



Councilmember Ben Bartlett
District 3

REVISED AGENDA MATERIAL

Meeting Date: April 25, 2017

Item Number: 38

Item Description: Referral to the Labor Commission and the Commission on the Status of Women: Paid Family Leave Ordinance

Submitted by: Councilmember Ben Bartlett

- Amended background to provide additional information regarding the need for paid leave to care for children and other family members with serious health conditions.
- Revised details regarding California's Paid Family Leave program.
- Revised the definition of "Covered Employer" to include those that regularly employ more than 25 employees worldwide.
- Revised the definition of "Caring for a Seriously Ill Family Member" to include parent-in-law.
- Defined "Voluntary Separation" from employment as excluding extenuating circumstances, including, but not limited to, circumstances where the employer is responsible for the employee's separation (e.g., the employer does not return the employee to his/her same position or reinstate the employee to a comparable position or fails to provide employee with lactation accommodations), or circumstances where the employee is needed to care for a seriously ill family member (e.g. the employee's new child has a serious health condition requiring the employee's full-time care).
- Amended details regarding the logistics of supplemental compensation to be consistent with the state paid leave program.
- Revised pay periods used to calculate average wages in determining supplemental compensation from 26 weeks prior to the date of leave to 52 weeks prior to the date of leave.



Councilmember Ben Bartlett
District 3

CONSENT CALENDAR
April 25, 2016

To: Honorable Mayor and Members of the City Council
From: Councilmember Ben Bartlett
Subject: Referral to the Labor Commission and the Commission on the Status of Women:
Paid Family Leave Ordinance

RECOMMENDATION

Refer the attached ordinance for consideration by to the Labor Commission and the Commission on the Status of Women to help in the development of a Paid Family Leave Ordinance for the City of Berkeley.

The Labor Commission shall be responsible for conducting a public hearing to collect community input on the attached draft legislation. The Labor Commission shall conduct outreach and invite relevant stakeholders to attend, including representatives from small business associations, chambers of commerce, Berkeley employers, and Berkeley employees.

The Commission on the Status of Women shall be responsible for research and overall project management.

The Commissions shall jointly prepare a report for submission to Council summarizing both commissions' suggestions and the community's suggestions for changes that should be made to the attached legislation.

BACKGROUND

The United States is the only industrialized nation that does not guarantee paid leave for new parents-, and in some cases new parents are not guaranteed even unpaid leave A 2012 survey by the US Department of Labor found that the main reason employees in the United States do not take unpaid leave under the federal Family Medical Leave Act is that they cannot afford to take it. Further, studies show that low-wage workers in particular would benefit from expanded paid family leave policies.

Giving employees the freedom right to take leave has important effects on quality of life – especially for new mothers. Babies whose mothers work during the first three months of the baby's life are less likely to be breastfed, taken to the doctor for well-baby visits, or be up to-date on immunizations. According to a 2015 study, rates of breastfeeding through infancy in California increased by 10%-20% after California developed its Paid Family

Leave program, which entitles employees to receive partial wage replacement while on leave.

Experts have found that it takes at least several months for a pattern of interaction to begin to develop between parent and child where they recognize and learn to respond to each other's distinct cues. Short-changing this time for parents to learn to be responsive caregivers may have impacts for children's cognitive as well as social and emotional development.

~~Giving employees the freedom to take leave also has enormous positive implications for families with sick children. Children in poor families are more likely to have longer health-related absences and studies show that children recover faster when cared for by their parents, which also reduces health expenditures.~~

~~Surveys show that paid leave is the primary factor in their decisions about staying home when their children are sick. When parents cannot care for sick children and they must attend child care, it takes a toll on the health of the child, other children, and child care providers. Without access to paid leave, parents may postpone or skip the well-child visits recommended by physicians, and may interrupt necessary treatment. Children are therefore more vulnerable to preventable serious illness. Low-income parents experience difficulties caring for their sick children.~~

