REPORT

To the Honorable Mayor and City Council
From the City Manager

March 26, 2018

SUBJECT
Local Minimum Wage in Redwood City

RECOMMENDATION
Waive first reading and introduce an Ordinance to add Chapter 46 "Minimum Wage Ordinance" to the Redwood City Code adopting an increase of the minimum wage for employees working within the city of Redwood City to fifteen dollars ($15.00) per hour by 2020 and finding that the proposed ordinance is not a project under CEQA and, in any event, exempt under Section 15061 of the CEQA guidelines

BACKGROUND
As part of the annual budget approval process in June 2017, the City Council determined that it would be appropriate to consider increasing the local minimum wage for employers who maintain a business in the City or perform any work/service within the City limits. At a September 25, 2017 Study Session, staff presented an informational report related to the minimum wage, and the City Council provided the following policy direction:

- Develop a minimum wage ordinance that increases the minimum wage to $15.00 per hour in Redwood City faster than the State of California's minimum wage, which will reach $15.00 per hour by 2022; and
- Not to include exceptions in the minimum wage ordinance; and
- Seek business and community input on timing and the potential phasing of a local minimum wage increase

Over the past five months, City Councilmembers and City staff have conducted a robust outreach program to business owners and residents about the proposed increase to the local minimum wage. Staff prepared the draft ordinance after considering feedback received. The Finance and Audit Sub-committee members reviewed the feedback received in the community outreach process and the draft local minimum wage ordinance. Though Sub-Committee members preferred differing schedules for phasing in a local minimum wage in Redwood City, Sub-Committee members generally

supported key parameters of a local minimum wage ordinance, and either staff's recommended approach or Alternative C.

Federal, State and Local Minimum Wages

The minimum wage established by Federal, State and local government law sets the lowest wage an employer legally may pay to workers. As of January 1, 2018, California law requires the minimum wage for all industries to be no less than $10.50 per hour for businesses with less than 25 employees and $11.00 per hour for businesses with 26 or more employees. The Federal minimum wage for covered nonexempt employees has been $7.25 per hour since July 24, 2009.

On April 4, 2016, California Governor Jerry Brown signed legislation (SB 3, Leno) which will raise California's minimum wage to $15.00 per hour by 2022. After January 1, 2023, future wage increases are tied to inflation, reflecting increases in the Consumer Price Index, up to 3.5% per year. Under the new state law, the Governor may suspend the wage increase schedule during economic downturns. The increased minimum wage levels would be applied uniformly across the state. The law also maintains existing exemptions in the State's minimum wage law. This legislation gives California the highest minimum wage in the country along with New York.

State of California Minimum Wage		
Effective Date	Employers w/ 25 Employees or Less	Employers w/ 26 Employees or More
January 1, 2016	$10.00	$10.00
January 1, 2017	$10.00	$10.50
January 1, 2018	$10.50	$11.00
January 1, 2019	$11.00	$12.00
January 1, 2020	$12.00	$13.00
January 1, 2021	$13.00	$14.00
January 1, 2022	$14.00	$15.00
January 1, 2023	$15.00	$15.00+CPI

Local governments retain the ability to adopt local wage ordinances. Such ordinances can increase the minimum wage more rapidly than the statewide timeframe or can increase the minimum wage beyond the level set by the State. Currently, Redwood City employers are subject to Federal and State minimum wage laws. When there are conflicts in the laws, the employer must follow the strictest standard, meaning that employers must follow the standard that is most favorable to the employee. Since the State's law on minimum wage is higher than the Federal law, covered employers are required to pay the State's minimum wage. Similarly, should the City enact a minimum

wage ordinance that is higher than State law, covered employers are required to pay the City's minimum wage.

Twenty-nine states and the District of Columbia have wages higher than the federal floor of $7.25 an hour. As of December 2017, forty-one local agencies (cities and counties) across the country had enacted a local minimum wage ordinance. Seventeen of the forty-one agencies are cities located in the Bay Area (Attachment A).

Currently, the City of San Mateo and the City of Belmont are the two cities in San Mateo County with adopted minimum wage ordinances. In addition to Redwood City, two other cities were examining minimum wage ordinances. Those cities were Brisbane and Daly City.

- San Mateo – On August 15, 2016, the San Mateo City Council adopted a Minimum Wage Ordinance with a wage schedule whereby most employers are required to pay $15 per hour by 2019. Non-profit organizations that are tax-exempt per Section 501(c)(3) of the tax code are provided with an extended time frame to reach $15 per hour beginning January 1, 2020.

City of San Mateo Minimum Wage		
Effective Date	**Citywide**	**Nonprofit**
January 1, 2016	$10.00	$10.00
January 1, 2017	$12.00	$10.50
January 1, 2018	$13.50	$12.00
January 1, 2019	$15.00	$13.50
January 1, 2020	$15.00+ CPI	$15.00+CPI
January 1, 2021	CPI	CPI
January 1, 2022	CPI	CPI
January 1, 2023	CPI	CPI

- Belmont – On November 14, 2017, the City Council adopted an ordinance to increase Belmont's Minimum Wage rate to $15.00 an hour by 2020. Beginning on January 1, 2021, the minimum wage will adjust annually based on the regional Consumer Price Index (CPI). In January 2021, the Belmont minimum wage will be increased by the 2020 and 2019 CPI; this will align Belmont's minimum wage with the City of San Mateo's minimum wage program - $15.00 + 2020 CPI + 2019 CPI.

City of Belmont Minimum Wage	
Effective Date	**Citywide**
July 1, 2018	$12.50
January 1, 2019	$13.50
January 1, 2020	$15.00
January 1, 2021	$15.00 + 2020 CPI + 2019 CPI
January 1, 2022	+ CPI
January 1, 2023	+ CPI

- Brisbane – further discussion on examining a local minimum wage will be part of the City's upcoming budget process.

- Daly City – The City Council discussed a proposed minimum wage increase on August 21, 2017. According to City staff, the City is no longer considering a minimum wage ordinance at this time.

- In addition, the County of San Mateo adopted a Living Wage Ordinance. This Ordinance requires contractors providing services under contract with the County of San Mateo to pay $15.00 per hour to their employees (as of July 1, 2017). Government entities providing services under County contract do not need to comply with the ordinance; including cities, counties and school districts.

Cost to Support a Family in San Mateo County

The California Budget and Policy Center, a Sacramento nonprofit agency, published a December 2017 report (Attachment B), "Making Ends Meet: How Much Does it Cost to Support a Family in California," which measures the cost of basic budgets for families and single individuals in each of the state's 58 counties. In San Mateo County, the combined salary of two full-time minimum wage workers will not cover a basic family budget. Taking into account housing, food, childcare, transportation, medical needs, and basics such as clothing, housekeeping supplies and telephone service, along with income and payroll taxes, a California family of four with two working parents needs annual earnings of $108,109 on average to afford basic necessities. This is equivalent to each working parent having a full-time job that pays $25.98 an hour. A family with only one working parent would need to earn $40.87 an hour to make ends meet, the report estimates.

Exceptions for Federal, State, County agencies, including School Districts

The City cannot impose a minimum wage on Federal, State or County agencies, including school districts. Each has their own jurisdiction and is not subject to our

oversight when it relates to their government function. They can subject themselves to the City's Ordinance, if they choose, but they are voluntarily consenting to the City's regulations in that case.

