

**From:** Rachel Deutsch <rdeutsch@populardemocracy.org>  
**Sent:** Friday, September 01, 2017 12:16 PM  
**To:** Dianne Martinez  
**Cc:** Ally Medina; Christian Robin Patz; John J. Bauters; Scott Donahue; Jennifer Lin; Michael Guina; cfife@calorganize.org  
**Subject:** Re: CPD, ACCE, EBASE comments on draft Fair Workweek regulations  
**Attachments:** ACCE CPD EBASE comment on final draft Regs 9-1-17.pdf

Mayor Donahue, Vice-Mayor Bauters, and Council Members Martinez, Medina and Patz,

Thank you for your leadership in implementation of the Fair Workweek Ordinance. Attached are comments from ACCE, EBASE and CPD on the final draft regulations that Council will consider next week. Please don't hesitate to reach out if you have questions - we would be happy to make time to speak before your meeting on Tuesday.

Best wishes,  
Rachel

On Wed, Jul 26, 2017 at 12:47 PM, Rachel Deutsch <[rdeutsch@populardemocracy.org](mailto:rdeutsch@populardemocracy.org)> wrote:  
Michael,

Thanks for the opportunity to discuss the Fair Workweek draft rules last week. I appreciate the effort that went into setting up the open forum and your openness to feedback. As promised, I'm following up with more detailed written comments, including suggested language that could be incorporated into the rules to address the issues we discussed.

thanks,  
Rachel

On Thu, Jul 13, 2017 at 2:22 PM, Michael Guina <[mguina@emeryville.org](mailto:mguina@emeryville.org)> wrote:

[Rachel,](#)

[Thank you for your comment letter.](#)

[Michael A. Guina](#)

[City Attorney](#)

[City of Emeryville](#)

[1333 Park Avenue](#)

[Emeryville, CA 94608](#)

[Tel. 510-596-4380](#)

Fax [510-596-3724](tel:510-596-3724)

[mguina@emeryville.org](mailto:mguina@emeryville.org)

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**From:** Rachel Deutsch [mailto:[rdeutsch@populardemocracy.org](mailto:rdeutsch@populardemocracy.org)]

**Sent:** Tuesday, July 11, 2017 5:16 PM

**To:** Michael Guina <[mguina@emeryville.org](mailto:mguina@emeryville.org)>; Dianne Martinez <[dmartinez@emeryville.org](mailto:dmartinez@emeryville.org)>; Ally Medina <[amedina@emeryville.org](mailto:amedina@emeryville.org)>; Christian Robin Patz <[crpatz@emeryville.org](mailto:crpatz@emeryville.org)>; John J. Bauters <[jbauters@emeryville.org](mailto:jbauters@emeryville.org)>; Scott Donahue <[sdonahue@emeryville.org](mailto:sdonahue@emeryville.org)>

**Cc:** Anthony Panarese <[apanarese@calorganize.org](mailto:apanarese@calorganize.org)>; Jennifer Lin <[jenny@workingeastbay.org](mailto:jenny@workingeastbay.org)>

**Subject:** CPD, ACCE, EBASE comments on draft Fair Workweek regulations

Michael,

Please see the attached comment letter on the proposed Fair Workweek regulations from CPD, EBASE and ACCE. We look forward to discussing further and working with you to implement the Fair Workweek Ordinance.

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Rachel Deutsch

*Senior Staff Attorney for Worker Justice*

**Center for Popular Democracy**

**+ CPD Action**

Los Angeles, CA

**M:** [415.793.3154](tel:415.793.3154)

[populardemocracy.org](http://populardemocracy.org) | [cpdaction.org](http://cpdaction.org)

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**Rachel Deutsch**

*Senior Staff Attorney for Worker Justice | She/Her/Hers*

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**+ CPD Action**

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September 1, 2017

### **ACCE, EBASE and CPD Input on Emeryville's Draft Fair Workweek Regulations**

Dear Mayor Donahue, Vice-Mayor Bauters, and Council Members Martinez, Medina and Patz,

The Center for Popular Democracy (CPD), East Bay Alliance for a Sustainable Economy (EBASE), and Alliance of Californians for Community Empowerment (ACCE) commend the Council for taking an active role in the implementation of Emeryville's Fair Workweek Ordinance ("the Ordinance"). We have participated in the stakeholder process convened by the office of the City Attorney and Mills College, providing comments on the Draft Regulations, and look forward to the finalization of the Regulations so that enforcement can begin.

We commend the city staff for a thoughtful approach to the rulemaking process and agree with most of the recommendations in the Staff Report. As the staff report notes, **inserting an array of new exceptions to the predictability pay requirements would make the Ordinance harder to administer by complicating investigation of claims and making it harder for workers to understand their rights and for employers to understand their obligations.** These exceptions would also undermine the original intent of the Council to *close the loopholes* to ensure a strong Ordinance.

