



Memorandum

TO: RULES AND OPEN
GOVERNMENT COMMITTEE

FROM: Richard Doyle
City Attorney

SUBJECT: Legal Issues related to vacation,
sick leave and holiday benefits
for contract employees

DATE: February 1, 2012

BACKGROUND

On January 4, 2012, the Rules and Open Government Committee directed the City Attorney and City Manager to:

1. Evaluate the various means by which the City can ensure that basic vacation, sick leave and holiday benefits are provided to contract employees, and report back to Council on the range of available options. As part of this analysis, staff should evaluate the possibility of adding criteria to our Request for Proposal (RFP) process that would award points based upon the level of leave benefits a given proposer provides to employees.
2. With the assistance of the City's Human Resources staff, attempt to determine industry norms for provision of vacation, sick leave and holiday benefits that may be suitable as minimum standards for City contractors.

The purpose of this memorandum is to provide you with the legal parameters with respect to regulating mandatory paid time off of City contractors.

ANALYSIS

Prevailing Wage Policy

For many decades, San José has been requiring the payment of a certain level of wages and benefits for workers providing services to the City under contracts. Prior to the late 1980's San José just relied on state and federal prevailing wages laws that related primarily to construction. With the adoption of its Prevailing Wage Policy, San José began to require the payment of a certain level of wages to workers in nonconstruction fields, such as janitorial, parking lot management, maintenance and other specific categories.

Living Wage Policy

In 1998, San José expanded its requirements by adopting its Living Wage Policy which provides for a minimum level of wages and health care benefits for workers that provide services under contract with the City. San José's Living Wage Policy does not specifically set forth any requirements with respect to compensated days off.

Before examining the legal issues related to possible changes to San José's Living Wage Policy, it is important to note a distinction between the Prevailing Wage Rates and the City's Living Wage Rate. The Prevailing Wage Rates that are set by the California Department of Industrial Relations include a dollar value that represents the prevailing amount of paid time off for that category of work. Thus, prevailing wage rates already include an element of compensated time off, and there is no additional requirement of a particular amount of mandatory compensated time off.

Living wage ordinances that have been adopted by other cities in the state, on the other hand, do include specific minimum number of compensated days off *in addition* to the requirement of the payment of the minimum rate of pay. For example, the living wage ordinances adopted by Los Angeles, Oakland and San Francisco each require a minimum of 12 paid days off. (See attached chart)

ERISA

Certain state and local efforts to set wages and benefits of workers have been subject to challenge on the ground that they are preempted by a federal act known as the Employee Retirement Income Security Act or ERISA. In ***WSB Electric, Inc. v. J.R. Roberts Corporation***, 88 F3d 788 (9th Cir. 1996), the United States Court of Appeals upheld California's prevailing wage statute against a claim of preemption under ERISA. The court found that the straight wage portion of the prevailing wage requirement was a subject of traditional state concern that did not fall within the ERISA definition of "employee benefit plan."

In addition to the straight wage rate, prevailing wage rates have a fringe benefit rate per hour to compensate for additional fringe benefits such as health, pension and paid days off. The ***WSB Court*** held that although the prevailing wage *benefit* contribution rate had some connection, "however indirect," to employee benefit plans, the connection was not sufficient to find that the statute was preempted by ERISA.

Similarly, various Living Wage Ordinances and Policies, including San José's, have a straight wage amount that must be paid plus an additional amount for health benefits, if the employer does not provide health benefits. Most of the other cities that have a living wage ordinance also require a minimum number of paid days off as an additional element. (See attached chart) We are not aware of any case deciding whether a mandate to provide a set number of paid days off as part of a living wage requirement would be sufficiently connected to an employee benefit plan to render it preempted under ERISA.

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NLRA

Courts have held that the National Labor Relations Act (NLRA) can preempt state laws that regulate activity that Congress intended to leave unregulated, such as the ability under the NLRA for an employer and its employees to collectively bargain over the terms of employment. Under these cases there is no preemption, however, of a state law which "establishes a minimal employment standard not inconsistent with general legislative goals of the NLRA." ***Dillingham Construction N.A. Inc. v. County of Sonoma***, 190 F.3d 1034, 1038 (9th Cir. 1999), ***quoting Metropolitan Life Ins. v. Massachusetts***, 471 U.S. 724, 757 (1985).

Because a number of mandatory days off would establish nothing more than a minimum labor standard, it would not likely be found to be preempted by the NLRA.

CONCLUSION

If Council gives direction on this issue, the City Attorney's Office will work with City staff to formulate a policy within legal constraints.

RICHARD DOYLE
City Attorney

By 

Brian Doyle
Sr. Deputy City Attorney

cc: Debra Figone

COMPARISON OF LIVING WAGE ORDINANCE REQUIREMENTS

| CITY | WAGE RATE | HEALTH BENEFITS | TIME OFF |
|----------------------|--|-----------------|---|
| LOS ANGELES | \$10.42 per hour if health benefits \$11.67 per hour without health benefits ¹ | \$1.25/hour | 12 compensated days off per year for sick leave, vacation or personal necessity at the employee's request. Employers are also required to permit employees to take at least an additional ten (10) days a year of uncompensated time to be used for sick leave for the illness of the employee or a member of his/her immediate family where the employee has exhausted his/her compensated days off for that year. |
| OAKLAND | \$11.35 per hour if health benefits \$13.05 per hour without health benefits ² | \$1.70/hour | 12 days off per year for sick leave, vacation or personal necessity at the employee's request. Employees accrue one compensated day off per month of full-time employment. Part-time employees accrue compensated days off in increments proportionally. Employees become eligible to use accrued days off after the first six months of employment or consistent with company policy whichever is sooner. Paid holidays, consistent with established employer policy, may be counted toward provision of the required twelve (12) compensated days off. Employees are also required to permit employees to take at least an additional ten (10) days a year of uncompensated time to be used for sick leave for the illness of the employee or a member of his/her immediate family where the employee has exhausted his/her compensated days off for that year. The Ordinance does not mandate the accrual from year to year of uncompensated days off. |
| SAN FRANCISCO | \$12.06 per hour ³ | * ⁴ | Compensated time off in an hourly amount that on an annualized basis for a full-time employee equals twelve (12) days per year. Time off vests at the end of the applicable pay period and may be used for sick leave, vacation or personal necessity. If a contractor reasonably determines in good faith that the contractor cannot comply with this requirement for compensated time off, the contractor is required to provide the covered employee with a cash equivalent of such compensated time off. Employers are also required to provide uncompensated time off in an hourly amount that on an annualized basis for a full-time employee equals ten (10) days per year. Time off vests with the covered employee at the end of the applicable pay period and may be used at the option of the covered employee for sick leave, for the illness of the covered employee or such covered employee's spouse, domestic partner, child, parent, sibling grandparent of grandchild. |
| SAN JOSE | \$13.59 per hour if health benefits \$14.84 per hour without health benefits | \$1.25 | <i>No Requirement</i> |

¹ Adjusted annually to correspond with adjustment, if any, to retirement benefits paid to members of the Los Angeles City Employees Retirement System (LACERS). The LACERS Board approved a 1.2% adjustment for Fiscal Year 2011-2012.

² Adjusted annually, not later than April 1 in proportion to the increase immediately preceding December 31st of the year earlier level of the Bay Region Consumer Price Index as published by the US Department of Labor/Bureau of Labor Statistics.

³ Adjusted by prior year's increase, if any, in the CPI

⁴ San Francisco has a separate ordinance that mandates a certain level of health care be provided by a wide range of employers that do business with and within the city.