

RECEIVED

Agenda Date: 3/4/2021
Council Meeting

2021 MAR -3 P 1:50

CITY OF FRESNO
CITY CLERK'S OFFICE

FRESNO CITY COUNCIL



Information Packet

ITEM(S)

File ID 21-335 (1-W)

BILL - (for introduction and adoption) an emergency ordinance adding Section 2-517 to the Fresno Municipal Code related to grocery store employee hazard pay. (Requires five affirmative votes)

Contents of Supplement: Comment Letters.

Item(s)

Supplemental Information:

Any agenda related public documents received and distributed to a majority of the City Council after the Agenda Packet is printed are included in Supplemental Packets. Supplemental Packets are produced as needed. The Supplemental Packet is available for public inspection in the City Clerk's Office, 2600 Fresno Street, during normal business hours (main location pursuant to the Brown Act, G.C. 54957.5(2)). In addition, Supplemental Packets are available for public review at the City Council meeting in the City Council Chambers, 2600 Fresno Street. Supplemental Packets are also available on-line on the City Clerk's website.

Americans with Disabilities Act (ADA):

The meeting room is accessible to the physically disabled, and the services of a translator can be made available. Requests for additional accommodations for the disabled, sign language interpreters, assistive listening devices, or translators should be made one week prior to the meeting. Please call City Clerk's Office at 621-7650. Please keep the doorways, aisles and wheelchair seating areas open and accessible. If you need assistance with seating because of a disability, please see Security.

March 3, 2021

The Honorable Luis Chavez
Council President, City of Fresno
2600 Fresno Street
Fresno, CA 93721



RE: Grocery Worker Pay

Dear President Chavez,

On behalf of Fresno grocers, I write to ask the Council to not move forward with the proposed grocery worker premium pay ordinance given the numerous negative consequences to grocery workers, neighborhoods and the grocery industry. Based on the consequences experienced in other jurisdictions with similar ordinances, we must oppose the ordinance for both policy and legal reasons.

We agree that grocery workers serve a vital and essential role during the pandemic. They have worked tirelessly to keep stores open for consumers, allowing our communities to have uninterrupted access to food and medications. To protect our employees, grocery stores were among the first to implement numerous safety protocols, including providing PPE and masks, performing wellness checks, enhancing sanitation and cleaning, limiting store capacity, and instituting social distance requirements, among other actions.

On top of increased safety measures, grocery employees have also received unprecedented amounts of supplemental paid leave to care for themselves and their families in addition to already existing leave benefits. Grocers have also provided employees additional pay and benefits throughout the pandemic in various forms, including hourly and bonus pay, along with significant discounts and complimentary groceries. All of these safety efforts and additional benefits clearly demonstrate grocers' dedication and appreciation for their employees. Most importantly the industry has been a fierce advocate for grocery workers to be prioritized for vaccinations. This is evident now that your County is now considering grocery workers a priority and they are currently receiving the vaccine.

Unfortunately, the Grocery Worker Premium Pay ordinance would mandate grocery stores provide additional pay beyond what is economically feasible, which would severely impact store viability and result in increased prices for groceries, limited operating hours, reduced hours for workers, fewer workers per store, and most concerning, possible store closures. These negative impacts from the ordinance would be felt most acutely by independent grocers, ethnic format stores, and stores serving low-income neighborhoods. The Cities of Long Beach and Seattle, who have passed a similar ordinance, have already suffered the permanent loss of several full-service grocery stores as a direct result.

We request the City of Fresno perform an economic impact report to understand the true impacts of this policy. If you choose not to understand specific impacts for Fresno, then we refer you to the economic impact report from the City of Los Angeles Legislative Analyst Office. This report makes it clear that the impact of this policy will severely impact workers, consumers, and grocery stores. These impacts are still significant at the proposed \$3 per hour rate.

