE AMENDING CHAPTER 3, ARTICLE 9, DIVISION 1 OF THE SAN DIEGO MUNICIPAL CODE BY AMENDING SECTIONS 39.0104, 39.0105, 39.0107, 39.0108, 39.0109, AND 39.0111; BY RETITLING AND AMENDING SECTION 39.0112; BY ADDING NEW SECTION 39.0113; BY RENUMBERING OLD SECTION 39.0113 TO SECTION 39.0114; BY RENUMBERING OLD SECTION 39.0114 TO SECTION 39.0115; AND RENUMBERING OLD SECTION 39.0115 TO NEW SECTION 39.0116, RELATING TO THE EARNED SICK LEAVE AND MINIMUM WAGE TO BE PROVIDED TO EMPLOYEES WORKING IN THE CITY OF SAN DIEGO.

WHEREAS, on August 18, 2014, the San Diego City Council (Council) approved San Diego Ordinance O-20390 (Ordinance), which amended the San Diego Municipal Code relating to earned sick leave and minimum wage for employees working in the City of San Diego (City); and

WHEREAS, on September 16, 2014, an authorized representative of the proponent Betsy Ann Kinner submitted a referendary petition against the Ordinance to the City Clerk, and on that same day, the City Clerk accepted the referendary petition as filed, thereby suspending the Ordinance; and

WHEREAS, on October 16, 2014, the City Clerk certified that the referendary petition was sufficient and qualified for submittal to the voters; and

WHEREAS, on June 7, 2016, the City's qualified voters approved the Ordinance; and

WHEREAS, the Ordinance, at section 39.0112, contemplates that the Council will, in an implementing ordinance, designate an Enforcement Office and establish a system to receive and adjudicate complaints, and to order relief in cases of violations; and

WHEREAS, on June 22, 2016, the Council's Budget and Government Efficiency Committee directed the City Attorney's Office to prepare an enforcement ordinance with specific provisions, to be presented to the Council, on the same date that the Council acts upon the June 7, 2016 election results; and

WHEREAS, the Council wishes to adopt an ordinance to amend Chapter 3, of the San Diego Municipal Code, by amending Article 9, Division 1, the City of San Diego Earned Sick Leave and Minimum Wage Ordinance, relating to the enforcement of earned sick leave and minimum wage in the City; and

WHEREAS, the Council recognizes that this ordinance, as it applies to the City's represented employees, must be adopted in accordance with the Meyers-Milias-Brown Act; NOW, THEREFORE,

BE IT ORDAINED, by the Council of the City of San Diego, as follows:

Section 1. That Chapter 3, Article 9, Division 1 of the San Diego Municipal Code is amended by amending section 39.0104, to read as follows:

§39.0104 Definitions

Each word or phrase defined in this Division appears in the text of this Division in italicized letters. To the extent that a federal, state, or other law is referenced within this Division, the citation includes and incorporates the law as it may be amended or renumbered in the future. For purposes of this Division, the following definitions apply:

Benefit Year through *Employer* [No change in text.]

Enforcement Office means the Office of the City Treasurer, or other Office or Department under the authority of the Mayor and designated by the Mayor to enforce this Division.

Enforcement Official means any person authorized to enforce violations of this Division.

Family Member through *Stalking* [No change in text.]

Section 2. That Chapter 3, Article 9, Division 1 of the San Diego Municipal Code is amended by amending section 39.0105, to read as follows:

§39.0105 Accrual of Earned Sick Leave

(a) [No change in text.]

(b) *Employers* must provide an *Employee* with one hour of *Earned Sick Leave* for every 30 hours worked by the *Employee* within the geographic boundaries of the *City*, but *Employers* are not required to provide an *Employee* with *Earned Sick Leave* in less than one-hour increments for a fraction of an hour worked. *Employers* may cap an *Employee's* total accrual of *Earned Sick Leave* at 80 hours.

(c) An *Employer* may satisfy the accrual and carry-over provisions of this section if no less than 40 hours of *Earned Sick Leave* are awarded to an *Employee* at the beginning of each *Benefit Year* for use in accordance with this Division, regardless of the *Employee's* status as full-time, part-time, or temporary.

(d) *Earned Sick Leave* begins to accrue at the commencement of employment or on July 11, 2016, whichever is later, and an *Employee* is entitled to begin using accrued *Earned Sick Leave* on the 90th calendar day following commencement of his or her employment or on July 11, 2016, whichever is later. After the 90th calendar day of employment or after July 11, 2016, whichever is later, an *Employee* may use *Earned Sick Leave* as it is accrued.

(e) *Earned Sick Leave* for *Employees* not exempt from the overtime requirements of federal and California law must be compensated at the same regular rate of pay for the work week in which the *Employee* uses the *Earned Sick Leave. Earned Sick Leave* for *Employees* exempt from the overtime requirements of federal and California law must be compensated at the same rate or in the same manner as the *Employer* calculates compensation for paid working time.

(f) *Employees* who are not covered by the overtime requirements of federal and California law or regulations are assumed to work 40 hours in each work week for purposes of *Earned Sick Leave* accrual unless their regular work week is less than 40 hours, in which case *Earned Sick Leave* accrues based upon that regular work week.

(g) An *Employer* who provides an *Employee* with an amount of paid leave, including paid time off, paid vacation, or paid personal days sufficient to meet the requirements of this section, and who allows this paid leave to be used for the same purposes and under the same conditions as the *Earned*

Sick Leave required by this Division, is not required to provide additional *Earned Sick Leave* to the *Employee*. An *Employer* who provides greater paid time off, either through a contract, collective bargaining agreement, employment benefit plan, or other agreement, than that required by this Division, is deemed to be in compliance even if the *Employer* utilizes an alternative methodology for calculation of, payment of, and use of *Earned Sick Leave* or other paid time off that can be used as *Earned Sick Leave.*

(h) *Employees* may determine how much *Earned Sick Leave* they need to use, provided that *Employers* may set a reasonable minimum increment for the use of *Earned Sick Leave* not to exceed two hours.

(i) *Employers* may limit an *Employee's* use of *Earned Sick Leave* to 40 hours in a *Benefit Year*, but unused, accrued *Earned Sick Leave* must be carried over to the following *Benefit Year*.

