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CALIFORNIA GROCERS ASSOCIATION

12
13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA

15
16 CALIFORNIA GROCERS ASSOCIATION,
a California non-profit organization,

17 Plaintiff,

18 v.

19 CITY OF SAN LEANDRO, a charter
20 municipality,

21 Defendant.

Case No.

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

22
23
24 Plaintiff California Grocers Association (“Plaintiff” or “CGA”) brings this
25 action against Defendant City of San Leandro (“Defendant” or “City”) and alleges
26 as follows in this Complaint for declaratory and injunctive relief:
27
28

INTRODUCTION

1
2 1. At the onset of the COVID-19 pandemic, the State of California
3 and various counties, cities, and other regulatory bodies throughout the state issued
4 a series of emergency orders and regulations in an effort to stem the spread of the
5 virus and protect the public health and welfare. These early efforts—aimed at
6 balancing the public’s basic economic and social needs with a desire to minimize
7 COVID morbidity and mortality—came at a steep price, especially for essential
8 businesses, and the millions of employees and members of the public who rely on
9 them.

10 2. California grocers have stayed open to serve their communities
11 since day one. They understand that defeating this pandemic requires extraordinary
12 measures and have eagerly committed themselves to the task. Since March of 2020,
13 California grocers of all sizes have established rigorous and science-driven safety
14 measures, often at great expense, to adapt to this new environment and ensure that
15 they operate in a safe and hygienic manner in order to help slow the spread of the
16 virus, and protect their workers and the public.

17 3. Grocers have implemented comprehensive safety measures for
18 customers and employees and compensated frontline grocery employees for their
19 extra efforts in a difficult environment. Grocers have provided “appreciation pay,”
20 “hero bonuses,” and “thank you pay” to reward their associates. Additionally, in
21 terms of employee support, grocers have offered COVID-19 testing to employees
22 and provided emergency leave and paid time off to those affected by the virus or
23 experiencing symptoms.

24 4. For worker safety, grocers have provided supplies to employees
25 including face masks and protective gear in addition to encouraging employees to
26 stay home if feeling ill and implementing paid leave policies. Plexiglas shields,
27 physical distancing measures, and contactless payment and delivery services have
28 been implemented to protect employees. Some of California’s largest grocers such

1 as Kroger and Albertsons joined the United Food and Commercial Workers
2 International union just last year to urge federal and state governments to designate
3 grocery store employees as emergency first responders.

4 5. Yet on February 16, 2021, the City passed the “Retail Food Worker
5 Hazard Pay Ordinance” (“Ordinance”) which requires employers to pay a \$5 per
6 hour premium on whatever the employees existing wage is at the time of
7 enactment, regardless of any existing bonus, incentive, or hero pay program that the
8 employer may have in place.

9 6. The Ordinance unreasonably singles out specific grocers, while
10 ignoring employers or essential frontline workers outside the grocery industry.
11 Plaintiff seeks a declaration that the law is invalid and unconstitutional, and an
12 injunction halting any action to enforce the Ordinance on the grounds that it (1) is
13 preempted by federal law regulating collective bargaining and unfair labor
14 practices; (2) violates the equal protection and contracts clauses of the U.S. and
15 California constitutions.

16 **JURISDICTION AND VENUE**

17 7. This Court has jurisdiction over the subject matter of this suit
18 pursuant to 28 U.S.C. §1331, as the Plaintiffs’ claims arise under federal laws;
19 namely, the National Labor Relations Act, 29 U.S.C. §141 *et seq.*; Article VI of the
20 U.S. Constitution which designates the Constitution and Laws of the United States
21 as the supreme law of the land; and the equal protection clause and contracts clause
22 of the U.S. Constitution.

23 8. This Court has supplemental jurisdiction over this subject matter
24 pursuant to 28 U.S.C. §1367(a), as the Plaintiffs’ claims arising under the
25 California Constitution are so closely related to the federal question claims that they
26 form part of the same case or controversy under Article III of the U.S. Constitution.

27 9. Venue is proper in this Court pursuant to 28 U.S.C. §1391(b), as
28 this Court is sited in the federal judicial district where the events giving rise to the

1 CGA’s claims have occurred, are now occurring, and will occur in the future if not
2 prevented through actions of this Court. CGA’s members are situated in this district
3 and are and will continue to be adversely affected by the irreparable harms sought
4 to be remedied and prevented by this Court’s action upon this Complaint.

5 **PARTIES**

6 10. Plaintiff California Grocers Association has served as the voice of
7 the state’s grocery community for over 120 years. As a nonprofit, statewide trade
8 association, CGA’s membership is comprised of over 300 retailers and
9 approximately 150 grocery supply companies. As part of its mission, CGA has
10 advocated on behalf of its member retailers on important policy issues.
11 Headquartered in Sacramento, California, CGA brings this action on behalf of its
12 members operating stores in the City of San Leandro.