Community Engagement and Outreach

Over the past five months, City Councilmembers and City staff have conducted robust outreach to business owners and residents about the proposed increase to the local minimum wage in Redwood City. Communication activities included: mailing postcards to all businesses located in Redwood City (approximately 6,100 businesses) inviting businesses to attend roundtable meetings and/or take an online business survey, and email feedback. Engagement activities included: 250 one-on-one business visits, ten stakeholder meetings, two citywide business roundtable meetings, and one citywide community meeting. In addition, the City established a dedicated web page for the minimum wage initiative, which included a subpage of frequently asked questions, and a dedicated email address to solicit minimum wage community feedback: localminimumwage@redwoodcity.org.

City Councilmembers and City staff met with the following key business stakeholder groups:

- California Restaurant Association
- Downtown Business Group
- Raise the Wage Coalition
- Redwood City Auto Dealerships
- Redwood City Improvement Association
- Redwood City-San Mateo County Chamber of Commerce
- San Mateo County Central Labor Council
- San Mateo County Convention and Visitors Bureau
- Seaport Industrial Association
- Ten Nonprofit Agencies via the Thrive Alliance of Nonprofits in San Mateo County

Local government entities:

- Belmont-Redwood Shores School District
- County of San Mateo
- Redwood City Elementary School District
- Sequoia Union High School District
- Silicon Valley Clean Water

Postcard/Online Survey

In November, the City mailed a postcard notice to all businesses with an active business license inviting them to participate in an online survey regarding their businesses and one of two business roundtable meetings hosted by the City. The survey, available in English, Spanish, and Chinese, asked respondents questions regarding the number of employees the business had, where the majority of the employees live, whether benefits are provided and wage information. The survey also asked if a change to the local minimum wage would affect their business and whether they would support the change. The survey was open from November 13, 2017 until January 31, 2018. Twenty-two businesses participated in the survey during this period.

While a majority of the survey participants indicated that they pay their employees higher than the current minimum wage, those that paid their employees at or near the current minimum wage of $10.50 an hour indicated that those employees were tipped employees. Their non-tipped employees were paid closer to $15.00 an hour. Sixty percent of the 22 respondents did not support raising the minimum wage to $15.00 an hour by 2019. Respondents commented that the increased minimum wage may negatively impact their business due to an increase in the cost of goods. This would have a greater impact on their business since they are already paying their employees at the higher rates.

One-on-One Business Outreach Visits

Between November 2017 and January 2018 City Councilmembers and City staff visited 250 businesses across the City. The goal of these visits was to notify local business owners and managers of the Council's consideration of a local minimum wage ordinance, provide an informational flyer, promote the City's online survey, invite owners and managers to attend business roundtable meetings, receive input, and share that the City Council will consider a draft Minimum Wage Ordinance at the March 2018 Council Meeting.

Stakeholder feedback

<u>Businesses</u>

In the business visits and the business roundtable and stakeholder meetings participants generally expressed support for establishing a local minimum wage in Redwood City. Many businesses are currently paying close to or more than $15.00 an hour and see this wage as necessary to attract and retain quality employees due to the high cost of living in the Bay Area.

Some businesses and the California Restaurant Association expressed concerns, and recommended the City phase-in the minimum wage increase, as it would be difficult for

businesses to adjust to a fifteen-dollar minimum wage in one step. Also, some businesses stated that the wage increases should take effect in one-year increments rather than six month increments as there is significant payroll administration work that has to be conducted to readjust employee wages, and six months is not enough time before they have to readjust wages again. Some businesses had concerns regarding wage compaction for veteran and up line employees, as most businesses currently pay above the state minimum wage, and if there is a new local minimum wage, they will need to pay their employees higher than the local minimum wage. Some conveyed that the increase in minimum wage would also increase operating costs on FICA, Medicare and workers compensation as they are tied to employee compensation. Additionally, some restaurateurs had concerns around the impact of restaurant servers (tipped employees) and the wage disparity with kitchen staff. A common theme from business owners was that rent increases were a greater burden than prospective minimum wage increases.

Attendees at the various stakeholder meetings including the Downtown Business Group, Redwood City Auto Dealerships, Redwood City Improvement Association, Redwood City – San Mateo County Chamber of Commerce, San Mateo County Convention and Visitors Bureau, and the Seaport Industrial Association all indicated that they were in general support of the increase to the minimum wage. Many of the members of these organizations were already paying their employees $15.00 an hour or more in order to attract and retain quality employees within their organizations and businesses. In addition to their support of the increase, each of these organizations committed to assisting the City in helping to distribute information about the proposed change to their members who were not present at the meeting. Additionally, the Chamber of Commerce surveyed their membership and the majority of respondents supported the City's proposed wage increase.

Nonprofits

Ten nonprofit organizations located in Redwood City attended a minimum wage roundtable discussion organized by the Thrive Alliance of Nonprofits in San Mateo County. The majority of nonprofit agencies in attendance supported the City moving forward with a minimum wage increase. Every nonprofit agency in attendance was currently paying their employees more than $15.00 per hour. They stated that the increased salary is needed to retain staff as staff members have left and moved away due to the high cost of housing. Nonprofit employers are challenged to pay more than the minimum wage because most have fixed revenue streams and are not able to charge higher prices or receive additional funding from the state, foundations, or donors. Some nonprofits advocated for training wages for new employees for a training period at the beginning of employment.

Government Entities

The City convened five local government entities: the Belmont-Redwood Shores School District, County of San Mateo, Redwood City Elementary School District, Sequoia Union High School District and Silicon Valley Clean Water. Almost all of these employers pay their employees more than $15.00 per hour. The only positions that pay sub $15.00 per hour wages are on campus student employees and interns. The City cannot impose a minimum wage on Federal, State or County agencies, including school districts.

Organized Labor

When meeting with representatives from the Raise the Wage Coalition and the San Mateo County Central Labor Council there was overwhelming support to move forward with a $15.00 per hour minimum wage. Attendees recommended the inclusion of a waiver for employees covered by collective bargaining agreements, proactive communications from the City notifying businesses of the new minimum wage and where to place minimum wage posters in prominent areas frequented by employees on the business premises, along with whistleblower protections and proactive enforcement of the proposed ordinance.

Community Meeting

Thirty-five people attended the minimum wage community meeting; residents and employees working in Redwood City with ties to labor organizations were well represented. General sentiment was that the minimum wage increase cannot happen soon enough: due to the high cost of living, even with a $15.00 per hour minimum wage it will still be difficult for low-wage workers to live in Redwood City and surrounding areas. Attendees also asked for whistleblower protections, stiff penalties for enforcement, and proactive communications from the City notifying businesses of the new minimum wage.

ANALYSIS

Proposed Ordinance

Based on the direction at the September 25, 2017 City Council Study Session and input from key stakeholders, staff recommends the following key parameters in the proposed ordinance:

Covered Employees

The minimum wage requirement set forth in the draft ordinance applies to adult and minor employees who work two or more hours per week within the City's geographic

boundaries. Covered employees are entitled to these rights regardless of immigration status.

Amount and Timeframe

The draft ordinance increases the minimum wage for employees working in Redwood City in increments. The rate of increase follows similar minimum wage increases enacted in the Cities of San Mateo and Belmont: San Mateo began an increased minimum wage program in January 2017 and Belmont will begin their program in July 2018.

