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July 15, 2021

Terri D. Stroud
General Counsel
District of Columbia Board of Elections
1015 Half Street, S.E., Suite 750
Washington, D.C. 20003

Re: Proposed Initiative, the “DC Full Minimum Wage for Tipped Workers Amendment Act of 2022”

Dear Ms. Stroud:

D.C. Official Code § 1-1001.16(b)(1A) requires that the General Counsel of the Council of the District of Columbia provide an advisory opinion to the District of Columbia Board of Elections (“Board”) as to whether proposed initiatives are a proper subject of initiative. I have reviewed the “DC Full Minimum Wage for Tipped Workers Amendment Act of 2022” (“Proposed Initiative”) for compliance with the requirements of District law, and based on my review, it is my opinion that the Proposed Initiative is a proper subject of initiative.

I. Applicable Law

The term “initiative” means “the process by which the electors of the District of Columbia may propose laws (*except laws appropriating funds*) and present such proposed laws directly to the registered qualified electors of the District of Columbia for their approval or disapproval.”¹ The Board may not accept a proposed initiative if it finds that the measure is not a proper subject of initiative under the terms of Title IV of the District of Columbia Home Rule Act or upon any of the following grounds:

- The verified statement of contributions has not been filed pursuant to D.C. Official Code §§ 1-1163.07 and 1-1163.09;
- The petition is not in the proper form established in D.C. Official Code § 1-1001.16(a);

¹ D.C. Official Code § 1-204.101(a) (emphasis added).

- The measure authorizes, or would have the effect of authorizing, discrimination prohibited under Chapter 14 of Title 2 of the D.C. Official Code; or
- The measure presented would negate or limit an act of the Council of the District of Columbia pursuant to D.C. Official Code § 1-204.46.²

The District of Columbia Court of Appeals (“Court”) has interpreted the prohibition on the use of the initiative process to propose “laws appropriating funds” very broadly, holding that it “extend[s] . . . to the full measure of the Council’s role in the District’s budget process . . .”³ Accordingly, the Court has deemed unlawful any initiative that (1) blocks the expenditure of funds requested or appropriated,⁴ (2) directly appropriates funds,⁵ (3) requires the allocation of revenues to new or existing purposes,⁶ (4) establishes a special fund,⁷ (5) creates an entitlement, enforceable by private right of action,⁸ or (6) directly addresses and eliminates a source of revenue.⁹

II. The Proposed Initiative

The Proposed Initiative would amend section 4 of the Minimum Wage Act Revision Act of 1992, effective March 25, 1993 (D.C. Law 9–248; D.C. Official Code § 32–1003), to gradually increase the tipped minimum wage to the same minimum wage that is required to be paid to non-tipped employees. Under the Proposed Initiative, the tipped minimum wage would be (provided that the employee actually receives tips in an amount at least equal to the difference between the hourly wage paid and the minimum wage set by D.C. Official Code § 32-1003(a)):

- As of July 1, 2021, \$5.05 an hour;
- As of July 1, 2023, not less than \$8.00 an hour;
- As of July 1, 2024, not less than \$10.00 an hour;
- As of July 1, 2025, not less than \$12.00 an hour;
- As of July 1, 2026, not less than \$14.00 an hour; and

² D.C. Official Code § 1-1001.16(b)(1).

³ *Dorsey v. District of Columbia Bd. of Elections & Ethics*, 648 A.2d 675, 677 (D.C. 1994) (quoting *Hessey v. District of Columbia Bd. of Elections & Ethics* (“*Hessey*”), 601 A.2d 3, 20 (D.C. 1991)).

⁴ *Convention Center Referendum Committee v. District of Columbia Bd. of Elections & Ethics*, 441 A.2d 889, 913-14 (D.C. 1981).

⁵ *District of Columbia Bd. of Elections & Ethics v. Jones* (“*Jones*”), 481 A.2d 456, 460 (D.C. 1984).

⁶ *Hessey*, 601 A.2d at 19-20.

⁷ *Id.*

⁸ *Id.* at 20 n. 34.

⁹ *Dorsey v. District of Columbia Bd. of Elections & Ethics*, 648 A.2d at 677.

- As of July 1, 2027, not less than the minimum wage set by D.C. Official Code § 32-1003(a).

The Proposed Initiative would provide that tipped employees may keep any tips received in addition to the tipped minimum wage required by the Proposed Initiative. The Proposed Initiative would expressly not apply to employees of the District of Columbia or to employees employed to perform services provided under contracts with the District of Columbia.

III. The Proposed Initiative is a Proper Subject of Initiative

The Proposed Initiative does not constitute a “law appropriating funds” because it specifically provides that the new tipped minimum wage would “not apply to employees of the District of Columbia, or to employees employed to perform services provided under contracts with the District of Columbia.”¹⁰ Accordingly, the Proposed Initiative does not block the expenditure of funds requested or appropriated, directly appropriate funds, require the allocation of revenues to new or existing purposes, establish a special fund, create an entitlement enforceable by private right of action, or directly address and eliminate a source of revenue.

In addition, the Proposed Initiative conforms with both the District Charter and the U.S. Constitution. The Proposed Initiative does not authorize or have the effect of authorizing any form of discrimination.

The Court has said that “absent express or implied limitation, the power of the electorate to act by initiative is coextensive with the power of the legislature to adopt legislative measures.”¹¹ In the instant case, no such express or implied limitation exists. Accordingly, the Proposed Initiative is a proper subject of initiative.

I am available if you have any questions.

Sincerely,

Nicole L. Streeter

Nicole L. Streeter
General Counsel, Council of the District of Columbia

¹⁰ Section 1(b) of the Proposed Initiative (adding a new D.C. Official Code § 32-1003(i)).

¹¹ *Jackson v. D.C. Bd. of Elections & Ethics*, 999 A.2d 89, 99 (D.C. 2010) (quoting *Convention Center Referendum Committee*, 441 A.2d at 897) (emphasis omitted).