



Office of the City Manager

ACTION CALENDAR

June 10, 2014

To: Honorable Mayor and Members of the City Council

From:  Christine Daniel, City Manager

Submitted by: Jane Micallef, Director Health Housing & Community Services

Subject: Minimum Wage Ordinance – Adding BMC Chapter 13.99

RECOMMENDATION

Adopt first reading of an Ordinance adopting the Minimum Wage Ordinance and adding Berkeley Municipal Code Chapter 13.99

FISCAL IMPACTS OF RECOMMENDATION

On May 1, 2014 the City Council considered a report from City staff describing the tasks and costs associated with implementation and administration of a Minimum Wage Ordinance. The annual cost for administering the ordinance is projected to be approximately \$200,000. That expenditure is included in the proposed FY 2015 Budget.

CURRENT SITUATION AND ITS EFFECTS

On May 20, 2014 the City Council declined to undertake a second reading of a Minimum Wage ordinance that it had previously approved on May 6, 2014 and instead directed staff to prepare a new ordinance for the Council’s consideration on June 10, 2014. The new ordinance includes different timing and amounts for the local minimum wage than were included in the May 6, 2014 version. The new ordinance is included with this report and if adopted would establish a local Minimum Wage as follows:

Date	Minimum Hourly Wage
October 1, 2014	\$10.00
October 1, 2015	\$11.00
October 1, 2016	\$12.53

Per the Council’s direction, the ordinance also provides that for employers that are Nonprofit Corporations, the requirements of the Ordinance will not take effect until October 1, 2015, at which time the minimum wage will be \$11.00 per hour. Additionally, individuals up to age 25 who are job training participants in a youth job training program operated by Nonprofit Corporations or governmental agencies are specifically exempted from coverage by the Ordinance.

BACKGROUND

The Commission on Labor received the Minimum Wage Ordinance referral from the City Council on April 30, 2013. At their regular meeting on May 15, 2013, the Commission formed a Subcommittee on Minimum Wage Ordinance, with Commissioners Angus Teter (subcommittee chairperson), Irene Yu and Steve Kessler appointed to the subcommittee. The subcommittee held fourteen subcommittee meetings between May 2013 and January 2014. Forty-three members of the public attended the subcommittee meetings. The Subcommittee Chairperson also sent a memo to City Commissions inviting them to provide input regarding a Minimum Wage increase. The Commission on Labor received reports from the subcommittee at each of their seven full commission meetings held after receiving the Council referral. Of those seven meetings, the Commission convened three Special Meetings, with the Minimum Wage Ordinance discussion as the primary agenda item. Sixty-nine members of the public provided public comment, both in favor and against a wage increase, during those meetings.

The Commission then presented its recommendation to the City Council by way of a report on the April 1, 2014 City Council Agenda. That report was carried over to a special meeting on May 1, 2014 so that the Council could focus on this single topic for discussion. The Council carried the discussion over to the May 6, 2014 City Council meeting and at that time approved the first reading of an ordinance establishing a local minimum wage of \$10 per hour effective January 1, 2015 and \$11 per hour effective January 1, 2016. The second reading of that ordinance was scheduled for May 20, 2014, at which time the City Council declined to conduct a second reading and instead directed staff to prepare an ordinance for consideration at its June 10, 2014 meeting. That ordinance is included with this item.

ENVIRONMENTAL SUSTAINABILITY

There are no identifiable environmental effects or opportunities associated with the subject of this report.

RATIONALE FOR RECOMMENDATION

The Ordinance proposed for approval is consistent with the City Council's direction at its May 20, 2014 meeting.

ALTERNATIVE ACTIONS CONSIDERED

The Labor Commission proposed an ordinance in its April 1, 2014 report and provided further information in its supplemental report for May 1, 2014; these reports identified a number of policy considerations as part of their analysis of the issues. The City Council has considered a variety of alternatives throughout its discussion of this issue at its meetings on May 1; May 6 and May 20, 2014.