~~Giving employees the freedom to take leave to care for a sick family member has enormous implications for a large portion of our population. A 2012 survey of employees in the United States showed that 1.6% of all workers faced an unmet need for leave due to a parent's, spouse's, or child's health condition.¹ The National Alliance for Caregiving (NAC) reports that there are at least 43.5 million unpaid family caregivers in the United States and that family caregivers provide an average of 20 hours of care per week. Moreover, caregiving often isn't limited to a few months, or even a year — in fact, caregiving lasts an average of almost five years and 70% of all caregivers are working while caring for a loved one.~~

~~Caregiving can cause significant financial, physical and emotional strain. NAC reports nearly 7 in 10 caregivers report having to make work accommodations while they are providing care to a loved one. Of caregivers who take time off to fulfill their responsibilities at home, 48% report losing income.² Of caregivers who leave the workforce, half (52%) said they did so because their jobs did not allow the flexibility they needed to work and provide elder care.³ The average caregiver over 50 who leaves the workforce to care for~~

¹ Klerman, J. A., Daley, K., & Pozniak, A. (2014). "Family and Medical Leave in 2012: Technical Report." Cambridge, MA: Abt Associates Inc. <http://www.dol.gov/asp/evaluation/fmla/FMLA-2012-Technical-Report.pdf>

² Aumann, K., Galinsky, E., Sakai, K., et. al. (2010). The Elder Care Study: Everyday Realities and Wishes for Change. Families and Work Institute Publication. Retrieved 4 November 2015, from http://familiesandwork.org/site/research/reports/elder_care.pdf

³ Matos, K. (2014). Highlights from the 2014 Older Adult Caregiver Study. Families and Work Institute Publication. Retrieved 4 November 2015, from <http://www.familiesandwork.org/downloads/2014-Older-Adult-Caregiver-Study.pdf>

a parent loses \$303,880 in wages, Social Security and private pensions when they do so. For women, that penalty is even higher: more than \$324,000.⁴ And caregiving takes more than a financial toll – It is widely documented that caregivers experience high levels of stress, depression, and suffer from higher rates of chronic disease, and diminished immune response. Family caregivers need paid time off to care for family members and maintain their own health without fear of disrupting their economic security.

Moreover, the number of older adults is expected to swell to more than 20% of the population by 2050. As our population ages and caregiving needs increase, paid leave will be even more critical to helping ensure working people can take care of their loved ones without risking their economic security.

In 2002, California became the first state in the United States to create the Paid Family Leave program – a family leave insurance program that provides income replacement to workers on leave for family caregiving or bonding with a new child. California’s family leave insurance program entitles employees, who are on leave to bond with a new child or care for a seriously ill family member, to receive partial wage replacement of 55%⁵ of the employee’s weekly wages up to a maximum weekly benefit amount of \$1,129. The maximum benefit amount in 2017 is \$1,173.

According to a 2014 report by the California Senate Office of Research, the number of California Paid Family Leave claims filed by individuals in the lowest income bracket consistently is much smaller than the number filed by those in the highest income bracket. Indeed, low-wage workers earning \$24,000 or less amount to almost 40% of all eligible PFL recipients in California, but they represent only 24% of actual claimants. Moreover, claims in the two lowest income brackets decreased gradually over the prior nine years. Numerous factors may contribute to this declining participation rate, including the current California Paid Family Leave partial wage-replacement rate ~~of 55%,~~ which may provide insufficient income, particularly for low-income households.

This Ordinance is intended to supplement the California Paid Family Leave partial wage replacement so that employee’s employees on leave will receive 100% of their weekly salary for the six-week period, subject to a weekly maximum benefit amount. The goal is to ensure that concern over loss of income does not preclude Berkeley employees from bonding with their new child or taking care of a seriously ill family member.

This is based on San Francisco’s Paid Parental Leave Ordinance which passed in April 2016 and became operative on January 1, 2017. We must follow San Francisco’s lead in making progressive policies to protect mothersparents, families, and children.