(j) If an *Employee* is transferred to a separate division, entity, or location in the *City*, but remains employed by the same *Employer*, the *Employee* is entitled to all *Earned Sick Leave* accrued at the prior division, entity, or location, and is entitled to retain and use all *Earned Sick Leave*, as provided by this Division. When there is a separation from employment and the *Employee* is rehired within six months of separation by the same *Employer*, previously accrued *Earned Sick Leave* that was not used or paid out must be reinstated and such *Employee* must be entitled to use such accrued *Earned Sick Leave*.

(k) *Employers* are not required by this Division to compensate an *Employee* for unused, accrued *Earned Sick Leave*, upon the *Employee's* termination, resignation, retirement, or other separation from employment.

Section 3. That Chapter 3, Article 9, Division 1 of the San Diego Municipal Code is amended by amending section 39.0107, to read as follows:

§39.0107 Minimum Wage

(a) [No change in text.]

(b) The *Minimum Wage* is an hourly rate defined as follows:

(1) Starting July 11, 2016, the *Minimum Wage* is $10.50.

(2) Starting January 1, 2017, the *Minimum Wage* is $11.50.

(3) Starting January 1, 2019, and each year thereafter, the *Minimum Wage* increases by an amount corresponding to the prior year's increase, if any, in the cost of living. The prior year's increase in the cost of living is measured by the percentage increase, if any, as of August of the immediately preceding year over the level as of August of the previous year of the Consumer Price Index (Urban Wage Earners and Clerical Workers, U.S. City Average for All Items) or its successor index as published by the U.S. Department of Labor or its successor agency, with the amount of the minimum wage increase rounded to the nearest multiple of five cents. The adjusted *Minimum Wage* will be announced by the *City* by October 1 of each year, and will become effective as the new

Minimum Wage on January 1 of the succeeding year. The adjusted *Minimum Wage* will be noticed and posted as set forth in this Division.

(4) In the event that the federal or California minimum wage is increased above the level of the *Minimum Wage* in force under this section, the *Minimum Wage* under this section will be increased to match the higher federal or California wage, effective on the same date as the increase in the federal or California minimum wage takes effect.

(c) [No change in text.]

Section 4. That Chapter 3, Article 9, Division 1 of the San Diego Municipal Code is amended by amending section 39.0108, to read as follows:

§39.0108 Notice and Posting

(a) The bulletin and notices specified in this section will be published by the *City* and made available to *Employers* in English, Spanish, and any other language for which the San Diego County Registrar of Voters provides translated ballot materials pursuant to section 203 of the federal Voting Rights Act. The materials specified in this section will be made available to *Employers* by September 1, 2016 with 2016 information; December 30, 2016 with 2017 information; and by October 1 of each year thereafter with information for the following year:

(1) through (3) [No change in text.]

(b) [No change in text.]

(c) Every *Employer* must also provide each *Employee* at the time of hire, or by October 1, 2016, whichever is later, written notice of the *Employer's* legal name and any fictitious business names, address, and telephone number and the *Employer's* requirements under this Division. The notice must also include information on how the *Employer* satisfies the requirements of this Division, including the *Employer's* method of *Earned Sick Leave* accrual. The notice must be provided to *Employees* in English and in each *Employee's* primary language, if it is a language referenced in subsection (a) and spoken by at least five percent of the *Employees* at the *Employer's* workplace. *Employers* may provide this notice through an accessible electronic communication in lieu of a paper notice.

Section 5. That Chapter 3, Article 9, Division 1 of the San Diego Municipal Code is amended by amending section 39.0109, to read as follows:

§39.0109 Employer Records

Employers must create contemporaneous written or electronic records documenting their *Employees*' wages paid and accrual and use of *Earned Sick Leave*, provide these records to *Employees* on a regular basis, and retain these records for a period of at least three years. *Employers* must allow the *Enforcement Official* reasonable access to these records in furtherance of an investigation conducted pursuant to this Division. An *Employer's* failure to create and retain contemporaneous written or electronic records documenting its *Employees'* wages paid and accrual and use of *Earned Sick Leave*, or an *Employer's* failure to allow

the *Enforcement Official* reasonable access to records creates a rebuttable presumption that the *Employer* has violated this section and the *Enforcement Official* may rely on an *Employee's* reasonable estimate regarding hours worked, wages that should have been earned, *Earned Sick Leave* that should have accrued, and *Earned Sick Leave* used.

Section 6. That Chapter 3, Article 9, Division 1 of the San Diego Municipal Code is amended by amending section 39.0111, to read as follows:

§39.0111 Retaliation Prohibited

Employers are prohibited from engaging in *Retaliation* against an *Employee* for exercising any right provided by this Division. The protections of this Division apply to any *Employee* who reasonably and in good faith reports a violation of this Division to his or her *Employer* or a governmental agency tasked with overseeing the enforcement of any wage and hour law applicable to the *Employer*. Rights under this Division include, but are not limited to, the right to request payment of the *Minimum Wage*, request and use *Earned Sick Leave*, file a complaint for alleged violations of this Division with the *Enforcement Office* or in court, communicate with any person about any violation or alleged violation of this Division, participate in any administrative or judicial action regarding an alleged violation of this Division, or inform any person of his or her potential rights under this Division. Protections of this Division apply to any *Employee* who mistakenly, but in good faith, alleges noncompliance with this Division. An *Employer's* adverse action against an *Employee* within 90 calendar days of the

Employee's exercise of rights provided by this Division creates a rebuttable presumption that the *Employer* acted in retaliation against the *Employee* for the *Employee's* exercise of protected rights.

Section 7. That Chapter 3, Article 9, Division 1 of the San Diego Municipal Code is amended by retitling and amending section 39.0112, to read as follows:

§39.0112 Remedies

(a) Any person claiming harm from a violation of this Division, including the *City* and an *Employee*, may bring a cause of action against an *Employer* in a court of competent jurisdiction to enforce the provisions of this Division, without exhausting the administrative remedies set forth in this Division. Submitting a complaint to the *Enforcement Office* is neither a prerequisite to nor a bar to bringing a civil action in a court of competent jurisdiction.