13 11. Defendant, City of San Leandro, is and at all relevant times has
14 been a public entity duly organized and existing under and by virtue of the laws of
15 the State of California as a charter municipality.

16 **FACTUAL BACKGROUND**

17 12. California Grocers Association pursues this action on behalf of its
18 members who are grocery store employers (“Members”) because the employers
19 who operate grocery stores in San Leandro will suffer a direct and adverse impact
20 from the application of the Ordinance, and thus would have standing to pursue
21 these claims in their own right. The policy and legal interest CGA seeks to protect
22 is at the core of Plaintiff’s mission, and the injunctive and declaratory relief sought
23 does not require the participation of individual members.

24 13. Several Members operate grocery stores in the City that employ
25 members of a specific labor union, United Food and Commercial Workers
26 International, Local 5 (“UFCW 5”), and those employees are parties to collective
27 bargaining agreements that govern the terms of their employment, including wage
28 scales. Other Members operate grocery stores that do not employ unionized

1 workers, but those employees are free to organize and select a collective bargaining
2 unit, should they choose to do so.

3 14. Members have suffered or will continue to suffer economic and
4 non-economic harm as a result of the enactment of the Ordinance, and its
5 foreseeable consequences on union organizing, ongoing collective bargaining, and
6 labor relations for both unionized and non-union grocery stores in the City of San
7 Leandro. Members are required to alter the wage scales and other terms of their
8 existing collective bargaining agreements, regardless of any additional hero pay,
9 bonuses, or other non-monetary compensation provided to their employees to ease
10 the burden of the COVID-19 pandemic.

11 15. By design, the Ordinance picks winners and losers. It singles out
12 large grocery companies with unionized workforces (i.e., UFCW 5's members)
13 without providing any reasonable justification for the exclusion of other employers
14 or frontline retail workers. The Ordinance arbitrarily and improperly targets certain
15 grocery store businesses in San Leandro for disparate treatment while not requiring
16 the same commitments from similarly situated businesses, or conferring *any*
17 benefits on similarly situated employees. There is no support for any of the City's
18 statements that the Premium Pay will protect public health, address economic
19 insecurity, and promote job retention.

20 THE ORDINANCE

21 16. The Retail Food Worker Hazard Pay Ordinance is attached hereto
22 as **Exhibit A**. It applies only to grocery stores with over 15,000 square feet that
23 sells primarily household foodstuffs for offsite consumption, grocery stores over
24 85,000 square feet with 10% of sales dedicated to sale of non-taxable merchandise,
25 or drug retail stores that also sell fresh produce, meats, poultry, fish, deli products,
26 dairy products, canned foods, dry food, beverages, prepared foods, and other
27 merchandise, which are operated by companies with more than 300 employees.
28 Section 6.

1 17. Grocery stores meeting this minimum threshold of employees are
2 required to provide each employee with premium pay consisting of an additional
3 four dollars (\$5.00) per hour for each hour worked. Section 7(a). The Ordinance
4 requires hazard pay to be paid until the Risk Level in the City of San Leandro returns
5 to Minimal (yellow) under State of California Health Orders. Section 7(b).

6 18. The Ordinance takes effect 30 days after its adoption on February
7 16, 2021 and prohibits reducing a grocery employee's compensation or limiting a
8 grocery employee's earning capacity for exercising any rights protected under the
9 Ordinance. Section 9.

10 19. Grocery stores are required to provide a notice of rights established
11 by the Ordinance. Section 8.

FIRST CAUSE OF ACTION

Declaratory and Injunctive Relief

(NLRA Preemption)

15 20. CGA incorporates herein by this reference the allegations contained
16 in Paragraphs 1 through 19, inclusive.

17 21. Enacted in 1935, the National Labor Relations Act ("NLRA"), as
18 amended, 29 U.S.C. § 151, *et seq.*, creates a uniform federal body of law governing
19 union organizing, collective bargaining, and labor-management relations applicable
20 to employers engaged in interstate commerce. It established various rules
21 concerning collective bargaining and defined a series of banned unfair labor
22 practices, including bans on interference with the formation or organization of labor
23 unions by employers. The NLRA does not apply to certain workers, including
24 supervisors, managerial employees and confidential employees – all categories
25 specifically excluded from the Ordinance.

26 22. The NLRA prohibits state and local regulation of conduct that
27 Congress intended to be left to be controlled by the free-play of economic forces.
28 Legislation that interferes with the "balanced state of collective bargaining" is

1 preempted by the NLRA. *See Machinists v. Wisconsin Employment Relations*
2 *Comm'n*, 427 U.S. 132 (1976).

