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Via E-Mail Only (Andy.Segovia@sanantonio.gov)
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Cc: Mayor Ron Nirenberg (*ron.nirenberg@sanantonio.gov*)
Cc: Roberto C. Treviño, City Council District 1 (*Roberto.trevino@sanantonio.gov*)
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Cc: Clayton Perry, City Council District 10 (*Clayton.perry@sanantonio.gov*)

Re: Potential FLSA Violations and Request for Pre-Suit Mediation

Dear Mr. Segovia,

Our Firm represents various employees of various City Council Members of the City of San Antonio for potential claims based on violations of the Fair Labor Standards Act (FLSA), as well as other laws. Please preserve all items identified in Appendix 1 herein as potential evidence in any litigation of these issues. It is my understanding that the issue of Council employee classification and benefits is being deliberated at this very moment within City Council and my clients feel they have no voice in these discussions. They have requested anonymity for now for fear of retaliation; however, based on your response to this letter, they will determine whether to publicly identify themselves and determine what actions to take.

Mr. Segovia, the City has a problem. The City has created a significant liability in the structure of its employment with City Council Members and their employees. It is my understanding that the City government has implemented a structure that dictates that each Council Member obtain his/her own Employer Identification Number (EIN) and act as an "independent" employer of all aides who work for that specific Council Member's office. Due to this legal structure, the City has, in essence, passed on all employer liabilities to each Council Member, while reaping the benefits of the work that each aide, in each office, brings to the City every day. **This legal issue has been created solely by the actions of the City government, through no fault or action of any individual City Council member**. **Furthermore, the City's interests in the outcome of any potential claims is very different from the interests of each Council Member, and for this reason, each Council**

Member should be afforded their own attorney to advise them of the perils for each if they are deemed to be the "employer" under the law.

For the past twenty-five-plus years, it seems that the City and City Council have continued to make small changes to the employment structure with employees of City Council. At one time, these employees were labeled "1099 independent contractors." Little by little, this structure was changed to provide some benefits, then move the aides to "W-2 employee" status, then continued to add and change benefits available to reach the current structure and compensation package. However, this structure still falls short of that which is required by law and that which is fair and acceptable to my clients. My clients do not earn an equivalent salary or receive comparable benefits to their City counterparts, while they must comply with City employment rules and obligations and meet the demands of their City Council Members.

Furthermore, these aides are not paid overtime. In its simplest form, the most basic allegation is that the "employer" of City Council aides has failed to pay overtime to each individual we currently represent in addition to other benefits that should have been made available to them as joint employees of the City of San Antonio. Who the "employer" is will be left to a judge and/or jury; it could be the City, it could be each Council Member, or they could be deemed to be joint employers under the law and both be subject to legal liability under the FLSA.

If my clients are forced to pursue a formal action for FLSA violations, due to the current employment structure imposed by the City Government, the burden will be placed on the ***City Council Members*** to prove how many hours each of their employees have worked in order to establish a defense to claims from my clients of average hours worked that were not paid in accordance with the FLSA.[1] Further, it appears that these potential violations of the FLSA regarding

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[1] An employee who sues under the FLSA for unpaid overtime compensation has the burden of proving that he has performed work for which he was not properly compensated. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 686 (1946). It is the ***employer's*** burden to "make, keep and preserve records: of employees and their "wages, hours, and other conditions and practices of employment in accordance with the regulations prescribed by the Administrator of the U.S. Department of Labor's Wage and Hour Division." 29 U.S.C.A. § 211(c); 29 C.F.R. § 516. However, since 1946, the Supreme Court has been very clear that an employee cannot be precluded from bringing a claim because his/her estimate of hours is somewhat speculative because it is the employer's burden to keep accurate and timely records of hours worked. *Id.* In holding that an employee does not have to show the precise extent of uncompensated work, the *Anderson* Court held that the "remedial nature of the [FLSA] and the great public policy which it embodies, militate against making that burden [to show specific damage amounts] an impossible hurdle for the employee." *Anderson*, 328 U.S. at 87. Where time records are inaccurate, the Supreme Court put in place a burden shifting structure that places the burden on the ***employer*** to "negative the reasonableness" of Plaintiff's assertions. *Id.*

The Supreme Court explained in detail:

> **Due regard must be given to the fact that it is the employer who has the duty under [the FLSA] to keep proper records of wages, hours and other conditions and practices of employment and who is in position to know and to produce the most probative facts concerning the nature and amount of work performed**. Employees seldom keep such records. . . When the employer has kept proper and accurate records the employee may easily discharge his burden by securing the production of those records. But where the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes a more difficult problem arises. **The solution, however, is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying compensation as contemplated by the Fair Labor Standards Act.** In such a situation we hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with

misclassification of exempt and non-exempt employees, unpaid overtime, and misclassification of employees as independent contractors has taken place over the past few years. As you may know, once a few employees bring an FLSA claim, they can move to certify a class and request that notice be issued to all current and past employees so that other employees can "opt in" to the claim.[2] If this happens, the floodgates of litigation will come open and all current and former employees of the City's Council will be provided "notice" that they can join said suit. **We do not believe that at this time, it is in the best interests of my clients, of the City, and of each City Council Member, current and past, to be involved in such litigation.**