In its own words the Los Angeles City Legislative Analyst clearly states that grocery "companies would be required to take action to reduce costs or increase revenue as the labor increase will eliminate all current profit margin." The report recognizes that "affected companies could raise prices to counteract the additional wage cost." This type of ordinance would put "more pressure on struggling stores (especially independent grocers) which could lead to store closures" and that "the closure of stores could lead to an increase in 'food deserts' that lack access to fresh groceries." These are all scenarios we know everyone in the city wants to avoid, especially during a pandemic. This is why we are asking the Council to not move forward with this policy and, instead, focus on making sure all grocery workers are provided the vaccine.

March 3, 2021
PAGE 2



Specific to ordinance language, there are numerous policy and legal issues which unnecessarily single out the grocery industry and create significant burdens. The ordinance fails to recognize the current efforts grocers are making to support their employees and requires grocers add significant costs on to existing employee benefit programs.

Furthermore, passing this ordinance improperly inserts the city into employee-employer contractual relationships. The ordinance also ignores other essential workers, including city employees, that have similar interaction with the public. Taken in whole, this ordinance is clearly intended to impact only specific stores within a single industry and fails to recognize the contributions of all essential workers. Based on language specifics, this ordinance misses a genuine effort to promote the health, safety and welfare of the public.

Emergency passage of the ordinance also ignores any reasonable effort for compliance by impacted stores, as several grocery stores will be operating at the time of passage. By implementing the ordinance immediately there is literally no time to communicate to employees, post notices, adjust payroll processes, and other necessary steps as required by California law. Coupled with the varied enforcement mechanisms and significant remedies outlined, the passage of this ordinance would put stores into immediate jeopardy. This scenario is yet another negative consequence resulting from the lack of outreach to grocers and the grocery industry to understand real world impacts.

Grocery workers have demonstrated exemplary effort to keep grocery stores open for Fresno. This why the grocery industry has provided significant safety measures and historic levels of benefits that include additional pay and bonuses. It is also why vaccinating grocery workers has been our first priority. Unfortunately, this ordinance is a significant overreach of policy and jurisdictional control. This will result in negative consequences for workers and consumers that will only be compounded by the pandemic.

We respectfully implore the Council to not move forward with the grocery worker pay ordinance at this time. We encourage you to recognize and understand the impacts of this ordinance on workers and the community by accepting our invitation to work cooperatively with Fresno grocers. If Council must bring the ordinance forward for a vote at this time we ask you to oppose its passage. CGA is submitting additional information from our legal counsel for your consideration.

Thank you for your consideration and we look forward to being able to combat the pandemic in partnership with the City of Fresno.

Sincerely,



Timothy James
California Grocers Association

CC: Members, Fresno City Council
City Clerk, City of Fresno

March 1, 2021

Writer's Direct Contact
+1 (415) 268.6358
WTarantino@mofo.com**Via Email**The Honorable Luis Chavez
Office of the City Council
2600 Fresno Street
Room 2097
Fresno, California 93721

Re: Grocery Store Employee Hazard Premium Pay Ordinance

Dear Council Members:

We write on behalf of our client, the California Grocers Association (the "CGA"), regarding the proposed Premium Pay for Designated Retail Employees Ordinance (the "Ordinance") that singles out a specific group of grocery stores (i.e., those companies with 300+ employees nationally) and requires them to implement mandatory pay increases. The City Council's rushed consideration of this Ordinance would, if passed, lead to the enactment of an unlawful, interest-group driven ordinance that ignores large groups of essential retail workers. It will compel employers to spend less on worker and public health protections in order to avoid losses that could lead to closures. In addition, the Ordinance, in its proposed form, interferes with the collective-bargaining process protected by the National Labor Relations Act (the "NLRA"), and unduly targets certain grocers in violation of their constitutional equal protection rights. We respectfully request that the City Council reject the Ordinance as these defects are incurable.

The Ordinance fails to address any issue affecting frontline workers' health and safety.

