

## MEMO

To: Councilwoman Mary Pat Clarke

From: National Employment Law Project (“NELP”)

Date: March 29, 2016

Re: Baltimore’s authority to create a private right of action to enforce its minimum wage ordinance

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**Question:** Does the City of Baltimore possess authority to enact a private right of action for private enforcement of a local minimum wage law?

**Answer:** The City of Baltimore may create a private right of action through ordinance as long as the ordinance regulates a matter of purely local concern. Case law supports the argument that the City’s minimum wage law constitutes this type of local law.

### **I. The City of Baltimore May Create a Private Right of Action through Ordinance as Long as the Ordinance Addresses an Issue of Local Concern**

No express provision in state law or in the City of Baltimore’s charter expressly gives the City of Baltimore authority to create a private cause of action. However, the City has broad Home Rule powers in the form of express powers granted to the City and codified in Article II of the Baltimore City Charter. *Piscatelli v. Bd. of Liquor License Comm'rs*, 378 Md. 623, 634, 837 A.2d 931, 937–38 (2003). Under these express powers, the City has the power “[t]o pass any ordinance, not inconsistent with the provisions of [the City’s] Charter or the laws of the State, which . . . it may deem proper in maintaining the peace, good government, health and welfare of Baltimore City.” City of Baltimore Charter, art. II, § 47.

Maryland case law has limited a locality’s power to create a private right of action through an ordinance, but the Maryland Court of Appeals has recognized the right of a locality like the City of Baltimore to create a private right of action as long as the ordinance addresses an issue of purely local concern.

In *McCrorry Corp. v. Fowler*, 319 Md. 12, 570 A.2d 834 (1990), *superseded by statute* *Washington Suburban Sanitary Comm'n v. Phillips*, 413 Md. 606, 994 A.2d 411 (2010), the Maryland Court of Appeals considered the validity of a Montgomery County employment discrimination ordinance that, in part, created a private right of action. The court explained that Section 27-20(a) of the ordinance authorized “a private citizen to seek redress for another private citizen’s violation of a county anti-employment discrimination ordinance by instituting a judicial action in the courts of the State for, *inter alia*, unlimited money damages.” *Id.* at 837. The court held that the ordinance was invalid because it “attempt[ed] to combat employment discrimination by creating a new private judicial cause of action.” *Id.* at 840. It was therefore not a “local law” under Article XI-A of the Maryland Constitution, and thus . . . not within the power of Montgomery County to enact.” *Id.* As discussed below, this holding was limited to ordinances that address matters of *statewide* concern, as opposed to matters of “purely local concern.”

In explaining why the private right of action at issue in the case was prohibited, the court in *McCrorry* stated that “[i]n creating a new judicial cause of action between private individuals,

§ 27-20(a) encroaches upon an area which heretofore had been the province of state agencies” and that “[i]n Maryland, the creation of new causes of action in the courts has traditionally been done either by the General Assembly or by this Court under its authority to modify the common law of this state.” *Id.* at 838. It also stated that “the creation of new judicial remedies has traditionally been done on a statewide basis.” *Id.* The court next explained that “[a]busive employment practices constitute a statewide problem” which had already been addressed by the State legislature. *Id.* The decision acknowledged that a city might have concurrent power with the State over an issue, but it ultimately concluded that “[n]evertheless, creating a remedy which has traditionally been the sole province of the General Assembly and the Court of Appeals, *to combat a statewide problem* such as employment discrimination, goes beyond a ‘matter [] of purely local concern.’” *Id.* (citation omitted) (emphasis added). Thus, the court did not rule out all private causes of action at the local level. It only ruled out those that are part of a scheme “to combat a statewide problem such as employment discrimination.” *Id.*

In fact, the court expressly acknowledged and distinguished an opinion by the Attorney General of Maryland concluding that “a charter home rule county has authority to specify a private right of action in court as a remedy for violation of a county law.”<sup>1</sup> *Id.* at 839. The court explained that “[t]he ordinance addressed in the Attorney General’s opinion created a private right of action for a vehicle owner whose vehicle has been improperly towed or damaged, and specified damages at ‘3 times the amount of any towing, release or storage fees charged.’” *Id.* The court distinguished the two cases the Attorney General had cited by explaining that “[s]now removal and towing ordinances, *unlike employment discrimination ordinances, deal with subject matters of a peculiarly local nature.*” *Id.* at 840 (emphasis added). Moreover, the court stated that Section 27-20(a) was “quite different from the ordinances addressed by the Attorney General,” explaining that:

The ordinance involved in the present case creates a new private judicial cause of action for unlimited money damages and injunctive relief as a remedy for employment discrimination, *a matter of statewide concern*. The county ordinance here attempts to accomplish that which has heretofore been viewed as the sole province of state institutions . . . .

