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November 11, 2008

Mayor Tom Barrett
City Hall
200 East Wells Street
Milwaukee, Wisconsin 53202

ATTN: Leslie Silletti, Research and Analysis Manager

Re: Expansion of Unemployed Residents Preference Program, MCO § 309-41

Dear Mayor Barrett:

By letter dated October 13, 2008, you asked whether the City of Milwaukee can expand the geographic boundaries of the unemployed residents preference program ("RPP") to include the entire city, for projects that include direct financial assistance from the City.

The Privileges and Immunities Clause[1] applies not only to resident preferences for public works projects but also to resident preferences for construction projects funded in part or in whole with municipal funds or funds administered by a municipality. *United Bldg & Constr. Trades Council v. Camden* ("*Camden*"), 465 U.S. 208 (1984) [2]. This is so because the Privileges and Immunities Clause analysis, unlike the Commerce Clause, is focused on the infringement of a fundamental individual right rather than the action or role of the municipality. *Camden*, 465 U.S. at 219-220. It does not matter that the agreements are "voluntary."

[1] Art. IV, § 2 of the U.S. Constitution ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States").

[2] *See also Hudson County Bldg & Constr. Trades Council v. Jersey City*, 960 F. Supp. 823 (D.N.J. 1996) (Privileges and Immunities Clause scrutiny applies to ordinance requiring that recipients of "economic incentives," including tax abatement or exemption, grants or loans, and below market sales, make a good faith effort to hire 51% residents); *Utility Contractors Ass'n v. City of Worcester* ("*Worcester*"), 236 F. Supp. 2d 113 (D. Mass. 2002) (striking 50% resident preference applying to any construction project or public work costing more than $25,000 and funded in whole or in part by city funds or funds administered by the city).

That said, it is our opinion that we could only defend in good faith the following methods for expanding the RPP boundaries:

1. If sufficiently justified by unemployment data establishing that the city-wide unemployment situation has significantly worsened in comparison to the unemployment rates for the nation, Wisconsin, Milwaukee County, and the metropolitan area, we could defend in good faith an expansion of the RPP boundaries to the City limits, provided further that participation continues to be limited to City residents who meet the definition of "unemployed" in the RPP ordinance, MCO § 309-41.

2. Because the Privileges and Immunities Clause protects against discrimination against citizens of another state, the City could exclude hours worked by out-of-state residents from the definition of "worker hours" in MCO § 309-41-2-a. This is the approach used in the City of Cleveland's "Fanny M. Lewis Cleveland Resident Employment Law" ("Cleveland Ordinance"), enclosed for your convenience. This option would most likely survive scrutiny under the Privileges and Immunities Clause, but may permit a contractor to employ all out-of-state workers and no City residents or to limit the number of in-state residents on a City-funded construction project while allowing unlimited numbers of out-of-state workers. In other words, we would be giving a preference to City residents and Illinois residents, while denying that preference to Wisconsin residents.

3. The City could adopt a program similar to MPS' Communities in Need program (COIN), which does not discriminate in favor of City residents and is therefore not subject to Privileges and Immunities scrutiny. However, it does provide a preference for all unemployed or underemployed individuals who meet certain criteria.

Federal and State Court Review of Resident Preference Ordinances

As we have explained in several previous opinions, virtually all resident preference programs reviewed by federal and state courts have been struck down as violative of the Privileges and Immunities Clause. We are aware of only one case, a 1985 Wyoming Supreme Court decision, in which a resident preference statute or ordinance was held valid. *State v. Antonich*, 694 P.2d 60 (Wyo. 1985).

In *Camden*, the United States Supreme Court held that resident preference ordinances discriminate against out-of-state residents in the exercise of a fundamental privilege: the opportunity to seek employment with a private employer. 465 U.S. at 221-22. However, the Privileges and Immunities Clause is not absolute; it does not preclude discrimination against out-of-state residents where there is a "substantial reason" for the discriminatory treatment. *Id.* at 222.

To establish a "substantial reason" for discrimination against out-of-state residents, a municipality must demonstrate that non-residents "constitute a peculiar source of the evil at which the [ordinance] is aimed." *Id.* at 222 (citation omitted). Further, the degree of discrimination must be closely related to the reason for the discriminatory treatment. *Id.* at 222; *Hicklin v. Orbeck*, 437 U.S. 518, 528 (1978) (striking statute because, among other reasons, the preference was afforded to all residents regardless of employment status rather than being "closely tailored to aid the unemployed the Act is intended to benefit.").