(b) Any person claiming harm from a violation of this Division, including an *Employee* and the *City*, is entitled to all legal and equitable relief to remedy any violation of this Division, including, but not limited to, the payment to an *Employee* of back wages withheld in violation of this Division; damages for an *Employer's* denial of the use of accrued *Earned Sick Leave* in violation of this Division, payable to an *Employee*; reinstatement of employment or other injunctive relief; reasonable attorneys' fees and costs to any plaintiff who prevails in an action to enforce this Division; and payment of liquidated damages to an *Employee* equal to double back wages withheld, except as otherwise provided in this subsection. When an *Employer* engages in *Retaliation* against an

Employee, the *Employer* is subject to liquidated damages that are the greater of double back wages or $1,000 for each violation not resulting in termination of employment, and the greater of double back wages or $3,000 when an *Employee* is terminated from employment for exercising any right provided by this Division. Violations of this Division are declared to irreparably harm the public and covered *Employees* generally.

(c) Any *Employer* who violates any requirement of this Division is also subject to a civil penalty, assessed and payable to the *City*, of no less than $500, but no more than $1,000 per violation, except as otherwise provided in this subsection. Each and every day that an *Employer* fails to pay an *Employee Minimum Wage* or fails to provide an *Employee* with *Earned Sick Leave* constitutes a separate and distinct violation. Any *Employer* who fails to comply with the notice and posting requirements of this Division is subject to a civil penalty of $500 for each *Employee* who was not given appropriate notice pursuant to that section, up to a maximum of $2,000. Any *Employer* who engages in *Retaliation* against an *Employee* for exercising any right provided by this Division is subject to a civil penalty of no less than $1,000, but no more than $3,000 per violation. The cumulative civil penalties that may be assessed against an *Employer*, who has not previously violated any provision of this Division and who violates the *Minimum Wage* provisions, are limited to $10,000. The cumulative civil penalties that may be assessed against an *Employer*, who has not previously violated any provision of this Division and who

violates the *Earned Sick Leave* provisions, are limited to $10,000. An *Employer* is deemed to have violated a provision of this Division upon issuance of (1) a Notice of Satisfaction, (2) Administrative Enforcement Order, or (3) final judgment of a court of competent jurisdiction, with a finding of a violation. The minimum and maximum civil penalties under this subsection must be increased cumulatively by fifty percent for each subsequent violation of the same provision in this Division by the same *Employer* or other person within a three-year period. If civil penalties and costs are the subject of administrative appeal or judicial review, then the accrual of penalties and other costs is stayed until the determination of the appeal or review is final.

(d) Notwithstanding section 12.0201 of this Code, violations of this Division may not be prosecuted as a misdemeanor or infraction.

(e) This Division does not create any right of action or cause of action for damages against the *City* in its enforcement of this Division.

(f) This section is not intended to supersede any applicable, current or future state or local law, rule, regulation, or approved memoranda of understanding binding on the *City*, as a public agency employer, and its *Employees*.

(g) If an *Employer* ceases its business operations, sells out, exchanges, or otherwise disposes of the *Employer's* business, then any person who becomes a successor to the business will be liable for the unpaid amount of the remedies as defined in the Notice and Order if, at the time of the

conveyance of the business, the successor has actual or constructive knowledge of the fact and amount of the Notice and Order.

Section 8. That Chapter 3, Article 9, Division 1 of the San Diego Municipal Code is amended by adding new section 39.0113, to read as follows:

§39.0113 Enforcement Office

(a) The *Enforcement Office* has full authority to implement and enforce this Division, consistent with the authority and powers set forth at Division 1 of Article 2, Chapter 1 of this Code. The *Enforcement Official* may investigate any possible violations of this Division by an *Employer* or other person. The *Enforcement Official* has authority to access any *Employer's* or *Employee's* workplace during workplace hours to examine and audit business and other relevant records; to interview witnesses, including *Employees*, at or away from *Employees'* workplace; and to investigate all matters necessary or appropriate to determine whether an *Employer* has violated any provisions of this Division. The *Enforcement Official* may issue subpoenas, in accordance with applicable federal and state law and this Code. The *Enforcement Official*, under the direction of the Mayor, may promulgate and issue administrative regulations to establish and adjudicate complaints and to order relief in cases of violations, consistent with this Division.

(b) The *Enforcement Office* will provide information about the complaint process that is readily accessible to the public, including non-English speakers. The information must be made available in English, Spanish,

and any other language for which the San Diego County Registrar of Voters provides translated ballot materials pursuant to section 203 of the federal Voting Rights Act.

(c) (1) Any person may file a complaint, in writing, with the *Enforcement Office* alleging a violation of this Division. The written complaint must include a statement of dates, places, and persons or entities responsible for the alleged violation. Notwithstanding anything to the contrary in this Code, complaints alleging a violation of this Division must be filed within two years of the occurrence of the alleged violation.

(2) To encourage reporting and cooperation with investigations, the *Enforcement Office* must maintain the confidentiality of any person reporting an alleged violation and persons assisting in any investigation, including the name, address, and other identifying information of the person, to the extent permitted by law. The *Enforcement Office* must also protect proprietary business information to the extent permitted by law. The *Enforcement Office* may disclose information as necessary to enforce this Division or for other lawful purposes.

(d) (1) Upon receipt of a written complaint, the *Enforcement Official* may issue a Notice of Violation to the *Employer*, informing the *Employer* of the alleged violation, including reference to the Code provision alleged to have been violated, and specifying the action

required to correct or remedy the alleged violation. The Notice of Violation may request access to the *Employer's* workplace to investigate the alleged violation, including inspecting records and interviewing witnesses. The Notice of Violation may be served personally or by registered mail, in accordance with Division 3 of Article 1 of Chapter 1 of this Code.

(2) At the discretion of the *Enforcement Official*, an *Employer* served with a Notice of Violation must be allowed 14 calendar days from the date of the Notice of Violation to submit a written declaration to the *Enforcement Office*, setting forth facts and evidence to demonstrate that no violation occurred, that the *Employer* is not responsible for the violation, or that the *Employer* has corrected or remedied the violation. The *Enforcement Official* may request documents to support an *Employer's* written declaration. The *Enforcement Official* may assign a longer period, not to exceed an additional seven calendar days, within which an *Employer* may submit a written declaration. The *Enforcement Official* may consider the cost of correction and the time needed to obtain information and documents about the alleged violation and any voluntary corrective action taken by the *Employer* in assigning a specific period of time within which to correct or remedy each violation, or obtain and submit evidence that no violation occurred or an *Employer* is not responsible for the violation.

