



**Ad-Hoc Subcommittee on Paid Family Leave**

**September 24, 2018**

**1:00-2:30pm**

**Pepperwood Room, 5<sup>th</sup> Floor, 2180 Milvia St.**

**Committee Members**

Ben Bartlett, District 3, Subcommittee Chair

Cheryl Davila, District 2

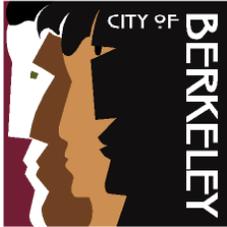
Sophie Hahn, District 5

Kate Harrison, District 4

**Agenda**

1. Call to Order
2. Public Comment
3. Discussion and possible action on Berkeley Employee Data
4. Discussion and possible action on the Referral on Fair Workweek Requirements from City Council (attached)
5. Discussion and possible action on Next Steps
6. Adjournment

*Pursuant to the City Council Rules of Procedure and Order, Chapter II, Section H, meetings of the Ad-Hoc Subcommittee must be open to the public and held in accessible locations that are open to the public. Public comment is permitted on agenda items, however the Chair may exercise a one-minute speaking limitation on public comments if necessary*



Kate Harrison  
Councilmember District 4

ACTION CALENDAR  
May 15, 2018

To: Honorable Mayor and Members of the City Council  
From: Councilmember Harrison  
Subject: Referral to Labor Commission to Establish Fair Workweek Requirements in Berkeley

RECOMMENDATION

Refer to the Labor Commission to draft an Ordinance to establish regulations governing the scheduling and hiring practices of qualifying businesses in Berkeley.

BACKGROUND

Even with sick pay and strong minimum wage laws, workers in Berkeley, particularly shift workers, still face unfair and exploitative work practices. Since the passage of the Affordable Care Act, a frequent issue that has arisen is the practice of businesses keeping their employees below 30 hours a week to avoid having to provide them health care. Workers may be forced to take “clopening” shifts, where an employee covers the closing shift one day and the opening shift the next day, giving them little time for rest. Shift workers frequently have shifts added or removed hours before they are set to begin, making scheduling impossible and creating financial difficulties for those with children who need child care.

Multiple jurisdictions have introduced measures to address these inequitable conditions, including the cities of Emeryville, San Jose, San Francisco, and New York and the state of Oregon. The strongest so far has been Emeryville’s ordinance (attached). The ordinance drafted by Labor Commission should be based on that law, strengthened with the following principles:

- The right to refuse “clopening” shifts, the right to request a flexible work arrangement, and a prohibition on refusing hours to prevent the application of benefits should apply to all employers and employees
- The right to at least two week notice of work schedule, to decline additional hours, and to “predictability pay” if changes are made to the schedule after the 2 two week deadline should apply to all businesses of at least 25 employees
- The requirement that new shifts first be offered to all qualified existing employees until they have at least 35 hours of work per week on average should apply to all Retail, Hotel, and Restaurant firms with at least 25 employees

- All requirements of the ordinance apply to the City of Berkeley and the Berkeley Rent Stabilization Board.

FISCAL IMPACTS OF RECOMMENDATION

Staff time to implement and enforce. Possible revenue from fines paid by noncompliant businesses.

ENVIRONMENTAL SUSTAINABILITY

None.

CONTACT PERSON

Councilmember Kate Harrison, (510) 981-7140

Attachments:

1: Emeryville Ordinance

## **CHAPTER 39.**

# **FAIR WORKWEEK EMPLOYMENT STANDARDS**

Sections:

[5-39.01 Definitions](#)

[5-39.02 Covered Employers](#)

[5-39.03 Advance Notice of Work Schedules](#)

[5-39.04 Notice, Right to Decline, and Compensation for Schedule Changes](#)

[5-39.05 Offer of Work to Existing Employees](#)

[5-39.06 Right to Rest](#)

[5-39.07 Right to Request a Flexible Working Arrangement](#)

[5-39.08 Notice and Posting](#)

[5-39.09 Implementation](#)

[5-39.10 Enforcement](#)

[5-39.11 No Preemption of Higher Standards](#)

[5-39.12 Severability](#)

### **5-39.01 Definitions.**

As used in this chapter, the following terms shall have the following meanings:

- (a) “Calendar week” shall mean a period of seven (7) consecutive days starting on Sunday.
- (b) “City” shall mean the City of Emeryville.
- (c) “Covered employer” shall mean an employer subject to the provisions of this chapter, as specified in Section [5-39.02](#).
- (d) “Employee” shall mean any person who:
  - (1) In a calendar week performs at least two (2) hours of work within the geographic boundaries of the City of Emeryville for an employer; 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. Employees shall include learners, as defined by the California Industrial Welfare Commission.

