



Commission on Labor

CONSENT CALENDAR
January 24, 2017

To: Honorable Mayor and Members of the City Council
 From: Commission on Labor
 Submitted by: Wendy Bloom, Chairperson, Commission on Labor
 Subject: Berkeley Family Friendly and Environment Friendly Workplace Ordinance;
 Adding BMC Chapter 13.101

RECOMMENDATION

Adopt first reading of an Ordinance adding Chapter 13.101 titled the Berkeley Family Friendly and Environment Friendly Workplace Ordinance.

SUMMARY

This ordinance creates a process by which an employee can formally request either a modified or a predictable work schedule. Employers are not compelled to comply with any request, but must provide an explanation for denying them. These interactions are observed by the City for their potential value in shaping future policy.

FISCAL IMPACTS OF RECOMMENDATION

None.

CURRENT SITUATION AND ITS EFFECTS

At the November 16, 2016 Labor Commission meeting, the Commission took the following action:

M/S/C (Fillingim/Sayre) to approve the revised ordinance language with proposed revisions except with the following changes:

Bullet #4: end sentence @ business reasons and add “reasons for denial shall be provided in writing”

Bullet #7: retain employee records for three years instead of one

Add: environmental findings section with language guidance to be provided by Charles Siegel

Ayes: Fillingim, Kessler, Sayre

Noes: None

Absent: Almanza-Gomez

Leave of Absence: W. Bloom; S. Frankel

Staff have made the changes to the draft ordinance per the Commissions direction in the action item and these changes are reflected in the Ordinance attached to this report.

Many employers and employees already work together to provide a flexible work schedule and/or a predictable work schedule. Since this occurs informally, the City and the Commission have little information on why employees in the city may be requesting changes in their work schedules, the kind of changes they are requesting, or the reasons that employers might grant or deny these requests. This ordinance would work to codify and document this already extant process for all employees and employers in the City of Berkeley.

BACKGROUND

Over the last few decades, the demographics of the nation's workforce and the structures of the nation's families have undergone significant changes. These changes include an increased number of women in the workforce; fewer households with children that have at least one parent staying at home full-time; and more single-parent households. Furthermore, Americans are living longer than they ever did, and many families have direct caregiving responsibilities for elderly parents or other older relatives. Experience in other countries, such as the UK, Australia, and New Zealand, with laws to increase workplace flexibility has been overwhelmingly positive. In 2013, San Francisco passed a "right to request" law applying to caregivers. In June 2014, President Obama adopted a policy giving the "right to request" to all Federal employees. In November 2014, voters in the City of Berkeley voted to have the City Council enact an ordinance entitled the Family Friendly and Environmentally Friendly Workplace Ordinance.

ENVIRONMENTAL SUSTAINABILITY

Potentially, we could lessen the overall environmental footprint of Berkeley by mitigating the negative factors associated with unpredictable or inconvenient work scheduling.

RATIONALE FOR RECOMMENDATION

Studies indicate that providing employees with access to flexible work arrangements reduces the conflicts many face between their work responsibilities and their family obligations, with the effect of enhancing employee satisfaction, morale, and overall well-being. Flexible work arrangements also benefit businesses at minimal cost; implementing workplace flexibility helps businesses attract and retain key talent, reduce turnover, overtime needs, and absenteeism, as well as enhance employee productivity, effectiveness, and engagement. Further, according to the President's Council of Economic Advisors, as more businesses adopt flexibility practices, the benefits to society, in the form of reduced traffic, improved employment outcomes, and more efficient allocation of employees to employers, may even be greater than the gains to individual businesses and employees.

ALTERNATIVE ACTIONS CONSIDERED

The Commission considered the possibility of requiring Employers to meet a stricter criterion than “business reasons” for denying requests by Employees, but to the best of the Commission’s knowledge no such satisfactory legal definition exists, and creating one was considered to be outside of the Commission’s expertise.

CITY MANAGER

The City Manager concurs with the content and recommendations of the Commission’s Report.

