



# City of San Gabriel

## STAFF REPORT

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DATE: February 19, 2019

TO: Honorable Mayor and City Council

FROM: Mark Lazzaretto, City Manager *ml*

BY: Keith Lemieux, City Attorney

SUBJECT: **Amended Tolling Agreement**

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### SUMMARY

*In January the City approved an extension of a tolling agreement between the Firefighters' Association and its members and the City that permits them to preserve the affected firefighter employees' wage-and-hour claims while the parties work toward a resolution of their dispute with the City without the costs of a lawsuit. However, subsequent to your approval the Firefighters' Association requested certain minor modifications to the approved agreement. As these changes are not adverse to the City, they have now been presented for your approval.*

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### ANALYSIS

In 2012 several police officers employed by the City brought a lawsuit against the City alleging that the City failed to include medical cash-in-lieu payments in the regular rate of pay, which is used to calculate overtime under the Fair Labor Standards Act ("FLSA"). The lawsuit was called Flores v. City of San Gabriel and the plaintiffs successfully argued to the court that medical cash in-lieu payments should have been included in the regular rate calculation and that the City owes them additional overtime wages. The City has corrected its payroll practices going forward and is currently in the final phases of calculating damages and attorneys' fees owed in that case.

Other City employees who are members of the Firefighters' Association also received the medical cash-in-lieu payments and potentially have claims for uncompensated overtime under the same theory as the Flores plaintiffs. The City previously entered into an agreement to toll the statute of limitations for these employees' claims ("tolling agreement") which preserved the affected employees' claims against the City while the City worked with the Flores plaintiffs to calculate the overtime underpayments. That tolling agreement would have expired on January 15, 2019. However, in January the City authorized the execution of a new tolling agreement ("new tolling agreement") which continues to preserve the affected firefighter employees' claims beginning at the expiration of the last tolling agreement on January 15, 2019 and continuing for one year. The other substantive terms of the tolling agreement were unchanged.

Subsequent to this approval, the Firefighters' Association requested certain modifications to the approved agreement. They wish to clarify the effective date of the agreement and the fact that there were two prior tolling agreements. They have also added language allowing either party to unilaterally terminate the tolling agreement upon 30 days' notice. (The original tolling agreement did not provide the City the ability to terminate the contract. It only provided that if any employee filed a lawsuit, the tolling agreement would be rescinded as to all employees.)

Staff believes that these changes are not adverse to the City.

### **RECOMMENDATION**

Staff recommends the City Council approve the amended "new tolling agreement" between the City of San Gabriel and the San Gabriel Firefighters' Association.

### **ATTACHMENTS**

- A. Amended Tolling Agreement between the City of San Gabriel and the San Gabriel Firefighters' Association.
- B. Redline comparison to previously approved Tolling Agreement between the City of San Gabriel and the San Gabriel Firefighters' Association

## **AMENDED TOLLING AGREEMENT**

### **IN RE STATUTES OF LIMITATION**

This Amended Tolling Agreement ("Agreement") is entered into effective January 16, 2019 between the City of San Gabriel (the "City"), represented by and through its counsel, and the San Gabriel Firefighters Association ("SGFFA") and Monte Mitchell individually and on behalf of similarly situated employees in the bargaining unit SGFFA has been formally recognized by the City to represent (Represented Employees), by and through their respective counsel. City and Represented Employees are collectively referred to herein as the "Parties."

### **RECITALS**

- A. Whereas, City of San Gabriel is a political subdivision of the State of California;
- B. Whereas, Represented Employees are SGFFA bargaining unit members formerly and currently employed by the City in the San Gabriel Fire Department;
- C. Whereas, the City has approached Represented Employees to inform them that the City has miscalculated the Fair Labor Standards Act ("FLSA") regular rate of pay, raising the issue of whether and to what extent the City may be liable to the individual Represented Employees for unpaid overtime and other relief under the FLSA;
- D. Whereas, the City has informed Represented Employees that it changed its method of calculating the FLSA regular rate of pay in an attempt to comply with the FLSA on or about August 19, 2017;

- E. Whereas, the statute of limitations for an FLSA claim is two years from the date that a person files or joins an FLSA lawsuit, or three years from such date for a willful violation;
- F. Whereas, in order for the City and Represented Employees to fully evaluate any FLSA claims relating to miscalculation of the regular rate of pay, and any proposed resolution of said claims, and to facilitate the informal and amicable resolution of said claims, the Parties are amenable to tolling the applicable statute of limitations, laches, or other time limitations – whether statutory, contractual, or otherwise, for the Represented Employees’ FLSA claims relating to miscalculation of the regular rate of pay;
- G. Whereas, the Parties previously entered into an agreement to toll the applicable statute of limitations from August 19, 2017 to January 15, 2018 and a second agreement to toll the statute of limitations from January 16, 2018 to January 15, 2019;