(e) “Employer” shall mean any person (including a natural person, corporation, nonprofit corporation, general partnership, limited partnership, limited liability partnership, limited liability company, business trust, estate, trust, association, joint venture, agency, instrumentality, or any other legal or commercial entity, whether domestic or foreign) who directly or indirectly (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 any employee.

(f) “Establishment” shall mean a business or industrial unit at a single location that distributes goods or performs services.

(g) “Fast food restaurant” shall mean a restaurant as defined in Section [9-2.319\(b\)](#) of the Emeryville planning regulations in Title [9](#) of the Emeryville Municipal Code where patrons order or select food or beverage items and pay before eating and such items may be consumed on or off the premises, or delivered to the customer’s location. It shall not include an establishment that provides food services to patrons who order and are served while seated and pay after eating; nor shall it include an establishment that offers alcoholic beverages with meals, regardless of when or where food is ordered and payment is made.

(h) “Firm” shall mean a business organization or entity consisting of one (1) or more establishments under common ownership or control. In the case of a franchise, the franchisor shall be considered the firm.

(i) “Franchise” shall have the meaning in California Business and Professions Code Section [20001](#).

(j) “Franchisee” shall have the meaning in California Business and Professions Code Section [20002](#).

(k) “Franchisor” shall have the meaning in California Business and Professions Code Section [20003](#).

(l) “Good faith” shall mean a sincere intention to deal fairly with others.

(m) “Predictability pay” shall mean wages paid to an employee, calculated on an hourly basis at the employee’s regular rate of pay as that term is used in [29](#) U.S.C. Section [207\(e\)](#), as compensation for schedule changes made by a covered employer to an employee’s schedule pursuant to Section [5-39.04](#), in addition to any wages earned for work performed by that employee.

(n) “Retail” shall mean a retail establishment as defined in Section [9-2.353](#) of the Emeryville planning regulations in Title [9](#) of the Emeryville Municipal Code.

(o) “Shift” shall mean the consecutive hours an employer requires an employee to work including employer-approved meal periods and rest periods.

(p) “Work schedule” shall mean all of an employee’s shifts, including specific start and end times for each shift, during a calendar week.

(Sec. 2 (part), Ord. 16-007, eff. July 1, 2017)

### **5-39.02 Covered Employers.**

(a) Except as provided in subsection (b) of this section, covered employees subject to the provisions of this chapter include:

(1) Retail firms with fifty-six (56) or more employees globally; and

(2) Fast food firms with fifty-six (56) or more employees globally and twenty (20) or more employees within the City limits of Emeryville.

(b) Alternative Compliance.

(1) Waiver through Collective Bargaining. To the extent permitted by 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 that the parties thereto intend to and do thereby waive all of or a specific portion(s) of this chapter.

(c) Number of employees, as referenced in subsection (a) of this section, shall include all employees as defined in this chapter that work for compensation during a given week. In determining the number of employees performing work for a covered employer during a given week, all employees performing work for the covered employer for compensation on a full-time, part-time, or temporary basis shall be counted, including employees made available to work through the services of a temporary services or staffing agency or similar entity.

(d) “Covered employer” shall include franchisees associated with a franchisor or a network of franchises with franchisees with more than twelve (12) locations globally.

For the purposes of determining whether a nonfranchisee entity is a covered employer as defined by this chapter, separate entities that form an integrated enterprise shall be considered a single employer under this chapter. Separate entities will be considered an integrated enterprise and a single employer under this chapter where a separate entity controls the operation of another entity. The factors to consider in making this assessment include, but are not limited to:

(1) Degree of interrelation between the operations of multiple entities;

(2) Degree to which the entities share common management;

- (3) Centralized control of labor relations; and
- (4) Degree of common ownership or financial control over the entities.

There shall be a presumption that separate legal entities, which may share some degree of interrelated operations and common management with one another, shall be considered separate employers for purposes of this chapter as long as (i) the separate legal entities operate substantially in separate physical locations from one another, and (ii) each separate legal entity has partially different ultimate ownership.

(Sec. 2 (part), Ord. 16-007, eff. July 1, 2017)

### **5-39.03 Advance Notice of Work Schedules.**

(a) Initial Estimate of Minimum Hours.

(1) Prior to or on commencement of employment, a covered employer shall provide each employee with a good faith estimate in writing of the employee's work schedule.

(2) Prior to or on commencement of employment, the employee may request that the covered employer modify the estimated work schedule provided under subsection (a)(1) of this section. The covered employer shall consider any such request, and in its sole discretion may accept or reject the request; provided, that the covered employer shall notify the employee of covered employer's determination in writing prior to or on commencement of employment.