FINANCIAL IMPLICATIONS

⁴ MetLife Mature Market Institute. (2011, June). The MetLife Study of Caregiving Costs to Working Caregivers: Double Jeopardy for Baby Boomers Caring for Their Parents. Retrieved 4 November 2015, from <https://www.metlife.com/assets/cao/mmi/publications/studies/2011/Caregiving-Costs-to-Working-Caregivers.pdf>

⁵ In 2018 the benefit rate will increase to 60 or 70%, depending on income.

Staff time.

ENVIRONMENTAL SUSTAINABILITY

No impact.

CONTACT PERSON

Councilmember Ben Bartlett, 510-981-7130

Attachments:

1: DRAFT Ordinance Amending the Berkeley Municipal Code by Requiring Employers to Provide Supplemental Compensation to Employees Who Are Receiving State Paid Family Leave for Purposes of Bonding with a New Child and Caring for a Seriously Ill Family Member

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

ORDINANCE AMENDING THE BERKELEY MUNICIPAL CODE BY REQUIRING EMPLOYERS TO PROVIDE SUPPLEMENTAL COMPENSATION TO EMPLOYEES WHO ARE RECEIVING STATE PAID FAMILY LEAVE FOR PURPOSES OF BONDING WITH A NEW CHILD AND CARING FOR SERIOUSLY ILL FAMILY MEMBER.

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

Section 1. The Berkeley Municipal Code is hereby amended by adding Chapter 9.90, to read as follows:

**Chapter 9.90
PAID FAMILY LEAVE**

Sections:

Article I	General
9.90.010	Applicability
9.90.020	Findings
9.90.030	Definitions
Article II	Employer's Obligations and Employee's Rights
9.90.040	Supplemental Paid Leave
9.90.050	Notice and Posting
9.90.060	Employer's Records
9.90.070	Exercise of Rights Protected; Retaliation Prohibited
Article III	Implementation and Enforcement
9.90.080	Implementation
9.90.090	Enforcement
9.90.010	Waiver Through Collective Bargaining
9.90.100	Other Legal Requirements
Article IV	General Welfare & Consistency with Federal and State Law
9.90.110	Undertaking for the General Welfare
9.90.120	Severability
9.90.130	No Conflict with Federal or State Law
9.90.140	Expiration
9.90.150	Change in Federal Law

Article I General

9.90.010 Applicability

This Chapter relates to California's family leave insurance program codified at Unemployment Insurance Code Section 3300 et seq., which allows employees who contribute to the California State Disability Insurance Fund to be entitled to six weeks of ~~paid time off at 55% of their weekly wages~~partial wage replacement up to a maximum weekly benefit amount to bond with a new child or care for a seriously ill family member.

This Chapter is intended to supplement the California Paid Family Leave partial wage replacement by providing compensation that, in combination with the California Paid Family Leave payment, will total 100% of an employee's weekly salary, subject to a weekly maximum benefit amount, during the six-week leave period, to help ensure that concern of loss of income does not preclude Berkeley employees from bonding with their new child or caring for a seriously ill family member.

9.90.020 Findings

A. California has a family leave insurance program that provides partial wage replacement to eligible employees on leave for family caregiving or bonding with a new child ("California Paid Family Leave"). Under the program, codified at Unemployment Insurance Code Section 3300 et seq., employees who contribute to the California State Disability Insurance fund are entitled to six weeks of partial pay each year while taking time off from work to bond with a newborn baby, newly adopted child, or new foster child, or to care for a seriously ill family member.

B. As of ~~January 2016~~2017, workers eligible for California Paid Family Leave can take up to six weeks of paid time off at 55% of their weekly wages up to a maximum weekly benefit amount to bond with a new child or care for a seriously ill family member. The weekly benefit amount is determined by using the employee's highest-earning calendar quarter during an approximately 12-month base period. As of ~~January 2016~~2017, the maximum weekly benefit amount is \$1,~~129.~~173 to qualify for ~~this~~the maximum weekly benefit amount, an individual must earn at least \$26,070.92 in a calendar quarter during the base period. ~~The Legislature is considering legislation that would extend the number of weeks of paid time off and increase the weekly benefit amount, but as of the enactment of this Chapter 9.90, the state legislation had not been passed.~~ This Ordinance is based on San Francisco's Paid Parental Leave Ordinance which passed in April 2016.

