



## EXECUTIVE SUMMARY OF LEGAL ANALYSES OF CHICAGO RETAIL LIVING WAGE ORDINANCE

This document summarizes two new analyses of the legality of the proposed Chicago retail living wage ordinance. The first analysis, by Professor Laurie Reynolds of the University of Illinois College of Law, a leading academic expert on local government law in Illinois and around the country, evaluates the legal arguments set forth by opponents of the proposed ordinance. The second, by the Brennan Center for Justice at New York University School of Law, explains the implications for the proposed ordinance of the recent ruling striking down Maryland’s health law.

Both analyses conclude that the proposed ordinance is legal and likely to be upheld by the Illinois and federal courts. Specifically, the analyses find that:

- There is a long history of federal, state and local laws that regulate based on industry and business size, and courts have consistently upheld such measures against legal challenge.
- Under the home rule provision of the Illinois constitution, unless the legislature explicitly bans cities from enacting wage laws – which it has not – Chicago is free to adopt a living wage ordinance to meet the needs of its low-income residents.
- Contrary to the *Chicago Tribune*’s claim in its July 22 editorial, the recent ruling striking down a Maryland health benefits law as violating ERISA (the federal Employee Retirement Income Security Act) has no bearing on the proposed ordinance. Every federal court of appeals that has reviewed a combined wage and benefits law like the Chicago ordinance has upheld the law under ERISA. As the courts have explained, “[A state or local government] can set a minimum cash wage, and allow an employer the option of paying part of that in benefits,’ without triggering ERISA preemption.”

**Background on the Authors.** Professor Reynolds is a leading academic expert on local government law in Illinois and nationally. She has written, taught and lectured on the subject for more than 20 years. She is the co-author of a leading law school text book on the topic, *State and Local Government Law* (West 2004), and of a leading reference work, *Local Government Law in a Nutshell* (West 2003). She received her J.D. degree *summa cum laude* from the University of Illinois where she was Editor-in-Chief of the *Illinois Law Forum*. Before joining the faculty in 1982, she practiced with Jenner & Block in Chicago.

The Brennan Center for Justice at New York University School of Law is a legal research center that works with state and local lawmakers on policy reform in a range of issue areas. The Brennan Center has advised communities across the United States on living wage and minimum wage legislation and has helped numerous cities and states successfully defend against legal challenge measures to provide family-sustaining wages for low-income residents.

## **SUMMARY OF CONCLUSIONS**

### **I. EQUAL PROTECTION**

***It Is Permissible to Regulate by Industry and Business Size.*** There is a long history of federal, state and local laws that regulate businesses based on both industry and size – and the courts have always upheld them. Examples include:

- The federal Fair Labor Standards Act, which establishes the federal minimum wage. During the 1960’s, the federal minimum wage applied in the retail industry only to enterprises with sales exceeding \$1 million annually – a coverage rule quite similar to the proposed Chicago ordinance.
- Illinois for many years had laws that set special industry minimum wage rates for fire fighters and has varied the rates based on the size of the city that employing such workers. The Illinois courts have rejected charges that they violate equal protection.
- Cook County recently enacted an ordinance regulating large employers in a single industry: the Cook County Displaced Building Service Workers Protection Ordinance, Cook County Ordinance 06-O-14 (Mar. 15, 2006). It provides employment security to employees in the janitor and security guard industry. Like the Chicago living wage proposal, the law focuses on large employers in a single industry: it applies to building services employees in commercial, retail or institutional buildings of 75,000 square feet or more, or residential buildings of 50 units or more.

***Cities May Regulate One Step at a Time.*** The Illinois Supreme Court has decisively rejected the argument that if Chicago desires to raise the minimum wage, it must do so for all employers in all industries. The court has stressed that lawmakers are “not bound . . . to make the unrealistic choice of establishing total and exhaustive regulation or none at all.” *Chicago Allis Manufacturing v. Metropolitan Sanitary District of Greater Chicago*, 288 N.E.2d 436, 443, 52 Ill. 2d 320 (1972). In that illustrative case, the Illinois Supreme Court upheld a local environmental ordinance that banned discharge of waste by large industrial plants, but allowed discharge by businesses in other industries and by smaller industrial plants. The court explained that local governments may permissibly regulate by business category or size, beginning “where the need is deemed to be the clearest” to lawmakers. 288 N.E.2d at 443. This “one step at a time” doctrine wisely preserves the city’s discretion and protects its ability to move deliberately and cautiously in this important area of the law.

***The Recent Maryland Case Rejected an Equal Protection Challenge to an Even Narrower Law.*** The recently decided case involving a health benefits mandate law in Maryland confirmed that narrowly framed regulatory measures do not violate equal protection:

- The Maryland court said, “the fact that [Wal-Mart] is the only entity subject to the [health] spending requirement of the [Maryland law] is not itself sufficient to make out a viable equal protection claim.” *Retail Industry Leaders Ass’n v. Fielder*, Civ. No. JFM-06-316, 2006 WL 2007654, at \*15 (D. Md. July 19, 2006). The court stressed that “legislatures are permitted the leeway to approach a perceived problem incrementally.” *Id.* at \*14.
- This ruling is notable because the Maryland law was even more narrowly focused than the Chicago proposal. It affected only Wal-Mart, while Chicago’s proposed living wage ordinance would apply to the whole large retail industry in the city, covering many major employers.

