



**OFFICE OF THE CITY ATTORNEY**

ROCKARD J. DELGADILLO

CITY ATTORNEY

**REPORT NO. R 0 5 - 0 4 3 1**

DEC 0 9 2005

**REPORT RE:**

**DRAFT ORDINANCE ADDING CHAPTER XVIII  
TO THE LOS ANGELES MUNICIPAL CODE**

The Honorable City Council  
of the City of Los Angeles  
Room 395, City Hall  
200 North Spring Street  
Los Angeles, California 90012

Council File No. 05-1522

Honorable Members:

This office has prepared and now transmits for your action the attached draft ordinance, approved as to form and legality. This draft ordinance adds a Grocery Worker Retention Ordinance to the Los Angeles Municipal Code.

**Background**

On July 22, 2005, the City Council adopted a motion (Padilla-Cardenas) directing the City Attorney to prepare an ordinance extending permitting requirements and standards to supermarkets (*i.e.*, grocery stores) to address public safety concerns, provide amenities to the public, and maintain the quality of life standards in the communities where they are located. The motion also directed that the ordinance include a transitional worker retention requirement in the event of a transfer of ownership of a supermarket to assure the maintenance of these standards. On August 12, 2005, the City Attorney was directed to depart from addressing permitting requirements and to instead focus on developing a transitional worker retention ordinance that would be triggered in the event of a transfer of a grocery establishment. Additionally, the Housing, Community, and Economic Development Committee amended the motion to request the City Attorney to report back as to whether the proposed ordinance could be extended to apply to superstores and major retailers, and to add a requirement for a ninety to one-hundred-eighty day notification period of the

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sale, transfer of ownership, closure, or adaptive reuse of grocery stores and other businesses within the scope of the ordinance.

### **Summary of Ordinance Provisions**

Through the proposed Grocery Worker Retention Ordinance (GWRO), the City seeks to sustain the stability of a workforce that forms the cornerstones of communities in Los Angeles. Grocery stores are the main points of distribution for food and daily necessities for the residents of Los Angeles. The City has an interest in ensuring the welfare of these residents through the maintenance of health and safety standards in grocery establishments. Experienced grocery workers with knowledge of proper sanitation procedures, health regulations, and understanding of the clientele and communities they serve are instrumental in furthering this interest. A transitional retention period upon change of ownership or operation of grocery stores ensures stabilization of this vital workforce, which results in preservation of health and safety standards.

The GWRO is similar to the City's current Service Contract Worker Retention Ordinance (SCWRO)<sup>1</sup>, except the GWRO imposes requirements on all owners of grocery stores over a certain size and superstores<sup>2</sup> (referred to collectively in the GWRO as "grocery establishments"), while the SCWRO applies only to businesses contracting with the City.

Specifically, the GWRO requires the "incumbent grocery employer" (the entity operating the establishment prior to a change in control, as defined by the GWRO) to provide to the "successor grocery employer" (the entity operating the establishment following a change in control) the name, address, date of hire, and employment occupation classification of all employees employed by the incumbent grocery employer at the time of transfer. This list is used to effect the following retention requirements of the Ordinance:

- Retention, for a transition period of ninety days, by the successor employer of those grocery employees who have been employed by the incumbent grocery employer for at least six months;

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<sup>1</sup> Los Angeles Administrative Code § 10.36.

<sup>2</sup> Los Angeles Municipal Code § 12.24 U.14 defines Superstores as "a Major Development Project that sells from the premises goods and merchandise, primarily for personal or household use, and whose total Sales Floor Area exceeds 100,000 square feet and which devote more than 10% of sales floor area to the sale of Non-Taxable Merchandise." The definition excludes wholesale clubs or establishments selling bulk merchandise and charging membership dues or periodic fees, as well as sale or rental of motor vehicles, other than parts or accessories, and construction materials, other than paint, fixtures, or hardware.