C. California Paid Family Leave is available to nearly all private sector workers who pay into the SDI program, either through payroll deductions or voluntarily.

D. This Chapter is intended to supplement the California Paid Family Leave partial wage replacement by providing compensation that, in combination with the California Paid Family Leave payment, will total 100% of an employee's weekly salary, subject to a weekly maximum benefit amount, during the six-week leave period, to help ensure that

concern of loss of income does not preclude parents in Berkeley from bonding with their new child or taking care of a seriously ill family member.

9.90.030 Definitions

For the purposes of this Chapter 9.90, the following definitions apply:

A. “California Paid Family Leave” means the State of California’s partial wage replacement insurance plan for paid family leave codified at the California Unemployment Insurance Code, Division 1, Part 2, Chapter 7 (commencing with Section 3300), as that law may be amended from time to time with respect to eligibility for, duration of, or amount of paid family leave compensation, or any other matter pertaining to paid family leave under that law.”

B. “City” means the City of Berkeley.

C. “Department” shall mean the Department of Finance or other City department or agency as the City shall by resolution designate.

D. “Covered Employee” means any person, including but not limited to part-time and temporary employees, who is employed by a Covered Employer (1) who commenced employment with the Covered Employer at least 90 days prior to the start of the California Paid Family leave period, (2) who performs at least eight hours of work per week for the employer within the geographic boundaries of the City, (3) at least 40% of whose total weekly hours worked for the employer are within the geographic boundaries of the City, and (4) who is eligible to receive paid family leave compensation from the State of California under the California Paid Family Leave law for the purpose of bonding with a new child. Where a person’s weekly work hours fluctuate from week to week, whether the person meets the eight-hour and/or 40% threshold requirements will be determined by using an average of the person’s weekly hours worked for the Covered Employer during the three monthly pay periods, six bi-weekly or semi-monthly pay periods, or 12 weekly pay periods immediately preceding the start of the person’s California Paid Family Leave period. If the person was on unpaid or partially paid leave during any of the aforementioned pay periods, such pay period(s) shall not be counted towards the average referenced in the preceding sentence; rather, earlier corresponding pay periods will be used for that person in order to satisfy the above designated number of pay periods, but in no case shall pay periods earlier than 2652 weeks prior to the California Paid Family Leave period be used in calculating the average.

E. “Covered Employer” means any person, as defined in Section 18 of the California Labor Code, including 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, employs or exercises control over the wages, hours, or working conditions of an employee and who regularly employs 25 employees or more nationwideworldwide. Covered Employer shall not include the City, the University of California, or any other governmental entity.

F. “New Child Bonding” means bonding with the Covered Employee’s minor child during the first year after the birth of the child or after placement of the child with the Covered Employee through foster care or adoption, per Section 3301 of the California Unemployment Insurance Code.

G. “Caring for a Seriously Ill Family Member” means caring for a seriously ill child, parent, parent-in-law, grandparent, grandchild, sibling, spouse, or registered domestic partner.

H. “State” means the State of California, including the State of California Employment Development Department.

I. “Supplemental Compensation” means a Covered Employer’s obligation to pay a Covered Employee’s partial weekly salary in accordance with Chapter 9.90.

J. “Voluntary Separation” means the termination of a Covered Employee’s employment from a Covered Employer as a result of the Covered Employee voluntarily resigning at his/her own instance without having been requested to do so by the Covered Employer, excluding circumstances beyond a Covered Employee’s control, including, but not limited to, circumstances where the employer is responsible for the employee’s separation (e.g., the employer does not return the employee to his/her same position or reinstate the employee to a comparable position or fails to provide employee with lactation accommodations), or circumstances where the employee is needed to care for a seriously ill family member (e.g. the employee’s new child has a serious health condition requiring the employee’s full-time care).