(b) Two (2) Weeks' Advance Notice of Work Schedule. A covered employer shall provide its employees with at least two (2) weeks' notice of their work schedules by doing one (1) of the following at least every fourteen (14) days (on a "biweekly schedule"): (1) posting the work schedule in a conspicuous place at the workplace that is readily accessible and visible to all employees; or (2) transmitting the work schedule by electronic means, so long as all employees are given access to the electronic schedule at the workplace. For new employees, a covered employer shall provide the new employee prior to or on his or her first day of employment with an initial work schedule that runs through the date that the next biweekly schedule for existing employees is scheduled to be posted or distributed. Thereafter, the covered employer shall include the new employee in an existing biweekly schedule with other employees. If the covered employer changes an employee's work schedule after it is posted and/or transmitted, such changes shall be subject to the notice and compensation requirements set forth in this chapter.

(Sec. 2 (part), Ord. 16-007, eff. July 1, 2017)

### **5-39.04 Notice, Right to Decline, and Compensation for Schedule Changes.**

(a) A covered employer shall provide an employee notice of any change to the employee's posted or transmitted work schedule. The covered employer shall provide such notice by in-person conversation, telephone call, email, text message, or other electronic communication.

This notice requirement shall not apply to any schedule changes the employee initiates, such as employee requested sick leave, time off, shift trades, or additional shifts.

(b) Subject to the exceptions in subsection (d) of this section, an employee has the right to decline any previously unscheduled hours that the covered employer adds to the employee's schedule, and for which the employee has been provided advance notice of less than fourteen (14) days.

(c) Subject to the exceptions in subsection (d) of this section, a covered employer shall provide an employee with the following compensation per shift for each previously scheduled shift that the covered employer adds or subtracts hours, moves to another date or time, cancels, or each previously unscheduled shift that the covered employer adds to the employee's schedule: (1) with less than fourteen (14) days' notice, but twenty-four (24) hours or more notice to the employee: one (1) hour of predictability pay; (2) with less than twenty-four (24) hours to the employee, (i) four (4) hours or the number of hours in the employee's scheduled shift, whichever is less, when hours are canceled or reduced; (ii) one (1) hour of predictability pay for all other changes. The compensation required by this subsection shall be in addition to the employee's regular pay for working that shift.

(d) Exceptions. The requirements of this section shall not apply under any of the following circumstances:

- (1) Operations cannot begin or continue due to threats to covered employers, employees or property, or when civil authorities recommend that work not begin or continue;
- (2) Operations cannot begin or continue because public utilities fail to supply electricity, water, or gas, or there is a failure in the public utilities or sewer system;
- (3) Operations cannot begin or continue due to: acts of nature (including but not limited to flood, fire, explosion, earthquake, tidal wave, drought), war, civil unrest, strikes, or other cause not within the covered employer's control;
- (4) Mutually agreed-upon work shift swaps or coverage among employees.

(e) Nothing in this section shall be construed to prohibit a covered employer from providing greater advance notice of employee's work schedules and/or changes in schedules than that required by this section.

(Sec. 2 (part), Ord. 16-007, eff. July 1, 2017)

### **5-39.05 Offer of Work to Existing Employees.**

(a) Subject to the limitations herein, before hiring new employees or contract employees, including hiring through the use of temporary services or staffing agencies, a covered employer shall first offer additional hours of work to existing part-time employee(s) if the part-time employee(s) are qualified to do the additional work, as reasonably and in good faith determined

by the covered employer. This section requires covered employers to offer to part-time employees only up to the number of hours required to give the part-time employee thirty-five (35) hours of work in a calendar week.

(b) A covered employer has discretion to divide the additional work hours among part-time employees consistent with this section; provided, that: (1) the employer's system for distribution of hours must not discriminate on the basis of race, color, creed, religion, ancestry, national origin, sex, sexual orientation, gender identity, disability, age, marital or familial status, nor on the basis of family caregiving responsibilities or status as a student; and (2) the employer may not distribute hours in a manner intended to avoid application of the Patient Protection and Affordable Care Act, [42 U.S.C. Section 18001](#).

(c) A part-time employee may, but is not required to, accept the covered employer's offer of additional work under this section.

(1) For additional work for an expected duration of more than two (2) weeks, the part-time employee shall have seventy-two (72) hours to accept the additional hours, after which time the covered employer may hire new employees to work the additional hours.

(2) When the covered employer's offer of additional work under this section is for an expected duration of two (2) weeks or less, the part-time employee shall have twenty-four (24) hours to accept the additional hours, after which time the covered employer may hire new employees to work the additional hours.