3 23. In particular, the NLRA preempts any and all state and local
4 enactments that, by design or consequence, regulate or interfere with the then-
5 existing balance of economic power between labor and management with respect to
6 zones of activity that, under federal labor law, are intended to be left to the free play
7 of economic forces. Laws subject to NLRA preemption include laws that interfere
8 with or attempt to regulate the economic tools available to labor or management
9 during the course of collective bargaining or that otherwise interfere with the
10 collective bargaining process, such as those that alter the parties' rights and
11 economic alternatives during collective bargaining, or the processes and procedures
12 utilized for union organizing.

13 24. Application of the Ordinance to the activities of the San Leandro
14 Members unequivocally intrudes upon zones of activity in the areas of labor
15 relations, union organizing, and collective bargaining that is reserved under federal
16 labor law and policy to the free play of economic forces. The Ordinance establishes
17 premium pay standards that, by design or consequence, empower the UFCW or
18 other collective bargaining units to secure a wage rate they could not otherwise
19 have obtained from the employer at a unionized or non-union grocery store. This
20 undermines the collective bargaining process and disrupts the process of union
21 organizing.

22 25. While the City has the ability to enact ordinances to further the
23 health and safety of its citizens, the Ordinance here bears no relation to those goals.
24 Local minimum wage laws, for example, seek to lessen the burden on public
25 welfare services. This ordinance is not a minimum labor standard. It is a mandatory
26 hourly bonus for a specific group of workers, regardless of the wage negotiated in
27 the current collective bargaining agreements or other employment agreements.

28 26. The Ordinance is preempted by the NLRA as it regulates zones of

1 activity that Congress intentionally left to be controlled by the free play of
2 economic forces.

3 27. The City's application and enforcement of the Ordinance will cause
4 CGA's Members to suffer irreparable harm for which they have no adequate
5 remedy at law, even if the Ordinance is later declared by this Court to be void and
6 unenforceable. This claim is also brought pursuant to 42 U.S.C. §1983 and
7 §1988(b).

8 28. CGA is entitled to judgment declaring the Ordinance to be void and
9 unenforceable under the Supremacy Clause of the U.S. Constitution and equitable
10 and injunctive relief to prevent the City of San Leandro or any other private
11 enforcer from attempting to enforce or give effect to the Ordinance.

12 **SECOND CAUSE OF ACTION**

13 **Declaratory and Injunctive Relief**

14 **(Equal Protection Clause of the United States Constitution)**

15 29. CGA incorporates herein by this reference the allegations contained
16 in Paragraphs 1 through 28, inclusive.

17 30. CGA hereby seeks declaratory, equitable and injunctive relief to
18 prevent the City from depriving Plaintiff's members of the protections afforded to
19 them under the Equal Protection Clause of the U.S. Constitution, which guarantee
20 each and all of them equal protection of the laws. (U.S. Const., Amend. XIV, § 1).
21 This claim is also brought pursuant to 42 U.S.C. §1983 and §1988(b).

22 31. The Equal Protection Clause requires that persons who are similarly
23 situated receive like treatment under the law, and that statutes may single out a class
24 for distinction only if that classification bears a rational relationship to the purpose
25 of the statute. As such, the City may not irrationally single out one class of
26 individuals for discriminatory treatment.

27 32. The Ordinance improperly singles out certain grocery store
28 businesses in San Leandro for disparate treatment while not requiring the same

1 treatment of similarly situated businesses. More importantly, the Ordinance
2 implicates the Members' fundamental right to be free from unreasonable
3 governmental interference with their contracts, specifically their collective
4 bargaining agreements and other employment agreements.

5 33. The stated purpose of the Ordinance, namely, to protect public
6 health, address economic insecurity, and promote job retention by continued
7 operation of the food supply chain during the COVID-19 emergency by requiring
8 grocery stores to provide premium pay is not rationally related to the discriminatory
9 treatment of CGA's Members. No significant and legitimate public purpose exists
10 for the Ordinance. The City's stated objectives are merely an attempt to impose a
11 public policy rationale on interest-group driven legislation for labor unions and, in
12 particular, for UFCW 5.

13 34. By virtue of the foregoing, application of the Ordinance to the
14 CGA's Members within the City violates the equal protection guarantees of the
15 U.S. Constitution.

16 35. The City's application and enforcement of the Ordinance will cause
17 Plaintiff's members to suffer irreparable harm for which they have no adequate
18 remedy at law, even if the Ordinance is later declared by this Court to be void and
19 unenforceable.

20 **THIRD CAUSE OF ACTION**

21 **Declaratory and Injunctive Relief**

22 **(Equal Protection Clause of the California Constitution)**

23 36. CGA incorporates herein by this reference the allegations contained
24 in Paragraphs 1 through 35, inclusive.

