David Whitaker, Esq.
Director
Irvin Corley, Jr.
Executive Policy Manager
Marcell R. Todd, Jr.
Senior City Planner
Janese Chapman
Deputy Director

LaKisha Barclift, Esq.
M. Rory Bolger, Ph.D., AICP
Elizabeth Cabot, Esq.
Tasha Cowen
Richard Drumb
George Etheridge
Deborah Goldstein

City of Detroit
CITY COUNCIL
LEGISLATIVE POLICY DIVISION
208 Coleman A. Young Municipal Center
Detroit, Michigan 48226
Phone: (313) 224-4946 Fax: (313) 224-4336

Christopher Gulock, AICP
Derrick Headd
Marcel Hurt, Esq.
Kimani Jeffrey
Anne Marie Langan
Jamie Murphy
Kim Newby
Analine Powers, Ph.D.
Jennifer Reinhardt
Sabrina Shockley
Thomas Stephens, Esq.
David Teeter
Theresa Thomas
Kathryn Lynch Underwood

TO: The Honorable Detroit City Council

FROM: David Whitaker, Director
Legislative Policy Division (LPD) Staff

DATE: November 2, 2018

RE: PA 84 of 2018, amending the "Local Government Labor Regulatory Limitation Act"

On October 8, 2018, Council Member Ayers requested that the Legislative Policy Division (LPD) provide an opinion on legislation recently signed into law by Governor Snyder, amending the "Local Government Labor Regulatory Limitation Act", Public Act 84 of 2018.

The text of PA 84 is attached. On its face, it prohibits local governments in Michigan from legislating so as to regulate information that an employer or potential employer "must request, require or exclude on an application for employment or during the interview process from an employee or potential employee." If this amendment applied to the existing Detroit "Ban the Box Ordinance" (Sections 18-5-81 through 18-5-86 of the City Code for City contractors, and Secs. 13-1-11 through 13-1-14 for prospective City employees), it would bar such a local ordinance prohibiting questions about criminal history on employment application forms, and allowing such questions only during actual job interviews.

However, the compiler's note to PA 84 further states that "This Act applies to ordinance, local policies, and local resolutions **adopted after December 31, 2014.**" (emphasis added) Detroit's Ban the Box ordinances were adopted in November 2011, and may therefore be grandfathered in and not barred by the prospective preemption of local employment application procedures enacted by PA 84 of 2018.

The statutory compiler's note goes on – using 'on-the-one-hand, on-the-other-hand' language that seems somewhat unusual compared to most similar clarifying statements, that it neither authorizes nor invalidates any such pre-existing statutes or any litigation challenges to them.[1] The framers of this preemption legislation apparently believe there are other rules of state law that might be used to undermine local authority, even before passage of the preemption statute.

PA 84 of 2018, like PA 105 of 2015, which it amends, states the current Michigan State Legislature's strong preemption policy against local governments regulating any aspects of employment relationships. (See, e.g., LPD's previous report on this legislation, dated July 13, 2015, HB 4052, the "Local Government Labor Regulatory Limitation Act", attached) However, presumably in order to obtain support within the legislature, this prohibition was made prospective only, and on its face states that it does not apply to preexisting ordinances.

The potential impact of such state preemption legislation restricting local government authority is of course not limited to either "Ban the Box" ordinances or employment relationships more generally. The Michigan Municipal League has stated that "Preemption may be among the most important policy issues facing local governments." The National League of Cities has issued a report, updated in 2018, tracking such state preemption legislation state-by-state. In the event that control of the Michigan State Legislature changes after November 6, 2018, consideration should be given to repealing such preemption statutes.

If Council has any other questions or concerns regarding this subject, LPD will be happy to provide further research and analysis upon request.

---

[1] "Nothing in this act shall be considered as an explicit or implicit authorization or recognition of the validity of any ordinance, local policy, or local resolution adopted before January 1, 2015. Nothing in this act authorizes a local governmental body to adopt an ordinance, local policy, or local resolution regulating the employment relationship as to matters described in this act, and nothing in this act shall be construed as an express or implied recognition of any such authority that may or may not exist elsewhere in state law. Whether a local governmental body had the authority, before January 1, 2015, to adopt an ordinance, local policy, or local resolution regulating the employment relationship as to matters described in this act is a separate question that this act does not address. This act is not intended to be construed to impact the reasoning or outcome of pending litigation in any way, for or against any particular legal position."

LOCAL GOVERNMENT LABOR REGULATORY LIMITATION ACT (EXCERPT)
Act 105 of 2015

123.1384 Information employer must request, require, or exclude on employment application or during interview process; regulation by local governmental body prohibited.