(e) The *Enforcement Official* may conduct an informal settlement conference with the *Employee* and *Employer*, upon receipt of a complaint from an *Employee*, and following issuance of the Notice of Violation, as an opportunity to remedy the alleged violation, without further administrative enforcement action. The *Enforcement Official* has discretion to impose civil penalties in accordance with section 12.0805 of this Code, as a condition to settle an alleged violation. A settlement is contingent upon approval by the *Employee*, *Employer*, and the *Enforcement Official.*

(f) If, following issuance of a Notice of Violation and the period of time assigned by the *Enforcement Official* to an *Employer* to respond by written declaration, the *Enforcement Official* determines that an *Employer* has violated any provision of this Division, the *Enforcement Official* may issue a Notice and Order to the *Employer* in violation. The Notice and Order may be served personally or by registered mail, in accordance with Division 3 of Article 1 of Chapter 1 of this Code. Each Notice and Order must be in writing and must describe the nature of the violation, including reference to the Code provision alleged to have been violated. The Notice and Order must include the assessment of unpaid wages and other damages, including liquidated damages, owed to the *Employee*, based on the facts presented to the *Enforcement Official*, and civil penalties payable to the *City*, in accordance with this Division and Division 8, Article 2 of Chapter 1 of this Code.

(g) If an *Employer* wants to contest a Notice and Order, the *Employer* must, within 15 calendar days after service of the Notice and Order, serve written notice to the *Enforcement Office* of his or her request for an administrative enforcement hearing. This written notice must be postmarked on or actually received by the *Enforcement Office* by the 15th calendar day following the service of the Notice and Order.

(h) As soon as practicable, the *Enforcement Office* must schedule the administrative enforcement hearing, which will be conducted by an Enforcement Hearing Officer, who is independent from the *Enforcement Official*. The administrative enforcement hearing must be conducted in accordance with the due process requirements set forth in Division 4 of Article 2 of Chapter 1 of this Code. The Enforcement Hearing Officer, at his or her discretion and in accordance with applicable law, may permit any person, who is not a party to an administrative enforcement hearing or a party's representative, to attend the administrative enforcement hearing upon the person's request. Any party to the administrative enforcement hearing may, at his or her own expense, require that the hearing be transcribed by a certified court reporter. At the conclusion of the administrative enforcement hearing, the Enforcement Hearing Officer must affirm, modify, or dismiss the Notice of Violation and any Notice and Order issued.

(i) The findings of the Enforcement Hearing Officer must be set forth in an Administrative Enforcement Order, which must be served on all parties by any one of the methods listed in section 11.0301 of this Code no later than 30 calendar days following the conclusion of the hearing or a later date by stipulation of the parties. The Administrative Enforcement Order becomes final on the date of service, and subject to judicial review, in accordance with section 12.0412 of this Code. *Employers* found in violation must pay any civil penalties assessed to the *City*, and damages, including liquidated damages, to the *Employee*, with documentation of payment to the *City*.

(j) The *Enforcement Office* may collect all civil penalties and related administrative costs in an Administrative Enforcement Order, by the use of all appropriate legal means, including referral to the City Treasurer for collections action and the recordation of a Code Enforcement Lien in accordance with the procedures set forth in Division 2, Article 3 of Chapter 1 of this Code. If unable to collect the obligation, the *Enforcement Official* must refer the obligation to the City Attorney, for a determination of further legal action to recover the damages, civil penalties, and costs.

(k) A judgment entered in accordance with this Division must bear the same rate of interest and have the same effect as other judgments and be given the same preference allowed by the law on other judgments.

(l) In lieu of contesting a Notice and Order, an *Employer* must transmit to the *Enforcement Office* the amount specified in the Notice and Order within 15 calendar days of service.

(m) An *Employer's* failure to respond to a Notice and Order or appear at an administrative enforcement hearing in accordance with the provisions of this Division will constitute a failure to exhaust administrative remedies.

(n) The *Enforcement Official* must issue a Notice of Satisfaction to the *Employer* when all outstanding damages, penalties, and costs have been paid in full.

(o) Throughout the administrative enforcement process set forth in this Division, *Employees* and *Employers* have the right to be represented by an attorney or other representative, at their own expense, and have the right to fully present all relevant evidence to the *Enforcement Official* or the Enforcement Hearing Officer.

(p) The *Enforcement Office* may collaborate, including entering into a contract with, with workers' rights advocates and community-based organizations to assist in outreach efforts and other governmental agencies to assist in enforcement.

(q) The *Enforcement Office* must provide a summary report of its activities, including information requested by the City Council, each year to the City Council, as part of the annual budget process.

Section 9. That Chapter 3, Article 9, Division 1 of the San Diego Municipal Code is amended by renumbering old section 39.0113 to 39.0114, to read as follows:

§39.0114 Compliance with Legal Agreements

[No change in text.]

Section 10. That Chapter 3, Article 9, Division 1 of the San Diego Municipal Code is amended by renumbering old section 39.0114 to 39.0115, to read as follows:

§39.0115 No Effect on Higher Wages or More Earned Sick Leave

[No change in text.]

Section 11. That Chapter 3, Article 9, Division 1 of the San Diego Municipal Code is amended by renumbering old section 39.0115 to new section 39.0116, to read as follows:

§39.0116 Effect of Invalidity; Severability

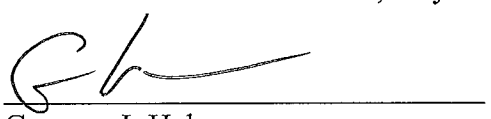
[No change in text.]

Section 12. That a full reading of this ordinance is dispensed with prior to its passage, a written or printed copy having been made available to the City Council and the public prior to the day of its passage.

Section 13. That this ordinance shall take effect and be in force on the thirtieth day from and after its final passage.

Section 14. That this ordinance, as it applies to the City's represented employees, is adopted in accordance with the Meyers-Milias-Brown Act.

APPROVED: JAN I. GOLDSMITH, City Attorney

By 

Gregory J. Halsey
Deputy City Attorney

GJH:JFD:ccm
July 12, 2016 REV.
July 11, 2016 COR. COPY 2
July 6, 2016 COR. COPY
July 5, 2016
Or.Dept: Council District 3
Doc. No. 1321569

I certify that this Ordinance was passed by the Council of the City of San Diego, at this meeting of JUL 26 2016.

