

GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL
KARL A. RACINE



July 6, 2021

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

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

Dear Ms. Stroud:

You asked this office whether the “District of Columbia Full Minimum Wage for Tipped Workers Amendment Act of 2022” (“Measure”), which would raise the tipped minimum wage in the District, is a proper subject of initiative. We conclude that it is.

The power of initiative, granted by a 1978 Charter amendment, “is a power of direct legislation by the electorate.”¹ The initiative power is broad; “absent express or implied limitation,” it is “coextensive with the power of the legislature to adopt legislative measures.”² The Board must, however, reject any measure that is “not a proper subject of initiative . . . under the terms of title IV of the District of Columbia Home Rule Act.”³ This means the Board must reject any measure that would be a “law[] appropriating funds,”⁴ as well as any measure that is inconsistent with the Constitution, the Home Rule Act, or any nationally applicable federal law.⁵

¹ *Convention Center Referendum Cmte., et al. v. Bd. of Elections and Ethics* (“Convention Center”), 441 A.2d 889, 897 (D.C. 1981) (internal citation omitted).

² *Id.*

³ D.C. Official Code § 1-1001.16(b)(1) (2016 Repl. and 2018 Supp.).

⁴ See Initiative, Referendum, and Recall Charter Amendments Act of 1977, § 2 (D.C. Law 2-46; D.C. Official Code § 1-204.101(a)) (“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”) (emphasis added); *Bd. of Elections and Ethics v. Dist. of Columbia*, 866 A.2d 788, 794 (D.C. 2005) (a law appropriating funds is not a proper subject of initiative).

⁵ See *Hessey v. Bd. of Elections and Ethics*, 601 A.2d 3, 14 (D.C. 1991); *Convention Center*, 441 A.2d at 903 (Council legislation must “be consistent with the U.S. Constitution and the Home Rule Act”); *McConnell v. United States*, 537 A.2d 211, 215 (D.C. 1988) (invalidating an initiative that would “appl[y] to federal defendants in every jurisdiction in the United States,” because the Council lacks authority to amend or repeal a federal law that is not “limited in application to the District of Columbia”).

This Measure involves what is known as the “tipped minimum wage,” which is the “minimum hourly wage required to be paid by an employer to an employee who receives gratuities.”⁶ Under section 4(f) of the Minimum Wage Revision Act of 1992,⁷ the tipped minimum wage is \$5.00 an hour plus annual increases (adjusted to the nearest 5-cent increment) anchored to the Consumer Price Index.⁸ Following this method, the Department of Employment Services (“DOES”) has calculated the 2021 tipped minimum wage at \$5.05 per hour.⁹

The Measure, which amends section 4(f), keeps the existing tipped minimum wage for 2021 and 2022. It provides that the 2021 tipped minimum wage will remain at \$5.05 per hour, and the 2022 tipped minimum wage will be increased based on the Consumer Price Index just as current law requires, but the Measure increases the tipped minimum wage starting it in 2023, until, in 2027, it matches the ordinary minimum wage.¹⁰ The tipped minimum wage will not, however, apply to District government employees or to “employees employed to perform services provided under contracts” with the District government.¹¹

That carve-out of District employees and contractors prevents this Measure from being an improper subject of initiative because it prevents it from being an impermissible “law appropriating funds.” The key element of a “law appropriating funds” is, as the D.C. Court of Appeals explained in *Board of Elections and Ethics v. District of Columbia* (“*BOEE*”), that it “intrude[s] upon the discretion of the Council to allocate District government revenues in the budget process.”¹² So, for example, an initiative cannot block the expenditure of requested or appropriated funds, “require[] the allocation of revenues to new or existing purposes,” or “directly address[] and eliminate[] a source of revenue.”¹³ But since the Measure does not reach District employees and contractors – and thus does not compel District agencies to expend funds to meet a newly increased minimum wage – it does not intrude on the Council’s budgetary discretion, including in any of the ways listed in *BOEE*. It thus is not a law appropriating funds.

Some of the Measure’s language, such as the description of contractors quoted above, could be written more clearly. Still, I conclude that the Measure is a proper subjective of initiative since it is not an impermissible law appropriating funds, does not exceed the Council’s own legislative

⁶ D.C. Official Code § 32-1003(f)(1). This rate applies “provided that the employee actually receives gratuities in an amount at least equal to the difference between the hourly wage paid and the minimum hourly wage as set by subsection (a) of this section.” *Id.* The Department of Employment Services has interpreted identical provisos in current law to mean that “if an employee’s hourly tip earnings (averaged weekly) added to the base minimum wage do not equal the District’s full minimum wage, the employer must pay the difference.” Office of Wage Hour Compliance, <https://does.dc.gov/service/office-wage-hour-compliance-0> (last visited July 2, 2021).

⁷ Effective Mar. 25, 1993 (D.C. Law 9-248; D.C. Official Code § 32-1003(f)).

⁸ D.C. Official Code § 32-1003(f)(1)(E) and (f)(2).

⁹ See <https://does.dc.gov/service/office-wage-hour-compliance-0>.

¹⁰ See Measure § 1(a).

¹¹ *Id.* § 1(b). The tipped minimum wage, like the minimum wage generally, also does not apply to the federal government because the federal government is not an “employer.” See D.C. Official Code § 32-1002(3).

¹² 866 A.2d 788, 794 (D.C. 2005).

¹³ *Id.* at 794-795 (summarizing prior case law).

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authority, and is not otherwise contrary to District or federal law. Thank you for the opportunity to present my views on this matter.

Sincerely,

Karl A. Racine/by JD

KARL A. RACINE

Attorney General for the District of Columbia