JONES DAY

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December 29, 2017

VIA EMAIL AND U.S. MAIL

Andrew L. Jared
Assistant City Attorney
City of Pomona
505 South Garey Avenue
Pomona, CA 91766

Re: "High-Quality Workforce Act" Initiative

Dear Mr. Jared:

Following up on my call earlier this morning, I write on behalf of Pomona Valley Hospital Medical Center ("PVHMC") to express concerns regarding the legality of the recently proposed "High-Quality Hospital Workforce Act (Pomona)" ("Initiative"). The Initiative targets PVHMC and Casa Colina, both independent, not-for-profit community-based health care providers located in the City of Pomona. The Initiative proposes arbitrary staffing increases of a specific classification of hospital employees and a higher minimum wage for hospital employees as a purported remedy to an issue of national concern, *i.e.*, infection rates in hospitals. But, the Initiative – the first of its kind in the nation, to our understanding – presents absolutely no evidence that its proposed "solutions" would have any meaningful impact on the stated concern. Instead, the Initiative is an unlawful and unconstitutional attempt to impose both unheard of obligations on PVHMC and Casa Colina and unreasonable burdens on the City of Pomona's resources. *See* §§ 36-3(f)(ii), 36-7(b), 36-7(d), 36-8(b)(ii), and 36-8(c).

No one should misinterpret PVHMC's objections to the Initiative. PVHMC is committed to protecting public health, preventing disease, and promoting the well-being of everyone in the City of Pomona and its greater service area. According to Healthgrades, the nation's leading online resource for comprehensive information about physicians and hospitals, PVHMC is rated in the top ten percent of hospitals nationwide for patient safety and earned the Healthgrades Patient Safety Excellence Award in 2016 and 2017. Pomona Valley Hospital Medical Center Profile, HEALTHGRADES, https://www.healthgrades.com/hospital-directory/california-ca-los-angeles/pomona-valley-hospital-medical-center-hgst27518d46050231 (last visited Dec. 29, 2017). The Initiative, however, is not about protecting the health of the community or of PVHMC's employees. Rather, the Initiative appears to be nothing more than an inappropriate and retaliatory effort by a particular labor union – SEIU UHW – that has been seeking to

represent certain of PVHMC's employees in a matter that currently remains on appeal (by both PVHMC and SEIU UHW) before the National Labor Relations Board in Washington, D.C.

The Initiative, which we understand was filed on December 19, 2017, is before you for review. We write today at the inception of this process to request you to withhold issuance of title and summary because the Initiative is an "improper exercise of the initiative power." *Widders v. Furchtenicht*, 167 Cal. App. 4th 769, 784-85 (2008) (holding that the Ojai City Attorney properly refused to issue title and summary for proposed initiatives that were "unconstitutional on their face"). Although we have just commenced our legal analysis of this unprecedented proposed local ordinance, it is already clear that the Initiative, if enacted, would be legally invalid on its face. The Initiative would place PVHMC and Casa Colina in the impossible situation of having to choose between complying with either a local ordinance or state and federal statutes and regulations that regulate the provision of health care. It would also undermine the policy determinations that the federal government has already made in this area. Given that the Initiative is fatally flawed and would be preempted by federal and state law, title and summary should not and need not be prepared.

A review of the Initiative illustrates its legal overreach. Under the Initiative, "[a] Covered Hospital that does not meet the Hospital-Acquired Infection Standard must increase staffing of Frontline Environmental Services Workers by twenty percent (20%) for a minimum 3-year period." § 36-5. The "Hospital-Acquired Infection Standard" is defined as "[a] classification of 'No Different than the National Benchmark' or 'Better than the National Benchmark' for C. Diff. infection rates and MRSA by the Centers for Disease Control and Prevention (CDC), as of the most recent data collection period reported in the Hospital Compare data published by the Centers for Medicare & Medicaid Services (CMS)." § 36-3(f)(i). "Frontline Environmental Services Worker" is defined broadly to mean any "Hospital Worker Employee ...whose primary job responsibilities are cleaning, disinfecting, or sanitizing" virtually all areas of a hospital, including "public areas, storage areas, common areas, ...offices, ...commodes, floors, carpets, window coverings, walls, ceilings, and exhaust grills." § 36-3(e). Thus, the Initiative, among other things, relies on information issued for another purpose by a federal agency to dictate staffing levels of EVS workers at hospitals located in the City of Pomona. In doing so and as explained further below, the Initiative would enter the infection control field that is already occupied by federal law and conflicts directly with state and federal law.

