



CITY COUNCIL AGENDA REPORT

City of Anaheim OFFICE OF CITY ATTORNEY

DATE: OCTOBER 9, 2018
FROM: OFFICE OF THE CITY ATTORNEY
SUBJECT: MEASURE L

ATTACHMENT (Y/N): YES **ITEM # 17**

RECOMMENDATION:

Receive and file report on Measure L, the Anaheim minimum wage initiative, including: (1) who it would apply to, if passed; (2) what impacts it would have on city staff to manage the initiative; and (3) where Anaheim would fall in comparison to other California cities that have an increase above the state minimum wage.

DISCUSSION:

At the August 28, 2018 City Council meeting, Councilmember Murray requested that staff bring back a report on Measure L. Specifically, Councilmember Murray requested a report regarding which employers it would apply to if passed, what impacts it would have on city staff to manage it, and how Anaheim would compare to other California cities that have minimum wage laws higher than the state minimum. This report is intended to summarize staff's findings in this regard. This report also includes a copy of Measure L (Attachment 1) and the City Attorney's Impartial Analysis (Attachment 2) that, pursuant to Elections Code Section 9280, was submitted to the County Registrar of Voters in August.

Summary of Measure L

As stated in the Impartial Analysis, Measure L was placed on the ballot by a petition signed by the requisite number of voters. If passed, the Measure would require specified hospitality employers who have 25 or more employees to pay their employees no less than \$15/hour beginning January 1, 2019, increasing yearly by one dollar per hour through 2022, when the minimum wage under the Measure would be \$18/hour. Beginning in 2023, the minimum wage would increase annually by the greater of 2%, or the percentage increase in the Consumer Price Index ("CPI").

Comparatively, should the Measure fail, then such employers would continue to be required to pay no less than the higher of the federal or state minimum wage, which is scheduled to be \$12/hour in 2019, increasing yearly by one dollar per hour through 2022, when the California minimum wage will be \$15/hour. Beginning in 2023, the California minimum wage will increase annually based on the CPI.

Measure L would also require covered employers to pay the entirety of all service charges to the employee(s) performing services for the customer who pays the service charge. No part of a service charge could be paid to managerial or supervisory employees.

Employers Covered¹

This summary of Measure L's applicability is distilled from the language of the Measure itself, particularly its numerous substantive definitions. For example, the Measure states in Section 6.99.010 that an "Employer shall pay an Employee a wage of no less than the hourly rates set under the authority of this article." However, the definitions portion of the Measure (such as the definitions of "Employer" "Hospitality Industry," and "City Subsidy") all modify and limit the scope of this provision.

Under Measure L, "Employer" is defined in part as "any business in the hospitality industry which benefits from a City Subsidy." "Hospitality industry" is defined as a "hotel, motel, amusement or theme park, or a restaurant, snack bar, tavern, lounge, club or other venue offering food or beverages which is within or adjacent to a hotel, motel or amusement or theme park, or a retail store which is within or adjacent to a hotel, motel or amusement or theme park, located in whole or in part within the Anaheim Resort . . . or Disneyland Resort [Zones]..." A business "benefits from a City Subsidy," under the Measure, "if the person or an affiliate of the person receives a City Subsidy directly or is an Employer which is a contractor or subcontractor, lessee or sublessee, or tenant or subtenant, with respect to a person or an affiliate of a person who receives a City Subsidy." A "City Subsidy" is defined as "any agreement with the city pursuant which a person other than the city has the right to receive a rebate of transient occupancy tax, sales tax, entertainment tax, property tax or other taxes, presently or in the future, matured or unmatured."

Taken together, and as summarized in the Impartial Analysis:

The measure would apply to any for-profit business that is a hotel, motel, amusement or theme park, or any retail store, restaurant, or other venue offering food or beverages, that is within or adjacent to a hotel, motel, or amusement or theme park and that: (1) is located in whole or in part within the Disneyland or Anaheim Resort Specific Plan Zones, (2) has an agreement to receive a tax rebate from the City, or is a hospitality industry contractor or tenant of an entity that has such an agreement, and (3) has 25 or more employees.

Based on this interpretation, Measure L would apply to those employers located in the Disneyland or Anaheim Resort Specific Plan Zones that have entered into agreements with the City in which they are entitled to receive a tax rebate, assuming that they have 25 or more employees. Employers that we know have such agreements are: (1)

¹ The opinions in this section are those of the City Attorney, based on an analysis of the language of Measure L, interpretive standards applicable to ballot measures, and the facts as known or presented, and are not binding in a court of law.

GardenWalk Hotel I, LLC, which has entered into two agreements, one related to a 446-room convention hotel, which is under construction and will be branded as a J.W. Marriott, and the second related to a 350-room resort hotel that is still in the planning stages; (2) FJS, Inc., a Texas corporation, for a 634-room hotel at 1030 West Katella Ave. which is under construction and will be branded as a Westin; and (3) Good Hope International, Inc., a California corporation, for a 580-room hotel at 1700 S. Harbor Blvd. that has not commenced construction (and staff anticipates may not be built given that renovations have been made to the existing hotel on the property).