NOW, THEREFORE, for valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

#### AGREEMENTS

1. To avoid an action filed on behalf of represented employees, the City agrees to toll the applicable statute of limitations, laches, or other time limitations- whether statutory, contractual, or otherwise- during the period this tolling agreement is in effect (as well as during the period of the prior tolling agreements) regarding: a.) all FLSA claims relating to miscalculation of the regular rate of pay *by failing to count the City's cafeteria contribution and/or in lieu pay in the overtime rate pursuant to Flores, et al. vs. City*

*of San Gabriel* by Represented Employees; and b.) all FLSA claims relating to any miscalculation by the City of the FLSA regular rate of pay arising from the City's effort to comply with the *Flores* decision on or about August 19, 2017. The running of any and all statutes of limitation for Members on FLSA claims is tolled effective January 16, 2019, to January 15, 2020, subject to the terms of this Agreement, and additionally tolled from August 19, 2017 to January 15, 2019 pursuant to the terms of the prior two tolling agreements between the parties. The City agrees that it shall be estopped in future FLSA litigation from asserting that the statute of limitations was not tolled during these time periods, consistent with the terms of such Agreements. The terms of this Tolling Agreement may be extended only by mutual written agreement.

2. In consideration for this Agreement, SGFFA and Monte Mitchell agree to postpone, for the duration of this Agreement, their pursuit of any legal remedies which they may assert on behalf of employees they represent against the City for improper calculation of payment of their FLSA overtime. The Parties also recognize that SGFFA and Monte Mitchell cannot preclude individual employees from asserting their own FLSA claims against the City. If any individual files his or her own FLSA lawsuit or joins an FLSA lawsuit against the City during the tolling period, this Agreement to toll the statute of limitations shall terminate with respect to that specific individual and all other employees covered by this Agreement, effective the date of such filing or joining of a lawsuit, at which time the statute of limitations will begin to run again with respect to all Represented Employees. Additionally, either City or SGFFA may unilaterally terminate this Agreement by providing 30 days written notice to the other party.

3. In further consideration of this Agreement, should Represented Employees pursue legal remedies after the expiration of this Agreement, the City agrees to confer in good faith with them and their counsel regarding stipulating to, and not opposing, any reasonable Motion for Conditional Certification of a collective action based upon FLSA Regular Rate claims. However, this does not in any way impact the City's ability to oppose conditional certification of a collective action based on any other unrelated claims, or to later seek decertification of any conditionally certified collective action based upon any FLSA claims.

4. The tolling of the applicable statute of limitations, laches, or other time limitations referred to in this Agreement shall have no effect on any cause of action or claim that is already time-barred as of the effective tolling period set forth in this Agreement.

5. This Agreement may be executed or modified only by the written agreement of the Parties hereto.

6. Execution of this Agreement is not and shall not be taken or used as (1) an admission of the date when any applicable statute of limitations may expire, or (2) an admission of liability or the validity of any claim, cause of action or defense. Such admissions or agreements are expressly denied.

7. Except as provided by this Agreement, this Agreement does not waive any defenses based on the doctrines of waiver, laches, or estoppel that may have arisen before this Agreement (and before the prior tolling Agreements between the parties) was signed, or for the period after this Agreement terminates.

8. This Agreement is made and entered into under the laws of the State of California, County of Los Angeles and shall be interpreted, governed and enforced under and pursuant to said laws. As to any cause of action governed pursuant to federal laws, this Agreement shall be construed, governed and enforced in accordance with the applicable laws and statutes of the United States of America.

9. This Agreement may be executed in counterparts and the combined original executed counterparts shall constitute a single enforceable agreement.

10. This Agreement comprises the entire Agreement of the Parties relating to the subject matter of this Agreement and supersedes any and all prior negotiations, representations, or discussions between the Parties regarding the subject matter covered herein. However, this Agreement does not affect the validity of the prior tolling agreements between the parties for the time period from August 19, 2017 to January 15, 2019. In choosing to execute this Agreement, each party has been advised by its own counsel, or has had the opportunity to seek such advice, and no party has relied upon any representation, statement or agreement of any other party which is not set forth expressly in this Agreement. By signing this Agreement, each party warrants and acknowledges that the party has read this Agreement, understands it, and has the legal authority to sign for the party represented by his or her signature.

11. This Agreement and the negotiations related hereto are intended to be treated as confidential settlement discussions subject to California Evidence Code Section 1152 and Federal Rules of Evidence 408. However, this Agreement is

admissible in subsequent court proceedings for the purpose of resolving any disputes about the existence of the tolling period.

12. This Agreement shall inure to the benefit of and be binding upon the legal representatives, successors, and assigns of the Parties hereto.

IN WITNESS WHEREOF, the Parties have executed this Agreement on the dates indicated below by and through their authorized agents and representatives.

For SGFFA and Monte Mitchell  
Individually and on behalf of similarly  
situated employees represented by SGFFA

RAINS LUCIA STERN ST.PHALLE &  
SILVER PC

By: Stephen H. Silver  
Stephen H. Silver Esq.

On behalf of the City of San Gabriel:

Dated: \_\_\_\_\_, 2019

By: \_\_\_\_\_  
City Manager, Mark Lazzaretto



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By: \_\_\_\_\_  
Stephen H. Silver Esq.

On behalf of the City of San Gabriel:

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