The City of Camden tried to justify its 40% resident preference goal by citing "grave economic and social ills," including depletion of the city's tax base caused by "spiralling [sic] unemployment," and a sharp drop in residents and local businesses. The Court summarized the city's argument as follows:

> The resident hiring preference is designed, the city contends, to increase the number of employed persons living in Camden and to arrest the "middle class flight" currently plaguing the city. The city also argues that all nonCamden [sic] residents employed on city public works projects, whether they reside in New Jersey or Pennsylvania, constitute a "source of evil at which the statute is aimed." That is, they "live off" Camden without "living in" Camden.

Id. at 222.

The Supreme Court did not rule that such reasons can never justify a resident preference. The Court remanded the case for lack of a record, noting:

> Every inquiry under the Privileges and Immunities Clause "must be conducted with due regard for the principle that the states should have considerable leeway in analyzing local evils and in prescribing appropriate cures." (citation omitted). This caution is particularly

> appropriate when a government body is merely setting conditions on the expenditure of funds it controls.

Id. at 222-23.

Despite the Supreme Court's language quoted in the paragraph above, in *W.C.M. Window Company, Inc. v. Bernardi*, the United States Court of Appeals for the Seventh Circuit (the appeals court that would review a Milwaukee ordinance, if challenged) applied the "substantial reason" test in a restrictive manner, requiring evidence of costs and benefits to satisfy the "substantial reason" test. 730 F.2d 486, 497 (7th Cir. 1984) ("there must be *some* evidence of the benefits of a residents-preference law in dealing with a problem created by nonresidents..."). The Seventh Circuit refused to assume the benefits of Illinois' resident preference law, stating that the effects of allowing nonresident labor on public construction projects were not at all "as clear as those of allowing carriers of Bubonic plague to enter the state without quarantine." *Id.* at 498. The court noted the absence of evidence of the following factors: the unemployment rate in Illinois' construction industry; what that unemployment costs Illinois; whether unemployment would be significantly increased if nonresidents were allowed to work on public works projects; and whether the costs, in higher unemployment or public aid, from allowing nonresident labor on public works projects are likely to exceed any cost savings in public construction from hiring nonresident workers. *Id.* at 498.

Since the adoption of MCO § 309-41 in 1991, federal and state courts have continued to strike down resident preference ordinances and statutes. *A.L. Blades & Sons, Inc. v. Yerusalim*, 121 F.3d 865 (3rd Cir. 1997) (striking a requirement that only Pennsylvania residents be hired on commonwealth-funded public works projects); *Worcester*, *supra* n.2; *Utility Contractors Ass'n v. City of Lowell*, 2001 WL 34059083 (Mass. Super. 2001) (trial court decision striking ordinance that required 33% resident labor on city-funded construction projects). However, none of the court decisions, pre- or post-1991, involved a preference that was limited to *unemployed* residents.

An Expansion of the RPP Boundaries to Include the Entire City

With this overwhelmingly unfavorable body of court decisions in mind, our office carefully constructed MCO § 309-41 to identify unemployment as an "evil" the city would suffer if too many nonresidents worked on City construction projects. At the time of the ordinance's adoption in 1991, a city-wide preference was not justifiable as the city's unemployment rate was not high and was actually lower

than the national unemployment rate. The legislative findings cite the following 1990 unemployment rates: City of Milwaukee (4.9%); Milwaukee County (4.1%); metropolitan area (3.8%); State of Wisconsin (4.4%); United States (5.4%). We advised that the RPP boundaries should consist of the portions of the city experiencing the greatest concentration of unemployment: the Special Impact Area (16.7%). The boundaries were expanded in 1993 to include the CDBG area, which had a 1990 unemployment rate comparable to the Special Impact Area.

The city's unemployment figures, on a city-wide basis, have not previously justified a city-wide resident preference program. We could defend a city-wide RPP ordinance that limits participation to "unemployed" residents as currently provided in MCO § 309-41 only if unemployment data indicates that the city-wide unemployment situation has significantly worsened to the point that it reflects a significantly worse unemployment rate than that of the nation, Wisconsin, Milwaukee County, and the metropolitan area. Statistics that demonstrate that Milwaukee's unemployment problem is worse than other large urban communities would also help to defend a city-wide preference.