In addition, Measure L would apply to hospitality industry tenants and contractors of the covered employers. So, for instance, a restaurant or retail store that has 25 or more employees and is a tenant of one of the employers listed above would also be covered by the Measure. Some examples of these types of tenants would be restaurants that operate within the hotel (FJS has indicated that it plans to have three tenant-operated restaurants), convenience stores (FJS plans to have a “grab & go” market), and bars or snack bars operated by third parties in or adjacent to the hotel property. If these tenants employ 25 or more employees, then they would likely be covered by Measure L.

One question that has arisen is whether Disneyland Resorts (“Disney”) would still be covered by Measure L, even though the City and Disney recently terminated two agreements that the proponents of the Measure had asserted would invoke coverage: (1) the July 7, 2015 Agreement Concerning Entertainment Tax Reimbursement; and (2) the July 1, 2016 Operating Covenant Agreement.

The drafters of Measure L have asserted that, despite the termination of the two agreements referenced above, Disney would still be subject to the provisions of Measure L. Specifically, they have asserted that the 1997 Bond Transaction (“Bond Transaction”) in which the Anaheim Finance Authority issued lease revenue bonds to help fund public improvements that resulted in Disney’s construction of California Adventure amounts to an “agreement to receive a tax rebate,” and thus invokes Measure L coverage. The City Attorney’s Office has studied this issue, and does not believe that to be the case.

As stated above, Measure L applies to larger hospitality industry employers in the Disneyland or Anaheim Resort Zones who have an agreement to receive a tax rebate from the City. Certain elements of the Bond Transaction include agreements between Disney, the City, and the Anaheim Finance Authority in which Disney guarantees to pay any debt service shortfall and is entitled to reimbursement if it does so, but that does not amount to a “tax rebate” as that term would most reasonably be interpreted.

“Rebate” is not defined in Measure L and it is not a fixed term in the law. However, the best definition of rebate (supported by legal interpretations as well as dictionary definitions) is that it amounts to a discount, most commonly one given retrospectively, such as a partial refund of money paid. The City Attorney’s Office has found no evidence that the Bond Transaction discounts the taxes that Disney must pay, or that Disney receives a tax refund as a result of the Bond Transaction, as explained below.

The Bond Transaction is complicated, but can be summarized as follows: The Anaheim Public Financing Authority (“Authority”) issued its initial series of Lease Revenue

Bonds in February 1997.² The proceeds of the 1997 Bonds were used to finance the acquisition and construction of certain public improvements, including the addition, improvement and betterment of the Anaheim Convention Center, various electrical, public safety, landscaping, storm drain, park and recreation, and street improvements, and certain public parking facilities located west of Disneyland and south of Interstate 5 (“Public Parking Facilities”). The Public Parking Facilities are managed by Disney and provide public parking for Disneyland Resort, the Anaheim Convention Center, and other day uses within the Anaheim Resort Area.

As part of the Bond Transaction, the City entered into a lease with the Authority, making payments for the use and occupancy of various public facilities, including the Anaheim Convention Center, Anaheim Stadium, the Anaheim Main Library, and the Public Parking Facilities, among others. Lease payments are payable from any legally available funds of the City (*i.e.*, its general fund), but the amount of each lease payment to be made by the City under the Lease Agreement is measured by Lease Payment Measurement Revenues. “Lease Payment Measurement Revenues” generally are (a) incremental transit occupancy taxes, sales taxes, and property taxes from Disney properties above such amounts received by the City in Fiscal Year 1995, subject to a 2% annual increase on the baseline index, and (b) 3% out of the 15% City-wide Transit Occupancy Tax. Lease Payment Measurement Revenues are not actually pledged to the payment of the lease payments under the Lease Agreement but, rather, as the name suggests, are the measurement mechanism through which the amount of lease payments owed payable is determined.

Payment of debt service on the Bonds is guaranteed pursuant to municipal bond insurance policies. The Bond Transaction includes arrangements under which Disney is required to advance money to the bond insurer if the bond insurer is required to make payment on the 1997 Bonds, and Disney is entitled to be reimbursed from lease payments. This reimbursement is not a refund of any taxes paid by Disney and, therefore, would not amount to a “tax rebate” under Measure L. A more detailed description of these arrangements can be found in Attachment 3.

In summary, although there are many moving parts to the Bond Transaction, it does not appear to incorporate a direct City subsidy; that is, an agreement in which Disney is entitled to a “rebate of transient occupancy tax, sales tax, entertainment tax, property tax or other taxes, presently or in the future, matured or unmatured.” Therefore, it is the City Attorney’s opinion that Measure L would not apply to Disney by virtue of the Bond Transaction.