(3) The twenty-four (24) or seventy-two (72) hour periods referred to in this subsection begin either when the employee receives the written offer of additional hours, or when the covered employer posts the offer of additional hours as described in subsection (d) of this section, whichever is sooner. A part-time employee who wishes to accept the additional hours must do so in writing.

(d) When this section requires a covered employer to offer additional hours to existing part-time employees, the covered employer shall make the offer either in writing or by posting the offer in a conspicuous location in the workplace where notices to employees are customarily posted. Covered employers may post the notice electronically on an internal website in a conspicuous location and which website is readily accessible to all employees. The notice shall include the total hours of work being offered, the schedule of available shifts, whether those shifts will occur at the same time each week, and the length of time the covered employer anticipates requiring coverage of the additional hours, and the process by which part-time employees may notify the covered employer of their desire to work the offered hours.

(e) The covered employer shall retain each written offer no less than three (3) years as required under Section [5-39.10](#).

(f) This section shall not be construed to require any covered employer to offer employees work hours paid at a premium rate under California Labor Code Section [510](#) nor to prohibit any covered employer from offering such work hours.

(Sec. 2 (part), Ord. 16-007, eff. July 1, 2017)

### **5-39.06 Right to Rest.**

- (a) An employee has the right to decline work hours that occur:
  - (1) Less than eleven (11) hours after the end of the previous day's shift; or
  - (2) During the eleven (11) hours following the end of a shift that spanned two (2) days.
- (b) An employee who agrees in writing to work hours described in this section shall be compensated at one and one-half (1-1/2) times the employee's regular rate of pay for any hours worked less than eleven (11) hours following the end of a previous shift.

(Sec. 2 (part), Ord. 16-007, eff. July 1, 2017)

### **5-39.07 Right to Request a Flexible Working Arrangement.**

An employee has the right to request a modified work schedule, including but not limited to additional shifts or hours; changes in days of work or start and/or end times for the shift; permission to exchange shifts with other employees; limitations on availability; part-time employment; job sharing arrangements; reduction or change in work duties; or part-year employment. A covered employer shall not retaliate against an employee for exercising his or her rights under this section.

(Sec. 2 (part), Ord. 16-007, eff. July 1, 2017)

### **5-39.08 Notice and Posting.**

- (a) The City shall publish and make available to covered employers, in English and other languages as provided in any implementing regulations, a notice suitable for posting by covered employers in the workplace informing employees of their rights under this chapter.
- (b) Each covered employer shall give written notification to each current employee and to each new employee at time of hire of his or her rights under this chapter. The notification shall be in English and other languages as provided in any implementing regulations, and shall also be posted prominently in areas at the work site where it will be seen by all employees. Every covered employer shall also provide each employee at the time of hire with the covered employer's name, address, and telephone number in writing. Failure to post such notice shall render the covered employer subject to administrative citation, pursuant to the provisions of this chapter. The City is authorized to prepare sample notices and covered employer use of such notices shall constitute compliance with this subsection.

(Sec. 2 (part), Ord. 16-007, eff. July 1, 2017)

### **5-39.09 Implementation.**

(a) Regulations. The City shall be authorized to coordinate implementation and enforcement of this chapter and may promulgate appropriate guidelines or rules for such purposes. Any guidelines or rules promulgated by the City shall have the force and effect of law and may be relied on by covered 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 covered employer compliance with this chapter, and for providing administrative hearings to determine whether a covered employer has violated the requirements of this chapter.

(b) Reporting Violations. An aggrieved employee may report to the City in writing any suspected violation of this chapter. The City shall keep confidential, to the maximum extent permitted by applicable laws, the name and other identifying information of the employee reporting the violation; provided, however, that with the authorization of such employee, the City may disclose his or her name and identifying information as necessary to enforce this chapter or other employee protection laws.

(c) Investigation. The City may investigate any possible violations of this chapter by a covered employer. The City shall have the authority to inspect workplaces, interview persons and subpoena records or other items relevant to the enforcement of this chapter.

(d) Informal Resolution. If the City elects to investigate a complaint, the City shall make every effort to resolve complaints informally and in a timely manner. The City's investigation and pursuit of informal resolution does not limit or act as a prerequisite for an employee's right to bring a private action against a covered employer as provided in this chapter.

(Sec. 2 (part), Ord. 16-007, eff. July 1, 2017)

### **5-39.10 Enforcement.**

(a) Enforcement by City. Where compliance with the provisions of this chapter is not forthcoming, the City may take any appropriate enforcement action to ensure compliance, including but not limited to the following:

The City may issue an administrative citation pursuant to provisions of the Emeryville Municipal Code. The amount of this fine shall vary based on the provision of this chapter violated, as specified below:

(1) A fine may be assessed for retaliation by a covered employer against an employee for exercising rights protected under this chapter. The fine shall be one thousand dollars (\$1,000.00) for each employee retaliated against.