Data would need to be established on the record and at a public hearing to justify an expansion of the RPP boundaries to the City limits. In addition to reliable statistics, the 1991 legislative findings made by the Common Council would need to be updated to reflect current conditions. We stress that MCO § 309-41 has never been challenged in court.

W.C.M. Window remains good case law and is binding on the City of Milwaukee. However, given possible evidence of Milwaukee's deteriorating unemployment situation, there is a basis for arguing that *W.C.M. Window* can be distinguished from the City's ordinance so as not to preclude the expansion of the ordinance to a city-wide preference. First, Milwaukee's ordinance is more closely related to the City's objective of aiding unemployed residents. Unlike MCO § 309-41, Illinois' state-wide preference was not limited to the unemployed or those in job-training programs.

Second, there is arguably a lesser *degree* of discrimination against nonresidents under the Milwaukee ordinance's 25% resident preference than under Illinois' 100% resident preference. *See Toomer v. Witsell*, 334 U.S. 385, 396 (1948) ("the inquiry in each case must be concerned with whether such reasons [for discriminatory treatment] do exist and whether the degree of discrimination bears a close relation to them."). The Illinois statute excluded nonresidents from working on any state, municipal, or other governmental unit public works project

unless the contractor certified that no Illinois workers were able and available to perform the particular work. *W.C.M. Window*, 730 F.2d at 489. The Seventh Circuit noted that the consequences for nonresidents under Illinois' statute were "much greater" than those of Camden's 40% resident preference. *Id.* at 497. *But see Worcester*, *supra* n.2 (striking 50% preference).

Third, the State of Illinois made absolutely no findings in support of the severity of the state's unemployment problems and the benefits of the preference law. *W.C.M. Window*, 730 F.2d at 497-98.

Please note that we informally advised your staff last year that we could defend an expansion of the current RPP boundaries to include those census tracts outside the CDBG area that have unemployment rates comparable to the average unemployment rate in the CDBG area. It is our understanding that this approach did not significantly expand the pool of potential residents. We understand that unemployment data is only available at the census tract level at the time of the decennial Census.

We also considered whether the City could expand the RPP boundaries to include non-CDBG census tracts that had 2000 Census unemployment rates lower than the CDBG average but that nonetheless had high poverty statistics. This approach would move the City away from the objective of addressing the "evil" of unemployment (which can arguably be attributed, in part, to non-Milwaukee residents working on City-funded projects while Milwaukee residents remain unemployed). In light of the case law summarized above, this approach would not likely survive scrutiny under the Privileges and Immunities Clause. *Worcester*, 236 F. Supp. 2d at 119-120.

Excluding Out-of-State Workers from the Definition of "Worker Hours"

The City could revise the unemployed resident preference ordinance to exclude out-of-state workers from the definition of "worker hours" in MCO § 309-41-2-a. We believe that this approach would likely survive a Privileges and Immunities Clause challenge and is the approach used in the Cleveland Ordinance.

The Cleveland Ordinance provides a 20% resident preference on any construction project which receives public subsidies of $100,000 or more in the form of city funds, privileges, credits, or funds administered by the city. The Cleveland Ordinance excludes from its definition of "Construction Worker Hours" the number of worker hours performed by out-of-state residents. Stated another way,

the Cleveland Ordinance requires that contractors ensure that 20% of the work hours *performed by Ohio residents* are worked by Cleveland residents. Thus, the discrimination against non-Cleveland residents is limited to Ohio residents, not out-of-state residents protected by the Privileges and Immunities Clause.

The Privileges and Immunities Clause prohibits discrimination against *out-of-state* residents, not state residents who do not live in the City of Milwaukee. Wisconsin residents disadvantaged by a City of Milwaukee resident preference ordinance have no claim under the Privileges and Immunities Clause. *Camden*, 465 U.S. at 217. Further, corporations, whether in-state or out-of-state, have no claim under the Privileges and Immunities Clause. *J.F. Shea Co., Inc. v. City of Chicago*, 992 F.2d 745, 749 (7th Cir. 1993).