Please do not interpret this letter as a threat, to the contrary, none of my clients wish to litigate the misclassification and FLSA violations *at this time*, however, the time has come to recategorize these employees properly and to compensate them in a way that is commiserate with their contributions to the City of San Antonio in the same way other employees of the City are compensated. Over the past few years, these employees have attempted to address these concerns through their supervisors and the City of San Antonio and feel they have been ignored. Because of this, **we are now respectfully requesting a mediation with the City Council Members, the Mayor, and the City Attorney, to confidentially settle this dispute without litigation and to provide employees of City Council with the benefits to which they should be entitled, and for compensation for past lost wages and benefits. If these cases are resolved quickly, efficiently, and confidentially, you can contain the possibility of future litigation.**

Ultimately, the goal of this discussion is to ensure fair compensation for these employees, without opening the floodgates of potential litigation to hundreds of current and former employees who have been misclassified due to the City's improper classification structure. Some of the detriments that the current misclassified suffer include, but are not limited to, the following:

- Lack of overtime pay
- Lack of comparable insurance benefits for themselves and their families
- Lack of comparable retirement benefits that City employees receive
- Lack of comparable disability benefits & medical leave
- Lack of comparable workers' compensation insurance
- Lack of comparable immunity for work done on behalf of the City
- Lack of comparable qualification to be subject to the Equal Employment Opportunity Commission (EEOC) rules and regulations

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> evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result is only approximate.

Id. at 687-88.

[2] "**An action to recover the liability prescribed [in the FLSA] may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.**" ***See*** **29 U.S.C. § 216(b).** "A representative action brought pursuant to this provision follows an 'opt-in' rather than an 'opt-out' procedure.' *Ali v. Sugarland Petroleum*, 2009 WL 5173508, at *1 (S.D. Tex. Dec. 22, 2009). District courts have discretion in deciding whether and how to award "timely, accurate, and informative" notice to prospective plaintiffs. *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 172 (1989). FLSA collective actions "are generally favored because such actions reduce litigation costs for the individual plaintiffs and create judicial efficiency by resolving in one proceeding common issues of law and fact arising from the same alleged ... activity." *Yaklin v. W-H Energy Servs., Inc.*, 2008 WL 1989795, at *1 (S.D. Tex. May 2, 2008) (citing *Hoffmann-La Roche Inc.*, 493 U.S. at 170).

- Lack of comparable tuition reimbursement

Should this mediation not be successful and if the parties are forced into litigation, damages will be sought for liquidated and unliquidated damages permitted through the FLSA. The FLSA provides for liquidated damages as a matter of right unless a defendant is successful on its affirmative defense of good faith and reasonable grounds. Each claimant is entitled to liquidated damages in an amount equal to the unpaid overtime wages. 29 U.S.C. § 216(b). In addition to an award of unpaid overtime, prevailing claimants are entitled to an award of reasonable attorneys' fees under the FLSA. 29 U.S.C. § 216(b). In fact, the award of reasonable attorney's fees to a prevailing claimant is mandatory in a FLSA case. *Id.*

Again, at this point, my clients only wish to be heard and to help create a fair employment structure for all parties involved – the City, each City Council Member, and themselves. Ultimately, I do not think it is in the best interests of my clients, City Council Members, and future employees of City Council for these issues to continue to go unresolved. As the potential liability for each City Council Member currently and in potential future known and unforeseen litigation is different than that of the City, again I reiterate that each City Council Member should be appointed their own attorney to represent their interests in this negotiation. I urge each Council Member to insist on this. As discussed herein, as an "employer," each City Council Member faces potential liability for employment violations – whether from employment discrimination claims, FLSA violations, IRS issues, or vicarious liability claims on behalf of their employees – not only the claims made at this time by my clients. Accordingly, I believe that the liability facing both the City of San Antonio and City Council Members as joint employers of misclassified employees requires each party to be independently represented as we wish for the current employment structure to be reevaluated. We understand that these are difficult issues and hope that the City Council Members, the Mayor, and the City Attorney will make good faith decisions that are in the best interest of the City of San Antonio and its dedication to the individuals who assist in the overall direction and success of this City.

I, for one, love San Antonio and wish nothing but the best for it and for the people that work every day to make it the great city that it is. I have spent my entire professional career standing up for the rights of workers and this is no different. If we can meet and come to an agreement for all interested parties, I am willing to waive our attorneys' fees in my representation of these clients. If my clients continue to be ignored and we must proceed to litigation, then we will seek all possible remedies under the law and my offer to waive attorneys' fees will be rescinded.

If interested, please contact me to set up a meeting as soon as possible. I will personally donate the money to rent a conference room large enough to accommodate the meeting. I may be reached at (210) 229-1300 (office), (210) 324-1729 (cell), or javier@espinozafirm.com.

Thank you very much for your attention to this matter and I look forward to hearing from you.

Very truly yours,

JAVIER ESPINOZA