The purported purpose of the Ordinance is to "protect and promote the public health, safety, and welfare" during the Covid-19 pandemic. (§ 2-517(a).) The Ordinance is devoid of any requirements related to the health and safety of frontline workers or the general public and instead imposes costly burdens on certain grocers by requiring them to provide an additional Three Dollars (\$3.00) per hour wage bonus ("Hazard Premium Pay"). (§ 30-805(A).) A wage increase does not play any role in mitigating the risks of exposure to COVID-19, nor is there any suggestion that there is any risk of interruption to the food supply absent an increase in wages. If anything, the Ordinance could increase those risks, as it may divert funds that otherwise would have been available for grocers to continue their investments in public health measures recognized to be effective: enhancing sanitation and cleaning

Hon. Luis Chavez
March 1, 2021
Page Two

protocols, limiting store capacity, expanding online orders and curbside pickup service, and increasing spacing and social distancing requirements.

The Ordinance also inexplicably chooses winners and losers among frontline workers in mandating Hazard Premium Pay. The Ordinance defines “grocery store” as a store that “employs 300 or more employees nationwide regardless of where those employees are employed.” (§ 2-517(b)(3)(i).) Other retail and health care workers are ignored, despite the fact that those same workers have been reporting to work since March. The Ordinance grants Hazard Premium Pay for select employees while ignoring frontline employees of other generic retailers and other frontline workers in Fresno that face identical, if not greater, risks.

The Ordinance is unlawful. By mandating Hazard Premium Pay, the Ordinance would improperly insert the City of Fresno into the middle of the collective bargaining process protected by the National Labor Relations Act. The Ordinance suggests that the certain grocery workers require this “relief” on an emergency basis, as “this ordinance is declared to be necessary as an emergency measure for preserving the public peace, health, or safety.” (§ 2.) Fresno employers and workers in many industries have been faced with these issues since March 2020. Grocers have continued to operate, providing food and household items to protect public health and safety. In light of the widespread decrease in economic activity, there is also no reason to believe that grocery workers are at any particular risk of leaving their jobs, but even if there were such a risk, grocers would have every incentive to increase the workers’ compensation or otherwise bargain with them to improve retention. The Ordinance would interfere with this process that Congress intended to be left to be controlled by the free-play of economic forces. *Machinists v. Wisconsin Employment Relations Comm’n*, 427 U.S. 132 (1976). Such ordinances have been found to be preempted by the NLRA.

For example, in *Chamber of Commerce of U.S. v. Bragdon*, the Ninth Circuit Court of Appeals held as preempted an ordinance mandating employers to pay a predetermined wage scale to employees on certain private industrial construction projects. 64 F.3d 497 (9th Cir. 1995). The ordinance’s purported goals included “promot[ing] safety and higher quality of construction in large industrial projects” and “maintain[ing] and improv[ing] the standard of living of construction workers, and thereby improv[ing] the economy as a whole.” *Id.* at 503. The Ninth Circuit recognized that this ordinance “differ[ed] from the [a locality’s] usual exercise of police power, which normally seeks to assure that a minimum wage is paid to all employees within the county to avoid unduly imposing on public services such as welfare or health services.” *Id.* at 503. Instead, the ordinance was an “economic weapon” meant to influence the terms of the employers’ and their workers’ contract. *Id.* at 501-04. The Ninth Circuit explained that the ordinance would “redirect efforts of employees not to bargain with employers, but instead, to seek to set specialized minimum wage and benefit

Hon. Luis Chavez
 March 1, 2021
 Page Three

packages with political bodies,” thereby substituting a “free-play of economic forces that was intended by the NLRA” with a “free-play of political forces.” *Id.* at 504.

The same is true of this Ordinance. While the City has the power to enact ordinances to further the health and safety of its citizens, it is prohibited from interfering directly in employers’ and their employees’ bargaining process by arbitrarily forcing certain grocers to provide Hazard Premium Pay that is both unrelated to minimum labor standards, or the health and safety of the workers and the general public. While minimum labor standards that provide a mere backdrop for collective bargaining are consistent with the NLRA, local laws such as this Ordinance which effectively dictate the outcome of the collective bargaining process are preempted. The Ordinance here imposes unusually strict terms on a narrow band of businesses without any allowance for further bargaining. By enacting an ordinance such as this, the City would end any negotiations by rewriting contracts.