CONTACT PERSON

Wendy Bloom, Chairperson, Commission on Labor, 510-701-0192
Delfina Geiken, Commission Secretary, 510-981-7551
Nathan Dahl, Community Development Project Coordinator, 510-981-5405

Attachments:
1: Ordinance

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

ADDING BERKELEY MUNICIPAL CODE CHAPTER 13.101 BERKELEY FAMILY FRIENDLY AND ENVIRONMENT FRIENDLY WORKPLACE ORDINANCE

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

Section 1. That Chapter 13.101 is hereby added to the Berkeley Municipal Code to read as follows:

CHAPTER 13.101

BERKELEY FAMILY FRIENDLY AND ENVIRONMENT FRIENDLY WORKPLACE ORDINANCE

Sections:

13.101.010 Title

13.101.020 Findings

13.101.030 Definitions

13.101.040 Right to Request Flexible or Predictable Working Arrangement

13.101.050 Response to Request for Flexible or Predictable Working Arrangement

13.101.060 Exercise of Rights and Caregiver Status Protected: Retaliation Prohibited

13.101.070 Notice and Posting Requirements for Employers

13.101.080 Employer Records

13.101.090 Implementation and Enforcement

13.101.100 Exemption of Certain Job Classifications Pertaining to Public Health and Public Safety

13.101.110 Waiver Through Collective Bargaining

13.101.120 Other Legal Requirements

13.101.130 Rulemaking

13.101.140 Outreach

13.101.150 Preemption

13.101.160 Severability

13.101.010 Title

This Chapter shall be known as the "Berkeley Family Friendly and Environment Friendly Workplace Ordinance".

13.101.020 Findings

A. Over the last few decades, the demographics of the nation's workforce and family structures have significantly changed. These changes include an increased number of women in the workforce; fewer households with children that have at least one parent staying at home full-time; and more single-parent households. As a result of these and other changes, the demands placed on workers with family responsibilities are greater and more complex today than they have been previously.

B. Many families have direct caregiving responsibilities for elderly parents or other older relatives. Family members serving this caregiving role face the same work/family pressures as parents with minor children, and are even more challenged when they also have caregiving responsibilities for minor children.

C. Many employees who live outside city centers have lengthy commutes to their jobs. Traffic patterns during rush hour elongate those commutes. Commutes of long duration leave less time for employees to balance work and caregiving responsibilities and also contribute to greenhouse gas emissions. Flexible working hours and telecommuting options will reduce demands on streets and highways and mass transportation systems during rush hour. Berkeley and the Bay Area will likely benefit from both a caregiving and environmental standpoint.

D. Shorter work hours can reduce environmental impact. If people choose to work less and consume less, they will also pollute less. A study named "Hours of Work and the Ecological Footprint of Nations" compared work hours and ecological footprint internationally and found that shorter work hours reduce total ecological footprint. If American work hours were the same as work hours in the Netherlands or in Germany, it would reduce our ecological footprint and our greenhouse gas emissions by about 20%. Allowing people to choose shorter work hours improves the quality of life at the same time as it reduces environmental impact, because people will choose shorter hours only if they think it would improve their lives.

E. Studies indicate that providing employees with access to flexible work arrangements reduces the conflicts many face between their work responsibilities and their family obligations, with the effect of enhancing employee satisfaction and morale and overall well-being.

F. Flexible work arrangements may also benefit businesses at minimal cost. Implementing workplace flexibility helps businesses attract and retain key talent, increase employee retention and reduce turnover, reduce overtime needs, reduce absenteeism, and enhance employee productivity, effectiveness, and engagement.

G. In 2014, over 78% of Berkeley residents voted in favor of Measure Q, an advisory measure to inform the Berkeley City Council that the voters request it to adopt an ordinance that would give public sector and private sector employees in the City of Berkeley the right to request to work part-time.

13.101.030 Definitions

For purposes of this Chapter, the following definitions apply.

A. "City" means the City of Berkeley.

B. "Department" means the City of Berkeley's Health, Housing, and Community Services Department, or any successor department, or any other Department as designated by the City Manager.

C. "Director" means the Director of the Health, Housing and Community Services Department or his or her designee or any other person as designated by the City Manager.

D. "Employee" means any person who is employed within the geographic boundaries of the City by an Employer, including part-time employees. "Employee" includes a participant in a Welfare-to-Work Program when the participant is engaged in work activity that would be considered "employment" under the federal Fair Labor Standards Act. 29 USC §201 et seq., and any applicable US. Department of Labor Guidelines.

E. "Welfare-to-Work Program" shall include any public assistance program administered by the Human Services Agency, including but not limited to CalWORKS, and any successor programs that are substantially similar, that require a public assistance applicant or recipient to work in exchange for their grant.

F. "Employer" means the City, or any person as defined in Section 18 of the California Labor Code who regularly employs 10 or more Employees, including an agent of that Employer and corporate officers or executives who directly or indirectly or through an agent or any other person, including through the services of a temporary services or staffing agency or similar entity, employ or exercise control over the wages, hours, or working conditions of an Employee. The term "Employer" shall also include any successor in interest of an Employer. The term "Employer" shall not include the state or federal government or any local government entity other than the City.