25 37. CGA hereby seeks declaratory, equitable and injunctive relief to
26 prevent the City from depriving CGA's members of the protections afforded to
27 them under the Equal Protection Clause of the California Constitution, which like
28 the U.S. Constitution, guarantees each and all of them equal protection of the laws.

1 (Cal. Const., Art. I § 7.)

2 38. For the same reasons set forth in Paragraphs 29 through 35 above,
3 the Ordinance violates the Equal Protection Clause of the California. Such
4 application will cause CGA’s Members to suffer irreparable harm for which they
5 have no adequate remedy at law.

6 **FOURTH CAUSE OF ACTION**

7 **For Declaratory and Injunctive Relief**

8 **(Contracts Clause of the U.S. Constitution)**

9 39. CGA incorporates herein by this reference the allegations contained
10 in Paragraphs 1 through 38, inclusive.

11 40. CGA hereby seeks declaratory, equitable and injunctive relief to
12 prevent the City from depriving CGA’s Members of the protections afforded to
13 them under the Contracts Clause of the U.S. Constitution, which provides in
14 pertinent part that: “No State shall . . . pass any . . . Law impairing the Obligation of
15 Contracts” (U.S. Const., Art. I, § 10, cl. 1). The Contract Clause imposes
16 limits upon the power of a State, and Municipalities operating under the color of
17 State law, to abridge existing contractual relationships, even in the exercise of its
18 otherwise legitimate police power.

19 41. The Ordinance substantially interferes with Members’ contracts,
20 including its collective bargaining agreements with its employees, without any
21 significant or legitimate public purpose. The City’s stated objectives are to protect
22 public health, address economic insecurity, and promote job retention through the
23 continued operation of its food supply chain. None of these justifications support
24 this measure, because the City’s stated objectives are merely an attempt to impose a
25 public policy rationale on interest-group driven legislation for labor unions and, in
26 particular, for UFCW.

27 42. Even if the City could show a significant and legitimate public
28 purpose behind the regulation, the substantial impairment to the Members’

1 contractual rights and obligations (i.e., the terms of the Members’ existing
2 collective bargaining agreements) are neither reasonable nor necessary to fulfill any
3 such public purpose.

4 43. By virtue of the foregoing, application of the Ordinance to CGA’s
5 members constitutes a substantial and unconstitutional impairment of those
6 members existing contractual relationships that will cause them to suffer irreparable
7 harm for which they have no adequate remedy at law.

8 **FIFTH CAUSE OF ACTION**

9 **Declaratory and Injunctive Relief**

10 **(Contracts Clause of the California Constitution)**

11 44. CGA incorporate herein by this reference the allegations contained
12 in Paragraphs 1 through 43, inclusive. Plaintiffs hereby seek declaratory and
13 injunctive relief to prevent the City from violating, and continuing to violate, the
14 Contract Clause of the California Constitution, which provides in pertinent part
15 that: “A ... law impairing the obligation of contracts may not be passed.” (Cal.
16 Const., Art. I, § 9.)

17 45. Like the Federal Contracts Clause, the California Contracts Clause
18 also imposes limits upon the State of California, and its municipalities, to abridge
19 existing contractual relationships, even in the exercise of its otherwise legitimate
20 police power. For the same reasons set forth in Paragraphs 41 through 43 above,
21 application of the Ordinance to CGA’s members within the City constitutes a
22 substantial and unconstitutional impairment of those members existing contractual
23 relationship in violation of the California Contract Clause. Such application will
24 cause those members to suffer irreparable harm for which they have no adequate
25 remedy at law.

26 **PRAYER FOR RELIEF**

27 WHEREFORE, Plaintiff prays for the following relief:

- 28 1. On the first cause of action, a judgment declaring that the

1 Ordinance, as well as any act taken in furtherance of the Ordinance by any person,
2 is preempted by the National Labor Relations Act, and its implementing regulations
3 and guidance, and are therefore void and unenforceable, and entering a preliminary
4 and permanent injunction enjoining the City from enforcing or taking any action
5 under the Ordinance;

6 2. On the second and third causes of action, enter a judgment declaring
7 that the Ordinance, as well as any act taken in furtherance of the Ordinance by any
8 person, violate state and federal equal protection guarantees, and are therefore void
9 and invalid, and entering a preliminary and permanent injunction enjoining the City
10 from enforcing or taking any action under the Ordinance;

11 3. On the fourth and fifth causes of action, enter a judgment declaring
12 that the Ordinance, as well as any act taken in furtherance of the Ordinance by any
13 person, violate the contracts clauses of the state and federal constitution, and are
14 therefore void and invalid, and entering a preliminary and permanent injunction
15 enjoining the City from enforcing or taking any action under the Ordinance;

16 4. For an award of attorneys' fees and costs of suit herein pursuant to
17 California Code of Civil Procedure § 1021.5, 42 U.S.C. §1988, or any other
18 applicable law; and

19 5. For such other and further relief as the Court may deem just and
20 proper.