The Sixth Circuit Court of Appeals recently rejected an argument that the Cleveland Ordinance violated a federal regulation prohibiting discrimination against the employment of out-of-state labor on federally funded highway projects. *City of Cleveland v. Ohio*, 508 F.3d 827 (6th Cir. 2007). The court held that the Cleveland Ordinance "does not operate to discriminate against the employment of labor from another State," reasoning as follows:

> If a contractor wishes to employ any Ohio construction workers, 20% of the hours performed by those Ohio workers must be worked by Cleveland residents. But if a contractor wishes to employ all out-of-state labor, it can do so without employing *any* Cleveland residents. The [ordinance] thus might disadvantage Ohio-based labor. But the [ordinance] has no effect whatsoever on the "employment of labor from any *other* State, possession, or territory of the United States."

Id. at 848 (emphasis in original) (citations omitted). The court noted Cleveland's "apparent attempt to avoid conflict with the Privileges and Immunities Clause by restricting the reach of this ordinance to Ohio residents only." *Id.* at 833.

We caution that the court was analyzing whether the Cleveland Ordinance discriminated against out-of-state residents in violation of a federal regulation rather than the Privileges and Immunities Clause and caution further that Sixth Circuit decisions are not binding on the Seventh Circuit. We further caution that

this approach may have the undesired result of permitting a contractor to employ all out-of-state workers and no City residents on a City-funded project.

The City Could Adopt a COIN Program

In addition, as we have advised your office and several aldermen over the years, the City could adopt a program similar to the Milwaukee Public Schools' Communities in Need program (COIN). Under the COIN program, MPS requires its contractors to hire a certain percentage of employees living in households that are below the poverty level. Workers outside of the city are eligible if they live in an area where the median income is below a certain level. Because the COIN program does not discriminate in favor of City residents, it is not subject to review under the Privileges and Immunities Clause.

We would be happy to continue to work with your staff to implement legally defensible ways to increase resident employment on City-funded construction projects. If you have any comments or concerns or require any additional information, please do not hesitate to contact the undersigned.

Very truly yours,

GRANT F. LANGLEY
City Attorney

THOMAS D. MILLER
Assistant City Attorney

Encl.
TDM:tdm
1077-2008-3205:138789v3

PART ONE — ADMINISTRATIVE CODE

Title XV — Purchases And Contracts

Chapter 188 — Fannie M. Lewis Cleveland Resident Employment Law

Complete to December 31, 2007

Note: Ordinance No. 2031-A-02, passed June 10, 2003, enacted Chapter 188, the "Fannie M. Lewis Cleveland Resident Employment Law" and provides for an effective date of January 1, 2004.

188.01 Definitions

For purposes of this chapter, the following words, phrases and terms are defined as follows:

(a) "City" means the City of Cleveland, Ohio.

(b) "Construction Contract" means any agreement whereby the City either grants a privilege or is committed to expend or does expend its funds or other resources, or federal grant opportunities, including without limitation, Community Development Block Grants, Urban Development Action Grants and Economic Development Administration Grants, in an amount of $100,000 or more, for the erection, rehabilitation, improvement, alteration, conversion, extension, demolition or repair of improvements to real property, including facilities providing utility service and includes the supervision, inspection, and other on-site functions incidental to construction, but does not include professional services. Construction Contract includes any contract that is entered into by a person or entity that receives a grant, loan, privilege, credit, or resources from the City, from its funds or from federal grant opportunities for the poor, minorities and/or unemployed in an amount of $100,000 or more, for the purpose of erecting, improving, rehabilitating, altering, converting, extending, demolishing, or repairing real property or improvements to real property.

(c) "Construction Worker Hours" means the total hours worked on a Construction Contract by Skilled and Unskilled Construction Trade Workers, whether those workers are employed by the Contractor or any Subcontractor. In determining the total Construction Worker Hours to be furnished at the construction site, there shall be included the number of hours devoted to all tasks customarily performed on a construction site, whether or not such tasks are, in fact, performed on the construction site. Construction Worker Hours excludes the number of hours of work performed by non-Ohio residents.

(d) "Contractor" means any person or company receiving a Construction Contract from the City of Cleveland, any subdivision of the City, or any individual legally authorized to bind the City pursuant to said contract.

(e) "Director" means the Director of the Office of Equal Opportunity.