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

(i) Failure to provide notice of employees' rights under this chapter.

(ii) Failure to timely provide an initial work schedule or to timely update work schedules following changes.

(iii) Failure to provide predictability pay for schedule changes with less than twenty-four (24) hours' advance notice.

(iv) Failure to offer work to existing employees before hiring new employees or temporary staff or to award work to a qualified employee.

(v) Failure to maintain payroll records for the minimum period of time as provided in this chapter.

(vi) Failure to allow the City access to payroll records.

(3) A fine equal to the total amount of appropriate remedies, pursuant to subsection (c) 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.

(b) Private Rights of Action. An employee claiming harm from a violation of this chapter may bring an action against the covered employer in court to enforce the provisions of this chapter and shall be entitled to all remedies available to remedy any violation of this chapter, including but not limited to back pay, reinstatement, injunctive relief, and/or civil penalties as provided herein. The prevailing party in an action to enforce this chapter is entitled to an award of reasonable attorney's fees, witness fees and costs.

(c) Remedies.

(1) The remedies for violation of this chapter include but are not limited to:

(i) Reinstatement, the payment of predictability pay unlawfully withheld, and the payment of an additional sum as a civil penalty in the amount of fifty dollars (\$50.00) to each employee 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 chapter or State law.

(ii) 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.

(iii) Reimbursement of the City's administrative costs of enforcement and reasonable attorney's fees.

(iv) If a repeated violation of this chapter has been finally determined in a period from July 1 to June 30 of the following year, the City may require the covered employer to pay an additional

sum as a civil penalty in the amount of fifty dollars (\$50.00) 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.

(2) 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, administrative or judicial, that may be brought to abate a violation or to seek compensation for damages suffered.

(3) No criminal penalties shall attach for any violation of this chapter, nor shall this chapter give rise to any cause of action for damages against the City.

(d) Retaliation Barred. A covered employer shall not discharge, reduce the compensation of, discriminate against, or take any adverse employment action against an employee, including discipline, suspension, transfer or assignment to a lesser position in terms of job classification, job security, or other condition of employment, reduction of hours or denial of additional hours, informing another covered employer that the person has engaged in activities protected by this chapter, or reporting or threatening to report the actual or suspected citizenship or immigration status of an employee, former employee or family member of an employee to a Federal, State or local agency, for making a complaint to the City, participating in any of the City's proceedings, using any civil remedies to enforce his or her rights, or otherwise asserting his or her rights under this chapter. Within one hundred twenty (120) days of a covered employer being notified of such activity, it shall be unlawful for the covered employer to discharge any employee who engaged in such activity unless the covered employer has clear and convincing evidence of just cause for such discharge.

(e) Retention of Records. Each covered employer shall maintain for at least three (3) years for each employee a record of his or her name, hours worked, pay rate, initial posted schedule and all subsequent changes to that schedule, consent to work hours where such consent is required by this chapter, and documentation of the time and method of offering additional hours of work to existing staff. Each covered employer shall provide each employee a copy of the records relating to such employee upon the employee's reasonable request.

(f) City Access. Each covered employer shall permit access to work sites and relevant records for authorized City representatives for the purpose of monitoring compliance with this chapter and investigating employee complaints of noncompliance, including production for inspection and copying of its employment records, but without allowing Social Security numbers to become a matter of public record.

(Sec. 2 (part), Ord. 16-007, eff. July 1, 2017)

### **5-39.11 No Preemption of Higher Standards.**

The purpose of this chapter is to ensure minimum labor standards. This chapter does not preempt or prevent the establishment of superior employment standards (including higher wages) or the expansion of coverage by ordinance, resolution, contract, or any other action of the City. This chapter shall not be construed to limit a discharged employee's right to bring a common law cause of action for wrongful termination.

(Sec. 2 (part), Ord. 16-007, eff. July 1, 2017)

### **5-39.12 Severability.**

If any provision or application of this chapter is declared illegal, invalid or inoperative, in whole or in part, by any court of competent jurisdiction, the remaining provisions and portions thereof and applications not declared illegal, invalid or inoperative shall remain in full force or effect. Nothing herein may be construed to impair any contractual obligations of the City. This chapter shall not be applied to the extent it will cause the loss of any Federal or State funding of City activities.

(Sec. 2 (part), Ord. 16-007, eff. July 1, 2017)