Sec. 4. A local governmental body shall not adopt, enforce, or administer an ordinance, local policy, or local resolution regulating information an employer or potential employer must request, require, or exclude on an application for employment or during the interview process from an employee or a potential employee. This section does not prohibit an ordinance, local policy, or local resolution requiring a criminal background check for an employee or potential employee in connection with the receipt of a license or permit from a local governmental body.

History: 2015, Act 105, Imd. Eff. June 30, 2015;—Am. 2018, Act 84, Eff. June 24, 2018.

Compiler's note: Enacting section 1 of Act 105 of 2015 provides:

"Enacting section 1. This act applies to ordinances, local policies, and local resolutions adopted after December 31, 2014. Nothing in this act shall be considered as an explicit or implicit authorization or recognition of the validity of any ordinance, local policy, or local resolution adopted before January 1, 2015. Nothing in this act authorizes a local governmental body to adopt an ordinance, local policy, or local resolution regulating the employment relationship as to matters described in this act, and nothing in this act shall be construed as an express or implied recognition of any such authority that may or may not exist elsewhere in state law. Whether a local governmental body had the authority, before January 1, 2015, to adopt an ordinance, local policy, or local resolution regulating the employment relationship as to matters described in this act is a separate question that this act does not address. This act is not intended to be construed to impact the reasoning or outcome of pending litigation in any way, for or against any particular legal position."

David Whitaker, Esq.
Director
Irvin Corley, Jr.
Executive Policy Manager
Marcell R. Todd, Jr.
SeniorCity Planner

LaKisha Barclift, Esq.
M. Rory Bolger, PhD, AICP
Timothy Boscarino, AICP
Elizabeth Cabot, Esq.

City of Detroit
CITY COUNCIL
LEGISLATIVE POLICY DIVISION
208 Coleman A. Young Municipal Center
Detroit, Michigan 48226
Phone: (313) 224-4946 Fax: (313) 224-4336

TO: The Honorable Detroit City Council

FROM: David Whitaker, Director
Legislative Policy Division Staff

DATE: July 13, 2015

RE: HB 4052, the "Local Government Labor Regulatory Limitation Act"

As Council Members will probably be aware from extensive media reports, Governor Snyder recently signed legislation prohibiting new local ordinances that purport to require terms or conditions of private employment within municipalities that are better or different than those minimal standards established by state or federal laws, especially in connection with public contracts. LPD is providing this summary of the legislation, emphasizing a concise analysis of the extent to which it will likely be held to affect a Community Benefits Agreement Ordinance of the type previously proposed for the City of Detroit.[1]

HB 4052

The preamble to HB 4052 (attached) states that it is "AN ACT to limit the powers of local government bodies regarding the regulation of terms and conditions of employment within local government boundaries for employees of nonpublic employers." Sections 4 through 12 of the statute are the operative terms. They expressly state that "A local governmental body shall not adopt, enforce, or administer an ordinance, local policy, or local resolution" doing any of the following things:

[1] Council may recall passing the attached resolutions on January 30, 2015, and a second attached resolution proposed by Council Member Castañeda-López in opposition to previous versions of HB 4052. It was formerly called the "local government employer mandate prohibition act". Those versions of HB 4052 were the State Legislature's second and third attempts to pass such legislation, after its first introduction failed (HB 5977) during the lame duck session of December 2014.

- Regulating information an employer or potential employer must request, require, or exclude on an application for employment from an employee or a potential employee;[2]

- Requiring an employer to pay to an employee a wage higher than the state minimum hourly wage rate under the applicable state or federal law, whichever is lower;[3]

- Requiring an employer to pay to an employee a wage or fringe benefit based on wage and fringe benefit rates prevailing in the locality;[4]

- Regulating work stoppage or strike activity of employers and their employees or the means by which employees may organize;

- Requiring an employer to provide to an employee paid or unpaid leave time;

- Regulating hours and scheduling that an employer is required to provide to employees;[5]

- Requiring an employer or its employees to participate in any educational apprenticeship or apprenticeship training program that is not required by state or federal law;

- Requiring an employer to provide to an employee any specific fringe benefit or any other benefit for which the employer would incur an expense, including, but not limited to, those referenced above; or

- Regulating or creating administrative or judicial remedies for wage, hour, or benefit disputes, including, but not limited to, any benefits itemized above;

In a major concession that was reportedly critical to securing passage of the final version of the legislation, it was made prospectively applicable only. Section 16 of the statute states: "This act does not prohibit a local governmental body from enforcing a written agreement voluntarily entered into and in effect prior to October 1, 2015. … This act applies to ordinances, local

[2] This section does not prohibit an ordinance, local policy, or local resolution requiring a criminal background check for an employee or potential employee in connection with the receipt of a license or permit from a local governmental body.