CONTACT PERSON

Jane Micallef, Director, Health Housing & Community Services, 981-5400

Attachments:

1: Ordinance

ORDINANCE NO. #,###-N.S.

ADOPTING MINIMUM WAGE IN BERKELEY

BE IT ORDAINED by the Council of the City of Berkeley as follows:

Section 1. That a new Chapter 13.99 is hereby added to the Berkeley Municipal Code to read as follows:

**Chapter 13.99
MINIMUM WAGE**

Sections

13.99.010	Title and Purpose.
13.99.020	Authority.
13.99.030	Definitions.
13.99.040	Minimum Wage.
13.99.050	Waiver Through Collective Bargaining.
13.99.060	Notice, Posting and Payroll Records.
13.99.070	Retaliation Prohibited.
13.99.080	Implementation.
13.99.090	Enforcement.
13.99.100	Relationship to Other Requirements.
13.99.110	Application of Minimum Wage to Welfare-To-Work Programs.
13.99.120	Fees.
13.99.130	Exemptions.

13.99.010 Title and Purpose.

This ordinance shall be known as the "Minimum Wage Ordinance."

The purpose of this ordinance is to protect the public health, safety and welfare. It does this by requiring that employees are compensated by their employers or respective subcontractors in such a manner as to enable and facilitate their individual self-reliance within the City of Berkeley.

13.99.020 Authority.

This Chapter is adopted pursuant to the powers vested in the City of Berkeley under the laws and Constitution of the State of California but not limited to, the police powers vested in the City pursuant to Article XI, Section 7 of the California Constitution and Section 1205(b) of the California Labor Law.

13.99.030 Definitions.

The following terms shall have the following meanings:

- A. "City" shall mean the City of Berkeley.
- B. "Department" shall mean the Department of Finance or other City department or agency as the City shall by resolution designate.
- C. "Employee" shall mean any person who:
 - 1. In a calendar week performs at least two (2) hours of work for an Employer within the geographic boundaries of the City; and

2. Qualifies as an employee entitled to payment of a minimum wage from any employer under the California minimum wage law, as provided under Section 1197 of the California Labor Code and wage orders published by the California Industrial Welfare Commission, or is a participant in a Welfare-to-Work Program.

D. "Employer" shall mean any person, including corporate officers or executives, as defined in Section 18 of the California Labor Code, who directly or indirectly through any other person, including through the services of a temporary employment agency, staffing agency, subcontractor or similar entity, employs or exercises control over the wages, hours or working conditions of any Employee, or any person receiving or holding a business license through Title 9 of the Berkeley Municipal Code.

E. "Minimum Wage" shall have the meaning set forth in Section 13.99.040 of this Chapter.

F. "Nonprofit Corporation" shall mean a nonprofit corporation, duly organized, validly existing and in good standing under the laws of the jurisdiction of its incorporation and (if a foreign corporation) in good standing under the laws of the State of California, which corporation has established and maintains valid nonprofit status under Section 501(c)(3) of the United States Internal Revenue Code of 1986, as amended, and all rules and regulations promulgated under such Section, or any non-profit educational organization qualified under Section 23701 (d) of the Revenue and Taxation code.

G. "Welfare-to-Work Program" shall mean the CalWORKS Program, County Adult Assistance Program (CAAP) which includes the Personal Assisted Employment Services (PAES) Program, and General Assistance Program, and any successor programs that are substantially similar to them.

13.99.040 Minimum Wage.

A. Employers shall pay Employees no less than the Minimum Wage set forth below for each hour worked within the geographic boundaries of the City.

Date	Minimum Hourly Wage
October 1, 2014	\$10.00
October 1, 2015	\$11.00
October 1, 2016	\$12.53

B. For Employers that are Nonprofit Corporations, the requirements of this Chapter shall not take effect until October 1, 2015, at which time the minimum wage will be \$11.00 per hour..

C. A violation for unlawfully failing to pay the Minimum Wage shall be deemed to continue from the date immediately following the date that the wages were due and payable as provided in Part 1 (commencing with Section 200) of Division 2 of the California Labor Code, to the date immediately preceding the date the wages are paid in full.