Article II Employer’s Obligations and Employee’s Rights

9.90.040 Supplemental Paid Leave

A. **Applicability:** This Section applies to Covered Employees who are receiving California Paid Family Leave benefits for the purposes of New Child Bonding or Caring for a Seriously Ill Family Member.

B. **Supplemental Compensation:**

1. General.

- a. Except as stated in subsection B2, when a Covered Employee receives California Paid Family Leave compensation for the purpose of New Child Bonding or Caring for a Seriously Ill Family Member, a Covered Employer shall, ~~during the leave period~~, supplement the California Paid Family Leave weekly benefit amount that the employee is receiving by paying the employee Supplemental Compensation in an amount such that the total of the California Paid Family Leave compensation the employee is receiving

and the Supplemental Compensation provides, but does not exceed, 100% of the employee's current normal gross weekly wage.

- b. If the Covered Employee's weekly wage fluctuates, the employee's normal gross weekly wage shall be calculated based on an average of the employee's weekly earnings from the Covered Employer during the three monthly pay periods, six bi-weekly or semi-monthly pay periods, or 12 weekly pay periods immediately preceding the start of the employee's California Paid Family Leave period. If the employee was on unpaid or partially paid leave during any of the aforementioned pay periods, such pay period(s) shall not be counted towards the average referenced in the preceding sentence; rather, the average shall be calculated using additional earlier corresponding pay periods in order to satisfy the above designated number of pay periods, but in no case shall pay periods earlier than 2652 weeks prior to the California Paid Family Leave period be considered. Notwithstanding the preceding sentence, if the Covered Employee's weekly wage fluctuates and the employee has worked for the Covered Employer for less than 2652 weeks, the weekly wage shall be calculated based on an average of the employee's weekly earnings for the entire period of employment to date.
- c. If the California Paid Family Leave weekly benefit amount that the Covered Employee is receiving from the State is based on earnings from a calendar quarter during which the employee did not work for the Covered Employer, or during which the employee earned a higher weekly wage from the Covered Employer than the employee is receiving at the time of his or her leave, the Supplemental Compensation amount shall be calculated to provide 100% of the employee's normal gross weekly wage in his or her current position; provided, however, that reducing a Covered Employee's wages during the leave period or within 90 days of the employee's having made a request or application for California Paid Family Leave shall raise a rebuttable presumption that such wage reduction was made to reduce the Covered Employer's Supplemental Compensation obligations under this Section 9.90.040. Unless the Covered Employer rebuts the presumption with clear and convincing evidence that the reduction was solely for a reason other than reducing its obligations to pay Supplemental Compensation, the employer shall be obligated to pay Supplemental Compensation during the leave period based on the employee's prior wage rate.
- d. Multiple Employers:
 - i. Where the Covered Employee works for more than one employer, the Supplemental Compensation amount shall be apportioned between or among the Covered Employers based on the percentage of the Employee's total gross weekly wages received from each

employer. For example, if the Employee earns \$800 a week from Covered Employer A, and \$200 per week from Covered Employer B for a combined total of \$1,000, Employer A shall pay 80% of the Supplemental Compensation amount and Employer B shall pay 20% of the Supplemental Compensation amount. If the Employee's weekly wage for a given Employer fluctuates, the percentage referenced in this subsection shall be calculated by averaging the employee's weekly wages earned from the Employer during the three monthly pay periods, six bi-weekly or semi-monthly pay periods, or 12 weekly pay periods immediately preceding the leave period. If the employee was on unpaid or partially paid leave during any of the aforementioned pay periods, such pay period(s) shall not be counted towards the average referenced in the preceding sentence; rather, the average shall be calculated using additional earlier corresponding pay periods in order to satisfy the above designated number of pay periods, but in no case shall pay periods earlier than 2652 weeks prior to the California Paid Family Leave period be considered.