G. "Flexible Working Arrangement" means a change in an Employee's terms and conditions of employment that provides flexibility, including but not limited to a modified work schedule, changes in start and/or end times for work, part-time employment, job sharing arrangements, working from home, telecommuting, reduction or change in work duties, or part-year employment.

H. "Major Life Event" means the birth of an Employee's child, the placement with an Employee of a child through adoption or foster care, or an increase in an Employee's care giving duties for a person with a Serious Health Condition who is in a Family Relationship with the Employee.

I. "Predictable Working Arrangement" means a change in an Employee's terms and conditions of employment that provides a consistent or reliable pattern of work assignment, including but not limited to days scheduled to work, start time and end time and work site location with at least seven (7) calendar days' notice prior to the start of the scheduled shift.

J. "Work Schedule" means those days and times within a work period that an Employee is required by an Employer to perform the duties of his or her employment for which he or she will receive compensation.

13.101.040 Right To Request Flexible Or Predictable Working Arrangement

A. An Employee who has been employed with an Employer for three months or more and works at least eight hours per week on a regular basis may request a Flexible or Predictable Working Arrangement.

B. Any request submitted to the Employer under this Section shall be in writing and specify the arrangement applied for, the date on which the Employee requests that the arrangement becomes effective, and the duration of the arrangement.

C. A request made under this Section may be made two times within any twelve month period, unless the Employee experiences a Major Life Event, in which case the Employee may make, and the Employer must consider, an additional request.

D. Nothing in this Chapter shall prohibit an Employee from making requests in addition to those permitted in subdivision c of this Section, but any such requests will not be covered by this Chapter.

13.101.050 Response To Request For Flexible Or Predictable Working Arrangement

A. An Employer to whom an Employee submits a request under Section 13.101.040 must meet with an Employee requesting a Flexible or Predictable Working Arrangement within 21 calendar days of the request.

B. An Employer must consider and respond to an Employee's request for a Flexible or Predictable Working Arrangement in writing within 21 calendar days of the meeting required in subsection (a). The deadline in this Section may be extended by agreement with the Employee confirmed in writing.

C. An Employer may grant or deny a request for Flexible or Predictable Working Arrangement. An Employer who grants the request shall confirm the arrangement in writing to the Employee. An Employer who denies a request must explain the denial in a written response that sets out a business reason for the denial.

D. Nothing in this Chapter prevents an Employer from later revoking or modifying a Flexible or Predictable Working Arrangement for business reasons. In this event, the Employer shall give the Employee reasonable notice related to the change of their work schedule and must provide in writing to the Employee, a business reason for the revocation or modification of the Flexible or Predictable Working Arrangement within 21 days of modifying or canceling the Flexible or Predictable Working Arrangement.

13.101.060 Exercise Of Rights Protected; Retaliation Prohibited

A. It shall be unlawful for an Employer to discharge, threaten to discharge, demote, suspend, or otherwise take adverse employment action against any person for exercising rights protected under this Chapter. Such rights include but are not limited to:

(1) The right to request a Flexible or Predictable Working Arrangement under this Chapter;

(2) The right to request reconsideration of the denial of a request for a Flexible or Predictable Working Arrangement under this Chapter;

- (3) The right to file a complaint with the Agency alleging a violation of any provision of this Chapter;
- (4) The right to cooperate with the Agency or other persons in the investigation of any alleged violation of this Chapter;
- (5) The right to inform any person of his or her rights under this Chapter.

13.101.070 Notice And Posting Requirements For Employers

A. The Department shall, by the operative date of this Chapter, publish and make available to Employers, in all languages spoken by more than 5% of the Berkeley workforce, a notice suitable for posting by Employers in the workplace informing Employees of their rights under this Chapter. The Department shall update this notice on December 1 of any year in which there is a change in the languages spoken by more than 5% of the Berkeley workforce. In its discretion, the Department may combine the notice required herein with any other Department notice that Employers are required to post in the workplace. This notice shall include an appropriate address for Employees and Employers to send copies of all written communication pursuant to the requirements of this Chapter.

B. Every Employer shall post in a conspicuous place at any workplace or job site where any Employee works the notice required by subsection (a). Every Employer shall post this notice in English, Spanish, Chinese, and any language spoken by at least 5% of the Employees at the workplace or job site. In instances where an Employee does not have a regular physical location where they perform their work, the Employer shall provide a copy of the public notice to the Employee when they are hired or assigned to complete work within the City of Berkeley. The notice shall be provided to the employee before they commence work within the city limits and must be provided in the language most easily comprehended by the Employee.