13.99.050 Waiver Through Collective Bargaining.

To the extent required by federal law, all or any portion of the applicable requirements of this Chapter may be waived in a bona fide collective bargaining agreement, provided that such waiver is explicitly set forth in such agreement in clear and unambiguous terms.

13.99.060 Notice, Posting and Payroll Records.

A. By November 1 of each year, the Department shall publish and make available to Employers a bulletin announcing the adjusted Minimum Wage rate, which shall take effect on January 1 of the following year. In conjunction with this bulletin, the Department shall by November 1 of each year publish and make available to Employers, in all languages spoken by more than five percent of the work force in the City, a notice suitable for posting by Employers in the workplace informing Employees of the current Minimum Wage rate and of their rights under this Chapter.

B. Every Employer shall post in a conspicuous place at any workplace or job site in the City where any Employee works the notice published each year by the Department informing Employees of the current Minimum Wage rate and of their rights under this Chapter. Every Employer shall post such notices in any language spoken by at least five percent of the Employees at the work-place or job site. Every Employer shall also provide each Employee at the time of hire with the Employer's name, address, and telephone number in writing. Failure to post such notice shall render the Employer subject to administrative citation, pursuant to Section 90, Subsection A, of this Chapter.

C. Employers shall retain payroll records pertaining to Employees for a period of four years, and shall allow the City access to such records, with appropriate notice and at a mutually agreeable time, to monitor compliance with the requirements of this Chapter. Where an Employer does not maintain or retain adequate records documenting wages paid or does not allow the City reasonable access to such records, the Employee's account of how much he or she was paid shall be presumed to be accurate, absent clear and convincing evidence otherwise. Furthermore, failure to maintain such records or to allow the City reasonable access shall render the Employer subject to administrative citation, pursuant to Section 90, Subsection A, of this Chapter.

D. If a violation of this Chapter has been finally determined, the City shall require the Employer to post public notice of the Employer's failure to comply in a form determined by the City. Failure to post such notice shall render the Employer subject to administrative citation, pursuant to Section 90, Subsection A, of this Chapter.

13.99.070 Retaliation Prohibited.

It shall be unlawful for an Employer or any other party to discriminate in any manner or take any adverse action (including action relating to any term, condition or privilege of employment) against any person in retaliation for exercising rights protected under this Chapter. Rights protected under this Chapter include, but are not limited to: the right to file a complaint or inform any person about any party's alleged noncompliance with this Chapter; and the right to inform any person of his or her potential rights under this Chapter or otherwise educate any person about this Chapter or to assist him or her in asserting such rights. Protections of this Chapter shall apply to any person who mistakenly, but in good faith, alleges noncompliance with this Chapter. Taking adverse action against a person within ninety (90) days of the person's exercise of rights protected under this Chapter shall raise a rebuttable presumption of having done so in

retaliation for the exercise of such rights. Failure to comply with this provision shall render the Employer subject to administrative citation, pursuant to Section 90, Subsection A, of this Chapter.

13.99.080 Implementation.

A. Guidelines. The Department shall be authorized to coordinate implementation and enforcement of this Chapter and may promulgate appropriate guidelines or rules for such purposes. The Department shall seek out partnerships with community-based organizations and collaborate with the Labor Commission to facilitate effective implementation and enforcement of this Chapter. Any guidelines or rules promulgated by the Department shall have the force and effect of law and may be relied on by Employers, Employees and other parties to determine their rights and responsibilities under this Chapter. Any guidelines or rules may establish procedures for ensuring fair, efficient and cost-effective implementation of this Chapter, including supplementary procedures for helping to inform Employees of their rights under this Chapter, for monitoring Employer compliance with this Chapter, and for providing administrative hearings to determine whether an Employer or other person has violated the requirements of this Chapter.