Under preemption principles, a city's authority to enact and enforce local laws like the Initiative is limited by state and federal law. A city can neither invade an area already occupied by state or federal laws nor pass legislation that conflicts with state or federal law. Cal. Const. Art. XI, § 7 ("A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws."); U.S. Const. Art. VI, cl.

2 (Supremacy Clause); *Hillsborough Cty., Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985) ("[F]or the purposes of the Supremacy Clause, the constitutionality of local ordinances is analyzed in the same way as that of statewide laws."). The Initiative raises both federal and state preemption concerns.

First, federal law governing infectious disease reporting preempts the field except to the extent state regulation is specifically permitted. *Cf. Cong. of California Seniors v. Catholic Healthcare W.*, 87 Cal. App. 4th 491, 493 (2001) (finding "the field of Medicare provider cost reporting and reimbursement ... so fully and completely occupied by federal law ... that there remains no room for state action"). Reporting the rates of health care associated infections (HAI) to the National Healthcare Safety Network (NHSN) is mandatory for PVHMC, Casa Colina, and other participants in the federal Medicare and federal-state Medicaid programs. The CDC and CMS explicitly call for the reported data, available through the CMS "Hospital Compare" website, to be used by the public to assist the selection of medical facilities. Hospital Compare, MEDICARE.GOV, https://www.medicare.gov/hospitalcompare/About/What-Is-HOS.html (last visited Dec. 28, 2017) (indicating that the information "helps [the patient] make decisions about where [they] get [their] health care" and "*encourage*[*s*] hospitals to improve the quality of care they provide") (emphasis added). In addition, the CDC contacts facilities with a high Standardized Infection Ratio (SIR) to work with the organization alongside CMS to address any found deficiencies. HAI Progress Report FAQ, "What is CDC doing about healthcare facilities with high standardized infection ratios (SIR)?", CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/hai/surveillance/progress-report/faq.html (last visited Dec. 28 2017) ("CDC is contacting these [high SIR] facilities and connecting them with prevention initiatives" in order to "see greater national reductions in HAIs").

The federal reporting framework does not permit or even contemplate that local governments would penalize hospitals for their performance. In fact, CMS specifically instructs the public to seek improvement in the quality of the hospitals by getting involved in the hospital's organization and staff procedures. Centers for Medicare & Medicaid Services, Guide to Choosing a Hospital 17, https://www.medicare.gov/Pubs/pdf/10181.pdf. The Initiative, however, uses the national standards aggregated by CDC and CMS to force hospitals to adopt a specific strategy in fighting hospital-acquired infections. § 36-3(f)(i). Moreover, the Initiative imposes steep civil penalties against a Covered Hospital for failing to increase staffing when mandated by the Initiative. § 36-8(b)(i)-(iv). The Initiative's mandate to increase environmental services staffing in response to a "Worse than National Benchmark" rating enters a field already occupied by federal infection control agencies.

Second, the Initiative would be preempted because it conflicts directly with applicable federal and state law and regulation. The Initiative dictates hospital staffing levels by mandating additional environmental service workers for the purpose of reducing infectious disease rates.

§ 36-5. As such, the Initiative would conflict directly with federal and state regulations requiring hospital administrators to develop and administer safety infection control policies. 42 C.F.R. § 482.42; 22 CCR § 70739 (a)(1-5); Cal. Health & Saf. Code § 1288.95. Specifically, under the federal requirements for participation in the Medicare programs, a designated hospital administrator has the authority and obligation to develop the system for infection control in the hospital. *See* 42 C.F.R. § 482.42(a). CMS also provides agency interpretation and guidance for a hospital's compliance with the regulation through the State Operating Manual. State Operations Manual (CMS-Pub. 100-07). Pursuant to these regulations, CMS directs that the hospital's infection control officer has the authority for "appropriate monitoring of housekeeping … and other activities to ensure that the hospital maintains a sanitary environment." State Operations Manual, § 482.42. Similarly, under California law, the oversight of the infection surveillance, prevention and control program involves input from medical staff, nursing, administration and infection control personnel to meet statutory safety requirements and yearly sanitation training. 22 CCR § 70739(a)(3)(A-B); Cal. Health & Saf. Code § 1288.95(d). In tandem, California law also dictates the creation of, and policies for, a multi-disciplinary hospital infection control program. 22 CCR § 70739 (a)(1-5); § 70739(b).