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Dated: February 17, 2021

MORRISON & FOERSTER LLP

By: /s/ William F. Tarantino
William F. Tarantino

Attorneys for Plaintiff
CALIFORNIA GROCERS
ASSOCIATION

Exhibit A

Ordinance No. _____

Retail Food Worker Hazard Pay Ordinance

SEC. 1 RECITALS.

The City Council finds the foregoing recitals to be true and correct and hereby incorporates those recitals into this Ordinance.

SEC. 2 TITLE AND PURPOSE.

This Ordinance shall be known as the “Retail Food Worker Hazard Pay Ordinance.” Retail Food establishments are a vibrant and integral part of the public infrastructure during the ongoing pandemic.

The retail food workers of San Leandro have continued to report to work and to serve their communities in the face of an unprecedented pandemic. Each day these workers risk their lives and the health of their families without any extra benefits or wages in order to keep the food and health supply chain operating.

The purpose of this Retail Food Worker Hazard Pay Ordinance (“Ordinance”) is to justly compensate retail food workers for the clear and present dangers of doing their jobs as essential workers during the pandemic by requiring their employers to provide hazard pay. The City has an interest in ensuring the welfare of its workers and the continued operation of its food supply chain.

Through this Ordinance, the City seeks to sustain the stability of the food and health supply chain through supporting the essential workers who continue to work during the pandemic.

SEC. 3 AUTHORITY

This Chapter is adopted pursuant to the powers vested in the City of San Leandro under the laws 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, California Labor Code section 1205(b), and the Charter of the City of San Leandro.

SEC. 4 FINDINGS.

The City Council finds and declares that adoption of this Ordinance is necessary for preserving the public peace, health and safety for the following reasons:

- A. The COVID-19 pandemic has led to the current state of emergency in local emergency in the City of San Leandro.
- B. Governor Newsom extended the “Safer at Home” emergency order on December 3, 2020 as a result of the critically low availability of Intensive Care Unit (“ICU”) beds.

- C. The virus is spreading rapidly across the region with many clusters arising within retail stores. Grocery stores remain a critical piece of infrastructure in the fight against the COVID-19 virus and in protecting the City's food supply chain.
- D. Grocery stores are the primary points of distribution for food and other daily necessities for the residents of the City of San Leandro and are therefore essential to the vitality of our community.
- E. Turnover, inability to pay for housing and increased childcare costs as a result of school closures and other necessities could become an immediate problem for certain grocery workers if they are not given immediate financial relief.
- F. To protect the food supply chain and the public health and safety, the City of San Leandro must take steps to guard against turnover and ensure that grocery stores in San Leandro have well-trained, consistent, and stable staffing.
- G. The City Council of the City of San Leandro finds that there is a current and immediate threat to the public health, safety and/or welfare and a need for immediate preservation of the public peace, health, welfare and safety that warrants this ordinance, which finding is based upon the facts stated in the recitals above, and in the staff report dated February 16, 2021, as well as any oral and written testimony at the February 16, 2021 City Council meeting.

SEC. 5 RESERVED

SEC. 6 DEFINITIONS

The following shall apply to this Ordinance:

"Base Wage" shall mean the hourly wage paid to Covered Employees as of the effective date of this Ordinance less Hazard Pay owed under this Ordinance or other premium hourly rate already paid to compensate Covered Employees for working during the pandemic (referred to herein as "employer-initiated hazard pay").

"City" shall mean the City of San Leandro.

"Covered Employer" shall mean:

(a) Retail food establishments defined herein, that employ 300 or more employees nationwide regardless of where those employees are employed, including but not limited to chains, integrated enterprises, or franchises associated with a franchisor or network of franchises.

(b) To determine the number of employees, the calculation shall be based upon:

1. The actual number per calendar week of employees who worked for compensation during the pay period preceding the effective date of this Ordinance; and
2. All employees who worked for compensation shall be counted, including but not limited to:
 - (i) Employees who are not covered by this Ordinance;
 - (ii) Employees who worked inside the City;
 - (iii) Employees who worked outside the City; and
 - (iv) Employees who worked in full-time employment, part-time employment, joint employment, temporary employment, or through the services of a temporary services or staffing agency or similar entity.

“Covered Employee” shall mean any person who:

- (a) In a calendar week performs at least two hours of work within the geographic boundaries of the City for a Covered Employer; and
- (b) Qualifies as an employee entitled to payment of a minimum wage from any employer under the California minimum wage law, as provided under Section 1197¹ of the California Labor Code and wage orders published by the California Industrial Welfare Commission, and the City of San Leandro’s Minimum Wage Ordinance.

¹ Lab. Code § 1197. The minimum wage for employees fixed by the commission or by any applicable state or local law, is the minimum wage to be paid to employees, and the payment of a lower wage than the minimum so fixed is unlawful. This section does not change the applicability of local minimum wage laws to any entity.