The first local wage increase for Redwood City would occur in January 2019 to allow for public outreach/notification, contract for implementation services, and to provide businesses lead time to prepare business plans and budgets to adapt to the wage increase. The draft ordinance increases the minimum wage in two increments in 2019 and 2020. The first increase would occur on January 1, 2019 and increases the minimum wage from the statewide level of $12.00 per hour to $13.50 per hour. The second increase would occur on January 1, 2020 and raises the wage to $15.00 per hour. To align with the State and other local minimum wage ordinances, the step increases occur on January 1 of the respective year. While the State provides two tiers for minimum wage increases (one for businesses with 25 or fewer employees, one for employers with 26 or more employees), the draft Redwood City ordinance has a single minimum wage schedule for all employers.

Starting on January 1, 2021, all employers in Redwood City would be subject to annual Consumer Price Index (CPI) increases based on the San Francisco-Oakland-San Jose regional CPI. In January 2021 the Redwood City minimum wage will be increased by the 2020 and 2019 CPI; this will align Redwood City's minimum wage with the City of Belmont and City of San Mateo minimum wage programs. It is important to note that, with this schedule, the City of Redwood City minimum wage will always be higher than the state minimum wage, because the City CPI increases would go into effect two years earlier than the state CPI increases (which begin in 2023).

City of Redwood City Proposed Minimum Wage		
Effective Date	**State of CA (26 + Employees)**	**City of Redwood City (Proposed)**
January 1, 2019	$12.00	$13.50
January 1, 2020	$13.00	$15.00
January 1, 2021	$14.00	$15.00 + 2020 CPI + 2019 CPI*
January 1, 2022	$15.00	+ CPI
January 1, 2023	$15.00 + CPI	+ CPI

* In January 2021 the Redwood City minimum wage will be increased by the 2020 and 2019 CPI; this will align Redwood City's minimum wage with the City of Belmont and City of San Mateo minimum wage programs.

Training/Learners Wage

The draft ordinance defaults to the State definition of a "learner's wage" of 85% of the applicable minimum wage for the first 160 hours of employment. Staff believed that adhering to the State standard instead of creating a new local standard was the most prudent action to address the needs of both employees and businesses.

Tipped vs. Non-Tipped Employees

Consistent with Council's direction and the State Legislative Counsel's opinion (Attachment C), the draft ordinance does not allow for a different minimum wage for tipped employees versus non-tipped employees. All employees would be subject to the same wage requirement regardless of tips or gratuities received.

Noticing and Enforcement

The draft ordinance includes various provisions regarding notification to employees and businesses, implementation procedures, and enforcement mechanisms. Pending Council adoption of this ordinance, staff would conduct extensive outreach this summer and fall to notify employees and businesses of the higher minimum wage requirement beginning on January 1, 2019. Currently the City of San Jose Office of Equality Assurance provides contractual minimum wage enforcement services to seven cities, including Cupertino, Los Altos, Mountain View, Palo Alto, San Mateo, Santa Clara and Sunnyvale. San Jose has expressed interest to provide contractual as-needed enforcement services to the City of Redwood City. This is the most cost effective means for enforcement of a local minimum wage ordinance. Pending Council adoption of this ordinance, staff would enter into an agreement with the City of San Jose to provide third-party enforcement.

Employee Protections

Under this draft ordinance, employees who assert their rights to receive the City's minimum wage are protected from retaliation. Employees may file a civil lawsuit against their employers for any violation of the draft ordinance or may file a complaint with the City. The City will investigate (via City of San Jose) possible violations and will require access to payroll records. The City may enforce violations of the minimum wage ordinance by ordering reinstatement of employees, payment of back wages unlawfully withheld, and penalties.

Collective Bargaining Waiver

The draft ordinance includes language that allows for all or any portion of the minimum wage requirements to be waived in a bona fide collective bargaining agreement if such a waiver is explicitly set forth in an agreement. The San Mateo County Central Labor Council has requested language in the ordinance that would create an exception for "property services workers" such as janitors, landscapers, and security guards. Staff recommends inclusion of this exception to keep this provision uniform with the two other cities in San Mateo County who have adopted local minimum wage ordinances (Belmont and San Mateo).

Exemptions

The draft ordinance includes an exemption for Federal, State, and County agencies, including school districts. The City cannot impose a minimum wage on these government entities. Each has their own jurisdiction and is not subject to the City's oversight when it relates to their government function. Government agencies can subject themselves to the City's ordinance on a voluntary basis.

Estimated City Impacts

A preliminary review of City employees indicates that the City has 226 hourly employees, representing a full-time employee equivalent (FTE) of 62.25 FTE, which would be affected by an increase in the minimum wage to $15.00 per hour. These employees are concentrated in classifications in three departments: Administrative Services (.25 FTEs), Library (17 FTEs), and Parks, Recreation and Community Services (45 FTEs). A large number of the affected positions in Parks, Recreation and Community Services are in the Youth and Teen Services program. While most of the work is seasonal, some positions work part-time on a year-round basis. An increase in City wages to $15.00 per hour, without any phasing, would cost approximately $122,000. However, the total fiscal impact is higher as wage increases for these classifications would prompt changes to the City's hourly wage structure beyond employees at the minimum wage level. Staff estimates that the total adjustment of wage ranges for the positions that are directly and indirectly impacted by the minimum wage increase would cost approximately $500,000; this cost would be phased in over a two-year period. Approximately half this cost is anticipated in the preliminary Five Year General Fund Forecast presented February 26, 2018. Should the City Council increase the City's minimum wage, staff will conduct a comprehensive review and redesign of hourly compensation.

An additional fiscal impact is the dedication of staff and fiscal resources towards the ongoing implementation of the ordinance, which includes enforcement costs to track and ensure compliance with a new City minimum wage ordinance. Typical duties of enforcement include community outreach, compliance review, and managing a

complaint process. Should the City choose to contract with the City of San Jose for enforcement services, staff recommends that the City budget approximately $30,000 annually for these services. Some of the enforcement cost could be offset by the collection of penalties from noncompliant employers.

Next Steps:
As a next step, staff recommends that the second reading and adoption of this ordinance be scheduled for the April 9, 2018 Council meeting. If adopted, the ordinance would go into effect in 30 days with the first minimum wage increase beginning January 1, 2019.

ALTERNATIVES

- **Alternative A:** Take no action at the local level with Redwood City employers adhering to the State's phased-in minimum wage schedule, which will reach $15.00 an hour by 2022.
- **Alternative B:** Adopt a local minimum wage ordinance that increases the minimum wage in Redwood City to $15.00 per hour at one time on January 1, 2019 and annually thereafter, the City will adjust the minimum wage based on the Consumer Price Index.
- **Alternative C:** Adopt a local minimum wage ordinance that increases the minimum wage in Redwood City to $13.50 per hour beginning July 1, 2018 and $15.00 per hour on January 1, 2019 in a phased approach and annually thereafter, the City will adjust the minimum wage based on the Consumer Price Index.