*Id.* (emphasis added). Thus, the only distinguishing feature between the ordinances cited by the Attorney General’s opinion in support of localities’ power to create a private right of action and the employment discrimination ordinance that the court invalidated was the fact that the employment discrimination ordinance addressed “a matter of statewide concern.” *Id.*

A 2003 Montgomery County Attorney opinion supports this limited reading of *McCrary* as prohibiting only private causes of action tied to an ordinance addressing a matter of statewide concern. The opinion noted that *McCrary* did not “completely foreclose[e] all county laws that

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<sup>1</sup> The home rule authority cited by the decision applied to Baltimore City as well. *Id.* at 836 (“Sections 1 and 1A of Article XI-A empower Baltimore City and the counties of Maryland to adopt a charter form of local government. . . . Section 3 of Article XI-A provides [that]. . . the Mayor of Baltimore and City Council of the City of Baltimore or the County Council of said County . . . shall have full power to enact local laws of said city or county . . . upon all matters covered by the express powers granted as above provided . . . .”) (internal quotations and citations omitted).

create private causes of action.” Montgomery County Office of the County Attorney Memorandum (Oct. 14, 2003) at 12.<sup>2</sup> It elaborated as follows:

Responding to Fowler’s reliance on an Opinion in which the Attorney General, citing out-of-state cases involving snow removal and towing ordinances, concluded that a charter county may provide a private right of action in court as a remedy for violation of a county law, “the Court indicated in limited circumstances a municipality has the authority to create private causes of action” and, presumably, a privately enforceable judicial remedy . . . .

In light of the State Consumer Protection law, the protection of consumers clearly addresses a statewide problem. Therefore, although the County and the State have concurrent authority to regulate the area, *McCrorry* teaches that a county consumer law that created a private cause of action would be invalid *because it would go beyond a matter of purely local concern*.

*Id.* at 12–15 (emphasis added) (internal citations omitted).

While numerous cases cite to the language in *McCrorry* explaining that the creation of a private right of action has traditionally lied within the province of the State and cite to the decision’s holding, no case addressing private causes of action created through ordinance appears to address (or otherwise rule out) a limited reading of *McCrorry* prohibiting only private causes of action created through ordinances tied to matters of statewide concern. *See, e.g., Edwards Sys. Tech. v. Corbin*, 379 Md. 278, 284, 841 A.2d 845 (2004) (quoting *McCrorry*’s language regarding private causes of action but applying it only to an alleged discrimination claim based on the statutory cause of action created after *McCrorry*); *H.P. White Lab., Inc. v. Blackburn*, 372 Md. 160, 812 A.2d 305 (2002) (holding an ordinance almost identical to the one in *McCrorry* invalid based on *McCrorry*’s reasoning that the ordinance “is not a local law”); *Shabazz v. Bob Evans Farms, Inc.*, 163 Md. App. 602, 881 A.2d 1212 (2005) (citing to *McCrorry* but addressing only a cause of action created by state statute). At least one case seems to characterize *McCrorry* as prohibiting only private causes of action that address matters of statewide concern. *See Gunpowder Horse Stables, Inc. v. State Farm Auto. Ins. Co.*, 108 Md. App. 612, 633, 673 A.2d 721, 732 (1996) (“As *McCrorry* unequivocally states, however, a county may not create a new cause of action between private parties *concerning matters of statewide concern*.”) (emphasis added)).

Ultimately, Maryland courts have not clearly prohibited private causes of action created through ordinance when the ordinance at issue concerns only a matter of purely local concern. It is also significant that the Court of Appeals upheld the City of Baltimore’s minimum wage law in 1969, which originally included a private right of action, without questioning the City’s right to create that right. *See City of Baltimore v. Sitnick*, 254 Md. 303, 255 A.2d 376 (1969).

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<sup>2</sup> Available at <http://www.amlegal.com/pdffiles/MCMD/10-14-2003.pdf>.