- ii. In cases where the Covered Employee works for a Covered Employer and a non-Covered Employer, the Covered Employer shall be responsible only for its percentage of the Employee's total gross weekly wages. For example, if the Employee earns \$800 per week from the covered Employer, and \$200 per week from the non-covered Employer for a combined total of \$1,000, the Covered Employer shall pay 80% of the Supplemental Compensation amount and the Non-Covered Employer shall pay nothing.
- iii. In cases of multiple employers, the Covered Employee shall, as a precondition of receiving Supplemental Compensation, provide the Covered Employer(s) with both (1) a copy of the employee's Notice of Computation of California Paid Family Leave Benefits from the State or other legally authorized statement, and (2) information pertaining to wages received from all employers during the 90 days prior to the leave period on a form prepared by the Department and signed by the employee under penalty of perjury. A Covered Employee's failure to comply with this requirement shall relieve the Covered Employer(s) of their obligation to provide employee with Supplemental Compensation.

2. **Maximum Weekly Benefit Amount.** In the case of a Covered Employee who is receiving the maximum weekly benefit amount under the California Paid Family Leave law, the Supplemental Compensation shall not be calculated to reach 100% of the employee's total normal gross weekly wage. Rather, the amount of Supplemental Compensation shall be calculated based on the gross wage that is derived from dividing the State's maximum weekly benefit amount by the

percentage rate of wage replacement provided under the California Paid Family Leave law.

3. **Termination During Leave Period.** A Covered Employer's obligation to provide Supplemental Compensation under this Section 9.90.040 applies only during the period the Covered Employee ~~is eligible for and~~ is receiving California Paid Family Leave Benefits for New Child Bonding or Caring for a Seriously Ill Family Member; provided, however, that if a Covered Employer terminates a Covered Employee during the leave period, the employer's obligation to pay Supplemental Compensation shall continue for the remainder of the period the Covered Employee is receiving California Paid Family Leave ~~period~~.
4. **Termination Prior to Leave Period.** Terminating a Covered Employee prior to the employee's leave period but within 90 days of the employee's having ~~made a request or application for~~ notified the Covered Employer of his or her intent to apply for and/or use California Paid Family Leave shall raise a rebuttable presumption that such termination was taken to avoid the Covered Employer's Supplemental Compensation obligations under this Section 9.90.040. Unless the ~~covered~~ Covered Employer rebuts the presumption with clear and convincing evidence that the termination was solely for a reason other than avoidance of its obligation to pay Supplemental Compensation, the employer shall be obligated to pay the terminated employee Supplemental Compensation ~~during the leave period~~.
5. **Unused Vacation Leave.** To be eligible to receive Supplemental Compensation, a Covered Employee must agree to allow a Covered Employer, in the employer's discretion, to apply up to two weeks of unused vacation leave that the employee has accrued as of the start of the leave period to help meet with the employer's obligation under this Section to provide Supplemental Compensation during the leave period. If the Covered Employee does not agree, the Covered Employer is not required to provide Supplemental Compensation under this Chapter, but such lack of agreement shall have no effect on the Employee's eligibility for California Paid Family Leave benefits or other benefits under the law. The preceding sentence shall not prevent a Covered Employer, in the employer's discretion, from requiring a Covered Employee to take up to two weeks of earned but unused vacation leave prior to the employee's initial receipt of California Paid Family Leave compensation as allowed under subsection (c) of Section 3303,1 of the California Unemployment Insurance Code, as amended, in addition to or in lieu of exercising the option provided in the foregoing sentence.
6. **Voluntary Plans.** A Covered Employer who has received State approval to pay California Paid Family Leave Compensation through a voluntary disability insurance plan in accordance with California Unemployment Insurance Code, Division 1, Part 2, Chapter 6 (commencing with Section 3251) must comply with the Supplemental Compensation requirements of this Section 9.90.030 either by

providing the Supplemental Compensation through the approved voluntary plan or by paying Supplemental Compensation directly to the Covered Employee.