ELIZABETH S. MALAND
City Clerk

By _____
Deputy City Clerk

Approved: 8/3/16
(date)

_____
KEVIN L. FAULCONER, Mayor

Vetoed: _____
(date)

_____
KEVIN L. FAULCONER, Mayor

STRIKEOUT ORDINANCE

OLD LANGUAGE: ~~Stricken~~
NEW LANGUAGE: Underlined

ORDINANCE NUMBER O-_____ (NEW SERIES)

DATE OF FINAL PASSAGE _____

AN ORDINANCE AMENDING CHAPTER 3, ARTICLE 9, DIVISION 1 OF THE SAN DIEGO MUNICIPAL CODE BY AMENDING SECTIONS 39.0104, 39.0105, 39.0107, 39.0108, 39.0109, AND 39.0111; BY RETITLING AND AMENDING SECTION 39.0112; BY ADDING NEW SECTION 39.0113; BY RENUMBERING OLD SECTION 39.0113 TO SECTION 39.0114; BY RENUMBERING OLD SECTION 39.0114 TO SECTION 39.0115; AND RENUMBERING OLD SECTION 39.0115 TO NEW SECTION 39.0116, RELATING TO THE EARNED SICK LEAVE AND MINIMUM WAGE TO BE PROVIDED TO EMPLOYEES WORKING IN THE CITY OF SAN DIEGO.

§39.0104 Definitions

Each word or phrase defined in this Division appears in the text of this Division in italicized letters. To the extent that a federal, state, or other law is referenced within this Division, the citation includes and incorporates the law as it may be amended or renumbered in the future. For purposes of this Division, the following definitions apply:

Benefit Year through *Employer* [No change in text.]

Enforcement Office means the ~~*City* Department or~~ Office ~~that the City Council designates~~ of the City Treasurer, or other Office or Department under the authority of the Mayor and designated by the Mayor to enforce this Division.

Enforcement Official means any person authorized to enforce violations of this Division.

Family Member through *Stalking* [No change in text.]

§39.0105 Accrual of Earned Sick Leave

(a) [No change in text.]

(b) *Employers* must provide an *Employee* with one hour of *Earned Sick Leave* for every ~~thirty~~ 30 hours worked by the *Employee* within the geographic boundaries of the *City*, but *Employers* are not required to provide an *Employee* with *Earned Sick Leave* in less than one-hour increments for a fraction of an hour worked. ~~*Earned Sick Leave* must be compensated at the same hourly rate or other measure of compensation as the *Employee* earns from his or her employment at the time the Employee uses the *Earned Sick Leave*.~~ *Employers* may cap an *Employee's* total accrual of *Earned Sick Leave* at 80 hours.

(c) An *Employer* may satisfy the accrual and carry-over provisions of this section if no less than 40 hours of *Earned Sick Leave* are awarded to an *Employee* at the beginning of each *Benefit Year* for use in accordance with this Division, regardless of the *Employee's* status as full-time, part-time, or temporary.

(d) *Earned Sick Leave* begins to accrue at the commencement of employment or on ~~April 1, 2015~~ July 11, 2016, whichever is later, and an *Employee* is entitled to begin using accrued *Earned Sick Leave* on the ~~ninetieth~~ 90th calendar day following commencement of his or her employment or on July ~~1, 2015~~ 11, 2016, whichever is later. After the ~~ninetieth~~ 90th calendar day of employment or after July ~~1~~ 11, 201~~5~~6, whichever is later, ~~such~~ an *Employee* may use *Earned Sick Leave* as it is accrued.

(e) *Earned Sick Leave* for *Employees* not exempt from the overtime requirements of federal and California law must be compensated at the same regular rate of pay for the work week in which the *Employee* uses the *Earned Sick Leave*. *Earned Sick Leave* for *Employees* exempt from the overtime requirements of federal and California law must be compensated at the same rate or in the same manner as the *Employer* calculates compensation for paid working time.

(~~e~~f) *Employees* who are not covered by the overtime requirements of federal and California law or regulations are assumed to work ~~forty~~ 40 hours in each work week for purposes of *Earned Sick Leave* accrual unless their regular work week is less than ~~forty~~ 40 hours, in which case *Earned Sick Leave* accrues based upon that regular work week.

(~~e~~g) An *Employer*~~, required to provide *Earned Sick Leave* pursuant to this Division,~~ who provides an *Employee* with an amount of paid leave, including paid time off, paid vacation, or paid personal days sufficient to meet the requirements of this section, and who allows this paid leave to be used for the same purposes and under the same conditions as the *Earned Sick Leave* ~~pursuant to~~ required by this Division, is not required to provide additional *Earned Sick Leave* to ~~such~~ the *Employee*. An *Employer* who provides greater paid time off, either through a contract, collective bargaining agreement, employment benefit plan, or other agreement, than that required by this Division, is deemed to be in compliance even if the

Employer utilizes an alternative methodology for calculation of, payment of, and use of *Earned Sick Leave* or other paid time off that can be used as *Earned Sick Leave*.

(~~f~~h) *Employees* may determine how much *Earned Sick Leave* they need to use, provided that *Employers* may set a reasonable minimum increment for the use of *Earned Sick Leave* not to exceed two hours.

(~~g~~i) *Employers* may limit an *Employee's* use of *Earned Sick Leave* to ~~forty~~ 40 hours in a *Benefit Year*, but ~~*Employers* must allow *Employees* to continue to accrue Earned Sick Leave based on the formula set forth in this section. U~~unused, accrued *Earned Sick Leave* must be carried over to the following *Benefit Year*.

(~~h~~j) If an *Employee* is transferred to a separate division, entity, or location in the *City*, but remains employed by the same *Employer*, the *Employee* is entitled to all *Earned Sick Leave* accrued at the prior division, entity, or location, and is entitled to retain and use all *Earned Sick Leave*, as provided by this Division. When there is a separation from employment and the *Employee* is rehired within six months of separation by the same *Employer*, previously accrued *Earned Sick Leave* that was not used or paid out must be reinstated and such *Employee* must be entitled to use such accrued *Earned Sick Leave*.

(~~i~~k) *Employers* are not required by this Division to compensate an *Employee* for unused, accrued *Earned Sick Leave*, upon the *Employee's* termination, resignation, retirement, or other separation from employment.

§39.0107 Minimum Wage

(a) [No change in text.]