- Upon a determination by the successor employer that fewer grocery employees are required, retention of the incumbent grocery employer's grocery employees based on their respective seniority within job classifications;
- During the transition period, retained grocery employees from the incumbent grocery employer may only be terminated for cause; and
- Following the transition period, the successor employer must perform a written performance evaluation of each retained grocery employee and consider offering each retained grocery employee continued employment if the employee's performance was satisfactory. The successor employer must keep a written verification of the employment offer for three years.

The GWRO provides for private enforcement actions by grocery employees against the incumbent grocery employer and/or the successor employer for violations of the ordinance. Remedies for violation of the GWRO include hiring and reinstatement rights, as well as back pay. There are no criminal penalties for violation of the GWRO.

Lastly, the GWRO requires the incumbent grocery employer to post a notice of transfer within five days of the execution of the purchase agreement or document(s) transferring ownership or control to the successor grocery employer, in a place at the grocery establishment visible to both employees and members of the public.

## **Discussion**

### **I. Introduction**

As discussed below, we believe that the City can impose a service worker retention program that would require grocery employers to retain existing workers in the event of a change in ownership. However, this is a relatively new and untested application of the City's police powers.

In recent years, New York City, Washington, D.C., Pittsburgh, Philadelphia, Providence, San Francisco, and Santa Monica have each enacted ordinances similar to the GWRO to protect displaced security and janitorial workers. Two of these cities (New York City and Washington, D.C.) prevailed in legal challenges to their worker retention ordinances on the grounds that they were not preempted by either state or federal law. The Washington, D.C. ordinance was also found to be in compliance with the Contracts Clause of the United States Constitution.<sup>3</sup>

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<sup>3</sup> U.S. Const. art. 1, § 10.

However, no court to date has been asked to determine whether the enactment of a worker retention ordinance regulating the private sector is a permissible exercise of a municipality's police power. Thus, the proposed GWRO is an untested use of the City's police power.

## **II. As a Market Participant, the City Avoids Preemption and Has Broad Authority to Establish Requirements**

The City of Los Angeles, as a market participant, has enacted a number of ordinances such as the SCWRO and the Living Wage Ordinance (LWO) because of the exemptions and allowances afforded to cities that establish requirements in a proprietary, rather than regulatory, capacity. Thus, as a market participant, the City, like any other private party, can entertain a certain level of freedom in selecting a party with whom to contract.

A municipality such as the City has a broader ability to establish requirements for contractors when it is acting in its capacity as a market participant, rather than as a market regulator. For example, if a municipality is acting as a market participant, it is immune from the preemptive effect of the National Labor Relations Act (NLRA)<sup>4</sup> as well as pitfalls under the Commerce Clause of the United States Constitution.<sup>5</sup> See *Bldg. & Constr. Trades Council v. Associated Builders & Contrs.*<sup>6</sup> (no preemption by NLRA) and *White v. Mass. Council of Construction Employers*<sup>7</sup> (no preemption by Commerce Clause). Because they are only enforcing requirements against parties with whom they contract, local governments are not impeding the market participation of their contractors; those contractors are free to disregard the regulations and not enter into contracts with local governments.

## **III. This Ordinance is a Proper Exercise of the City's Municipal Police Powers**

With the proposed GWRO, the City departs from the role of market participant and regulates a private industry using its police powers. However, as a regulatory measure, the GWRO must be analyzed for possible preemption by state and federal laws, and must also be evaluated in terms of the Equal Protection Clause of the United States Constitution.<sup>8</sup>

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<sup>4</sup> 29 USCS § 151 *et seq.*

<sup>5</sup> U.S. Const. art. 1, § 8, cl. 3.

<sup>6</sup> 507 U.S. 218, 226-230 (1993)

<sup>7</sup> 460 U.S. 204, 208 (1983)

<sup>8</sup> U.S. Const. amend XIV, § 1.