(f) "Low Income Person" means a Resident who is a member of a family having an income equal to or less than the Section 8 very low income limit established by the Department of Housing and Urban Development. Very low-income families are defined as families whose incomes do not exceed fifty percent (50%) of the median family income for. the area. Income limits are adjusted for family size. Unrelated individuals shall be considered as one person families for this purpose.

(g) "Resident" or "Resident of the City" shall mean persons domiciled within the boundaries of City of Cleveland. The domicile is an individual's one and only true, fixed and permanent home and principal establishment.

(h) "Skilled and Unskilled Construction Trade Worker" means all work site foremen, journeyworkers, including technical engineers, apprentices, construction trainees and elevator construction helpers and apprentices that are in a bona fide apprenticeship training program that is certified by the U.S. Department of Labor, Bureau of Apprenticeship and Training. Also included are other workers appropriate for construction activities. Salaried superintendents are excluded from this special provision.

(i) "Subcontractor(s)" means any person or company that assumes by secondary contract some or all of the obligations of the original Contractor.
(Ord. No. 2031-A-02. Passed 6-10-03, eff. 1-1-04)

188.02 Employment of City Residents

(a) Where not otherwise prohibited by federal, state or local law or the terms of federal or state grants, all Construction Contracts shall contain a provision that requires that Residents of the City perform twenty percent (20%) of the total Construction Worker Hours ("Resident Construction Worker Hours") and shall contain a provision detailing the penalties for failure to do so, which penalties are set forth in Section 188.05. Additionally, where not otherwise prohibited by federal, state or local law or the terms of federal or state grants, all Construction Contracts shall contain a provision that requires the Contractor to use significant effort, and requires any Subcontractors to use significant effort, to ensure that no less than four percent (4%) of the Resident Construction Worker Hours are performed by persons who qualify as Low Income Persons. Cleveland residents employed by a Contractor or Subcontractor as Skilled or Unskilled Construction Trade Workers at the time that work on a Construction Contract begins, but who are otherwise employed by the Contractor or Subcontractor on projects that are not pursuant to a Construction Contract, may be counted toward the above-stated Resident Construction Worker Hours requirement upon presentation of documentary proof to the Director. Residents who are Skilled and Unskilled Construction Trade Workers and are graduates from established pre-apprenticeship programs, such as the Union Construction Industry Partnership_Apprenticeship Skill Achievement Program ("UCIP-ASAP") who are working for the Contractor or Subcontractor, may be counted toward the above-stated Resident Construction Worker Hours requirement.

(b) The percentage levels set forth in Section 188.02(a) are intended as minimum requirements for use of Residents of the City of Cleveland under Construction Contracts and shall not be construed as limiting or deferring the full use of Residents of the City beyond this numerical level.

(c) Prior to the commencement of work, each Contractor and Subcontractor(s) shall complete and submit to the Director a work force table. This document shall identify the estimated work force requirements for the duration of the job, broken down by trade and month. This document shall be revised as required, but not less than once a month.
(Ord. No. 2031-A-02. Passed 6-10-03, eff. 1-1-04)

188.03 Standards, Reductions and No Waiver

(a) The Director, consistent with the provisions of this Chapter, shall establish standards and procedures, as the Director deems proper and necessary, to effectively administer the intent and purpose of this Chapter. In creating these standards and procedures and in creating any subsequent modifications thereof, the Director shall work with the Chairperson of the Employment, Affirmative Action and Training Committee. The standards and exceptions shall be effective thirty (30) days after publication in the City Record. However, at least ten (10) days prior to publication in the City Record, the Director shall provide the President of City Council and the Chairperson of the Employment, Affirmative Action and Training Committee with a copy of the proposed standards and procedures.

(b) Such standards and procedures shall specify that the employment of the minimum percentage of Residents may be reduced prior to or during construction only when a Contractor or potential Contractor can demonstrate the high impracticality of complying with this percentage level for particular contracts or classes of employees. The Director shall apply the standard of "efforts to the greatest extent feasible" to the Contractor's or Subcontractor's efforts when evaluating requests for reduction. A reduction may be deemed appropriate by the Director if a Contractor or potential Contractor has unsuccessfully solicited a sufficient number of Residents of the City to perform the work identified in the bid specifications and has documented such effort to the satisfaction of the Director. In addition, such standards and procedures shall require that a Contractor or potential Contractor seeking a reduction shall have provided timely notice of the need for Residents of the City to an appropriate source(s) of referrals, as determined by the Director, which source(s) shall be entitled to comment on any reduction application. If the Director determines that a lesser percentage of Residents is appropriate with respect to a potential Construction Contract for which bids will be solicited, bid specifications shall include a statement of the revised standards. The standards established by the Director shall also provide for a reduction during construction based on petition by the Contractor demonstrating serious unforeseen circumstances, such as new governmental regulations, national or natural disasters, war and/or other disastrous events or high impracticality.