(b) The *Minimum Wage* is an hourly rate defined as follows:

~~(1) Starting January 1, 2015, the Minimum Wage is $9.75.~~

(~~2~~1) Starting ~~January 1, 2016~~ July 11, 2016, the *Minimum Wage* is $10.50.

(~~3~~2) Starting January 1, 2017, the *Minimum Wage* is $11.50.

(43) Starting January 1, 2019, and each year thereafter, the *Minimum Wage* increases by an amount corresponding to the prior year's increase, if any, in the cost of living. The prior year's increase in the cost of living is measured by the percentage increase, if any, as of August of the immediately preceding year over the level as of August of the previous year of the Consumer Price Index (Urban Wage Earners and Clerical Workers, U.S. City Average for All Items) or its successor index as published by the U.S. Department of Labor or its successor agency, with the amount of the minimum wage increase rounded to the nearest multiple of five cents. The adjusted *Minimum Wage* will be announced by the *City* by October 1 of each year, and will become effective as the new *Minimum Wage* on January 1 of the succeeding year. The adjusted *Minimum Wage* will be noticed and posted as set forth in this Division.

(~~5~~4) In the event that the federal or California minimum wage is increased above the level of the *Minimum Wage* in force under this section, the *Minimum Wage* under this section will be increased to match the higher federal or California wage, effective on the same date as the increase in the federal or California minimum wage takes effect.

(c) [No change in text.]

§37.0108 Notice and Posting

(a) The bulletin and notices specified in this section will be published by the *City* and made available to *Employers* in English, Spanish, and any other language for which the San Diego County Registrar of Voters provides translated ballot materials pursuant to section 203 of the federal Voting Rights Act. The materials specified in this section will be made available to *Employers* by ~~April 1 in 2015, 2016, and 2017; by October 1 in 2018;~~ September 1, 2016 with 2016 information; December 30, 2016 with 2017 information; and by October 1 of each year thereafter with information for the following year:

(1) through (3) [No change in text.]

(b) [No change in text.]

(c) Every *Employer* must also provide each *Employee* at the time of hire, or by ~~April~~ October 1, 201~~5~~6, whichever is later, written notice of the *Employer's* legal name and any fictitious business names, address, and telephone number and the *Employer's* requirements under this Division. The notice must also include information on how the *Employer* satisfies

the requirements of this Division, including the *Employer's* method of *Earned Sick Leave* accrual. The notice must be provided to *Employees* in English and in each *Employee's* primary language, if it is a language referenced in subsection (a) and spoken by at least five percent of the *Employees* at the *Employer's* ~~job site~~ workplace. *Employers* may provide this notice through an accessible electronic communication in lieu of a paper notice.

§39.0109 Employer Records

Employers must create contemporaneous written or electronic records documenting their *Employees'* wages ~~earned~~ paid and accrual and use of *Earned Sick Leave*, provide these records to *Employees* on a regular basis, and retain these records for a period of at least three years. *Employers* must allow the *Enforcement ~~Office~~ Official* reasonable access to these records in furtherance of an investigation conducted pursuant to this Division. An *Employer's* failure to create and retain contemporaneous written or electronic records documenting its *Employees'* wages ~~earned~~ paid and accrual and use of *Earned Sick Leave*, or an *Employer's* failure to allow the *Enforcement ~~Office~~ Official* reasonable access to records creates a rebuttable presumption that the *Employer* has violated this section and the *Enforcement Official* may rely on an *Employee's* reasonable estimate regarding hours worked, wages ~~paid~~ that should have been earned, *Earned Sick Leave* that should have accrued, and *Earned Sick Leave* ~~taken~~ used ~~may be relied upon~~.

§39.0111 Retaliation Prohibited

Employers are prohibited from engaging in *Retaliation* against an *Employee* for exercising any right provided ~~pursuant to~~ by this Division. The protections of this Division apply to any *Employee* who reasonably and in good faith reports a violation of this Division to his or her *Employer* or a governmental agency tasked with overseeing the enforcement of any wage and hour law applicable to the *Employer*. Rights under this Division include, but are not limited to, the right to request payment of the *Minimum Wage*, request and use *Earned Sick Leave*, file a complaint for alleged violations of this Division with the *Enforcement ~~Office~~ Official* or in court, communicate with any person about any violation or alleged violation of this Division, participate in any administrative or judicial action regarding an alleged violation of this Division, or inform any person of his or her potential rights under this Division. Protections of this Division apply to any *Employee* who mistakenly, but in good faith, alleges noncompliance with this Division. An *Employer's* adverse action against an *Employee* within 90 calendar days of the *Employee's* exercise of rights provided by this Division creates a rebuttable presumption that the *Employer* acted in retaliation against the *Employee* for the *Employee's* exercise of protected rights.

§39.0112 ~~Implementation, Enforcement, and~~ Remedies

~~(a) The *City Council* will designate the *Enforcement Office*.~~

~~(b) The *Enforcement Office* will have full authority to implement and enforce this Division, as set forth in an implementing ordinance to be approved by the *City Council*. The ordinance will establish a system to receive and adjudicate complaints and to order relief in cases of violations.~~

(~~e~~a) ~~The City or a~~Any person claiming harm from a violation of this Division, including the *City* and an *Employee*, may bring ~~an~~ a cause of action against ~~the~~ an *Employer* in a court of competent jurisdiction to enforce the provisions of this Division, without exhausting the administrative remedies set forth in this Division. Submitting a complaint to the *Enforcement Office* is neither a prerequisite to nor a bar to bringing a civil action in a court of competent jurisdiction.

(~~e~~b) ~~The *City* or a~~Any person claiming harm from a violation of this Division ~~may bring an action against the *Employer* in court to enforce the provisions of this Division. Any person claiming harm from a violationof thie Division~~, including an *Employee* and the *City*, ~~are~~ is entitled to all legal and equitable relief to remedy any violation of this Division, including, but not limited to, the payment to an *Employee* of back wages withheld in violation of this Division; ~~an additional amount equal to double back wages withheld as liquidated damages;~~ damages for an *Employer's* denial of the use of accrued *Earned Sick Leave* in violation of this Division, payable to an *Employee*; reinstatement of employment or other injunctive relief; reasonable attorney~~'ss~~' fees and costs to any plaintiff~~,~~ who prevails in an action to enforce this Division; and payment of liquidated damages to an *Employee* equal to double back wages withheld, except as otherwise provided in this subsection. When an *Employer* engages in *Retaliation* against an *Employee*, the *Employer* is subject to liquidated damages that are the greater of double back wages or

$1,000 for each violation not resulting in termination of employment, and the greater of double back wages or $3,000 when an *Employee* is terminated from employment for exercising any right provided by this Division. Violations of this Division are declared to irreparably harm the public and covered *Employees* generally.