## **II. Case Law Supports Finding that the City of Baltimore’s Minimum Wage Law Constitutes an Ordinance Addressing a Matter of Purely Local Concern**

Whether the City of Baltimore’s minimum wage law pertains to a matter of purely local concern remains an open question. *McCrorry* explained that the Maryland Constitution does not define the distinction between a local law and a general law, “but leaves that question to be determined by the application of settled legal principles to the facts of particular cases in which the distinction may be involved.” *McCrorry*, 570 A.2d at 836 (internal quotations and citation omitted). It also noted that “a local law in subject matter and substance is confined in its operation to prescribed territorial limits. . . . [a]nd [that] [a] general law, on the other hand, deals with the general public welfare, a subject which is of significant interest not just to any one county, but rather to more than one geographical subdivision, or even to the entire state.” *Id.* (internal quotations and citations omitted). *McCrorry* concluded that “[a]busive employment practices constitute a statewide problem,” but it did not elaborate on the basis for that conclusion. *Id.* at 838.

*Tyma v. Montgomery Cty.*, 369 Md. 497, 801 A.2d 148 (2002), on the other hand, addressed the validity of Montgomery County’s Employee Benefits Equity Act which extended employment benefits afforded to County employees to the domestic partners of those employees. Appellants, in part, had argued that the recognition of domestic partnerships affected “the interests of the whole State as well as interests outside of the state.” *Id.* at 509 (internal quotations omitted). The court clearly had *McCrorry* in mind when addressing the difference between a local law and one that affects the interests of the State, as a whole. *Id.* at 507–08 (citing to *McCrorry* when stating: “This [c]ourt has recognized that even a law that is local in form or the operation of which is, by its terms, confined to a single county, may be a general law, nonetheless. That is the case when such law affects the interests of the whole state.”)

*Tyma* found that the Act fell within the County’s authority under Article 25A, § 5(S) of the Maryland Code to “enact such ordinances as may be expedient in maintaining the peace, good government, health and welfare of the county.” *Id.* at 511 (internal quotations and citation omitted). It further explained that “[a]lthough not expressly enumerated, Home Rule counties in Maryland, by necessary implication from the powers that the General Assembly enumerated as well as § 5(S)’s catchall provision, *must have the power to regulate local employment* and, as to that, its employees.” *Id.* at 512 (emphasis added). The court concluded that “[t]he determination that the County has the authority to pass the subject Act under § 5(S) also dispos[ed] of the appellants’ argument that the Act [was] general, or non-local, legislation.” *Id.* at 513. The court distinguished the case from previous cases invalidating local ordinances, including *McCrorry*, noting that the court “has invalidated ordinances passed by Home Rule counties only when they have intruded on some well defined [sic] State interest.” *Id.* at 513–14. In elaborating why the Act at issue was not one of statewide concern, the court stated:

As a matter of fact, therefore and in sum, the Act affects only the personnel policies of Montgomery County and does not implicate the State’s interest in marriage or affect the State’s ability to regulate marriage on a statewide basis. Moreover, the only employer the ordinance impacts is the County; it has no effect outside the County and, therefore, no statewide interests are affected. The

ordinance simply has no resemblance to other enactments that we have held were not local laws.

*Id.* at 515.

*City of Baltimore v. Sitnick*, 254 Md. 303, 255 A.2d 376 (1969), speaks extensively to the City of Baltimore’s Home Rule power to enact its local minimum wage law and adheres to a theory of concurrent powers in finding that state law did not conflict with or otherwise preempt the local law. The decision does not, however, clearly address whether the City’s minimum wage law should be seen as one addressing a purely local concern.

The reasoning in *Tyma* offers a strong basis for arguing that Baltimore’s local minimum wage law constitutes a local law and does not address a matter of statewide concern. Baltimore’s local minimum wage law is authorized by the City’s express general welfare powers granted by the State which today closely track the Section 5(S) powers underlying the decision in *Tyma*.<sup>3</sup> *Tyma* made clear that a “necessary implication” of those powers is the City’s “power to regulate local employment” even *beyond* the employment of its employees. *Tyma*, 369 Md. at 512 (“Although not expressly enumerated, Home Rule counties in Maryland, by necessary implication from the powers that the General Assembly enumerated as well as § 5(S)'s catchall provision, must have the power to regulate local employment and, as to that, its employees.”). This fact alone should dispose of any argument that the minimum wage law is “general, or non-local, legislation.” *Id.* 513 (“The determination that the County has the authority to pass the

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<sup>3</sup> The relevant language of Section 5(S), as applied in *Tyma*, stated:

“The foregoing or other enumeration of powers shall not be held to limit the power of the county council ... to pass all ordinances, resolutions or bylaws, not inconsistent with the provisions of this article or the laws of the State, as may be proper in executing and enforcing any of the powers enumerated in this section or elsewhere in this article, as well as such ordinances as may be deemed expedient in maintaining the peace, good government, health and welfare of the county.