Alternatives					
Effective Date	**State of CA (26 + Employees)**	**City of Redwood City (Proposed)**	**Alternative A**	**Alternative B**	**Alternative C**
July 1, 2018	$11.00	$11.00	$11.00	$11.00	$13.50
January 1, 2019	$12.00	$13.50	$12.00	$15.00	$15.00
January 1, 2020	$13.00	$15.00	$13.00	+ CPI	+ CPI
January 1, 2021	$14.00	$15.00 + 2020 CPI + 2019 CPI	$14.00	+ CPI	+ CPI
January 1, 2022	$15.00	+ CPI	$15.00	+ CPI	+ CPI
January 1, 2023	$15.00 + CPI	+ CPI	$15.00 + CPI	+ CPI	+ CPI

FISCAL IMPACT
Increasing the minimum wage to $15.00 as required by the State or through a potential local ordinance would have an estimated cost impact to the City of approximately $500,000 annually. The City would also budget $30,000 annually for a third party enforcement contract.

ENVIRONMENTAL REVIEW

This activity is not a project under CEQA as defined in CEQA Guidelines, Section 15378, because it has no potential for resulting in either a direct or a reasonably foreseeable indirect physical change in the environment. In the event that the Ordinance is found to be a project under CEQA, it is subject to the CEQA exemption contained in CEQA Guidelines section 15061(b)(3) because it can be seen with certainty to have no possibility of having a significant effect on the environment.

ALEX KHOJIKIAN
DEPUTY CITY MANAGER

MELISSA STEVENSON DIAZ
CITY MANAGER

ATTACHMENTS:

1. Ordinance
2. Bay Area Ordinances
3. San Mateo County Monthly Family Budget
4. Minimum Wage Legislative Counsel Opinion

ORDINANCE NO. _____

ORDINANCE ADDING A NEW CHAPTER 46 OF THE CODE OF THE CITY OF REDWOOD CITY RELATING TO A CITY-WIDE MINIMUM WAGE

WHEREAS, the State of California has enacted a minimum wage that will reach $15.00 per hour for all Employers in January of 2023; and

WHEREAS, in an effort to help working households achieve economic security and acknowledging the higher relative cost of living on the Peninsula, the City Council of the City of Redwood City wishes to enact a citywide minimum wage to reach $15.00 per hour before 2023; and

WHEREAS, the City of Redwood City may adopt a higher minimum wage pursuant to the powers vested in the City under the laws and Constitution of the State of California, including but not limited to the police powers vested in the City pursuant to Article XI, Section 7 of the California Constitution.

NOW, THEREFORE, THE COUNCIL OF THE CITY OF REDWOOD CITY DOES ORDAIN AS FOLLOWS:

Section 1. The purpose and intent of this Ordinance is to adopt a new Chapter 46 of the Code of the City of Redwood City to provide a minimum wage that increases annually and reaches the level of $15.00 per hour on January 1, 2020.

Section 2. The recitals set forth above are true and correct and are hereby incorporated herein by this reference as if fully set forth in their entirety.

Section 3. The City Council hereby finds that the proposed Ordinance is in the public interest.

Section 4. The proposed Ordinance is not a project within the meaning of section 15378 of the CEQA Guidelines because it has no potential for resulting in either a direct or a reasonably foreseeable indirect physical change in the environment, either directly or ultimately. In the event that this Ordinance is found to be a project under CEQA, it is subject to the CEQA exemption contained in CEQA Guidelines section 15061(b)(3) because it can be seen with certainty to have no possibility of having a significant effect on the environment.

Section 5. If any section, subsection, clause or phrase of this Ordinance is for any reason held to be invalid, such decision shall not affect the validity of the remaining portion or sections of the Ordinance. The City Council of the City of Redwood City hereby declares that it would have adopted the Ordinance and each section, subsection, sentence, clause or phrase thereof irrespective of the fact that

any one or more sections, subsections, sentences, clauses or phrases be declared unconstitutional.

Section 6. Chapter 46 is added to the Code of the City of Redwood City to read as follows:

"**CHAPTER 46: – Minimum Wage Ordinance**

SEC. 46.010. – Short title: This Chapter shall be known as the "Minimum Wage Ordinance."

SEC. 46.020. – Definitions. The following terms shall have the following meanings:

a. **Calendar Week** shall mean a period of seven consecutive days starting on Sunday.

b. **Employee** shall mean any person who:

   1. In a calendar week performs at least two (2) hours of work for any Employer (as defined below); and

   2. Qualifies as an employee entitled to payment of a minimum wage from any Employer under the California minimum wage law, as provided under Sec. 1197 of the California Labor Code and wage orders published by the California Industrial Welfare Commission. Employees shall contain learners as defined in this section.

c. **Employer** shall mean any person, including corporate officers or executives, as defined in Sec. 18 of the California Labor Code, who directly or indirectly through any other person, including through the services of a temporary employment agency, staffing agency, or similar entity, employs or exercises control over the wages, hours, or working conditions of any employee and who is either subject to the City's business license requirements or maintains a business facility in the City.

d. **Learner** shall mean an employee who is a Learner as defined by California Welfare Commission Order No. 4-2001.

e. **Minimum Wage** shall mean the minimum wage set forth in Section 46.030 of this Chapter.

SEC. 46.030. – Minimum Wage.

a. Employers shall pay Employees no less than the minimum wage set forth in this Chapter for each hour worked within the geographic boundaries of the City.

b. On January 1, 2019, the Minimum Wage shall be an hourly rate of thirteen dollars and fifty cents ($13.50). On January 1, 2020, the Minimum Wage shall be an hourly rate of fifteen dollars ($15.00). To align the Minimum Wage with other cities in San Mateo County, on January 1, 2021 the Minimum Wage shall increase by the sum of the cost of living increase, if any, for 2019 and 2020. (For example, if the cost of living increases by 3% in 2019 and by 2% in 2020, then on January 1, 2021, the Minimum Wage will increase by 5%.) To prevent inflation from eroding its value, beginning on January 1, 2022, and each year thereafter, the Minimum Wage shall increase by an amount corresponding to the prior year's increase, if any, in the cost of living. The increase in the cost of living for any year shall be measured by the percentage increase, if any, in the Consumer Price Index for San Francisco-Oakland-San Jose (or its successor index) as published by the U.S. Department of Labor or its successor agency (CPI). The increase shall be calculated by using the August to August change in the CPI. A decrease in the CPI shall not result in a decrease in the Minimum Wage.

c. An Employee who is a Learner shall be paid no less than eighty-five percent (85%) of the applicable Minimum Wage for the first 160 hours of employment. Thereafter, the Employee shall be paid the applicable Minimum Wage.

d. An Employer may not deduct an amount from wages due an Employee on account of any tip or gratuity, or credit the amount or any part thereof, of a tip or gratuity, against, or as part of, the wages due the Employee from the Employer.

e. No Employer may fund increases in compensation required by this Chapter, nor otherwise respond to the requirements of this Chapter, by reducing the wage rate paid to any Employee, nor by increasing charges to them for parking, meals, uniforms or other items, nor by reducing the citation or other non-wage benefits of any such Employee, nor by increasing the share any Employee pays towards her/his benefits, except to the extent such prohibition would be pre-empted by the Federal Employee Retirement Income Security Act.

f. A violation for unlawfully failing to pay the Minimum Wage shall be deemed to continue from the date immediately following the date that the wages

were due and payable as provided in Part 1 (commencing with Section 200) of Division 2 of the California Labor Code, to the date immediately preceding the date the wages are paid in full.

