Notice of Your Right to Join a Federal Lawsuit
to Collect Underpaid FLSA-Eligible Overtime the City Owes You

Description of Lawsuit

When a non-exempt City employee works more than 40 hours during any 7-day work week, the federal Fair Labor Standards Act ("FLSA") requires the City to pay a premium "time-and-a-half" overtime rate. To calculate this premium rate, the City uses the employee's "regular rate of pay," which the FLSA defines as "all remuneration for employment paid to, or on behalf of, the employee," subject to a number of exclusions set forth in the FLSA. The City has never counted or included any "flex dollars" available to eligible employees under City's Flexible Benefits Plan as eligible "remuneration" when determining an employee's "regular rate" of pay.

However, the Ninth Circuit Court of Appeals in *Flores v. City of San Gabriel* has concluded that payments made under a Flexible Benefits Plan (FBP) should be treated as FLSA "remuneration" and included in the determination of an employee's regular and premium rates of pay. The *Flores* case involved the issue of cash-in-lieu of benefits payments, as well as payments made under a FBP on an employee's behalf to third parties for health, dental, vision and life insurance. The City of San Gabriel asked the United States Supreme Court to grant discretionary review of the Ninth Circuit's decision but, in May this year, the high Court declined to do so. The Ninth Circuit's decision is now final.

To comply with the *Flores* decision, the City sent e-mail notice to all employees on June 30, 2017 that, effective July 1, 2017, "in accordance with recent changes to federal law regarding FLSA overtime," the City "will include in an employees' FLSA overtime calculations the cash value of any flexible benefit credits that they did not use to pay for health, dental, vision or life insurance." Despite this concession, much more must be done to enforce your FLSA rights.

Who Should Join This Lawsuit

If you worked more than 40 hours during a 7-day work week at any time in the past three years **– while you were also participating in the City's Flexible Benefits Plan** – you have a meritorious claim for *underpaid overtime*. The more overtime you worked, the larger your claim will be. You have a right to recover up to two years of underpaid overtime but, on proof that the City's failure to comply with the FLSA was willful, you may recover up to three years. You also have a right to seek up to "double" the amount owed as liquidated damages; however, the City may defeat this aspect of your claim by proving that it acted in good faith and had a reasonable basis to believe that it was in compliance with the law. The City may also be entitled to reduce the amount it owes you by certain offsets and credits available under the FLSA.

What This Lawsuit Is Designed To Do

Based on the *Flores* decision, the City concedes that it *does owe money* to those who worked FLSA-eligible overtime while participating in its FBP. However, it is expected that the City will interpose every conceivable defense and legal argument available to it in order to reduce what it must pay to make each eligible Plaintiff "whole" for the FLSA-eligible overtime he or she worked during the relevant period. And, despite the changes the City implemented on

July 1, 2017 (as explained in City's 6/30/17 e-mail notice), the City continues to exclude from "remuneration" (and thus from its calculation of premium rate overtime) the payments it makes under the Flexible Benefits Plan to third party insurers on behalf of employees.

The purpose of this federal lawsuit is to:

(1) gain the City's full compliance with the FLSA regarding the proper treatment of all eligible payments made under the FBP when determining an employee's regular and premium overtime rates of pay;

(2) recover for each eligible employee the full amount of all underpaid FLSA-eligible overtime, with interest, for the longest period available under the law (which is either a minimum 2-year period or, if "willful" conduct in violation of the FLSA is proven, then a 3-year period);

(3) recover liquidated damages for each eligible employee (up to double the amount of underpaid overtime owed) by defeating City's affirmative defense that it acted in good faith and with reasonable grounds to believe that it was not in violation of the FLSA; and,

(4) seek a Court-ordered award of reasonable attorneys' fees and costs from the City to cover the expense of enforcing the FLSA for the benefit of affected employees.

Your Written Consent To Join This Lawsuit Is Needed For You To Participate In Any Judgment or Settlement and TIME IS OF THE ESSENCE!

Unlike "class actions" where a few individuals can be named as plaintiffs and sue to protect the rights – and achieve a recovery – for all others similarly situated, the FLSA requires each person who seeks to enforce his/her claim to money to sign a written consent to "opt into" the case. Without this, the individual has no private right to recover past underpaid overtime the City owes even if the fact that it is owed is not disputed. In other words, if you choose not to join this lawsuit, you will not be affected by or included in any judgment or settlement rendered.

If you seek to recover any amount the City owes you by joining this lawsuit, you must sign and return the attached Consent to Join Action form so that your attorneys can file it with the Court to protect and enforce your rights.

Caution: Your individual claim will be based on a 2 or 3-year period dating back from the day on which your attorneys actually file this Consent Form with the court – *not* the date when the original Complaint or any other employee's Consent Form is filed. Therefore, your prompt personal action is critical in preserving and pursuing your right to a recovery.

You Will Not Be Charged Attorneys' Fees or Costs If You Consent to Join This Lawsuit

MEA's Board of Directors has voted to retain Ann M. Smith and her firm Smith, Steiner, Vanderpool & Wax, APC, to file and litigate this case on behalf of all affected MEA-represented employees. MEA is taking this action in order to assure that the City's commitment to comply with the FLSA – which is included in MEA's Memorandum of Understanding and in each

Annual Salary Ordinance the City Council enacts – is enforced. Without MEA's action in the matter, the risk is great that individual employees will find it difficult, if not impossible, to enforce their rights on a cost-effective basis, if at all. MEA has also determined that there is little, if any, likelihood that the City will pay MEA-represented employees the full amount owed *without* this litigation.

MEA is entrusting this important lawsuit to Ann Smith and her firm because Ann is an experienced litigator in matters of this type with knowledge of City policies and practices gained over 32 years of representing MEA at the bargaining table and in litigation with the City. MEA will pay the agreed-upon fees and costs incurred by Ann's firm to file and litigate this lawsuit – subject to reimbursement of those fees and costs by the City pursuant to a Court order awarding fees and costs to Ann's firm as allowed under the FLSA. MEA will provide critical staff support to facilitate the communications and the completion of paperwork between Ann's firm and participating MEA-represented employees. Your cooperation in respecting these lines of communication will be essential to an effective litigation process where potentially hundreds of employees will have legitimate claims included in this lawsuit.

You remain free to file your own individual lawsuit rather than consent to join this lawsuit.

Federal Law Prohibits Employer Discrimination or Retaliation

Federal law clearly and unequivocally prohibits the City from discriminating or retaliating against you for taking part in this lawsuit to enforce your RIGHTS under the FLSA.

What You Must Do To Join This Lawsuit

Using your private e-mail account – *not* your City e-mail – notify Nichole Johnson at MEA that you want to join the lawsuit. Send your e-mail to njohnson@sdmea.org giving her your name. Nichole will send you the following documents on your private e-mail which you should complete and return to her:

(1) A brief confidential questionnaire;

(2) A consent to the retainer arrangement between MEA and Smith, Steiner, Vanderpool & Wax, APC, which will make qualified counsel available to represent you on your claim without obligating you to pay fees and costs of litigation; and,

(3) A separate CONSENT TO JOIN form which will be filed with the federal court.

You may also go to MEA during normal office hours (8:30 to 4:30 Monday through Friday) to fill out this paperwork in person or ask Nichole to mail the forms to your home address.

Call MEA at 619-264-6632

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