13.101.080 Employer Records

Employers shall retain documentation of the written response required under Section 13.101.050(B) for a period of three years from the date of issuance of the written response, and shall allow the Department access to such records, with appropriate notice and at a mutually agreeable time, to monitor compliance with the requirements of this Chapter.

13.101.090 Implementation And Enforcement

A. If the Employer fails to provide a response to the Employee in accordance with the procedures outlined in BMC Section 13.101.050, or an Employee believes that retaliation as described in Section 13.101.060 has taken place, the Employee may file a complaint with the City on a form provided by the Department. Upon receipt of a complaint, the Department may investigate possible violations of this Chapter. Where the Department has reason to believe that a violation has occurred, the Department shall make every effort to resolve complaints informally, in a timely manner, before initiating an enforcement action.

B. Complaints filed with the Department by City of Berkeley Employees who are not exempt from this Chapter under Sections 13.101.100(a) or 13.101.110, shall be forwarded to the City's Human Resources Department or to the City Manager or her designee for investigation and resolution under City of Berkeley internal rules and procedures.

C. Where the Department determines that a violation has occurred, it may issue an administrative penalty pursuant to Chapter 1.28. The Department's finding of a violation shall not be based on the validity of the Employer's business reason for denying an Employee's request for a Flexible or Predictable Working Arrangement. Instead, the Department's review shall be limited to an Employer's adherence to procedural, posting and documentation requirements, set forth in this Chapter, as well as the validity of any claims under Section 13.101.060.

D. Any Employee affected by his or her Employer's willful violation of this Chapter may bring a civil action in a court of competent jurisdiction against the Employer 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.

E. 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.

13.101.100 Exemption Of Certain Job Classifications Pertaining To Public Health And Public Safety

A. Department Director may request an exemption from this Chapter from the Director of Human Resources for certain classifications of City employees working in public health or public safety functions, based upon operational requirements according to criteria developed by the Director of Human Resources. Such criteria shall promote efficiency and advance public safety or public health.

B. The Department, in consultation with the Director of Human Resources, may exempt non-City Employees working in public safety or public health functions, upon request of those non-City Employers, based upon operational requirements according to criteria developed by the Agency and the Director of Human Resources. Such criteria shall promote efficiency and advance public safety or public health.

13.101.110 Waiver Through Collective Bargaining

This Chapter shall not apply to Employees covered by a bona fide collective bargaining agreement to the extent that such requirements are expressly waived in the collective bargaining agreement in clear and unambiguous terms. The City of Berkeley is exempt from providing the entitlements of this ordinance to employees until the City and its Unions have had the opportunity in successor contract negotiations to negotiate an express waiver of this Ordinance in its collective bargaining agreements.

13.101.120 Other Legal Requirements

This Chapter provides minimum employment requirements pertaining to Employees and shall not be construed to preempt, limit, or otherwise affect the applicability of any other law, regulation, requirement, policy, standard, or provision of a collective bargaining agreement, that provides for greater or other rights of or protections for Employees or that extends other rights or protections to Employees.

13.101.130 Rulemaking Authority

The Director shall have authority to issue regulations or develop guidelines that implement provisions of this Chapter.

13.101.140 Outreach

The Agency and the City of Berkeley's Labor Commission shall jointly create an outreach and community engagement program to educate Employees and Employers about their rights and obligations under this Chapter. This outreach program shall include media, trainings and materials accessible to the diversity of Employees and Employers in Berkeley.

13.101.150 Preemption

Nothing in this Chapter shall be interpreted or applied so as to create any requirement, power, or duty in conflict with federal or state law.

13.101.160 City Undertaking Limited To Promotion Of General Welfare

In enacting and implementing this Chapter, the City is assuming an undertaking only to promote the general welfare. The City is not assuming, nor is it imposing on its officers and employees, an obligation for breach of which it is liable in money damages to any person who claims that such breach proximately caused injury. This Chapter does not create a legally enforceable right against the City.

13.101.170 Severability

If any of the parts or provisions of this Chapter including sections, subsections, sentences, clauses, phrases, words, numbers, or the application thereof to any person or circumstance is held invalid or unconstitutional by a decision of a court of competent jurisdiction, the remainder of this Chapter, including the application of such part or provisions to persons or circumstances other than those to which it is held invalid, shall not be affected thereby and shall continue in full force and effect. To this end, the provisions of this Chapter are severable.

Section 2. Copies of this Ordinance shall be posted for two days prior to adoption in the display case located near the walkway in front of Council Chambers, 2134 Martin Luther King Jr. Way. Within 15 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.