SEC. 46.040. – Exempt Organizations.

a. State, federal, and county agencies, including school districts, shall not be required to pay minimum wage when the work performed is related to their governmental function. However, for work that is not related to their governmental function, including, but not limited to: booster or gift shops, non-K-12 cafeterias, on-site concessions and similar operations, minimum wage shall be required to be paid. Minimum wage shall also be required to be paid by lessees or renters of facilities or space from an exempt organization.

b. Any organization claiming "auxiliary organization" status under California Education Code Sec. 89901 or Sec. 72670(c) shall not be required to pay minimum wage. The organization, upon request of the City, shall provide documentary proof of its auxiliary organization status.

SEC. 46.050. – Waiver Through Collective Bargaining. All or any portion of the applicable requirements of this Chapter may be waived in a bona fide collective bargaining agreement, provided that such waiver is explicitly set forth in such agreement in clear and unambiguous terms and provided that the waiver may not be applied retroactively. The waiver allowed by this provision does not apply to Employees in the property services industry (e.g. janitors, landscapers, groundskeepers, and security guards).

SEC. 46.060. – Notice, posting and payroll records.

a. By November 1 of each year, the City shall publish and make available to Employers a bulletin announcing the adjusted Minimum Wage rate for the upcoming year, which shall take effect on January 1 of each year. In conjunction with this bulletin, the City shall, by November 1 of each year, publish and make available to Employers a notice suitable for posting by Employers in the workplace informing Employees of the current minimum wage rate and of their rights under this Chapter. Such notice shall be in English and other languages as provided in any regulations promulgated pursuant to Section 46.080(a).

b. Every Employer shall post in a conspicuous place at any workplace or job site where any Employee works the notice published each year by the City informing Employees of the current Minimum Wage rate and of their rights under this Chapter. Every Employer shall post such notices in English and other languages as provided in any regulations promulgated pursuant to Section 46.080(a). Every Employer shall also

provide each Employee at the time of hire with the Employer's name, address and telephone number in writing.

c. Employers shall retain payroll records pertaining to Employees for a period of three (3) years, and shall allow the City access to such records, with appropriate notice and at a mutually agreeable time, to monitor compliance with the requirements of this Chapter. Where an Employer does not maintain or retain adequate records documenting wages paid or does not allow the City reasonable access to such records, the Employee's account of how much he or she was paid shall be presumed to be accurate, absent clear and convincing evidence otherwise.

SEC. 46.070. – Retaliation prohibited.

a. It shall be unlawful for an Employer or any other party to discriminate in any manner or take adverse action against any person in retaliation for exercising rights protected under this Chapter. Rights protected under this Chapter include, but are not limited to: the right to file a complaint or inform any person about any party's alleged noncompliance with this Chapter; and the right to inform any person of his or her potential rights under this Chapter and to assist him or her in asserting such rights. Protections of this Chapter shall apply to any person who mistakenly, but in good faith, alleges noncompliance with this Chapter.

b. Taking adverse action against a person, including, without limitation, terminating employment, within one hundred twenty days (120) days of the person's exercise of rights protected under this Chapter shall raise a rebuttable presumption of having done so in retaliation for the exercise of such rights.

SEC. 46.080. – Implementation.

a. **Regulations.** The City Manager may promulgate regulations for the implementation and enforcement of this Chapter. Any regulations promulgated by the City Manager shall have the force and effect of law and may be relied on by Employers, Employees, and other parties to determine their rights and responsibilities under this Chapter. Any regulations may establish procedures for ensuring fair, efficient and cost-effective implementation of this Chapter, including supplementary procedures for helping to inform Employees of their rights under this Chapter, for monitoring Employer compliance with this Chapter, and for providing administrative hearings to determine whether an Employer or other person has violated the requirements of this Chapter.

b. **Reporting violations.** An Employee or any other person may report to the City in writing any suspected violation of this Chapter. The City shall encourage reporting pursuant to this subsection by keeping confidential,

to the maximum extent permitted by applicable laws, the name and other identifying information of the Employee or person reporting the violation, provided, however, that with the authorization of such person, the City may disclose his or her name and identifying information as necessary to enforce this Chapter or other Employee protection laws. In order to further encourage reporting by Employees, if the City notifies an Employer that the City is investigating a complaint, the City shall require the Employer to post or otherwise notify its Employees that the City is conducting an investigation, using a form provided by the City.

c. **Investigation.** The City shall be responsible for investigating any possible violations of this Chapter by an Employer or other person. The City shall have the authority to inspect workplaces, interview persons, and request the City Attorney to subpoena books, papers, records or other items relevant to the enforcement of this Chapter.

d. **Informal resolution.** The City shall make every effort to resolve complaints informally, in a timely manner.

SEC. 46.090. – Enforcement.

a. Where prompt compliance is not forthcoming, the City shall take any appropriate enforcement action to secure compliance. In addition to all other civil remedies, the City may enforce this Chapter pursuant to Article II of Chapter 1 of the Redwood City Code. To secure compliance, the City may use the following enforcement measures:

    1. The City may issue an administrative citation with a fine of not more than fifty dollars ($50) for each day or portion thereof and for each Employee or person as to whom the violation occurred or continued.

    2. The City may issue an administrative compliance order.

    3. The City may initiate a civil action for injunctive relief and damages and civil penalties in a court of competent jurisdiction.

b. Any person aggrieved by a violation of this Chapter, any entity a member of which is aggrieved by a violation of this Chapter, or any other person or entity acting on behalf of the public as provided for under applicable state law may bring a civil action in a court of competent jurisdiction against the Employer or other person violating this Chapter and, upon prevailing, shall be awarded reasonable attorneys' fees and costs and shall be entitled to such legal or equitable relief as may be appropriate to remedy the violation including, without limitation, the payment of any back wages unlawfully withheld, the payment of an additional sum as a civil

penalty in the amount of fifty dollars ($50) to each Employee or person whose rights under this Chapter were violated for each day that the violation occurred or continued, reinstatement in employment, and/or injunctive relief; provided, however, that any person or entity enforcing this Chapter on behalf of the public as provided for under applicable state law shall, upon prevailing, be entitled only to equitable, injunctive or restitutionary relief to Employees and reasonable attorneys' fees and costs.

c. This section shall not be construed to limit an Employee's right to bring legal action for a violation of any other laws concerning wages, hours, or other standards or rights, nor shall exhaustion of remedies under this Chapter be a prerequisite to the assertion of any right.

d. Except where prohibited by state or federal law, City agencies or departments may revoke or suspend any registration certificates, permits, or licenses held or requested by the Employer until such time as the violation is remedied.

e. **Relief.** The remedies for violation of this Chapter include, but are not limited to:

1. Reinstatement, and the payment of back wages unlawfully withheld, and the payment of an additional sum as a civil penalty in the amount of fifty dollars ($50) to each Employee or person whose rights under this Chapter were violated for each day or portion thereof that the violation occurred or continued, and fines imposed pursuant to other provisions of this code or State law.

2. Interest on all due and unpaid wages at the rate of interest specified in subdivision (b) of Sec. 3289 of the California Civil Code, which shall accrue from the date that the wages were due and payable as provided in Part 1 (commencing with Sec. 200) of Division 2 of the California Labor Code, to the date the wages are paid in full.