“Designated Administrative Agency” means the Department of Finance or other City Department or agency the City Manager may designate.²

“Holiday Premium” shall mean the hourly wage paid to Covered Employees for performing work during a holiday or holiday season.

“Hazard Pay” shall mean an additional \$5.00 per hour wage bonus in addition to the Covered Employee’s Base Wage or Holiday Premium wage for each hour worked for any pay period during the duration of this Ordinance.

“Hours Worked” means the time during which a Covered Employee is subject to the control of a Covered Employer, including all the time the employee is suffered or permitted to work, and on-call.³

“Person” shall mean any 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.⁴

“Retail Food Establishment” shall mean a retail store in the City of San Leandro that is either:

(a) 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;

(b) over 85,000 square feet and with 10% of its sales floor area dedicated to sale of non-taxable merchandise including, but not limited to, the sale of fresh produce, meats, poultry, fish, deli products, dairy products, canned foods, dry foods, beverages, baked foods and/or prepared foods;⁵ or

(c) a drug retail store in the City of San Leandro that sells a variety of prescription and nonprescription medicines and miscellaneous items, including but not limited to drugs, pharmaceuticals, sundries, fresh produce, meats, poultry, fish, deli products, dairy products, canned foods, dry foods, beverages, prepared foods, and other merchandise.

“Retaliatory Action” shall mean the failure to hire, or the discharge, suspension, demotion, penalization, lowering of the Base Wage or Holiday Premium wage, or discrimination or any other adverse action against a Covered Employee with

² San Leandro Minimum Wage Ordinance, San Leandro Municipal Code Section 4-35.

³ California Code of Regulations, Title 8, Section 11040

⁴ Living Wage Ordinance, San Leandro Municipal Code Section 1-6-615

respect to the terms and conditions of the Covered Employee’s employment, for opposing any practice proscribed by this Ordinance, for participating in proceedings related to this Ordinance, for seeking to enforce his or her rights under this Ordinance by any lawful means, or for otherwise asserting rights under this Ordinance.

SEC. 7 PAYMENT OF HAZARD PAY TO COVERED EMPLOYEES

(a) Hazard Pay. Covered Employers shall pay Covered Employees a wage of no less than the premium hourly rate set under the authority of this Ordinance. The premium hourly rate for each Covered Employee shall be an additional

\$5.00 per hour for all hours worked on top of the Covered Employee's Base Wage or Holiday Premium Wage, whichever is applicable at the time of hours worked. The Hazard Pay rate shall not include compensation already owed to Covered Employees, Holiday Premium rates, gratuities, service charge distributions, or other bonuses. Covered Employers providing employer-initiated hazard pay will be credited for doing so in accordance with Sections 6 and 13.

(b) Duration of Hazard Pay. Covered Employers shall pay Hazard Pay to all workers for any pay period for 120 days from the effective date of this Ordinance, or during which the City of San Leandro is within a Widespread (purple), Substantial (red) or Moderate (orange) Risk Level, and until such time as risk levels return to Minimal (yellow) under State Health Orders, or until such time as all Covered Employers' Covered Employees are vaccinated, excluding those Covered Employees who are prevented from receipt of vaccination by disability or sincerely held religious beliefs, whichever is later.

SEC. 8 NOTICE AND POSTING.⁶

Every Employer shall post in a conspicuous place at any workplace or job site where any Employee works, a notice informing Employees of their rights under this Ordinance. Every Employer shall post notices in the top three languages spoken in San Leandro as determined by the last U.S. Census. Every Employer shall provide each Employee at the time this Ordinance becomes effective or at the time of hire, whichever is later, the Employer and owner or manager's name; address; telephone number; and whether it is part of a chain, integrated enterprise, or franchise associated with a franchisor or network of franchises. If the information the Employer provided to the Employee changes, the Employer shall provide the updated information in writing within ten days of the change.

SEC. 9 RETALIATION PROHIBITED.⁷

It shall be unlawful for an Employer or any other party to discriminate in any manner or take adverse action against any Employee in retaliation for exercising rights

⁶ San Leandro Minimum Wage Ordinance, San Leandro Municipal Code Section 4-35-600

⁷ San Leandro Minimum Wage Ordinance, San Leandro Municipal Code Section 4-35-700

protected under this Ordinance. Rights protected under this Ordinance include, but are not limited to: the right to file a complaint or inform any person about any party's alleged noncompliance with this Ordinance; and the right to inform any person of his or her potential rights under this Ordinance and to assist him or her in asserting such rights. Protections of this Ordinance shall apply to any Employee who mistakenly, but in good faith, alleges noncompliance with this Ordinance. Taking adverse action against an Employee, including lowering Covered Employees' Base Wage or Holiday Premium Wages or reduction of hours, within 90 days of the Employee's exercise of rights

protected under this Ordinance shall raise a rebuttable presumption of having done so in retaliation for the exercise of such rights.