A. The GWRO is not preempted by existing state or federal laws.

The California Constitution provides that any county, city, town or township may make and enforce within its limits all local, police, sanitary and other regulations as are not in conflict with general laws.<sup>9</sup> Thus, in the absence of preemption by state or federal law, a municipality can use its police power to regulate for safety, health, welfare, and morals.

When we first reported on the SCWRO in 1995, our preemption analysis focused on the NLRA, although as a market participant with the SCWRO, the City would not have been preempted under the NLRA. See *Building & Constr. Trades Council*.<sup>10</sup> The NLRA preempts state regulations in cases where the state laws disrupt the balance between labor unions and employers as created and maintained by Congress through the NLRA. *Chamber of Commerce of the United States v. Lockyer*.<sup>11</sup> When evaluating the SCWRO for preemption, we concluded that the City could properly enact that ordinance as long as the labor standards imposed were consistent with the general legislative goals of the NLRA. See *Metropolitan Life Ins. Co. v. Massachusetts*.<sup>12</sup>

With the GWRO, our preemption analysis is the same. The City's regulations under the GWRO, as with the SCWRO, are not an attempt to affect collective bargaining efforts or the relationship between employers and labor organizations. Moreover, like the SCWRO, the GWRO specifically provides an exemption for collective bargaining agreements, stating that a collective bargaining agreement may supersede the ordinance's requirements. Thus, because the GWRO avoids the area of labor regulation already occupied by Congress with the NLRA, the City still appears to avoid NLRA preemption.

B. The GWRO is consistent with the Equal Protection Clause as it has a rational basis related to a legitimate government interest.

The GWRO imposes requirements upon grocery employers based on the legitimate government interests of maintaining the safety and welfare of the people of the City. By regulating the activities of some business and not others, the GWRO must satisfy the Equal Protection Clause of the United States Constitution.<sup>13</sup> In order to determine whether an ordinance such as the GWRO is defensible against an Equal Protection challenge, a court would review the ordinance under what is known as the "rational basis" test. The more burdensome "strict scrutiny" test would not apply to the GWRO because it does not involve classifications based on constitutionally protected traits (gender, race, national origin, etc.). The rational basis test requires simply that the

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<sup>9</sup> Cal. Const. art. XI, § 11.

<sup>10</sup> 507 U.S. 218, 226-230

<sup>11</sup> 422 F.3d 973, 988 (9th Cir. 2005)

<sup>12</sup> 471 U.S. 724, 756-757 (1985)

<sup>13</sup> U.S. Const. amend XIV, § 1.

GWRO is rationally related to a legitimate government interest. See *Exxon Corp. v. Governor of Maryland*.<sup>14</sup>

In order to show that the GWRO violates the Equal Protection Clause, a challenger would have to prove that the action was “arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare.” *Village of Euclid v. Ambler Realty Co.*<sup>15</sup> Here, the GWRO is driven by a desire to ensure the public’s safety and welfare by allowing for a smooth transition when a cornerstone of the community, the local grocery store, experiences a change in ownership. Through a smoother transition and stable workforce, health and safety standards are better protected.

Courts have upheld laws that regulate a particular industry or a single portion of an industry despite claims of Equal Protection Clause violations, so long as the regulations met the rational basis test. For example, in *Straus Family Creamery v. Lyons*<sup>16</sup>, organic milk producers alleged an Equal Protection Clause violation because of disparate treatment of organic milk producers under California’s Gonsalves Milk Pooling Act. Although compliance with the Gonsalves Milk Pooling Act meant that the organic producers were subject to more regulations than their non-organic counterparts (since they also had to comply with organic production laws), the court found that the purpose of the legislation, which was to protect consumers by protecting and stabilizing the quantity and quality of the milk products they consume, was rationally related to a legitimate government interest, namely the health and safety of consumers.<sup>17</sup>

In another Supreme Court case, this time dealing with a regulation of the railroad industry, plaintiffs contended that a statute singled out for regulation only one facet of the transportation industry, constituting a violation of the Equal Protection Clause. The Supreme Court upheld the statute under the rational basis test, noting:

[t]he legislature, in attempting to deal with the safety problems in one industry, [was not] required to investigate the various differing hazards encountered in all competing industries and then to enact additional legislation to meet these distinct problems.