3. Reimbursement of the City's administrative costs of enforcement and reasonable attorney's fees.

f. **Posted notice.** If a repeated violation of this Chapter has been finally determined, the City may require the Employer to post public notice of the Employer's failure to comply in a form determined by the City.

SEC. 46.100. – Relationship to other requirements.

This Chapter provides for payment of a local minimum wage and shall not be construed to preempt or otherwise limit or affect the applicability of any other law, regulation, requirement, policy, or standard that provides for payment of higher or supplemental wages or benefits, or that extends other protections. This Chapter shall not be construed to limit a discharged Employee's right to bring a common law cause of action for wrongful termination.

SEC. 46.110. – Fees.

Nothing herein shall preclude the City Council from imposing a cost recovery fee on all Employers to pay the cost of administering this Chapter.

SEC. 46.120. – Federal or State Funding. This Chapter shall not be applied to the extent it will cause the loss of any federal or state funding of City activities."

Section 7. This Ordinance shall go into effect thirty (30) days after the date of its passage and adoption.

* * *

Bay Area Cities Minimum Wage Increase Schedules as of September 12, 2017

Locality (year enacted)	Wage before first increase	1st step		2nd step		3rd step		4th step		5th step	
		New minimum wage	Date of increase	New minimum wage	Date of increase	New minimum wage	Date of increase	New minimum wage	Date of increase	New minimum wage	Date of increase
Belmont, CA (2017)	$11.00	$12.50	7/1/2018	$13.50	1/1/2019	$15.00	1/1/2020				
Berkeley, CA (2016)	$11.00	$12.53	10/1/2016	$13.75	10/1/2017	$15.00	10/1/2018				
Cupertino, CA (2016)	$10.00	$12.00	1/1/2017	$13.50	1/1/2018	$15.00	1/1/2019				
El Cerrito, CA (2015)	$10.00	$11.60	7/1/2016	$12.25	1/1/2017	$13.60	1/1/2018	$15.00	1/1/2019		
Emeryville, CA (2015) *large businesses (more than 55 employees)*	$9.00	$14.44	7/1/2015	$14.82	7/1/2016	$15.00	7/1/2017	$16.00	7/1/2018	$16.00	7/1/2019
Emeryville, CA (2015) *small businesses (55 or fewer employees)*	$9.00	$12.25	7/1/2015	$13.00	7/1/2016	$14.00	7/1/2017	$15.00	7/1/2018	Same rate as large businesses	7/1/2019
Los Altos, CA (2016)	$10.00	$12.00	1/1/2017	$13.50	1/1/2018	$15.00	1/1/2019				
Milpitas, CA (2017)	$10.50	$11.00	7/1/2017	$12.00	1/1/2018	$13.50	7/1/2018	$15.00	7/1/2019		
Mountain View, CA (2015)	$10.30	$11.00	1/1/2016	$13.00	1/1/2017	$15.00	1/1/2018				
Oakland, CA (2014)	$9.00	$12.25	1/1/2015	$12.55	1/1/2016	$12.86	1/1/2017				
Palo Alto, CA (2015)	$9.00	$11.00	1/1/2016	$12.00	1/1/2017	$13.50	1/1/2018	$15.00	1/1/2019		
Richmond, CA (2014)	$9.00	$9.60	1/1/2015	$11.52	1/1/2016	$12.30	1/1/2017	$13.00	1/1/2018		
San Francisco, CA (2014)	$11.05	$12.25	5/1/2015	$13.00	7/1/2016	$14.00	7/1/2017	$15.00	7/1/2018		
San Jose, CA (2016)	$10.50	$12.00	7/1/2017	$13.50	1/1/2018	$15.00	1/1/2019				
San Leandro, CA (2016)	$10.50	$12.00	7/1/2017	$13.00	7/1/2018	$14.00	7/1/2019	$15.00	7/1/2020		
San Mateo, CA (2016)	$10.00	$12.00	1/1/2017	$13.50	1/1/2018	$15.00	1/1/2019				
San Mateo, CA (2016) *nonprofits*	$10.00	$10.50	1/1/2017	$12.00	1/1/2018	$13.50	1/1/2019	same as other businesses	1/1/2020		
Santa Clara, CA (2015)	$10.00	$11.00	1/1/2016								
Sunnyvale, CA (2014; amended 2016)	$9.00	$10.30	1/1/2015	11.00	7/1/2016	$13.00	1/1/2017	$15.00	1/1/2018		

California Budget & Policy Center

Making Ends Meet

San Mateo County

Monthly Family Budget

Expenses Per Month and as a Percentage of Budget

This budget represents the total income required to cover a family's basic needs in this county through earnings only, without government benefits or supports.

	Single Adult	Single-Parent Family	Two-Parent Family (One Working)	Two-Working-Parent Family
Housing and Utilities	$1,915 52.5%	$3,018 36.1%	$3,018 42.6%	$3,018 33.5%
Food	$268 7.3%	$577 6.9%	$773 10.9%	$773 8.6%
Child Care	$0 0.0%	$1,800 21.5%	$474 6.7%	$1,800 20.0%
Health Care (Employer-Based)	$150 4.1%	$564 6.7%	$589 8.3%	$589 6.5%
Transportation	$304 8.3%	$437 5.2%	$437 6.2%	$567 6.3%
Miscellaneous	$361 09.9%	$463 5.5%	$787 11.1%	$787 8.7%
Taxes	$648 17.8%	$1,510 18.0%	$1,007 14.2%	$1,475 16.4%
MONTHLY TOTAL	$3,645	$8,370	$7,085	$9,009
ANNUAL TOTAL	$43,745	$100,440	$85,020	$108,109
Monthly Total With Unsubsidized Marketplace Health Care	$3,890	$8,510	$7,611	$9,544
Annual Total With Unsubsidized Marketplace Health Care	$46,683	$102,123	$91,334	$114,526

Note: All family types except "single adult" are assumed to have two children, one preschool-aged and one school-aged. Main budget totals include health care costs with employer-based health insurance, while totals with unsubsidized marketplace health care include health care costs with unsubsidized health insurance purchased on the individual marketplace (Covered California). Amounts correspond to calendar year 2017. Numbers and percentages may not sum due to rounding. For methodology details, see the full 2017 *Making Ends Meet* report.

This estimated family budget is from the California Budget & Policy Center report, *Making Ends Meet: How Much Does It Cost to Support a Family in California?* (December 2017).
Visit calbudgetcenter.org/MakingEndsMeet.

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October 7, 2015

Honorable Roger Hernández
Room 5016, State Capitol

LOCAL MINIMUM WAGE: TIP CREDIT - #1528001

Dear Mr. Hernández:

You have asked whether a charter city ordinance that authorizes an employer to pay an employee less than the local minimum wage of $12.50 per hour, but no less than the state minimum wage, if the employee's total pay, including tips, is at least $15 per hour, would be preempted by state law.