SEC. 10 IMPLEMENTATION.⁸

The Department may promulgate guidelines and rules consistent with this Ordinance for the implementation of the provisions of this Ordinance. Any guidelines or rules shall have the force and effect of law, and may be relied upon by Covered Employers, Covered Employees and other parties to determine their rights and responsibilities under this Ordinance.

SEC. 11 RECORDS

Covered Employers shall keep records necessary to demonstrate compliance with this Ordinance, including but not limited to payroll records that specify the amount of compensation paid to employees under sections 6 and 7 of this Ordinance. Employers shall retain such records at the place of employment or in a central records office for a period of four years, and shall allow the Department access to such records, with appropriate notice and at a mutually agreeable time, to monitor compliance with the requirements of this Ordinance. When an issue arises as to a Covered Employer's compliance with this Ordinance, if the Covered Employer does not maintain or retain adequate records documenting compliance or does not allow the Department reasonable access to such records within 30 days of the Department's request, it shall be presumed that the Covered Employer has violated the Ordinance, absent clear and convincing evidence otherwise.

SEC. 12 ENFORCEMENT.

The provisions related to enforcement set forth in the San Leandro Municipal Code Section 4-35-900 shall apply equally to the enforcement of this Chapter and individuals and entities afforded rights and protections under those Sections are hereby granted those same rights and protections in connection with the enforcement of any provision of this Chapter. Covered Employers shall have all obligations of "Employers" and "employers" under Section 4-35-300. The terms "Employer," "Employ," and "Employee," when used in Section 4-35-300 for purposes of enforcing provisions of this Ordinance,

⁸ San Leandro Minimum Wage Ordinance, San Leandro Municipal Code Section 4-35-800

shall have the meanings set forth in Section 6 of this Ordinance. The provisions of this Ordinance do not diminish, alter, or negate any other legal rights, remedies, or procedures available to an Employee.

SEC. 11 EMPLOYEE REMEDIES FOR VIOLATIONS.

(a) **Damages and Restitution.** Every Employer who violates this Ordinance, or any portion thereof shall be liable to the Employee whose rights were violated for any and all relief, including, but not limited to:

1. Legal and equitable relief including but not limited to reinstatement, rescission, the payment of Hazard Pay unlawfully withheld, and the payment of all penalties and fines imposed pursuant to other provisions of this Ordinance or State law. For retaliatory action by the Employer, the Employee shall be entitled to a trebling of lost wages and penalties owed in addition to reinstatement.

2. Interest on all due and unpaid wages at the rate of interest specified in subdivision (b) of Section 3289 of the California Civil Code⁹, which shall accrue from the date that the wages were due and payable as provided in Part 1 (commencing with Section 200¹⁰) of Division 2 of the California Labor Code, to the date the wages are paid in full.

(b) **Civil Enforcement.** For any Covered Employee aggrieved by a violation of this Ordinance, the City Attorney 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 Covered Employer violating this Ordinance. A Covered Employee or the City, upon prevailing, shall be entitled to such legal or equitable relief as may be appropriate to remedy the violation including but not limited to monies to be paid pursuant to this Ordinance, back pay, reinstatement, rescission, and reasonable attorneys' fees and costs. Any other person or entity enforcing this Ordinance on behalf of the public as provided for under applicable state law, upon prevailing, shall be entitled only to equitable, injunctive and/or restitutionary relief, and reasonable attorneys' fees and costs. Nothing in this Ordinance shall be interpreted as restricting, precluding, or otherwise limiting a separate or concurrent criminal

⁹ Cal Civ. Code §3289. (a) Any legal rate of interest stipulated by a contract remains chargeable after a breach thereof, as before, until the contract is superseded by a verdict or other new obligation. (b) If a contract entered into after January 1, 1986, does not stipulate a legal rate of interest, the obligation shall bear interest at a rate of 10 percent per annum after a breach. For the purposes of this subdivision, the term contract shall not include a note secured by a deed of trust on real property.

¹⁰ Labor Code § 200. As used in this Ordinance: (a) "Wages" includes all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation. (b) "Labor" includes labor, work, or service whether rendered or performed under contract, subcontract, partnership, station plan, or other agreement if the labor to be paid for is performed personally by the person demanding payment.

prosecution under the Municipal Code or state law. Jeopardy shall not attach as a result of any administrative or civil enforcement action taken pursuant to this Ordinance.