#### **Specifically, we agree with the staff recommendations that:**

- The City should adopt Option A, including commissions in the regular rate of pay on which predictability pay is based. Indeed, that conclusion is compelled by Ordinance section 5-39.01 (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) . . .*" 29 CFR § 778.117, which interprets 29 USC § 207(e), states: "Commissions (whether based on a percentage of total sales or of sales in excess of a specified amount, or on some other formula) are payments for hours worked and *must be included in the regular rate. . .*" Thus, any rule that did *not* include commissions would be contrary to the Ordinance's plain language and would be subject to legal challenge.
- The City should adopt Option E, which allows for a six-minute grace period, and *not* Option D, which allows an open-ended extension of shifts where commissions are earned.
- The City should adopt Option F, allowing early departures without predictability pay when voluntarily initiated by employees. However, the Regulations should include the following clarifying language: "If an employer seeks a volunteer to end their shift early, it is no longer 'voluntarily initiated' by the employee and predictability pay is owed."
- The City should adopt Option G, which requires documentation of consent for added hours and clarifies that consent is not needed for reductions in hours, consistent with the Ordinance.
- The City should *delete* Option H, which would allow employer to send employees home early without compensation for disciplinary reasons. (The staff report is ambiguous – it recommends deleting Option H but suggests that no predictability pay should be owed under these circumstances.) This exception would invite employers to invent a basis for discipline in order to reduce hours without cost. And it would be challenging to administer, as there are six discrete

components to “just cause” in the disciplinary context which would all require investigation; moreover, none of these components are articulated in the draft Rules.

- The City should adopt Options I and K, to ensure that predictability pay is owed when overtime is assigned. Overtime pay is designed to compensate workers for long work hours; predictability pay is designed to compensate workers for flexibility in accommodating last-minute changes. When an employer requires both long hours and flexibility, the employee should be compensated for both.
- The City should adopt Option J and delete Option C. Predictability pay is owed for hours offered and accepted within the 14-day posting window.

**The Rules still lack meaningful procedures for investigation and enforcement.** Clear procedures and timelines for investigating and resolving complaints are needed to promote collaboration between worker advocates and the city in addressing potential noncompliance, as well as giving Covered Employers notice of investigative practices. The City’s decision to contract enforcement duties to an outside company makes it especially critical to specify transparent, effective enforcement procedures. Without them, workers lack confidence that their complaints will be taken seriously by the city and its contractors. **Workers take large risks in coming forward to identify noncompliance, and they need to know that their complaint will be investigated and dealt with in a timely manner and that retaliation will not be tolerated.**

The revised Regulations include procedures designed to minimize enforcement costs; yet the staff report recommends that the Regulations not include standards for prompt investigation and communication with complainants because it must “remain flexible to address staffing shortfalls.” **Yet the procedures recommended by CPD would have no fiscal impact on the City:**

- “Upon request of records documenting compliance, each employer shall provide a copy of records relating to the employee (in the case of a request by an individual employee) or for all covered employees within a reasonable time period. Failure to furnish such records within 30 days of a request by an employee, the city, or the city’s designated representative shall give rise to a presumption of noncompliance.” *Specifying a period for responding to document requests costs the City nothing.*
- “Upon receipt of a complaint regarding an alleged violation, the City shall within 14 days send a demand letter to the employer notifying the employer that the city is in receipt of a complaint of noncompliance and shall specify the basis of the complaint. The letter shall demand that the employer provide, within 10 days of receipt of the letter, written confirmation of compliance or an admission of noncompliance and plan for corrective action. The letter shall inform the employer that failure to respond to the demand letter is a basis for further enforcement action by the City that may result in an order to pay back wages, civil fines, an award of attorneys’ fees, and other remedies. The letter shall also inform the employer that retaliation against an employee for claiming rights under the ordinance is prohibited.” *The City can draft a form letter at very little cost and likewise send the letter upon receipt of complaints at almost no cost.*
- “The City will prioritize investigation and resolution of claims of unlawful retaliation. If the employer fails to provide reasons for termination at the time of termination, the City will

treat this as evidence of retaliatory motive. If the employer changes the reasons for termination after stating a basis for termination, this also will be treated as evidence of retaliatory motive. The City will also look at the timing of the adverse action: the sooner the adverse action occurs after the employee exercises a right protected by this ordinance, the more likely the motive is to be retaliatory.” *This standard directs the City’s enforcement contractor to prioritize retaliation complaints, but imposes no substantive obligation or even timeline for those investigations. The standards for evaluating claims of retaliation likewise have no cost implications.*

- “Employees may designate representatives to assist them in enforcing their rights under the Ordinance; the representative need not be a lawyer. If an employee designates an individual or organization as a representative, the city must release information regarding the employee’s complaint to the representative.” *This standard simply specifies who is entitled to information about complaint investigation, again at no cost.*

The City’s insistence that enforcement of labor standards must be sacrificed to address budget shortfalls signals loudly to employers that the City will impose no consequences for violations of the Fair Workweek Ordinance or other local labor standards. Such a position threatens to render the Council’s legislative accomplishments hollow. There is no excuse for failing to adopt Regulations with reasonable enforcement standards that can be implemented at virtually no cost to the City.

Sincerely,

Rachel Deutsch  
Center for Popular Democracy

Jennifer Lin  
East Bay Alliance for a Sustainable Economy

Carroll Fife  
Alliance of Californians for Community Empowerment