1. Background

With certain exceptions,[1] the state minimum wage is currently $9 per hour, and will increase to $10 per hour on January 1, 2016. (Lab. Code, § 1182.12.)[2] However, the state minimum wage requirement does not "restrict the exercise of local police powers in a more stringent manner." (§ 1205, subd. (b).) As such, state law permits cities and counties to set local minimum wages that are higher than the state minimum wage. However, section 351 specifically prohibits tip crediting as follows:

> "351. *No employer* or agent *shall* collect, take, or receive any gratuity or a part thereof that is paid, given to, or left for an employee by a patron, or *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*. Every gratuity is hereby declared to be the sole property of the employee or employees to whom it was paid, given, or left for. An employer that permits patrons to pay gratuities by

[1] There are exceptions for "any individual employed as an outside salesman or any individual participating in a national service program carried out using assistance provided under Section 12571 of Title 42 of the United States Code." (Lab. Code, § 1171.)

[2] All further section references are to the Labor Code, unless otherwise indicated.

> credit card shall pay the employees the full amount of the gratuity that the patron indicated on the credit card slip, without any deductions for any credit card payment processing fees or costs that may be charged to the employer by the credit card company. Payment of gratuities made by patrons using credit cards shall be made to the employees not later than the next regular payday following the date the patron authorized the credit card payment." (Emphasis added.)

Accordingly, in relevant part, section 351 provides that tips are the "sole property" of the employee, and prohibits an employer from deducting "any amount from wages due an employee an account of a gratuity" or from crediting a tip "against and as a part of the wages due the employee from the employer."

A charter city ordinance that authorizes an employer to pay an employee less than the local minimum wage of $12.50 per hour, but no less than the state minimum wage, if the employee's total pay including tips is at least $15 per hour (hereafter proposed ordinance) allows an employer to pay an employee a lower wage than is otherwise legally required based upon the tips received by the employee. Therefore, we must determine if section 351 would preempt the proposed ordinance.

2. Preemption

In general, a city may "make and enforce within its limits all police, sanitary, and other ordinances ... not in conflict with general laws." (Cal. Const., art. XI, § 7.) "A conflict exists if the local legislation '"duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication."' [Citations.]" (*O'Connell v. City of Stockton* (2007) 41 Cal.4th 1061, 1067; italics omitted.) However, a charter city may adopt ordinances that conflict with general laws, provided that the subject of the ordinance is a "municipal affair" and the general state law does not address a matter of "statewide concern." (Cal. Const., art. XI, § 5; *American Financial Services Ass'n. v. City of Oakland* (2005) 34 Cal.4th 1239, 1251.) Because the proposed ordinance is specific to a charter city, in order for section 351 to preempt the proposed ordinance, section 351 must both address a matter of statewide concern and conflict with the proposed ordinance.

3. Matter of statewide concern

In order to determine whether section 351 would preempt a charter city ordinance we must first determine whether it addresses a matter of statewide concern. One could argue that, to the extent section 351 applies to a higher local minimum wage, but not the state minimum wage, it addresses a municipal, rather than a statewide, concern. However, although no case has specifically held that minimum wages or tip credits are matters of statewide concern, the California Supreme Court has expressed its opinion that a question regarding tip credits is "of statewide importance." (*Henning v. Industrial Welfare Com.* (1988) 46 Cal.3d 1262, 1265; hereafter *Henning*.) Further, California Constitution article XIV, section 1 specifically authorizes the Legislature to "provide for minimum wages and for the

general welfare of employees."[3] The Legislature has exercised this authority by enacting the Labor Code and expressly providing, as follows:

> "It is the policy of this state to vigorously enforce minimum labor standards in order to ensure employees are not required or permitted to work under substandard unlawful conditions or for employers that have not secured the payment of compensation, and to protect employers who comply with the law from those who attempt to gain a competitive advantage at the expense of their workers by failing to comply with minimum labor standards." (§ 90.5, subd. (a).)

Based upon these authorities, one could conclude that a state law prohibiting tip credits in either the state or local minimum wage context would be a matter of statewide concern.

In support of this conclusion is the fact that a tip credit prohibition serves an employee welfare function. As explained above, the Legislature has specific constitutional authority to provide for the general welfare of employees (Cal. Const., art. XIV, § 1), and section 351 provides that tips are the "sole property" of the employee or employees. Further, the Legislature has expressly declared that a purpose of the section 351 is "to prevent fraud upon the public in connection with the practice of tipping and [that it was] passed for a public reason" that is "part of the social policy of the state." (§ 356.)

Moreover, an Attorney General opinion recognizes the extent to which a tip credit may generally harm employee welfare by illustrating the following scenario if a tip credit was permitted:

> ""It would not be long before employers discovered which of their employees were costing them the most money. Obviously, the [workers] who received the least in tips would have to be paid the highest wages to make up the [minimum wage]. Gradually the [workers] receiving low tips would be dismissed, whether efficient or not, and those with ability to wile larger tips from an irresponsible public would be employed in their places. The workers would be no slower than the employers in discovering the effects of the reporting system on their welfare. The dismissal of one or two workers would be sufficient to warn the others that if they were to retain their jobs their tips must equal those of their more fortunate coworkers. There is always one effective way out of a situation like this for a worker who is desperately in need of a job, and that is to report to the employer a greater amount of tips than actually received. The whole purpose of the minimum wage law, that of

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[3] The California Constitution also provides plenary authority to charter cities to provide for the compensation of municipal officers and employees (Cal. Const., art. XI, § 5, subd. (b)(4)), but no law or case extends this authority to the compensation of other types of employees.

> guaranteeing the worker a living wage, would be defeated if this practice were permitted and the State authorities would be almost helpless to correct the situation.'" (11 Ops.Cal.Atty.Gen. 291 (1948).)

Based on the foregoing authorities, and the fact that "[a]ny fair, reasonable and substantial doubt whether a matter is a municipal affair or broader state concern must be resolved in favor or the legislative authority of the state" (*Cox Cable San Diego, Inc. v. City of San Diego* (1987) 188 Cal.App.3d 952, 962), it is our opinion that section 351 addresses a matter of statewide concern and would preempt the proposed ordinance in the event of a conflict.

4. Conflict

We must now determine whether the second element of preemption is met, that there is a conflict between section 351 and the proposed ordinance. The proposed ordinance authorizes an employer to reduce the wages due an employee under the charter city's higher minimum wage ordinance if the employee earns enough tips. Section 351 prohibits an employer from deducting "any amount from *wages due* an employee on account of a gratuity." (Emphasis added.) Therefore, the proposed ordinance would conflict with section 351 if the "wages due an employee" under section 351 include wages due under local charter city minimum wage laws, even where those wages are not due under state minimum wage laws.

In construing a statute, courts begin with the statutory language because it is generally the most reliable indication of legislative intent, and if the statutory language is unambiguous, courts presume the Legislature meant what it said, and the plain meaning of the statute controls. (*Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 45.) Section 351 does not specify which wages an employer may not credit tips against; the prohibition is just generally against "wages due" and does not distinguish wages due under state law from wages due under municipal or federal law. As such, one could argue that the prohibition applies to all wages, including wages due under a local minimum wage ordinance, because courts may not read into a statute an exception not incorporated therein by the Legislature. (*Phillippe v. Shapell Industries* (1987) 43 Cal.3d 1247, 1265.) However, a court may apply an unwritten exception if such an exception must reasonably and necessarily be implied. (*Ibid.*) In our view, there are two competing arguments concerning whether an exception to section 351 may be reasonably and necessarily implied for wages due under a local ordinance that are above the state minimum wage, and thus not due pursuant to the state minimum wage law.