*Brotherhood of Locomotive Firemen & Enginemen v. Chicago, R. I. & P. R. Co.*<sup>18</sup>

Thus, with the GWRO, even if there are other methods by which the City can maintain the safety and welfare of its communities, the City’s enactment of this ordinance may be defended on the grounds that the City is not obligated to exhaust

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<sup>14</sup> 437 U.S. 117, 124-25 (1978)

<sup>15</sup> 272 U.S. 365, 395 (1926)

<sup>16</sup> 280 F. Supp. 2d 1028 (D. Cal. 2003)

<sup>17</sup> *Id.* at 1032.

<sup>18</sup> 393 U.S. 129, 143 (1968)

those other options before acting, and because the ordinance advances the City's interest in promoting public health and safety.

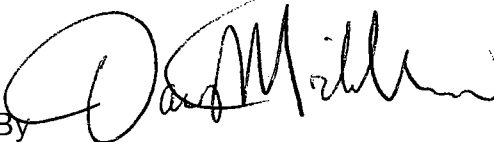
#### **IV. Conclusion**

Although not free from doubt, we believe that the City may impose worker retention requirements on grocery or superstore employers. We believe that the regulatory scheme of the GWRO falls within the City's police powers, and that it is constitutionally sound.

If you have any questions, please contact Deputy City Attorney Adrienne Khorasanee at (213) 978-8145. Either she or another member of this office will be available when you consider this matter to answer any questions you may have.

Sincerely,

ROCKARD J. DELGADILLO, City Attorney

By 

DAVID MICHAELSON  
Chief Assistant City Attorney

DM:AK:TS:lee  
Transmittal

**ORDINANCE NO. \_\_\_\_\_**

An ordinance adding Chapter XVIII to the Los Angeles Municipal Code to require grocery stores to provide transitional worker retention when these establishments change control.

**THE PEOPLE OF THE CITY OF LOS ANGELES  
DO ORDAIN AS FOLLOWS:**

**Section 1. A new Chapter XVIII is added to the Los Angeles Municipal Code to read:**

**CHAPTER XVIII  
GROCERY WORKER RETENTION ORDINANCE**

**Sec. 181.00. Purpose.**

Supermarkets and other grocery retailers are the main points of distribution for food and daily necessities for the residents of Los Angeles and are essential to the vitality of any community. The City has an interest in ensuring the welfare of the residents of these communities through the maintenance of health and safety standards in grocery establishments. Experienced grocery workers with knowledge of proper sanitation procedures, health regulations, and understanding of the clientele and communities they serve are instrumental in furthering this interest. A transitional retention period upon change of ownership, control, or operation of grocery stores ensures stabilization of this vital workforce, which results in preservation of health and safety standards. Through this ordinance, the City seeks to sustain the stability of a workforce that forms the cornerstones of communities in Los Angeles.

**Sec. 181.01. Definitions.**

The following definitions shall apply to this chapter:

**A. "City"** shall mean the City of Los Angeles.

**B. "Change in Control"** shall mean any sale, assignment, transfer, contribution, or other disposition of all or substantially all of the assets or a controlling interest (including by consolidation, merger, or reorganization) of the Incumbent Grocery Employer or any Person who controls such Incumbent Grocery Employer ("IGE Parent") or any Grocery Establishment(s) under the operation or control of either such Incumbent Grocery Employer or IGE Parent.

**C. “Eligible Grocery Worker”** shall mean any individual whose primary place of employment is at the Grocery Establishment subject to a Change in Control, and who has worked for the Incumbent Grocery Employer for at least six months prior to the execution of the Transfer Document. “Eligible Grocery Worker” does not include a managerial, supervisory, or confidential employee.