## **II. HOME RULE POWER**

***Illinois Cities Are Authorized to Enact Laws to Meet Local Needs Except Where Prohibited by the Legislature.*** The purpose of the Illinois constitution’s system of home rule is to allow different communities to tailor laws to meet their particular needs, and those laws need not be consistent with general state laws.

- Unless the legislature explicitly bans cities from enacting higher minimum wages for their communities – which it has not – Chicago is free to adopt wage laws to meet the needs of its low-income residents.

***The Proposed Ordinance Addresses Important Local Interests.*** Chicago has identified a number of important local interests promoted by the proposed ordinance:

- Chicago has the highest number and highest percentage of low income residents in the region, and people with low incomes are more likely than wealthier citizens to rely on low paying retail jobs as their primary employment. In many parts of the state, a larger percentage of big retailers’ employees are typically individuals seeking to supplement their family’s pension or income, or young adults earning their own spending money. Chicago’s concern for its many citizens who are likely to find their primary income at big retail operations is a local concern justifying a local response.
- In addition, the cost of living in Chicago is substantially higher than in many other parts of the state; the same wage goes a lot farther in rural Illinois than in its urbanized core. Again, this factual difference makes Chicago’s ordinance responsive to a local problem, and thus well within the limits of home rule.

***The Courts Routinely Uphold Local Laws That Provide Greater Protection Than State Laws.*** The Illinois courts have repeatedly upheld laws that address local needs by

supplementing the protections found under state laws, even where the state has enacted extensive regulatory systems in the field:

- Examples range from environmental ordinances that regulate sewage discharge more restrictively than state law, *see Village of Bolingbrook v. Citizens Utility Co. of Illinois*, 632 N.E.2d 1000 (Ill. 1994), to gun safety ordinances that regulate hand guns more restrictively than state law, *see Kalodimos v. Morton Grove*, 470 N.E.2d 266 (Ill. 1984).

Only where local ordinances have attempted to undercut state wage laws, or to regulate activity beyond the borders of the city, have they been invalidated:

- When Highland Park attempted to allow businesses to pay less than the state prevailing wage law, denying employees the protections of the state law, that action was invalidated in *Bernardi v. City of Highland Park*, 121 Ill. 2d 1 (1988).

But local ordinances that do not undercut state protections but rather go beyond them, like Chicago's policy of extending benefits to same sex domestic partners, was upheld in *Crawford v. City of Chicago*, 304 Ill.App.3d 818, 828 (Ill.App. 1 Dist.,1999).

Because the proposed ordinance would apply only to retail employment within the City of Chicago, and does not attempt to undercut the state minimum wage, it would not violate these limitations.

### III. ERISA

In the recent ruling involving a Maryland health benefits mandate law, *Retail Industry Leaders Ass'n v. Fielder*, a federal court struck down the law on the grounds that it was preempted by ERISA (the federal Employee Retirement Income Security Act). However, contrary to the *Chicago Tribune's* claim in its editorial today, that ruling has no bearing on the proposed Chicago ordinance because the ordinance follows an approach the federal courts have approved as complying with ERISA.

***The Federal Courts Have Repeatedly Held That Combined Wage and Benefits Laws Are Not Preempted by ERISA.*** It is well-established that combined wage and benefits laws that require employers to provide a minimum level of compensation, and give them the option of providing some of that compensation in the form of health, vacation, disability or other benefits, are not preempted by ERISA.

- To date, four federal appeals courts have ruled on whether ERISA preempts combined wage and benefits laws. All four have ruled that they are not preempted by ERISA. *See Burgio v. NYS Dep't of Labor*, 107 F.3d 1000 (2d Cir. 1997); *WSB Electric v. Curry*, 88 F.3d 788 (9th Cir. 1996); *Minnesota Chapter of Associated Builders and Contractors, Inc. v. Minnesota Department of Labor and Industry*, 47 F.3d 975 (8th Cir. 1995); *Keystone Chapter, Ass'd Builders & Contractors Inc. v. Foley*, 37 F.3d 945 (3rd Cir. 1994).

- As the courts have explained, “[A state or local government] can set a minimum cash wage, and allow an employer the option of paying part of that in benefits,’ without triggering ERISA preemption.” *Minnesota Chapter*, 47 F.3d at 980 (quoting *Keystone*, 37 F.3d at 961).

***The Chicago Retail Living Wage Ordinance Follows Exactly the Structure of the Wage Laws That Have Been Upheld by the Courts.***

- The Chicago ordinance establishes a base minimum wage for large retailers – set at \$9.25 per hour in the first year – and then asks employers to provide an additional \$1.50 per hour, which can be provided in the form of supplemental wages, benefits, or any combination thereof. Employers are allowed to mix and match wages and benefits. Whether to provide any benefits at all, and what kind of benefits to provide – paid vacation days, health or other benefits, or just supplemental wages – is left to the employer’s discretion.
- The federal courts of appeals have all held that where, under a combined wage and benefits law, “benefits and wages can be used interchangeably,” *Minnesota Chapter*, 47 F.3d at 980, and “an employer may provide supplemental benefits in any form or combination so long as the sum total is not less than locally prevailing benefits,” *Burgio*, 107 F.3d at 1009, the law is not preempted by ERISA.

***Unlike the Combined Wage and Benefits Laws That Have Been Approved Under ERISA, the Maryland Law Was a Straight Health Benefits Mandate.*** The Maryland law did not allow employers the option of providing any combination of wages or benefits – including non-health benefits or supplemental wages – as is required by ERISA. As the four courts of appeals have explained, this difference is crucial for ERISA purposes – and explains why combined wage and benefits laws have been upheld, but the Maryland law was not.