“Provided, that the powers herein granted shall only be exercised to the extent that the same are not provided for by Public General Law; provided, however, that no power to legislate shall be given with reference to licensing, regulating, prohibiting or submitting to local option, the manufacture or sale of malt or spirituous liquors.”

*Tyma*, 369 Md. at 505–06.

The City of Baltimore Charter, art. II, § 47 states:

The Mayor and City Council of Baltimore shall have full power and authority to exercise all of the powers heretofore or hereafter granted to it by the Constitution of Maryland or by any Public General or Public Laws of the State of Maryland; and in particular, without limitation upon the foregoing, shall have power by ordinance, or such other method as may be provided for in its Charter, subject to the provisions of said Constitution and Public General Laws:

...

To pass any ordinance, not inconsistent with the provisions of this Charter or the laws of the State, which it may deem proper in the exercise of any of the powers, either express or implied, enumerated in this Charter, as well as any ordinance as it may deem proper in maintaining the peace, good government, health and welfare of Baltimore City and to promote the welfare and temperance of minors exposed to advertisements for alcoholic beverages placed in publicly visible locations.

subject Act under § 5(S) also disposes of the appellants’ argument that the Act is general, or non-local, legislation.”). As in *Tyma*, the minimum wage law also affects only the employment policies of the City of Baltimore and does not implicate the State’s interest in regulating employment or the State’s ability to regulate employment on a statewide basis. In addition, the minimum wage law applies only to employees working in the City of Baltimore and has no effect outside of the City.

Arguably, the City of Baltimore’s minimum wage law addresses an even more clearly local concern than the law in *Tyma* in that the cost of living in the City is among the highest in the State. See Table 1. The City of Baltimore cited this challenge when it first enacted the ordinance. City of Baltimore Code, art. 11, subtit. 1, § 1-2 (“The Mayor and City Council, after conducting an investigation of employment conditions in the City of Baltimore, hereby find . . . that many persons employed in Baltimore are paid wages which, in relation to the cost of living in the City and the income necessary to sustain minimum standards of decent living conditions, are insufficient to provide adequate maintenance for themselves and their families.”). It explained, too, that such low wages “threaten[ed] the health, welfare, and well-being of the people of the City” and “injure[d] the City economically.” *Id.* Today, approximately 24 percent of City of Baltimore residents have an income below the poverty level, and more than one-fifth of City of Baltimore households receive food stamps/SNAP.<sup>4</sup>

Area	Cost of Living for Single Worker
Baltimore/Towson, MD Metro Area	\$33,994
Cecil County MD	\$32,523
Cumberland, MD Metro Area	\$24,568
Hagerstown, MD Metro Area	\$28,274
Maryland suburbs of Washington, DC	\$41,424
Rural, MD	\$32,271
Salisbury, MD Metro Area	\$26,235

Maryland would not be the first state to find that a local minimum wage law addresses only matters of local concern. A Missouri Circuit Court recently rejected the argument that the local minimum wage ordinance enacted by the City of St. Louis “exceed[ed] the City of St. Louis’s charter authority because it goes beyond purely local concerns and extends to matters of statewide and national concerns.” *Cooperative Home Care, Inc. et al. v. City of St. Louis*, No.

<sup>4</sup> United States Census Bureau, Easy Stats, <https://www.census.gov/easystats/> (last viewed Mar. 29, 2016).

<sup>5</sup> Data derived from the Economic Policy Institute’s Family Budget Calculator. Economic Policy Institute, Family Budget Calculator, <http://www.epi.org/resources/budget/> (last viewed Mar. 28, 2016).

1522-CC10604, Division No. 13 (Findings of Fact, Conclusions of Law, and Judgment, Oct. 14, 2015) at ¶ 52.<sup>6</sup> Much like Maryland law, the Missouri Supreme Court has stated that a charter city ordinance “may not invade the province of general legislation involving the public policy of the state as a whole.” *Id.* at ¶ 53 (quoting *Mo. Bankers Ass’n v. St. Louis County*, 448 S.W.3d 267, 271 (Mo. banc 2014)) (internal quotations omitted). In finding that the ordinance did not address a matter of statewide concern, the court noted that the ordinance was limited by its own terms to local concerns. *Id.* at ¶ 54.

In conclusion, for the reasons stated above, the City of Baltimore has the authority to create a private cause of action through ordinance as long as the ordinance addresses only local matters. Based on *Tyma*, as well as the unique cost of living challenges facing Baltimore residents, one can make a strong argument that the City’s minimum wage law constitutes a purely local law.

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<sup>6</sup> Available at <http://static.politico.com/0a/b8/24daa1984cff83687c925c413233/st-louis-minimum-wage-decision.pdf>.