(c) The Director shall file his determination on all reductions, and the reasons for the reduction, with the Clerk of City Council, the President of City Council, and the Chairperson of the Employment Affirmative Action and Training Committee, within five (5) working days of making a determination.

(d) The Director shall not waive the Resident Construction Worker Hours of this chapter.
(Ord. No. 2031-A-02. Passed 6-10-03, eff. 1-1-04)

188.04 Monitoring by Director: Reporting by Contractor, and Advisory Committee to the Director

(a) The Director shall separately monitor the use of Residents of the City on all applicable projects in Skilled and Unskilled Construction Trade Worker positions, and shall report his findings in writing to the Clerk of City Council, the President of City Council, and to the Employment Affirmative Action and Training Committee of this Council on a bimonthly basis.

(b) The Contractor shall provide for the maintenance of all records documenting that Residents of the City are employed in pursuance of the Construction Contract. The Contractor and Subcontractor(s) shall maintain copies of personnel documents supportive of every Resident employee's actual record of residence.

(c) The Contractor shall designate a principal officer of its firm to be responsible for administering the Resident requirements for the Contractor and all of its Subcontractor(s) pursuant to the requirements detailed in this Chapter. This officer shall meet regularly, or as may be required, with the Director or his designee to ensure compliance with the Resident requirements set forth herein. Primary responsibility for meeting established goals shall remain with the Contractor. Certified payroll reports (U.S. Department of Labor form WH-347 or equivalent) in a format specified by the Director shall be submitted monthly to the Director for applicable construction contracts and shall identify clearly the actual residence of every employee on each submitted certified payroll. The first time an employee's name appears on a payroll, a hire date for the employee should be included after the employee's name.

(d) Full access to the Contractor(s') and Subcontractor(s') employment records that document information that relates to the requirements of this Chapter shall be granted to the Director, his designated agents, the Chief of Police, or any duly authorized representative thereof. The Contractor and Subcontractor(s) shall maintain all relevant personnel data in records for a period of at least three (3) years after final completion of work. This retention period may be extended in writing by the Director based upon audit irregularities.

(e) The Director may require affidavits and other supporting documentation from the Contractor and/or Subcontractor(s) to verify or clarify that an employee is a Resident when doubt or lack of clarity has arisen.

(f) There shall be established a Residency Construction Advisory Committee to the Director with the charge of furthering the intent and purpose of this Chapter. Membership shall consist of one representative appointed by the Mayor, one representative appointed by the President of City Council, one representative appointed by the Executive Director of the Cleveland Building and Construction Trade Council, one representative appointed by the Executive Director of the Construction Employers Association or its delegate and one representative jointly appointed by the Mayor and the President of City Council who is not affiliated with Cleveland Building and Construction Trade Council or the Construction Employers Association or its delegate. This Committee may establish one (1) or more advisory subcommittees to help achieve the goals established pursuant to this legislation.
(Ord. No. 2031-A-02. Passed 6-10-03, eff. 1-1-04)

188.05 Violation and Penalty

(a) When work under a Construction Contract is completed, and in the event that the Director determines that the Contractor has failed to fulfill the requirements contained in Section 188.02 concerning Construction Worker Hours performed by Residents of the City or has failed to submit reports as required in Sections 188.02 and 188.04, the City is deemed to have been damaged. Good faith efforts on the part of the Contractor or Subcontractor to provide employment to Residents of the City shall not suffice to replace the actual, verified achievement of the requirements contained in Section 188.02.

(b) In the event the Contractor breaches its Construction Contract obligation for Resident Construction Worker Hours stated in Section 188.02, one eighth (1/8) of one (1) percent of the final total amount of the Construction Contract shall be paid by the Contractor to the City in payment for each percentage of shortfall toward the Resident Construction Worker Hours set forth in Section 188.02 or the reduced requirement established by the Director in accordance with Section 188.03. In the event the Low Income Person objective is not achieved, the Director shall determine if a penalty is appropriate and assess the penalty in his/her discretion.