**D. “Employment Commencement Date”** shall mean the date on which an Eligible Grocery Worker retained by the Successor Grocery Employer pursuant to this chapter commences work for the Successor Grocery Employer in exchange for benefits and compensation under the terms and conditions established by the Successor Grocery Employer and as required by law.

**E. “Grocery Establishment”** shall mean a retail store in the City of Los Angeles that is over 15,000 square feet in size and that sells primarily household foodstuffs for offsite consumption, including the sale of fresh produce, meats, poultry, fish, deli products, dairy products, canned foods, dry foods, beverages, baked foods and/or prepared foods. Other household supplies or other products shall be secondary to the primary purpose of food sales. The definition of “Grocery Establishment” shall also include Superstores as defined in the Los Angeles Municipal Code Section.

**F. “Incumbent Grocery Employer”** shall mean the Person that owns, controls, and/or operates the Grocery Establishment prior to the Change in Control.

**G. “Person”** shall mean an individual, corporation, partnership, limited partnership, limited liability partnership, limited liability company, business trust, estate, trust, association, joint venture, agency, instrumentality, or any other legal or commercial entity, whether domestic or foreign.

**H. “Retaliatory Action”** shall mean the failure to hire, or the discharge, suspension, demotion, penalization, or discrimination or any other adverse action against an Eligible Grocery Employee with respect to the terms and conditions of the Eligible Grocery Worker’s employment.

**I. “Successor Grocery Employer”** shall mean the Person that owns, controls, and/or operates the Grocery Establishment after the Change in Control.

**J. “Transfer Document”** shall mean the purchase agreement or other document(s) effecting the Change in Control.

#### **Sec. 181.02. Grocery Employers’ Responsibilities.**

**A.** The Incumbent Grocery Employer shall, within fifteen days after the execution of the Transfer Document, provide to the Successor Grocery Employer the name, address, date of hire, and employment occupation classification of each Eligible Grocery Worker.

**B.** The Successor Grocery Employer shall maintain a preferential hiring list of Eligible Grocery Workers identified by the Incumbent Grocery Employer as set forth in Subsection A of this section and shall be required to hire from that list for a period beginning upon the execution of the Transfer Document and continuing for ninety days after the Grocery Establishment is fully operational and open to the public under the Successor Grocery Employer.

**C.** If the Successor Grocery Employer extends an offer of employment to an Eligible Grocery Worker, the Successor Grocery Employer shall retain written verification of that offer for no fewer than three years from the date the offer was made. The verification shall include the name, address, date of hire, and employment occupation classification of each Eligible Grocery Worker.

**Sec. 181.03. Transition Employment Period.**

**A.** A Successor Grocery Employer shall retain each Eligible Grocery Worker hired pursuant to this chapter for no fewer than ninety days following the Eligible Grocery Worker's Employment Commencement Date. During this ninety-day transition employment period, Eligible Grocery Workers shall be employed under the terms and conditions established by the Successor Grocery Employer, as required by law and pursuant to the terms of a relevant collective bargaining agreement, if any.

**B.** If within the period established in Section 181.02(B) the Successor Grocery Employer determines that it requires fewer Eligible Grocery Workers than were required by the Incumbent Grocery Employer, the Successor Grocery Employer shall retain Eligible Grocery Workers by seniority within each job classification to the extent that comparable job classifications exist or pursuant to the terms of a relevant collective bargaining agreement, if any. Non-classified Eligible Grocery Workers shall be retained by seniority and according to experience or pursuant to the terms of a relevant collective bargaining agreement, if any.

**C.** During the ninety-day transition employment period, the Successor Grocery Employer shall not discharge without cause an Eligible Grocery Worker retained pursuant to this chapter.

