

## MEMO

To: Councilwoman Mary Pat Clarke

From: National Employment Law Project (“NELP”)

Date: March 29, 2016

Re: Authority of City of Baltimore to provide for compensatory damages for violation of an ordinance

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**Question:** Does the City of Baltimore have authority to impose damages, in addition to unpaid wages, for violations of the City minimum wage law?

**Short Answer:** Yes. Both case law and the current City Code provide support for the proposition that the City can impose damages, in addition to unpaid wages, for violations of the City minimum wage law.

Currently, the City of Baltimore’s minimum wage law provides that workers whose minimum wage rights are violated are entitled to recover their unpaid wages and interest. A proposed revision would require that employees be entitled to what is termed “double damages” under federal and state wage and hour laws—unpaid wages and interest plus an equal amount in damages to compensate workers for the employer’s failure to pay the minimum wage.

Neither the City of Baltimore Charter nor the state laws concerning the powers of municipalities, Md. Code Ann., Local Gov’t §§ 6-101–115, clearly give the City the power to enact an ordinance that provides for such compensatory damages (in addition to fines and penalties). However, no Charter provision or state law seems to prohibit it. Both case law and the current City Code provide support for the proposition that the City can impose double damages<sup>1</sup> payable to an aggrieved person as a remedy, although case law might limit such damages to those that are reasonably quantifiable and relate to actual losses.

The Court of Special Appeals has recognized that entities like the City of Baltimore are authorized to award damages for violation of an ordinance. In *Beretta U.S.A. Corporation v. Santos*, the court considered a county ordinance that had authorized a commission to award damages for violation of an anti-discrimination law. *Beretta U.S.A. Corp. v. Santos*, 122 Md. App. 168, 712 A.2d 69 (1998) *rev’d on other grounds sub nom. Prince George’s Cty. v. Beretta U.S.A. Corp.*, 358 Md. 166, 747 A.2d 647 (2000). While the opinion invalidated the damages provision because it conflicted with a state statute authorizing local anti-discrimination ordinances and, alternatively, constituted a non-local law, it separately asserted that “*any authority to the [c]ommission to award damages for a violation of the Prince George’s County anti-discrimination ordinance would be a remedial power under Art. 25A, § 5(S)*” of the state law. *Id.* at 194 (emphasis added).

Article 25A, § 5(S), provided, in relevant part:

The foregoing or other enumeration of powers in this article shall not be held to limit the power of the county council, in addition thereto, to pass all ordinances,

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<sup>1</sup> The draft ordinance refers to “liquidated” damages, but to clarify the meaning of this term, it can be substituted with “double” damages throughout the draft bill.

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. . . .

*Id.*

The court limited counties' remedial power, however. It explained that "[i]mplicit in both *McCrorry* and *Investors Funding* is the Court's view that a county agency may be vested with the authority to award damages for pecuniary loss resulting from discrimination, when such damages are reasonably quantifiable and relate to identifiable, actual losses. *Id.* at 199. Indeed, *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), 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>2</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.* (emphasis added). In distinguishing the ordinance at issue in *McCrorry*, the court did not express any concern about including a treble damages provision in a local private right of action.

Thus, *Beretta* supports the proposition that a local government authorized to enact local laws under Article 25A, § 5(S), or a provision like it, may authorize a limited amount of quantifiable damages that relate to identifiable, actual losses for violations of an ordinance.

Because the language of Article 25A, § 5(S) underlying *Beretta's* statement on a county's power to provide for damages largely mirrors Home Rule powers now expressly granted to the City of Baltimore under Article II of its charter,<sup>3</sup> the City of Baltimore arguably has the power to

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<sup>2</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).

<sup>3</sup> Article II, section 47 of the City of Baltimore Charter 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

impose damages for violation of an ordinance as part of its remedial powers. Moreover, the minimum wage bill under consideration allows workers to recover only double the amount of wages owed as compensatory damages, a clearly quantifiable amount tied to actual losses, as *Beretta* would permit. These compensatory damages are crucial to the law’s remedial purpose.<sup>4</sup> In fact, most local and state laws around the country, as well as the Fair Labor Standards Act, allow workers to recover double the amount of wages owed (and some allow for triple the amount of wages owed or a fixed amount for each day a violation took place).<sup>5</sup>

Such double damage (or triple damage) awards are compensatory and not punitive. While they may provide some deterrent effect, they are remedial provisions designed to compensate workers and make them fully whole. As the Supreme Court recognized early on with the “double damages” provision in the federal Fair Labor Standards Act, “the [double damages] provision is not penal in nature but constitutes compensation for the retention of a workman’s pay,” *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 578 (1942). Thus, even though such double damages have a deterrent effect, *see Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697 (1945), the purpose of such awards is plainly compensatory. *Id.* at 707 (recognizing that “the failure to pay the statutory minimum on time may be so detrimental to the minimum standard of living . . . that double payment must be made in the event of delay in order to insure restoration of the worker to that minimum standard of well-being”)

At least two City ordinances already give parties whose rights have been violated a right to pursue double damages. *See* Baltimore City Code, art. 2, subtit. 1, § 1-14 (providing for civil penalties in an amount “double the amount unlawfully received, retained, or withheld” in its regulation of auctions); Baltimore City Code, art. 7, subtit. 35, § 35-2 (providing that any person who “fails to install or maintain erosion and sediment controls in accordance with an approved plan is liable in a civil action to the City or the State, as the case may be, for damages in an amount equal to double the cost of installing or maintaining the controls”).

In conclusion, based on *Beretta* and *McCrorry*, the City of Baltimore may include in its bill to amend the local minimum wage law a double damages provision (based on the amount of unpaid wages) to ensure that its local minimum wage law fulfills its remedial purpose.

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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.

City of Baltimore Charter, art. II, § 47.

<sup>4</sup> National Employment Law Project, *The Top 5 Enforcement Tools for Local Minimum Wage Laws* (2015) at 3, available at <http://www.nelp.org/content/uploads/Policy-Brief-Top-Five-Enforcement-Tools-Local-Minimum-Wage.pdf>.

<sup>5</sup> *Id.*