Impacts on City Staff:

Although Measure L is intended to apply to various employers in the Anaheim or Disneyland Resort Zones, it would directly and indirectly impact City resources as well, although the full extent of that impact is uncertain. The direct impact stems from the City’s role in investigating and enforcing Measure L, in addition to its role in determining small business exemptions, as discussed below.

According to Section 6.99.050 of the Measure, an “Employee claiming violation of this article may report such claimed violation to the City Manager which shall investigate such complaint.” In addition to investigating the complaint, the City Manager must enforce any violations of Measure L (“[w]hether based upon such a complaint or otherwise”) by issuing a written notice to the business that the violation has to be corrected within ten days. If the violation is not cured, the City Manager may request the City Council to debar the business from any future city subsidy for three years.

The impact of this investigation and enforcement obligation on the City Manager could be great or minimal, depending on the number of claimed violations that are submitted, and whether any claimant employees decide to enforce through a civil lawsuit instead, as discussed below.

Measure L does not make the City Manager process the only enforcement option for employees. The Measure states that an employee may also “bring an individual or class action against his or her Employer in Superior Court” to enforce rights granted under the Measure. There does not appear to be an “administrative exhaustion” requirement for any such lawsuits. In other words, employees can choose to file a complaint with the City Manager’s Office, or alternatively, file a direct lawsuit against the employer without first seeking relief from the City.

The City Manager and City staff (as well as the Council) would also be impacted by the provision in Measure L that allows employers with fewer than 100 full-time employees to apply for an exemption from its provisions. Section 6.99.060 states that such employers:

...may apply in writing to the City Manager for an exemption from the provisions of this Chapter. The City Manager may grant such an exemption, valid for no more than one year, upon a proper showing by the Small Business that it meets one or more of the criteria of this section.

The criteria for an exemption are as follows: that the higher minimum wage would cause the business to either (1) reduce its workforce by more than 20%, (2) cut its employees’ total work hours by more than 30%, or (3) close its business or seek bankruptcy protection. Assuming one or more businesses seek such an exemption, City resources would be expended to train or hire staff to make these kinds of determinations, and to actually establish a process and hear the exemption claims. Also, if a party disagrees with the City’s determination, the City may be put in a position of having to defend the decision in a lawsuit.

Indirectly, City staff can be impacted by having to defend any lawsuits challenging Measure L itself. Impacts could be either the burden placed on City Attorney staff to defend the case, or the costs associated with hiring an outside firm to do so. Whether anyone decides to challenge the Measure, of course, is speculative at this time. But in

light of the nature of the Measure, it would not be surprising if one or more challenges were to be filed.³

Minimum Wage Comparisons⁴

A chart prepared by the City Manager's Office showing how Measure L's minimum wage would compare to other California cities' minimum wages is attached. The chart summarizes the minimum wage ordinances that currently exist in twenty-three California cities and projects their scheduled wage increases through 2022. Additionally, the chart also outlines the California state minimum wage schedule as adopted in 2016. The state minimum wage is currently set at \$11.00 for 2018 and increases to \$15.00 by 2022.

If Measure L is adopted, by 2022, based on data available to city staff at this point in time, affected Anaheim employers would have the highest minimum wage in the state, higher than cities like Los Angeles, San Francisco, San Jose, San Diego Oakland, and every other city that has a voter approved minimum wage that exceeds the state's requirement.

The data indicates that most of the cities with wage ordinances have established a schedule with the intent to reach a \$15.00 an hour wage within the next few years. Once that target is met, most all of the cities then tie any future increases above \$15.00 to the rate of annual inflation utilizing the Consumer Price Index (CPI). As the chart shows, Anaheim's minimum wage increase per Measure L in 2019 would be somewhat commensurate with a handful of other cities at \$15.00. However, beginning in 2020 and thereafter, Anaheim's wage increase would likely outpace all others that are tied to typically more modest CPI adjustments. Over the past ten years, the CPI rate has ranged from a low of -.4% in 2009 to a high of 3.8% in 2008, with the CPI for 2017 at 2.1%. It is also important to note that Measure L will potentially be limited to a subsection of Anaheim businesses, whereas these other minimum wage ordinances across the state are more comprehensive in their application to all businesses, with certain exceptions for small business.

IMPACT ON THE BUDGET:

The receipt and filing of this report will have no impact on the budget.

Respectfully submitted,

Robert Fabela
City Attorney

³ It should be noted that there may be an expectation that the City would defend the Measure if challenged, but it is not required if Council directs the City Attorney not to do so. In many instances where a public entity chooses not to defend a measure or proposition that has won voter approval, a "real party in interest" would intervene to defend the lawsuit on the City's behalf.

⁴ Prepared by the Office of the City Manager.

Attachments:

1. Measure L
2. Impartial Analysis of Measure L
3. Description of Disney Credit Enhancement Arrangement
4. Minimum Wage Comparison