(~~d~~c) Any *Employer* who violates any requirement of this Division is also subject to a civil penalty ~~for each violation~~ , assessed and payable to the *City*, of ~~up to,~~ no less than $500, but ~~not to exceed,~~ no more than $1,000 per violation, except ~~that an~~ as otherwise provided in this subsection. Each and every day that an *Employer* fails to pay an *Employee Minimum Wage* or fails to provide an *Employee* with *Earned Sick Leave* in accordance with this Division constitutes a separate and distinct violation. ~~a~~Any *Employer* who fails to comply with the notice and posting requirements of this Division is subject to a civil penalty of ~~one hundred dollars~~ $500 for each *Employee* who was not given appropriate notice pursuant to that section, up to a maximum of $2,000. Any *Employer* who engages in *Retaliation* against an *Employee* for exercising any right provided by this Division is subject to a civil penalty of no less than $1,000, but no more than $3,000 per violation. The cumulative civil penalties that may be assessed against and *Employer*, who has not previously violated any provision of this Division and who violates the *Minimum Wage* provisions, are limited to $10,000. The cumulative civil penalties that may be assessed against and *Employer*, who has not previously violated any provision of this Division and who violates the *Earned Sick Leave*

provisions, are limited to $10,000. An *Employer* is deemed to have violated a provision of this Division upon issuance of (1) a Notice of Satisfaction, (2) Administrative Enforcement Order, or (3) final judgment of a court of competent jurisdiction, with a finding of a violation. The minimum and maximum civil penalties under this subsection must be increased cumulatively by fifty percent for each subsequent violation of the same provision in this Division by the same *Employer* or other person within a three-year period. If civil penalties and costs are the subject of administrative appeal or judicial review, then the accrual of penalties and other costs is stayed until the determination of the appeal or review is final.

(~~d~~e) Notwithstanding section 12.0201 of this Code, ~~V~~violations of this Division may not be prosecuted as a misdemeanor or infraction.

(~~e~~f) This Division does not create any right of action or cause of action for damages against the *City* in its enforcement of this Division.

(~~f~~g) This section is not intended to supersede any applicable, current or future state or local law, rule, regulation, or approved memoranda of understanding binding on the *City*, as a public agency employer, and its *Employees*.

(g) If an *Employer* ceases its business operations, sells out, exchanges, or otherwise disposes of the *Employer's* business, then any person who becomes a successor to the business will be liable for the unpaid amount of the remedies as defined in the Notice and Order if, at the time of the

conveyance of the business, the successor has actual or constructive knowledge of the fact and amount of the Notice and Order.

§39.0113 Enforcement Office

(a) The *Enforcement Office* has full authority to implement and enforce this Division, consistent with the authority and powers set forth at Division 1 of Article 2, Chapter 1 of this Code. The *Enforcement Official* may investigate any possible violations of this Division by an *Employer* or other person. The *Enforcement Official* has authority to access any *Employer's* or *Employee's* workplace during workplace hours to examine and audit business and other relevant records; to interview witnesses, including *Employees*, at or away from *Employees'* workplace; and to investigate all matters necessary or appropriate to determine whether an *Employer* has violated any provisions of this Division. The *Enforcement Official* may issue subpoenas, in accordance with applicable federal and state law and this Code. The *Enforcement Official*, under the direction of the Mayor, may promulgate and issue administrative regulations to establish and adjudicate complaints and to order relief in cases of violations, consistent with this Division.

(b) The *Enforcement Office* will provide information about the complaint process that is readily accessible to the public, including non-English speakers. The information must be made available in English, Spanish, and any other language for which the San Diego County Registrar of Voters provides translated ballot materials pursuant to section 203 of the federal Voting Rights Act.

(c) (1) Any person may file a complaint, in writing, with the *Enforcement Office* alleging a violation of this Division. The written complaint must include a statement of dates, places, and persons or entities responsible for the alleged violation. Notwithstanding anything to the contrary in this Code, complaints alleging a violation of this Division must be filed within two years of the occurrence of the alleged violation

(2) To encourage reporting and cooperation with investigations, the *Enforcement Office* must maintain the confidentiality of any person reporting an alleged violation and persons assisting in any investigation, including the name, address, and other identifying information of the person, to the extent permitted by law. The *Enforcement Office* must also protect proprietary business information to the extent permitted by law. The *Enforcement Office* may disclose information as necessary to enforce this Division or for other lawful purposes.

(d) (1) Upon receipt of a written complaint, the *Enforcement Official* may issue a Notice of Violation to the *Employer*, informing the *Employer* of the alleged violation, including reference to the Code provision alleged to have been violated, and specifying the action required to correct or remedy the alleged violation. The Notice of Violation may request access to the *Employer's* workplace to investigate the alleged violation, including inspecting records and interviewing witnesses. The Notice of Violation may be served

personally or by registered mail, in accordance with Division 3 of Article 1 of Chapter 1 of this Code.

(2) At the discretion of the *Enforcement Official*, an *Employer* served with a Notice of Violation must be allowed 14 calendar days from the date of the Notice of Violation to submit a written declaration to the *Enforcement Office*, setting forth facts and evidence to demonstrate that no violation occurred, that the *Employer* is not responsible for the violation, or that the *Employer* has corrected or remedied the violation. The *Enforcement Official* may request documents to support an *Employer's* written declaration. The *Enforcement Official* may assign a longer period, not to exceed an additional seven calendar days, within which an *Employer* may submit a written declaration. The *Enforcement Official* may consider the cost of correction and the time needed to obtain information and documents about the alleged violation and any voluntary corrective action taken by the *Employer* in assigning a specific period of time within which to correct or remedy each violation, or obtain and submit evidence that no violation occurred or an *Employer* is not responsible for the violation.