4.1 Narrow interpretation argument

The first argument supports a narrow interpretation of section 351 and assumes that the section's prohibition against tip crediting applies to credits against only an employer's minimum wage obligations under state law, not against his or her minimum wage obligations under local law. In support of this narrow interpretation is the rule of construction that the words of a statute should be construed in their statutory context. (*City of Alhambra v. County of Los Angeles* (2012) 55 Cal.4th 707, 719.) Thus, one could argue that, in the context of the

Labor Code, "wages due" refers only to wages due under that code, and thus, that the term would not apply to wages due under local, higher minimum wage laws. In other words, when the Legislature referenced wages in section 351, it did so in the context of the state minimum wage required under section 1182.12.

One could also contend that this narrow interpretation is supported by the legislative history of section 351. In this regard, the Legislature amended section 351 in 1975 by, among other things, removing an exception to the tip credit prohibition for "a valid regulation of the Industrial Welfare Commission." (Stats. 1975, ch. 324; hereafter A.B. 232.) The digest of A.B. 232 provided that "This bill would eliminate the authority of the Industrial Welfare Commission to permit an employer to receive or deduct from employee wages any part of a gratuity given to or left for an employee by a patron." (*Henning, supra,* 46 Cal.3d at pp. 1274-1275.) The Senate Committee on Industrial Relations stated that the purpose of the bill was "To eliminate the authority of the Industrial Welfare Commission to permit employers to credit tips against the wages of employees." (*Id.* at p. 1275; Sen. Com. on Ind. Relations, Mem. on A.B. 232 (1975-1976 Reg. Sess.) as amended May 19, 1975, p. 1.) It could be reasoned that these portions of the legislative history of section 351 support the narrow interpretation by evincing that the Legislature intended to remove only the state's authority to authorize a tip credit against the state minimum wage, not a charter city's authority to authorize a tip credit against a local minimum wage.

4.2 Broad interpretation argument

The second argument supports a broad interpretation of section 351 and assumes that the section's prohibition against tip crediting applies to credits against all of the wages legally due to an employee, including those due under a higher local minimum wage ordinance. As described above, the plain language supports a broad interpretation of section 351 that applies to all "wages due" without an exception for higher local minimum wages. Additionally, the rule of statutory construction that a statute should be construed in its statutory context can also be found to support this argument. Examining all provisions of section 351, it is notable that the section explicitly provides that tips are the "sole property" of employees. Accordingly, the plain language of section 351, when read in its entirety, is inconsistent with a construction of section 351 that allows a reduction in the value of a tip such that the benefit of the tip accrues to the employer.

Additionally, even going beyond the plain language of the statute, courts have examined the legislative intent behind section 351 and found that it provides support for a broad interpretation. For instance, in *Henning, supra,* 46 Cal.3d at pages 1274-1275, the court thoroughly examined the legislative history of section 351 to invalidate an Industrial Welfare Commission (IWC) order establishing a two-tier minimum wage system that fixed a lower wage for tipped employees. Although the IWC order did not impose a traditional tip credit, just an alternative lower minimum wage for tipped employees, the court found that the "Legislature could not have intended to allow indirectly what it forbade directly." (*Id.* at p. 1276.) The court stated that "We might have come to a different result if the words and legislative history of [section 351] revealed an intent on the part of the Legislature to prohibit

only the 'tip credit' and not its effect ... ." (*Id.* at p. 1279.) In regard to that legislative history, the court found that the effect that section 351 was intended to remedy is that of an employer benefiting from "his employee's tips by paying the employee a wage lower than he would be obligated to pay if the employee did not receive tips." (*Ibid.*) This legislative intent was reiterated by the California Supreme Court in *Lu v. Hawaiian Gardens Casino* (2010) 50 Cal.4th 592, 600, in which the court explained that the legislative history of section 351 confirms that "the Legislature's ultimate goal was to prevent an employer from taking any part of an employee's gratuity by crediting an employee's tips against *any* wages earned. [Citations.]" (Emphasis added.)

Therefore, the weight of the legislative history of section 351, as described by the courts, displays that the law was intended to prevent an employer from benefiting from an employee's tips by crediting them against any wages due to the employee. This intent is best served by applying section 351 broadly to wages due under a higher local minimum wage ordinance.

Courts have also made statements in dicta[4] that support a broad interpretation of section 351, applying its prohibition to wages due under local law. For instance, in analyzing section 351, one court has stated that the law must be "'vigilant in its protection of the property rights of ordinary working people.'" (*Leighton v. Old Heidelberg, Ltd.* (1990) 219 Cal.App.3d 1062, 1072, fn. 6.) Presumably, the rights of working people would be better served by a tip credit prohibition that applies to all wages. Moreover, examining the legality of a tip pooling arrangement under section 351, another court made the following cautionary statement:

> "Even though an employer can no longer use tip sharing to subsidize minimum wages of non-tipped employees, it is possible that an employer could use tip sharing to subsidize *market wages* of non-tipped employees, resulting in the same evil. Thus, when considering tip pooling, it is important to make certain that the employer is not using the tip pool as a de facto tip credit against market wages." (*Etheridge v. Reins Intern. California, Inc.* (2009) 172 Cal.App.4th 908, 915; emphasis in original.)

Following this line of reasoning, if tip credits cannot be used as a credit toward an employer's obligation to pay market wages, then it is unlikely that they can be used as a credit toward an employer's obligation to pay higher local minimum wages. Lastly, in upholding a Los Angeles minimum wage ordinance that required that certain hotel workers be paid $15.57 per hour, not including gratuities, the court stated: "The California Labor Code *prohibits* the state and municipalities from establishing minimum wages that distinguish between

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[4] Although dicta is not controlling, "it does not follow that the dictum of a court is always and at all times to be discarded." (*San Joaquin & Kings River Canal & Irrigation Co. v. Stanislaus County* (1908) 155 Cal. 21, 28.)

tipped and non-tipped workers. [Citations.]" (*American Hotel & Lodging Assn. v. City of Los Angeles* (C.D. Cal., May 13, 2015, No. CV 14-09603-AB (SSx)) __ F.Supp.3d __ [2015 WL 4576463, at p. 15]; emphasis in original.) Although the court was not specifically applying section 351, this dicta implies that the prohibition against tip credits applies equally to higher local minimum wage ordinances passed by municipalities.

It is our view, based upon the plain language of section 351 and the relevant cases, that the legislative intent in enacting section 351 was to protect an employee's tips as his or her "sole property," not merely to enforce a state minimum wage. Therefore, we conclude that the second argument is the stronger argument, and that a court would be more likely to interpret section 351 to apply to wages due under higher local minimum wage ordinances. Because section 351 prohibits an employer from deducting any amount of wages due on account of a tip, in our opinion, section 351 would conflict with the proposed charter city ordinance.

5. Conclusion

For the foregoing reasons, it is our opinion that section 351 both addresses a matter of statewide concern and would conflict with the proposed ordinance. Consequently, in our opinion, a charter city ordinance that authorizes an employer to pay an employee less than the local minimum wage of $12.50 per hour, but no less than the state minimum wage, if the employee's total pay, including tips, is at least $15 per hour, would be preempted by state law.

Very truly yours,

Diane F. Boyer-Vine
Legislative Counsel

Lisa C. Goldkuhl

By for
Joanna E. Varner
Deputy Legislative Counsel

JEV:sjk