B. Reporting Violations. An Employee or any other person may report to the Department in writing any suspected violation of this Chapter. The Department shall encourage reporting pursuant to this subsection by keeping confidential, to the maximum extent permitted by applicable laws, the name and other identifying information of the Employee or person reporting the violation. Provided, however, that with the authorization of such person, the Department may disclose his or her name and identifying information as necessary to enforce this Chapter or other employee protection laws. In order to further encourage reporting by Employees, if the Department notifies an Employer that the Department is investigating a complaint, the Department shall require the Employer to post or otherwise notify its Employees that the Department is conducting an investigation, using a form provided by the Department. Failure to post such notice shall render the Employer subject to administrative citation, pursuant to Section 90, Subsection A, of this Chapter.

C. Investigation. The Department shall be responsible for investigating any possible violations of this Chapter by an Employer or other person. The Department shall have the authority to inspect workplaces, interview persons and request the City Attorney to subpoena books, papers, records, or other items relevant to the enforcement of this Chapter.

D. Informal Resolution. The Department shall make every effort to resolve complaints informally, in a timely manner, and shall have a policy that the Department shall take no more than six months to resolve any matter, before initiating an enforcement action. The failure of the Department to meet these timelines within six months shall not be grounds for closure or dismissal of the complaint.

13.99.090 Enforcement.

A. Where prompt compliance is not forthcoming, the City and the Department shall take any appropriate enforcement action to secure compliance, including but not limited to the following:

1. The City may issue an Administrative Citation pursuant to Chapter 1.28 of the Berkeley Municipal Code. The amount of this fine shall vary based on the provision of this

Chapter being violated, as specified below:

a. A fine of one thousand dollars (\$1,000.00) may be assessed for retaliation by an Employer against an Employee for exercising rights protected under this Chapter for each Employee retaliated against.

b. A fine of five hundred dollars (\$500.00) may be assessed for any of the following violations of this Chapter:

- i. Failure to post notice of the Minimum Wage rate
- ii. Failure to provide notice of investigation to Employees
- iii. Failure to post notice of violation to public
- iv. Failure to maintain payroll records for four years
- v. Failure to allow the City access to payroll records

c. A fine equal to the total amount of appropriate remedies, pursuant to subsection E of this section. Any and all money collected in this way that is the rightful property of an Employee, such as back wages, interest, and civil penalty payments, shall be disbursed by the City in a prompt manner.

2. Alternatively, the City may pursue administrative remedies in accordance with the following procedures:

a. Whenever the City determines that a violation of any provision of this Chapter is occurring or has occurred, the City may issue a written compliance order to the Employer responsible for the violation.

b. A compliance order issued pursuant to this chapter shall contain the following information:

- i. The date and location of the violation;
- ii. A description of the violation;
- iii. The actions required to correct the violation;
- iv. The time period after which administrative penalties will begin to accrue if compliance with the order has not been achieved;

v. Either a copy of this Chapter or an explanation of the consequences of noncompliance with this Chapter and a description of the hearing procedure and appeal process;

vi. A warning that the compliance order shall become final unless a written request for hearing before the City is received within fourteen days of receipt of the compliance order.

c. Following receipt of a timely request for a hearing, the City shall provide the Employer responsible for the violation with a hearing and, if necessary, a subsequent appeal to the City Council that affords the Employer due process. During the pendency of the hearing and any subsequent appellate process, the City will not enforce any aspect of the compliance order.

3. The City may initiate a civil action for injunctive relief and damages and civil penalties in a court of competent jurisdiction.

B. Any person aggrieved by a violation of this Chapter, any entity a member of which is aggrieved by a violation of this Chapter, or any other person or entity acting on behalf of the public as provided for under applicable state law, may bring a civil action in a court of competent jurisdiction against the Employer or other person violating this Chapter and, upon prevailing, shall be awarded reasonable attorneys' fees and costs and shall be entitled to such legal or equitable relief as may be appropriate to remedy the violation including, without limitation, the payment of any back wages unlawfully withheld, the

payment of an additional sum as a civil penalty in the amount of \$50 to each Employee or person whose rights under this Chapter were violated for each day that the violation occurred or continued, reinstatement in employment and/or injunctive relief. Provided, however, that any person or entity enforcing this Chapter on behalf of the public as provided for under applicable state law shall, upon prevailing, be entitled only to equitable, injunctive or restitutionary relief to employees, and reasonable attorneys' fees and costs.