(c) Failure to submit, or knowing falsification of, the reports required in Sections 188.02 and 188.04 shall result in a breach of the Construction Contract subject to assessment of the maximum penalty provided in division (b), and the penalty shall be calculated as if no Residents of the City were employed on the construction project in furtherance of the Construction Contract.

(d) No Contractor shall knowingly falsify any required reports, statements or payroll certifications. Any Contractor who knowingly falsifies reports, statements or the certification of payroll data Is guilty of a misdemeanor of the first degree and subject to a fine of not more than five thousand dollars ($5,000). If a Contractor is convicted under this division, that Contractor shall be barred from contracting with the City on any construction project subject to this Chapter for a period of five (5) years.

(e) Any retainage to cover contract performance that may become due to the Contractor pursuant to the Codified Ordinances of the City of Cleveland may be withheld by the City pending the determination by the Director of whether the Contractor must pay a penalty.

(f) The imposition of any penalty or fine under this section shall not preclude the City from exercising any other rights or remedies to which it is entitled.

(g) All funds collected by the City of Cleveland under division (b) or (c) of this section shall be deposited into a special account which shall be created for the sole purpose of receiving said funds. The funds deposited into this account shall be used for the operation of the Office of Equal Opportunity provided such funds have been appropriated for that purpose, provided there is any necessary legislative authority and provided the funds are used in compliance with all laws or restrictions regarding their use.

(h) In addition to assessing the penalty set forth above, the City may, for a period of five (5) years after a violation of this chapter, require the Contractor to post a surety bond or other appropriate security in an amount representing twenty percent (20%) of the contract price for any subsequent contract awarded to the Contractor, which the Contractor shall agree and shall be required to forfeit in its entirety in the event that full compliance with the requirements of this chapter are not achieved during the performance of the contract. This surety bond shall be in addition to such other surety bonds that are required pursuant to the Codified Ordinances of Cleveland, Ohio.

(i) No person shall knowingly supply false information to establish that the person is a Resident for purposes of this Chapter. Any person who knowingly supplies false information to establish that he or she is a Resident is guilty of a misdemeanor of the first degree and subject to imprisonment for a period not to exceed (6) months and a fine of not more than one thousand dollars ($1,000). Upon conviction, such person shall be barred from employment in furtherance of a Construction Contract for a period of five (5) years.
(Ord. No. 2031-A-02. Passed 6-10-03, eff. 1-1-04)

188.06 Severability

Each section and each part of each section of this Fannie M. Lewis Cleveland Resident Employment Law is declared to be an independent section or part of a section, and notwithstanding any other evidence of legislative intent, it is declared to be the controlling legislative intent that if any section or part of a section or any provision thereof, or the application thereof to any person or circumstances, is held to be invalid, the remaining sections or parts of sections and the application of such provision to any other person or circumstances, other than those as to which it is held invalid, shall not be affected thereby. It is further declared to be the legislative intent that the other provisions of this Code would have been adopted independently of such section or parts of a section which are held to be invalid.
(Ord. No. 2031-A-02. Passed 6-10-03, eff. 1-1-04)

188.07 Duration

This Fannie M. Lewis Cleveland Resident Employment Law is enacted as a temporary measure to alleviate the lack of use of Residents on City of Cleveland construction projects found to exist by the Council of the City of Cleveland. This code shall remain in full force and effect, subject to periodic review by the Council of the City of Cleveland. The City Council shall regularly, but at a minimum of once every five (5) years, determine whether there is a continuing need to ensure adequate resident employment, and make relevant findings in support of that determination, and, if necessary amend this Chapter as appropriate. In addition thereto, every two (2) years after enactment of this Fannie M. Lewis Cleveland Resident Employment Law, the City Council shall review the twenty (20) percent resident requirement, and the four (4) percent requirement for Low Income Persons, to determine the appropriateness of each percentage and make relevant findings of that determination, and if necessary, amend 188.02(a).

(Ord. No. 2031-A-02. Passed 6-10-03, eff. 1-1-04)

188.08 Effective Date

This chapter shall be effective and be in force upon its passage and approval as of January 1, 2004.
(Ord. No. 2031-A-02. Passed 6-10-03, eff. 1-1-04)