(e) The *Enforcement Official* may conduct an informal settlement conference with the *Employee* and *Employer*, upon receipt of a complaint from an *Employee*, and following issuance of the Notice of Violation, as an opportunity to remedy the alleged violation, without further administrative enforcement action. The *Enforcement Official* has discretion to impose

civil penalties in accordance with section 12.0805 of this Code, as a condition to settle an alleged violation. A settlement is contingent upon approval by the *Employee*, *Employer*, and the *Enforcement Official*.

(f) If, following issuance of a Notice of Violation and the period of time assigned by the *Enforcement Official* to an *Employer* to respond by written declaration, the *Enforcement Official* determines that an *Employer* has violated any provision of this Division, the *Enforcement Official* may issue a Notice and Order to the *Employer* in violation. The Notice and Order may be served personally or by registered mail, in accordance with Division 3 of Article 1 of Chapter 1 of this Code. Each Notice and Order must be in writing and must describe the nature of the violation, including reference to the Code provision alleged to have been violated. The Notice and Order must include the assessment of unpaid wages and other damages, including liquidated damages, owed to the *Employee*, based on the facts presented to the *Enforcement Official*, and civil penalties payable to the *City*, in accordance with this Division and Division 8, Article 2 of Chapter 1 of this Code.

(g) If an *Employer* wants to contest a Notice and Order, the *Employer* must, within 15 calendar days after service of the Notice and Order, serve written notice to the *Enforcement Office* of his or her request for an administrative enforcement hearing. This written notice must be postmarked on or actually received by the *Enforcement Office* by the 15th calendar day following the service of the Notice and Order.

(h) As soon as practicable, the *Enforcement Office* must schedule the administrative enforcement hearing, which will be conducted by an Enforcement Hearing Officer, who is independent from the *Enforcement Official*. The administrative enforcement hearing must be conducted in accordance with the due process requirements set forth in Division 4 of Article 2 of Chapter 1 of this Code. The Enforcement Hearing Officer, at his or her discretion and in accordance with applicable law, may permit any person, who is not a party to an administrative enforcement hearing or a party's representative, to attend the administrative enforcement hearing upon the person's request. Any party to the administrative enforcement hearing may, at his or her own expense, require that the hearing be transcribed by a certified court reporter. At the conclusion of the administrative enforcement hearing, the Enforcement Hearing Officer must affirm, modify, or dismiss the Notice of Violation and any Notice and Order issued.

(i) The findings of the Enforcement Hearing Officer must be set forth in an Administrative Enforcement Order, which must be served on all parties by any one of the methods listed in section 11.0301 of this Code no later than 30 calendar days following the conclusion of the hearing or a later date by stipulation of the parties. The Administrative Enforcement Order becomes final on the date of service, and subject to judicial review, in accordance with section 12.0412 of this Code. *Employers* found in violation must pay any civil penalties assessed to the *City*, and damages, including liquidated damages, to the *Employee*, with documentation of payment to the *City*.

(j) The *Enforcement Office* may collect all civil penalties and related administrative costs in an Administrative Enforcement Order, by the use of all appropriate legal means, including referral to the City Treasurer for collections action and the recordation of a Code Enforcement Lien in accordance with the procedures set forth in Division 2, Article 3 of Chapter 1 of this Code. If unable to collect the obligation, the *Enforcement Official* must refer the obligation to the City Attorney, for a determination of further legal action to recover the damages, civil penalties, and costs.

(k) A judgment entered in accordance with this Division must bear the same rate of interest and have the same effect as other judgments and be given the same preference allowed by the law on other judgments.

(l) In lieu of contesting a Notice and Order, an *Employer* must transmit to the *Enforcement Office* the amount specified in the Notice and Order within 15 calendar days of service.

(m) An *Employer's* failure to respond to a Notice and Order or appear at an administrative enforcement hearing in accordance with the provisions of this Division will constitute a failure to exhaust administrative remedies.

(n) The *Enforcement Official* must issue a Notice of Satisfaction to the *Employer* when all outstanding damages, penalties, and costs have been paid in full.

(o) Throughout the administrative enforcement process set forth in this Division, *Employees* and *Employers* have the right to be represented by an attorney or other representative, at their own expense, and have the right to

fully present all relevant evidence to the *Enforcement Official* or the Enforcement Hearing Officer.

(p) The *Enforcement Office* may collaborate, including entering into a contract with, with workers' rights advocates and community-based organizations to assist in outreach efforts and other governmental agencies to assist in enforcement.

(q) The *Enforcement Office* must provide a summary report of its activities, including information requested by the City Council, each year to the City Council, as part of the annual budget process.

§39.0114 Compliance with Legal Agreements

[No change in text.]

§39.0115 No Effect on Higher Wages or More Earned Sick Leave

[No change in text.]

§39.0116 Effect of Invalidity; Severability

[No change in text.]

JFD:GJH:ccm
July 12, 2016 REV.
June 24, 2016
Or.Dept: Council District 3
Doc. No.: 1321502

Passed by the Council of The City of San Diego on JUL 26 2016, by the following vote:

Councilmembers	Yeas	Nays	Not Present	Recused
Sherri Lightner	☒	☐	☐	☐
Lorie Zapf	☒	☐	☐	☐
Todd Gloria	☒	☐	☐	☐
Myrtle Cole	☒	☐	☐	☐
Mark Kersey	☒	☐	☐	☐
Chris Cate	☒	☐	☐	☐
Scott Sherman	☒	☐	☐	☐
David Alvarez	☒	☐	☐	☐
Marti Emerald	☒	☐	☐	☐

Date of final passage AUG 03 2016.

AUTHENTICATED BY:

KEVIN L. FAULCONER
Mayor of The City of San Diego, California.

(Seal)

ELIZABETH S. MALAND
City Clerk of The City of San Diego, California.

By _____, Deputy

I HEREBY CERTIFY that the foregoing ordinance was not finally passed until twelve calendar days had elapsed between the day of its introduction and the day of its final passage, to wit, on JUL 11 2016, and on AUG 03 2016.

I FURTHER CERTIFY that said ordinance was read in full prior to passage or that such reading was dispensed with by a vote of five members of the Council, and that a written copy of the ordinance was made available to each member of the Council and the public prior to the day of its passage.

(Seal)

ELIZABETH S. MALAND
City Clerk of The City of San Diego, California.

By _____, Deputy

Office of the City Clerk, San Diego, California

Ordinance Number O- 20706