Federal regulations require the infection control officer to "develop and implement policies governing control of infections and communicable diseases." 42 C.F.R. § 482.42(a). These controls must be integrated into the hospital's overarching Quality Assurance and Performance Improvement (QAPI) program. 42 CFR 482.42(b)(1). CMS directs the infection control officer to develop policies that are "specific to each department, service, and location" and to coordinate with "non-patient-care support staff, such as maintenance and housekeeping staff." State Operations Manual, § 482.42(a). Yet, in spite of these regulations and agency directives, the Initiative requires a blanket 20% staffing level increase for all environmental service workers covering the entire hospital without regard to whether high infection rates are localized, without an epidemiological assessment or investigation related to staffing, or any assessment of the effect of additional housekeeping staff on optimal infection control policies. § 36-5. Further, annual 20% increases in environmental services staffing would occur if the designated national standards are not met in any single quarter over a rolling three year period. § 36.5(c) – (e). Such broad brush, limited, and simplistic nonclinical staffing responses without regard to the complex issues raised by hospital acquired infections or without epidemiological investigation are inconsistent with federal and state regulations requiring tailored and specific responses to issues relating to hospital acquired infections. The Initiative's myopic focus on environmental services staffing is inconsistent with CDC findings and guidelines for infection control in health care facilities. *See generally* Guidelines for Environmental Infection Control in Health-Care Facilities, CENTERS FOR DISEASE CONTROL AND PREVENTION (2003), updated Feb. 15, 2017. For example, the CDC has found that cleaning and disinfecting of environmental surfaces "generally are not directly associated with transmission of infections to either staff or

patients" and "extraordinary cleaning and decontamination of floor in health-care settings is unwarranted." *Id.*, at 85, 89.

Federal regulations further require the CEO, medical staff, and director of nursing services at the hospital to "[e]nsure that the hospital-wide quality assessment and performance improvement program (QAPI) and training programs address problems identified by the infection control officer" and "[b]e responsible for the implementation of successful corrective action plans in affected problem areas." 42 CFR § 482.42(b)(1-2). Similarly, although the CDC indicates that the CEO, medical staff, and director of nursing are held "explicitly responsible for implementing successful corrective action plans" and must "assess the effectiveness of actions taken, with implementation of revised corrective actions as needed," the Initiative seeks to dictate how scarce resources are spent, tying the hands of the responsible leadership. State Operations Manual, §482.42(b). Hospital administrators seeking to address a concern related to hospital acquired infections would be faced with a conflict between a local ordinance dictating hospital-wide staffing levels for environmental services personnel and federal regulations requiring hospital administrators to make those decisions on a department-, service-, and location-specific basis, and to course-correct where necessary.

Local efforts such as the Initiative that deviate from federal and state law are preempted. *See Mission Hosp. Reg'l Med. Ctr. v. Shewry*, 168 Cal. App. 4th 460, 485 (2008) (The Medicaid Act "preempts any state law that stands as an obstacle to its enforcement."); *Am. Fin. Servs. Ass'n v. City of Oakland*, 34 Cal. 4th 1239, 1254-56 (2005) (holding city could not pass more restrictive measure that would ban practice allowed under state law); *N. Cal. Psychiatric Soc'y v. City of Berkeley*, 178 Cal. App. 3d 90, 105-06 (1986) (holding that where state placed detailed regulations on when and how controversial psychiatric treatment could be offered, city could not ban such treatment entirely). In fact, because "regulation of statewide commercial activities" like health care "command statewide uniformity," courts are particularly wary of individual cities setting their own standards in "matters of health and medicine," which "are of statewide concern." *N. Cal. Psychiatric Soc'y*, 178 Cal. App. 3d at 101, 108. *See Coyne v. City & Cty. of S.F.*, 9 Cal. App. 5th 1215, 1229-30 (2017) (local ordinance requiring relocation subsidies when a landlord chooses to go out of the rental business subject to conflict preemption because it prohibited landlords from "exercis[ing] their rights under [California's] Ellis Act").

While this remains only a preliminary analysis of the Initiative and we have not exhaustively listed our concerns in this letter, it is clear that the Initiative has, on its face, numerous legal defects. These defects are most efficiently addressed by a court now. *See, e.g.*, *Widders*, 167 Cal. App. 4th at 772 ("While we recognize the strong public policy in favor of putting initiative measures before the electorate, that policy is not advanced where, as here, the proposed measures are *plainly unconstitutional on their face*.") (emphasis added). Preparation of

a ballot title and summary notwithstanding the Initiative's legal deficiencies would only waste public resources, create divisions within the community, and mislead the public.

Thank you for your attention in this matter that would so adversely affect the delivery of care at hospitals located in the City of Pomona, such as PVHMC and Casa Colina. Please let me know if you believe that any further information would be of assistance. If you would like to discuss any matter related to the Initiative, please call.

Very truly yours,

F. Curt Kirschner, Jr.

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cc: Arnold Alvarez-Glasman
City Attorney
City of Pomona

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