7. **Integration/Coordination of Benefits.** In accordance with California Unemployment Insurance Code Section 2656, a Covered Employee who is receiving California Paid Family Leave Benefits may not receive Supplemental Compensation under this Chapter 9.90 which would result in the employee's receiving total compensation while on paid leave that is greater than the employee's normal gross weekly wages. As a precondition of receiving Supplemental Compensation, a Covered Employee must either (1) provide the Covered Employer with a copy of the employee's Notice of Computation of California Paid Family Leave Benefits from the State or other legally authorized statement, or (2) at the time of applying for California Paid Family Leave, provide the State with written authorization to disclose the weekly benefit amount to the employer. A Covered Employee's failure to comply with this requirement shall relieve the Covered Employer of its obligation to provide the employee with Supplemental Compensation.
8. **Existing Paid Leave Policies.** This Chapter 9.90 does not require a Covered Employer to provide Supplemental Compensation under Chapter 9.90 to a Covered Employee if the employer's existing policy provides the employee with at least six weeks fully paid leave within any twelve-month period for purposes of New Child Bonding or Caring for a Seriously Ill Family Member, whether or not such paid leave includes California Paid Family Leave benefits. Unless the Employee elects otherwise, the six weeks fully paid leave referenced in the prior sentence must be provided as six consecutive weeks.
9. **Reimbursement.** As a precondition of receiving Supplemental Compensation, a Covered Employee must agree to reimburse the full amount of Supplemental Compensation received from any Covered Employer(s) if the employee voluntarily separatesengages in Voluntary Separation from employment with the Covered Employer(s) within 90 days of the end of the Employee's leave period and if the Employer requests such reimbursements in writing.

9.90.050 Notice and Posting

Every Covered Employer shall post in a conspicuous place at any workplace or jobsite where any Covered Employee works a notice, in all languages spoken by more than 5% of the employees at the workplace or job site, a poster informing Covered Employees of their rights under this article.

9.90.060 Employer's Records

A. Covered Employers shall retain records documenting Supplemental Compensation paid to employees as required by this Chapter, for a period of three years, and shall allow the City to access such records, with appropriate notice and at a mutually

agreeable time, to monitor compliance or investigate complaints regarding compliance with the requirements of this Chapter 9.90.

B. When an issue arises as to the employee's entitlement to Supplemental Compensation under this Chapter 9.90, if the Covered Employer does not maintain or retain adequate records documenting Supplemental Compensation paid to the employee, or does not allow the City reasonable access to such records, it shall be presumed that the employer has violated this Article, absent clear and convincing evidence otherwise.

9.90.070 Exercise of Rights Protected; Retaliation Prohibited

A. It shall be unlawful for a Covered Employer or any other person to interfere with, restrain, or deny the exercise of the attempt to exercise, any right protected under this Chapter 9.90.

B. It shall be unlawful for a Covered Employer or any other person to discharge, threaten to discharge, demote, suspend, or in any manner discriminate or to take adverse action against any person in retaliation for exercising rights to Supplemental ~~compensation~~ Compensation protected under this Chapter 9.90. Such rights include but are not limited to the right to Supplemental Compensation pursuant to this Chapter; the right to file ~~tea~~ complaint or inform any person about any employer's alleged violation of this Chapter; the right to cooperate with the City in investigations of alleged violations of this Chapter; and the right to inform any person of his or her possible rights under this Chapter.

C. Protections of this Section 9.90.070 shall apply to any person who mistakenly but in good faith alleges violations of the Section 9.90.070.