The Ordinance also violates the U.S. Constitution and California Constitution’s Equal Protection Clauses (the “Equal Protection Clauses”). The Equal Protection Clauses provide for “equal protections of the laws.” U.S. Const. amend. XIV, § 1; Cal. Const. art I, § 7(a). This guarantee is “essentially a direction that all persons similarly situated should be treated alike” and “secure[s] every person within the State’s jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.” *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985); *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). No law may draw classifications that do not “rationally further a legitimate state interest.” *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). By requiring that any classification “bear a rational relationship to an independent and legitimate legislative end, [courts] ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by law.” *Romer v. Evans*, 517 U.S. 620, 633 (1996).

As discussed above, the Ordinance here unfairly targets traditional grocery companies and arbitrarily subjects certain 300-employee grocers to the Hazard Premium Pay mandate while sparing other generic retailers who also employ frontline workers. *See Fowler Packing Co., Inc. v. Lanier*, 844 F.3d 809, 815 (9th Cir. 2016) (“[L]egislatures may not draw lines for the purpose of arbitrarily excluding individuals,” even to “protect” those favored groups’ “expectations.”); *Hays v. Wood*, 25 Cal. 3d 772, 786-87 (1979) (“[N]othing opens the door to arbitrary action so effectively as to allow [state] officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.”).

As an ordinance that impinges on fundamental rights to be free of legislative impairment of existing contractual agreements, this ordinance would be subject to heightened scrutiny by courts. *See, e.g., Plyler v. Doe*, 457 U.S. 202, 216 (1982); *Hydrick v. Hunter*, 449 F.3d 978, 1002 (9th Cir. 2006); *Long Beach City Employees Ass’n v. City of Long Beach*, 41 Cal.3d

Hon. Luis Chavez
March 1, 2021
Page Four

937, 948 (1986). The City's unilateral modification of contractual terms governing wages and hours of grocery employees goes to the very heart of bargained-for agreements—it modifies contractual terms and as such impinges on a fundamental right. Regardless, absent from the Ordinance is any requirement that would actually address its stated purpose of promoting the public's health and safety. Paying grocery workers this Hazard Premium Pay will not protect anyone from contracting coronavirus. Put simply, there is a disconnect between the Ordinance's reach and its stated purpose, making it unlawful and violating the equal protection rights of CGA's members.

CGA disagrees with the Council's characterization of the Ordinance as an "emergency measure." There is nothing in the Ordinance that is required for immediate preservation of public peace, health, or safety. (§ 2.) Even if an emergency measure passes, there is no requirement that an emergency measure become effective immediately on passage. As this Council has done many times before, an emergency measure can become effective at a set date in the future.

Finally, in light of emerging vaccination programs for essential workers, stores' increasing ability to protect patrons and workers from infection using distancing, curbside pickup, and other measures, we strongly encourage the City to set an alternate deadline for expiration of the hazard premium pay ordinance (i.e., 90 days) so that it can be revisited by the Council in light of the rapidly changing pandemic conditions.

For all of the reasons discussed above, we respectfully request that the City Council reject the Ordinance.

Sincerely,



William F. Tarantino

cc: Fresno City Council
Nelson Esparza
Esmeralda Z. Soria
Mike Karbassi
Miguel Arias
Tyler Maxwell
Garry Bredefeld

Dear Fresno City Council Members:

We strongly oppose the proposed extra pay ordinance and urge you to vote no on the proposal before you today. There are too many unintended consequences including higher grocery prices for consumers and possible store closures leaving workers without jobs.

Local grocery stores are committed to paying competitive wages and benefits to their employees. Since the start of the COVID-19 pandemic, **grocers have invested significantly in infrastructure and enhanced safety protocols to protect frontline essential workers and shoppers, as well as to provide incentive pay, bonuses and additional health benefits for grocery workers.**

The City of Fresno's proposed emergency pay mandates ignore this commitment and ongoing efforts, and would have significant, negative impacts at the worst possible time.