**D.** At the end of the ninety-day transition employment period, the Successor Grocery Employer shall perform a written performance evaluation for each Eligible Grocery Worker retained pursuant to this chapter. If the Eligible Grocery Worker's performance during the ninety-day transition employment period is satisfactory, the Successor Grocery Employer shall consider offering the Eligible Grocery Worker continued employment under the terms and conditions established by the Successor Grocery Employer and as required by law. The Successor Grocery Employer shall retain a record of the written performance evaluation for a period of no fewer than three years.

**Sec. 181.04. Notice to Public.**

**A.** The Incumbent Grocery Employer shall post public notice of the Change in Control at the location of the affected Grocery Establishment within five business days following the execution of the Transfer Document. Notice shall remain posted during any closure of the Grocery Establishment and until the Grocery Establishment is fully operational and open to the public under the Successor Grocery Employer.

**B.** Notice shall include, but not be limited to, the name of the Incumbent Grocery Employer and its contact information, the name of the Successor Grocery Employer and its contact information, and the effective date of the Change in Control.

**C.** Notice shall be posted in a conspicuous place at the Grocery Establishment so as to be readily viewed by Eligible Grocery Workers and other employees, customers, and members of the public.

**Sec. 181.05. Enforcement.**

**A.** Eligible Grocery Workers may bring an action in the Superior Court of the State of California, as appropriate, against the Incumbent Grocery Employer or the Successor Grocery Employer for violations of this chapter and may be awarded:

**1.** Hiring and reinstatement rights pursuant to this chapter, whereupon the ninety-day transition employment period shall not commence until the Eligible Grocery Worker's Employment Commencement Date with the Successor Grocery Employer.

**2.** Front pay or back pay for each day during which the violation continues, which shall be calculated at a rate of compensation not less than the higher of:

**a.** The average regular rate of pay received by the Eligible Grocery Worker during the last three years of the Eligible Grocery Worker's employment in the same occupation classification; or

**b.** The most recent regular rate received by the Eligible Grocery Worker while employed by either the Incumbent Grocery Employer or the Successor Grocery Employer.

**3.** Value of the benefits the Eligible Grocery Worker would have received under the Successor Grocery Employer's benefit plan.

**B.** If the Eligible Grocery Worker is the prevailing party in any legal action taken pursuant to this section, the court shall award reasonable attorney's fees and costs as part of the costs recoverable.

**Sec. 181.06. Exemption for Collective Bargaining Agreement.**

Parties subject to this chapter may, by collective bargaining agreement, provide that the agreement supersedes the requirements of this chapter.

**Sec. 181.07. Coexistence with Other Available Relief for Specific Deprivations of Protected Rights.**

This chapter shall not be construed to limit an Eligible Grocery Worker's right to bring legal action for wrongful termination.

**Sec. 181.08. Severability.**

If any provision of this chapter is found invalid by a court of competent jurisdiction, the remaining provisions shall remain in full force and effect.

Sec. 2. The City Clerk shall certify to the passage of this ordinance and have it published in accordance with Council policy, either in a daily newspaper circulated in the City of Los Angeles or by posting for ten days in three public places in the City of Los Angeles: one copy on the bulletin board located at the Main Street entrance to the Los Angeles City Hall; one copy on the bulletin board located at the Main Street entrance to the Los Angeles City Hall East; and one copy on the bulletin board located at the Temple Street entrance to the Los Angeles County Hall of Records.

I hereby certify that this ordinance was passed by the Council of the City of Los Angeles, at its meeting of \_\_\_\_\_.

FRANK T. MARTINEZ, City Clerk


By \_\_\_\_\_ Deputy

Approved \_\_\_\_\_

\_\_\_\_\_  
Mayor

Approved as to Form and Legality

ROCKARD J. DELGADILLO, City Attorney

By   
ADRIENNE KHORASANEE  
Deputy City Attorney

Date 12-8-2005

File No. \_\_\_\_\_