D. Taking adverse action against a person within 90 days of the person's filing a complaint with the City or a court alleging a violation of any provision of this Chapter; of informing any person about an employer's alleged violation of this Chapter; of cooperating with the City or other persons in the investigation or prosecution of any alleged violation of this Chapter; of opposing any policy, practice, or act that is unlawful under this Chapter; or of informing any person of his or her rights under this chapter; shall raise a rebuttable presumption that such adverse action was taken in retaliation for the exercise of one or more of the aforementioned rights. Unless the Covered Employer rebuts the presumption with clear and convincing evidence that the adverse action was solely for a reason other than retaliation, the employer shall be deemed to have violated this Section 9.90.070.

Article III Implementation and Enforcement

9.90.080 Implementation

A. **Guidelines.** The Department shall be authorized to coordinate implementation and enforcement of this Chapter 9.90 and may promulgate appropriate guidelines or rules for such purposes. The Department shall seek out partnerships with community-based organizations and collaborate with the Berkeley 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 persons 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.** Any 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. (Ord. 7505-NS § 1 (part), 2016; Ord. 7352-NS § 1 (part), 2014)

9.90.090 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 a Covered 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 any notice, bulletin, or information required under Section 60 of this Chapter
 - ii. Failure to provide notice of investigation to Employees
 - iii. Failure to post notice of violation to public
 - iv. Failure to maintain records for four years
 - v. Failure to allow the City access to payroll records
 - vi. Failure to provide to an Employee any information required to be provided to an Employee under Section 60 of this Chapter.
 - 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. (Ord. 7505-NS § 1 (part), 2016: Ord. 7352-NS § 1 (part), 2014)

9.90.100 Waiver Through Collective Bargaining

All or any portion of the applicable requirements of this Chapter shall not apply to employees covered by a bona fide collective bargaining agreement if (1) such requirements are expressly waived in the collective bargaining agreement in clear and unambiguous terms, or (2) the agreement was entered into before the effective date of the ordinance enacting this Chapter. The exception designated (2) in the preceding sentence shall not apply to any such agreement once it has been extended or expired.

9.90.110 Other Legal Requirements

A. This Chapter provides minimum requirements pertaining to paid leave as provided herein. It shall not be construed to preempt, limit, or otherwise affect the applicability of any other law, regulation, requirement, policy, or standard that provides for greater leave, whether paid or unpaid, or that extends other protections to employees.

B. This Chapter provides minimum requirements pertaining to paid leave and shall not be construed to prevent employers from adopting or retaining leave policies that are more generous than policies that comply with this Chapter.

C. This Chapter is intended to supplement other available sources of income during specified periods of leave to which the employee is otherwise eligible. Nothing in this Chapter shall be construed to expand, reduce, or otherwise affect the total amount of parental or other leave time available to employees under federal, state, or local law.

Article IV General Welfare & Consistency with Federal and State Law

9.90.110 Undertaking for the General Welfare

In enacting and implementing this Chapter, the City is assuming an undertaking to promote the general welfare. It 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.

9.90.120 Severability

If any section, subsection, sentence, clause, phrase, or word of this Chapter, or any application thereof to any person or circumstance, is held to be invalid or unconstitutional by a decision of a court of competent jurisdiction, such decision shall not affect the validity of the remaining portions or applications of the Chapter.

9.90.130 No Conflict with Federal or State Law

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.

9.90.140 Expiration

This Chapter 9.90 shall expire by operation of law if the Legislature amends the California Paid Family Leave program such that the benefits provided under that program amount to 100% of an eligible employee's wages, as capped by any maximum benefit amount under the State law. Upon certification from the City Attorney to the City Council that such a change in State law has occurred, the City Attorney shall cause the Chapter 9.90 to be removed from the Berkeley Municipal Code.

9.90.150 Change in Federal Law

Within 180 days of final enactment of any federal law requiring private employers to provide paid leave to employees or providing governmentally funded paid leave, the City Manager shall provide a report to the City Council analyzing the impact of the newly

adopted federal law on employers and employees subject to this Chapter as well as any overlap between the federal benefits and benefits required under this Chapter. In the report, the City Manager may, in his or her discretion, recommend changes to this Chapter.