The proposed \$3/hour increase in grocery worker pay would substantially increase the cost of food and groceries for our region's residents and families by an estimated \$240 per year for a family of four. Higher grocery costs would hurt Californians at a time they are already struggling to put food on the table – and would be especially harmful to low-income, people of color and disadvantaged communities.

According to a recent [Public Policy Institute of California survey](#), 33% of Californians earning less than \$40,000 per year have had trouble paying some kind of bill as a result of COVID-19. Forty-two percent (42%) of these low-income residents report cutting back on food. Increasing the cost of groceries and other essentials would only compound these already-concerning statistics.

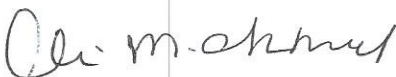
In addition, extra pay mandates could make it more difficult for many grocers to stay afloat, especially independent grocers, small markets, ethnic grocers and grocery stores in disadvantaged communities already struggling to keep their doors open. A study by the California Grocers Association estimates the \$3/hour increase would result in labor costs rising by approximately 17%, and if grocers were forced to find offsetting savings in operational costs, it could mean across-the-board reduction in work hours, hurting the very workers these proposals aim to help.

Recklessly advancing these ordinances that could lead to grocery stores shutting down will result in increased food insecurity and food deserts, especially in low-income and disadvantaged neighborhoods.

These ordinances are rushed and not adequately researched. We urge the Fresno City Council to pause the vote on any local extra pay ordinance until you complete a full analysis of the costs, impacts on local families and our community, and input from local businesses.

Extra pay mandates will not make grocery workers any safer.

Sincerely,



Dear Fresno City Council Members:

We strongly oppose the proposed extra pay ordinance and urge you to vote no on the proposal before you today. There are too many unintended consequences including higher grocery prices for consumers and possible store closures leaving workers without jobs.

Local grocery stores are committed to paying competitive wages and benefits to their employees. Since the start of the COVID-19 pandemic, **grocers have invested significantly in infrastructure and enhanced safety protocols to protect frontline essential workers and shoppers, as well as to provide incentive pay, bonuses and additional health benefits for grocery workers.**

The City of Fresno's proposed emergency pay mandates ignore this commitment and ongoing efforts, and would have significant, negative impacts at the worst possible time.

The proposed \$3/hour increase in grocery worker pay would substantially increase the cost of food and groceries for our region's residents and families by an estimated \$240 per year for a family of four. Higher grocery costs would hurt Californians at a time they are already struggling to put food on the table – and would be especially harmful to low-income, people of color and disadvantaged communities.

According to a recent [Public Policy Institute of California survey](#), 33% of Californians earning less than \$40,000 per year have had trouble paying some kind of bill as a result of COVID-19. Forty-two percent (42%) of these low-income residents report cutting back on food. Increasing the cost of groceries and other essentials would only compound these already-concerning statistics.

In addition, extra pay mandates could make it more difficult for many grocers to stay afloat, especially independent grocers, small markets, ethnic grocers and grocery stores in disadvantaged communities already struggling to keep their doors open. A study by the California Grocers Association estimates the \$3/hour increase would result in labor costs rising by approximately 17%, and if grocers were forced to find offsetting savings in operational costs, it could mean across-the-board reduction in work hours, hurting the very workers these proposals aim to help.

Recklessly advancing these ordinances that could lead to grocery stores shutting down will result in increased food insecurity and food deserts, especially in low-income and disadvantaged neighborhoods.

These ordinances are rushed and not adequately researched. We urge the Fresno City Council to pause the vote on any local extra pay ordinance until you complete a full analysis of the costs, impacts on local families and our community, and input from local businesses.

Extra pay mandates will not make grocery workers any safer.

Sincerely,

Aussien Ahmed

My name is Stephanie Vazquez

As a single mom and not working because of the virus. Any increase in my grocery bill will hurt. There are 1000's like me

Please vote no.

Stephanie Vasquez