[3] Although proponents falsely claim that this legislation was motivated by conformity and avoiding an alleged "patchwork" of different local employment standards, the actual terms of the statute on their face make it clear that it is in fact the lowest standards, rather than any common or consistent standards, that are adopted and required.

[4] This section does not apply to state projects subject to 1965 PA 166, MCL 408.551 to 408.558, providing for prevailing wages on state projects.

[5] This section does not prohibit an ordinance, local policy, or local resolution that limits the hours a business may operate.

policies, and local resolutions adopted after December 31, 2014. Nothing in this act shall be considered as an explicit or implicit authorization or recognition of the validity of any ordinance, local policy, or local resolution adopted before January 1, 2015." That is, it does not apply to pre-existing local ordinances already "on the books" of Michigan municipalities before the beginning of this calendar year. It prohibits such ordinances only in the future.

The statute also includes a few other exceptions to its prohibition of local legislation regarding the employment relationship. They are:

- The act does not prohibit a local governmental body from adopting or enforcing an ordinance, policy, or resolution prohibiting employment discrimination;

- Other than the specific terms and conditions expressly carved out from local authority as stated above, the act does not prohibit a local governmental body from adopting, enforcing, or administering an ordinance, local policy, or local resolution that provides for the terms and conditions of a voluntary agreement between an employer and the local governmental body in connection with the provision of services directly to the local governmental body or in connection with the receipt of a grant, tax abatement, or tax credit from the local governmental body.

In sum, HB 4052 carves out virtually all new, substantive requirements for terms and conditions of private employment from the universe of those things a Michigan municipality can legislate in any way, other than enforcing state or federal standards, and other standards voluntarily agreed to between parties to the employment relationship.[6]

Effects on Proposed Community Benefits Agreement Ordinance

A previous version of this legislation expressly barred local ordinances mandating community benefits agreements in connection with major publicly funded development projects. That language was removed from the final version that has now become law.[7] But in LPD's opinion

[6] Forceful and cogent reasons were put forward by many knowledgeable advocates of local government authority and power - including City Council's attached resolution in opposition to HB 4052 on January 30, 2015 – supporting local officials' authority to determine the most fitting and appropriate conditions for employment (among other contexts) within local communities, and especially in connection with public projects that create jobs and associated social and economic benefits in our communities. But those voices and reasons are not aligned with the philosophy or interests of the state legislative majority in Lansing or the current governor, and so this rather invasive legislation is now law.

[7] LPD believes there is an argument that can be made based on this legislative history, that HB 4052 would not invalidate any of the provisions of the proposed Community Benefits Agreement Ordinance, if the City were to enact it. The original legislation expressly prohibited such an ordinance at a time when it was widely known to be pending, but that provision was removed from the enacted statute. Therefore it is not intended to apply to the Community Benefits Agreement context, where the terms of the agreement are voluntary and voluntary agreements are not the target or subject matter of HB 4052. However, in LPD's opinion a more likely plausible reading (recognizing that predicting a given court's ruling in any specific case is inherently unreliable) would apply HB 4052 to invalidate any provisions of a Community Benefits Agreement Ordinance that specify or require any terms or conditions of private employment other than those required by state or federal laws..

HB 4052 could partially invalidate the following provisions of the latest version of the proposed Community Benefits Agreements Ordinance under consideration by Detroit City Council:

- Provisions requiring that Community Benefits Agreements address "employment opportunities" [Sec. 14-12-3(a)(1)(b)(1)];
- Provisions requiring that they address "job training" [Sec. 14-12-3(a)(1)(b)(2)];
- Provisions providing that they can address a "first source hiring program" [Sec. 14-12-4(a)(1)];
- Provisions requiring a specific percentage of local contractors [Sec. 14-12-4(a)(2)];
- Provisions providing that they can address "worforce development programs" [Sec. 14-12-4(a)(3)]; and
- Provisions providing that they can address "youth employment programs" [Sec. 14-12-4(a)(4)].

In sum, while HB 4052 likely would require significant modifications of the existing draft proposed Community Benefits Agreement Ordinance as itemized above, to eliminate all references to terms and conditions of employment, which would be a very significant limitation of the scope of such an ordinance, it does not appear to prohibit such an ordinance entirely.

If Council has any additional questions or concerns regarding this matter, LPD would be pleased to provide further research and analysis and report back regarding same.