City's Responses to Comments Received During the Public Comment Period Regarding the Proposed Regulations Interpreting the Oakland Hotel Minimum Wage and Working Conditions Law (Oakland Municipal Code Section 5.93 et seq.

During the public comment period, from October 16, 2019 to November 30, 2019, the City received many comments from members of the public regarding the proposed interpretive regulations for the Oakland Minimum Wage and Working Conditions Law. The City sincerely thanks everyone for their thoughtful and constructive participation in the process.

All but one employee who commented on the proposed interpretive regulations fully supported the proposed interpretive regulations as drafted. Hotel owners and management and their representatives, and the California Hotel and Lodging Associated submitted multiple comments expressing concerns regarding various sections of the proposed interpretive regulations. The City considered all comments carefully. We have summarized the comments along with the City's responses below.

1. Definitions (OMC Section 5.93.010; Interpretive Regulation (IR) Section I).

Hotel Employer comment: The interpretive regulations should exclude restaurants from the law's coverage. Restaurant profit margins are only 3% on average. The measure increases labor costs by 40%. It is unfair that a restaurant across the street from a hotel restaurant does not have to comply but a hotel restaurant does. To date, since the passage of Measure Z at least one hotel restaurant has closed and more will follow. It is unfair that a Buttercup restaurant attached to a hotel must comply while a Buttercup restaurant not attached to a hotel need not comply. Independent restaurants will stop opening in hotels.

City Response: The City will not change the proposed regulation. The Ordinance defines Hotel as including "any contracted, leased, or sublet premises connected to or operated in conjunction with the building's purpose, or providing services at the building." This definition clearly include restaurants meeting the criteria.

Hotel Employer comment: Clarify that Additional-Bed Rooms (ABRs) do not include rooms with more than one permanent bed that do not also have an additional bed such as a cot or rollaway.

City Response: We have added clarifying language to IR Section I.

Hotel Employer comment: Clarify that the mere existence of a permanent sofa bed in a guest room does not convert that guest room into an ABR.

City Response: The City agrees in part. We have added language to IR Section I to clarify that the mere existence of a permanent sofa bed in a guest room does not by itself convert the guest room into an ABR unless the guest(s) opens the sofa and uses it as a bed.

2. Panic button requirements of OMC Section 5.93.020 (IR Section II(A)) .

Hotel Employer Comment: Requiring panic buttons to alert the responder to the precise location of the employee in distress exceeds the City's statutory authority. The City should accept a panic button that only sounds an alarm.

City Response: The City will not change the proposed regulation. The Ordinance provides a panic button must alert someone who is responsible for providing "immediate assistance." A responder cannot provide immediate assistance if they do not know the location of the employee.

Hotel Employer Comment: IR Section II(A)(2), which states panic buttons must work in every area of the hotel where an employee or assailant may be present, exceeds statutory authority because OMC Section 5.93.020(B) states only that panic buttons must be provided to employees assigned to work in a guest room or bathroom without other employees present.

City Response: The City agrees with the comment and has made the appropriate change at IR Section II(A)(2)(c). However, the City will propose an amendment to the Ordinance that will expand the reach of the panic button provision to require that panic buttons be operational in all areas in which a Hotel Employer may assign a Hotel Employee to work without other Hotel Employees present. Therefore, notwithstanding the current language of the regulation, the City recommends that Hotel Employers ensure their panic button systems are operational in all areas in which they may assign Hotel Employees to work without other Hotel Employees present.

Hotel Employer Comment: IR Section II(A)(4) prohibits employers from charging employees for lost or damaged panic buttons. Hotel Employers should be allowed to charge employees for lost or damaged panic buttons.

City Response: The City will not change the proposed regulation. The statute places the burden of providing panic buttons squarely on Hotel Employers.

Hotel Employer comment: Installation of a compliant system will require investment of significant resources and time to get system in place. The panic button provision in the Ordinance is vague and without the interpretive regulations failed to provide clarity regarding its specific requirements. Therefore, the City should provide a grace period for compliance.

City Response: The Ordinance, including the panic button requirement, has been in effect for some time and therefore the City cannot grant a grace period.

3. Right to reassignment/presumption of reasonableness (OMC Section 5.93.020; IR Section II(B)(1)(a)).

Hotel Employer Comment: The City exceeds statutory authority with IR Section II(B)(1)(a), which provides it shall be presumed an employee's belief his/her safety is at risk is reasonable unless the employer can prove otherwise by clear and convincing evidence.