SEC. 12 ADDITIONAL REMEDIES

The City, when enforcing on behalf of an Employee, has the authority to require that payment of wages, Hazard Pay and/or penalties found to be due and owing to the Employee, be paid directly to the City for disbursement to the Employee. The City, when enforcing on the behalf of an Employee, has the authority to require that payment of all amounts due under this Ordinance be paid directly to the City. The failure of an Employer to pay any amounts due under this Ordinance shall constitute a debt to the City. The City, as plaintiff and/or judgment creditor, may file a civil action on behalf of an Employee

and/or the City or, to the extent feasible under state law, create and impose a lien against any property owned or operated by an Employer or other person who fails to pay wages, penalties and administrative fines assessed, or pursue other legal and equitable remedies available to the City. The City shall be awarded reasonable attorney's fees and costs as well as costs associated with enforcing a violation under this Ordinance.

The remedies, penalties and procedures provided under this Ordinance are cumulative and are not intended to be exclusive of any other available remedies, penalties and procedures.

SEC. 13 CREDIT FOR EMPLOYER-INITIATED HAZARD PAY

- (a) Any Covered Employer already providing a premium hourly rate to compensate Covered Employees for working during the pandemic (hereinafter "employer-initiated hazard pay") shall be credited against the \$5.00 per hour for the hourly amount paid to each Covered Employee (e.g. A Covered Employer offering a \$2.00 per hour employer-initiated hazard pays an additional \$3.00 per hour in Hazard Pay per this Ordinance.) Such Covered Employer must demonstrate that, as of the effective date of this Ordinance and in any subsequent covered pay periods, all Covered Employees are receiving such employer-initiated hazard pay. No Covered Employer shall be credited prospectively for any past payments. No Covered Employer shall be credited for any hourly premiums already owed to Covered Employees, such as but not limited to, Holiday Premiums. Nothing herein shall be interpreted to prohibit any employer from paying more than \$5.00 per hour in Hazard Pay.
- (b) To receive credit for employer-initiated hazard pay policies, Covered Employers must offer the following showings of proof to the Department:
 - (1) A copy of the Employer's hazard pay policy.
 - (2) A concise statement explaining Covered Employees' hourly base wages, hourly Holiday Premiums, hourly employer-initiated hazard pay, and any other wage bonuses received during the last 12 months.
 - (3) Evidence that, since the effective date of the Ordinance and for so long as this Ordinance is applicable, each and every Covered Employee has received employer-initiated hazard pay.
 - (4) Evidence that allows the City to review for compliance by assessing wages for the past 12 months and that is itemized in such a way that the City can understand a Covered Employee's Base Wage distinguished from Holiday Premiums and other bonuses or pay increases that are separate and distinct from employer-initiated hazard pay.
 - i. Accepted evidence of employer-initiated hazard pay wage described in (b)(4):
 - 1. A spreadsheet, of all Covered Employees and their wages for each pay period for the last 12 months, that allows the City to distinguish Base Wage from Holiday Pay and other bonuses or pay increases that are separate and distinct from employer-initiated hazard pay. The foregoing does not exempt any Covered Employer from maintaining, and

providing access to, the underlying payroll records described above. The foregoing notwithstanding if the City creates an online submission form for its Online Certified Payroll System (OCPS) that meets the above criteria then all offers of proof under subparagraph (b) shall be submitted directly to the OCPS.

- b. Any offer of proof under subparagraph (b) shall be accompanied by a written acknowledgement that it was so submitted under penalty of perjury.

SEC. 14 WAIVER THROUGH COLLECTIVE BARGAINING

To the extent required by Federal law, all or any portion of the applicable requirements of this Ordinance 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.

SEC. 15 COEXISTENCE WITH OTHER AVAILABLE RELIEF FOR SPECIFIC DEPRIVATIONS OF PROTECTED RIGHTS.¹¹

The provisions of this Ordinance shall not be construed as limiting any Covered Employee's right to obtain relief to which he or she may be entitled at law or in equity.

SEC. 16 CONFLICTS.¹²

Nothing in this Ordinance shall be interpreted or applied so as to create any power or duty in conflict with any federal or state law.

¹¹ San Leandro Minimum Wage Ordinance, San Leandro Municipal Code Section 4-35-1000

¹² San Leandro Minimum Wage Ordinance, San Leandro Municipal Code Section 4-35-1000

SEC. 17 SEVERABILITY.

If any subsection, sentence, clause or phrase of this Ordinance is for any reason held to be invalid or unconstitutional by a court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this ordinance. The City Council hereby declares that it would have adopted this section, and each and every subsection, sentence, clause and phrase thereof not declared invalid or unconstitutional, without regard to whether any portion of the ordinance would be subsequently declared invalid or unconstitutional.

SEC. 18 EFFECTIVE DATE AND PUBLICATION.

This ordinance shall take effect thirty (30) days after adoption. The City Clerk is directed to publish the title once and post a complete copy thereof on the City Council Chamber bulletin board for five (5) days prior to adoption.