C. This Section shall not be construed to limit an Employee's right to bring legal action for a violation of any other laws concerning wages, hours, or other standards or rights nor shall exhaustion of remedies under this Chapter be a prerequisite to the assertion of any right.

D. Except where prohibited by state or federal law, City agencies or departments may revoke or suspend any registration certificates, permits or licenses held or requested by the Employer until such time as the violation is remedied. The City shall not renew any such license of an Employer with outstanding violations, as finally determined under this Chapter, until such time as the violation is remedied.

E. The remedies for violation of this Chapter include but are not limited to:

1. Reinstatement, the payment of back wages unlawfully withheld, and the payment of an additional sum as a civil penalty in the amount of \$50 to each Employee or person whose rights under this Chapter were violated for each day or portion thereof that the violation occurred or continued, and fines imposed pursuant to other provisions of this Code or state law.

2. Interest on all due and unpaid wages at the rate of interest specified in subdivision (b) of Section 3289 of the California Civil Code, which shall accrue from the date that the wages were due and payable as provided in Part 1 (commencing with Section 200) of Division 2 of the California Labor Code, to the date the wages are paid in full.

3. Reimbursement of the City's administrative costs of enforcement and reasonable attorney's fees.

4. If a repeated violation of this Chapter has been finally determined, the City may require the Employer to pay an additional sum as a civil penalty in the amount of \$50 to the City for each Employee or person whose rights under this Chapter were violated for each day or portion thereof that the violation occurred or continued, and fines imposed pursuant to other provisions of this Code or state law.

F. The remedies, penalties and procedures provided under this Chapter are cumulative and are not intended to be exclusive of any other available remedies, penalties and procedures established by law which may be pursued to address violations of this Chapter. Actions taken pursuant to this Chapter shall not prejudice or adversely affect any other action, civil or criminal, that may be brought to abate a violation or to seek compensation for damages suffered.

13.99.100 Relationship to Other Requirements.

This Chapter provides for payment of a local Minimum Wage and shall not be construed to preempt or otherwise limit or affect the applicability of any other law, regulation, requirement, policy or standard that provides for payment of higher or supplemental wages or benefits, or that extends other protections.

13.99.110 Application Of Minimum Wage To Welfare-To-Work Programs.

The Minimum Wage established under this Chapter shall apply to the Welfare-to-Work programs under which persons must perform work in exchange for receipt of benefits. Participants in Welfare-to-Work Programs within the City of Berkeley shall not, during a given benefits period, be required to work more than a number of hours equal to the value of all cash benefits received during that period, divided by the Minimum Wage.

13.99.120 Fees.

Nothing herein shall preclude the City Council from imposing a cost recovery fee on all Employers to pay the cost of administering this Chapter.

13.99.130 Exemptions.

The requirements of this chapter shall not apply to the following Employees:

1. Employees who are standing by or on-call according to the criteria established by the Fair Labor Standards Act, 29 U.S.C. Section 201. This exemption shall apply only during the time when the employee is actually standing by or on-call.
2. Job training program participants up to 25 years of age in youth job training programs operated by Nonprofit Corporations or governmental agencies.

Section 2. Severability.

If any part or provision of this ordinance, or the application of this ordinance to any person or circumstance, is held invalid, the remainder of this ordinance, including the application of such part or provisions to other persons or circumstances, shall not be affected by such a holding and shall continue in full force and effect. To this end, the provisions of this ordinance are severable.

Section 3. Copies of this Ordinance shall be posted for two days prior to adoption in the display case located near the walkway in front of Old City Hall, 2134 Martin Luther King Jr. Way. Within fifteen days of adoption, copies of this Ordinance shall be filed at each branch of the Berkeley Public Library and the title shall be published in a newspaper of general circulation.