City Response: The City agrees with the comment and has made the appropriate change to IR Section II(B)(1)(a).

4. Paid time off and counselor or advisor of the employee's choosing (OMC Section 5.93.020(b)(2); IR Section II(B)(2)).

Hotel Employer comment: IR Section II(B)(2)(d), which prohibits an employer from deducting sick, vacation or any other accrued or prospective leave for providing paid time off, exceeds statutory authority.

City Response: The City will not change the proposed regulation. The Ordinance requires Hotel Employers to allow an affected employee "sufficient paid time to contact the police and provide a statement…" OMC Section 5.93.020(C)(2). The regulation is consistent with the Ordinance, which does not require employees to use other types of leave such as vacation or sick leave.

Hotel Employer comment: A counselor or advisor should not include family and friends and instead must be a professional counselor or lawyer.

City Response: The City will not change the proposed regulation. The Ordinance clearly requires Hotel Employers to allow Hotel Employees who brings to the Hotel Employer's attention the occurrence of violence or threatening behavior sufficient paid time to "consult with a counselor or advisor of the hotel employee's choosing." The Ordinance does not contain any limitation regarding who may serve as a counselor or advisor.

5. Pro-Rata adjustments of the number of Checkout (CO) and ABR rooms (OMC Section 5.93.030; IR Section III(A)(2), III(A)(3), Section III(A)(4)(b) and(c)).

Hotel Employer comment: The Ordinance provides that for shifts of fewer than eight hours, the "maximum floor space" is reduced on a pro-rata basis. OMC Section 5.93.030(B). The Ordinance does not similarly provide for a prorated reduction in the number of allowable COs/ABRs cleaned when the workday is reduced below eight hours or when the square footage to be cleaned is increased. Therefore, the provisions in the proposed interpretive regulations providing for the number of COs/ABRs to be reduced proportionately when the workday is shortened below 8 hours or when the area to be cleaned increases exceed the authority of the Ordinance.

City Response: The City agrees with the comment and has made the appropriate changes to IR Sections III(A)(2), III(A)(3) and III(A)(4)(b), and has deleted IR Section III(A)(4)(c).

Hotel Employer comment: For clarification, amend IR Section III(A)(2) to say "and/or" instead of "or" in the first sentence.

City Response: We have made the requested change.

Hotel Employer comment: Clarify that a single room that is both a CO and ABR should be counted only once for purposes of determining the number of COs and ABRs a room cleaner cleans.

City Response: We have added clarifying language to IR Section III(A)(3).

6. Maximum square footage limitations before double time is due (OMC Section 5.93.030; IR Section III).

Hotel Employer comment: The 4,000 square foot limitation for an 8-hour shift is too low as evidenced by the fact that unions representing hotel workers are negotiating for higher limitations.

City Response: The City will not change the proposed regulation. The statute clearly provides for a limit of 4,000 square feet in an 8-hour workday before double time is owed.

7. Requirement to document each room cleaner's specific assignment prior to the start of each shift (OMC Section 5.93.030; IR Section III(A)(5)).

Hotel Employer comment: Interpretive Regulation III(A)(5), which requires Hotel Employers to document prior to the start of the shift of the number of hours each room cleaner is assigned to room-cleaning, the number of rooms to be cleaned, and the number of rooms that are COs/ABRs, is impractical, administratively burdensome, and exceeds the authority of the Ordinance. Management must adjust work assignments throughout the shift to adapt to changing circumstances. For instance, guests may leave early, or a guest may put a do not disturb sign on the door, or take the do not disturb sign off at 4:00 and expect the room to be cleaned, so the work is unpredictable. Additionally, the record-keeping requirements are vague and therefore it will be difficult later to explain what happened.

City Response: We have deleted the requirement that Hotel Employers complete the above-referenced documentation prior to the start of the shift. This change will enable Hotel Employers additional time during the shift to make adjustments as needed. Note also there is nothing to prevent Hotel Employers from keeping more comprehensive records than currently required under the Ordinance and IRs.

8. Determining the sufficiency of health benefits (OMC Section 5.93.040(B); IR Section IV(B)).

Hotel Employer comment: The procedure provided in IR Section IV(B) for "truing up" payments to employees where the average hourly amounts paid for health benefits were insufficient is confusing and will make compliance impossible.

City Response: We have changed the language of IR Section IV(B) to clarify that Hotel Employers should perform the computation relative to the previous month and not the previous three months.

9. Health Insurance waiting periods (OMC Section 5.93.040; IR Section IV(C)).

Hotel Employer comment: The proposed regulation, which requires Hotel Employers to pay the higher minimum hourly rate until an employee becomes eligible for health insurance, exceeds the City's statutory authority. Once an employee begins receiving the higher wage, the employee will be reluctant to opt for insurance. Requiring the higher minimum wage rate is unfair because insurance companies impose the waiting periods--not the employers.

City Response: The City will not change the proposed regulation. The Ordinance requires Hotel Employers to pay the higher minimum wage rate if they are not providing health benefits. During a waiting period, Hotel Employees are not being provided health benefits and therefore, Hotel employers must pay the higher minimum wage rate. Paying the higher minimum wage rate during waiting periods furthers the law's purpose of increasing wages for hotel workers.

10. Requirement when a Hotel Employee declines an employer's offer of health insurance (OMC Section 5.93.040 (Hotel Minimum Wage, Interpretive Regulation (IR) Section IV(D)).

Hotel Employer Comment: The proposed regulation, which provides that if a Hotel Employee declines a Hotel Employer's offer of health insurance the employer must pay the higher minimum wage rate, exceeds the City's statutory authority. The City should interpret OMC Section 5.93.040 to mean that once a Hotel Employer has offered health insurance to a Hotel Employee, the Hotel Employer may pay the Hotel Employee the lower hourly minimum wage, even if the Hotel Employer declines coverage.

The proposed regulation runs counter to one of the goals of the law--to encourage Hotel Employers to provide health insurance to workers. The law does not require that it be the employee's choice whether to take health insurance or the higher hourly wage.

The proposed interpretive regulation as drafted would result in Hotel Employers being unable to secure health insurance for workers. Most health insurers require that 75% of workers participate in the plan in order to offer a plan to the business. If given a choice, the vast majority of healthy hotel workers will forego health insurance in favor of a higher hourly rate, meaning it will be difficult or impossible for Hotel Employers to obtain health insurance for the employees who want it.

City Response: The City will not change the proposed regulation. Similar issues were litigated in *California Hotels and Lodging Association v. City of Oakland*, Case No. 19-cv-01232-WHO (D. Ca. June 26, 2019). The court rejected the Association's arguments and the Association chose not to appeal the decision.

At its core, the Ordinance is a minimum wage law. It does not require Hotel Employers to purchase insurance. The requirement that if employees decline coverage the employer must pay the higher hourly rate is consistent with the language of the City's Living Wage Ordinance (OMC Chapter 2.28) and the manner in which the City has interpreted and applied that law for many years. The interpretive regulation reflects the legal requirements of the Hotel Worker Minimum Wage and Working Conditions Law as passed by the voters.

11. Part-Time Hotel Employees (OMC Section 5.93.040; IR Section IV(E)).

IR Section IV(E) provides that the Ordinance, including 5.93.040, applies equally to part time employees who meet the definition of Hotel Employee.

Hotel Employer Comment: Most health plans impose minimum hourly requirements for providing health insurance and may also be impacted by law. The issue is outside of employers' control and therefore the City should delete this provision from the regulations.

City Response: The City will not change the proposed regulation. The Ordinance does not exclude part time employees from coverage.

12. Minimum wage increases pursuant to Consumer Price Index (CPI) data (OMC Section 5.93.040(C); IR Section IV(F)(2)).

Hotel Employer Comment: If there is a decrease in the CPI the minimum wage should be decreased.

City Response: The City will not change the proposed regulation. OMC Section 5.93.040(C) provides that the wage rates set forth in that Section shall be adjusted for inflation annually "in the manner set forth in Section 5.92.020(B)" (City of Oakland Minimum Wage and Sick Leave Law). The regulation interpreting Section 5.92.020(B) provides "[i]f there is a decrease in the CPI, the minimum wage will remain the same and shall not decrease."

13. Preservation of Records (OMC Section 5.93.050; IR Section V(A)(1)(c)).

Hotel Employer Comment: The interpretive regulations, which requires Hotel Employers to keep certain specified records when assigning a room cleaner to non-cleaning duties, exceeds the City's authority.

City Response: The City agrees. We have deleted IR Section V(A)(1)(c).

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