RILA

CALIFORNIA RETAILERS ASSOCIATION

June 5, 2017

Carolyn Lehr
City Manager
City of Emeryville, CA
1333 Park Avenue
Emeryville, CA 94608

Re: Fair Workweek Ordinance Implementation

Dear Ms. Lehr:

On behalf of the Retail Industry Leaders Association (RILA) and the California Retailers Association (CRA), we are writing today to respectfully request a stay of enforcement for the City of Emeryville's Fair Workweek ordinance, which is currently slated to go into effect on July 1, 2017.

As you are likely aware, RILA is the trade association of the world's largest and most innovative retail companies who operate many of the storefronts and represent hundreds of employees throughout Emeryville. These companies have made substantial investments in the city and provide city residents with jobs and access to the services and consumer goods they both want and need.

The California Retailers Association is the only statewide trade association representing all segments of the retail industry including general merchandise, department stores, mass merchandisers, restaurants, convenience stores, supermarkets and grocery stores, chain drug, and specialty retail such as auto, vision, jewelry, hardware and home stores. CRA works on behalf of California's retail industry, which currently operates over 418,840 retail establishments with a gross domestic product of $330 billion annually and employs 3,211,805 people—one fourth of California's total employment.

As we have seen in other jurisdictions that have passed similar ordinances, the rule drafting process can be extremely complicated and can have wide ranging unintended consequences if all affected voices are not heard. This ordinance will have a fundamental impact on the operations of retailers in Emeryville including, among other things, a retailer's ability to offer additional hours to its employees and to accommodate employee schedule requests. Our industry has endeavored to be helpful in the process; however, forcing this complex process into a six-week timeline is not conducive to ensuring that the most responsible and effective rules are produced that will benefit both the employers and employees of Emeryville.

Additionally, the expertise on this issue from the retailer perspective resides with those who deal with human resource and scheduling issues on a daily basis. Many retailers employ professionals who have a clear understanding of individual company policies as well as the

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1700 N. Moore Street
Arlington, VA 22209
(703) 841-2300

California Retailers Association
980 Ninth Street, Suite 2100
Sacramento, CA 95814
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Attachment 2

RILA

CALIFORNIA RETAILERS ASSOCIATION

impact on employees. The efforts of some in the city's rulemaking process to conduct on the spot interviews of in store employees while on the job unfairly disrupts retail operations and will not result in a comprehensive understanding of companywide policies and how the rules may be best crafted to comply with the city law.

We believe that a stay of enforcement will allow us to work together to ensure that the city productively engages with the experts within the retail industry to produce what we hope is a workable regulation process.

We look forward to hearing from you and continuing to engage in a productive conversation.

Sincerely,

Brian Rose
Director, State Affairs and Advocacy
Retail Industry Leaders Association

Bill Dombrowski
President & CEO
California Retailers Association

CC. Michael Guina, City Attorney, Emeryville, CA

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Daytime Population

	Total daytime population	Total Population	Total workers working in area	Total workers living in area	Workers living and working in same area
Emeryville	**25,102**	10,830	21,284	7,012	1,167
Berkeley	**140,033**	117,384	79,803	57,154	26,960
Pinole	**14,917**	18,922	4,928	8,933	1,400
Walnut Creek	**89,143**	66,799	52,219	29,875	8,367

UNITEHERE! Local 2850
1440 Broadway, Suite 208, Oakland, CA 94612 510/893-3181 Fax: 510/893-5362

July 10, 2017

Michael Guina, City Attorney
City of Emeryville
1333 Park Ave
Emeryville, CA 94608

Dear Mr. Guina,

I am writing on behalf of UNITE HERE Local 2850 to register serious concerns regarding the proposed Regulations for Emeryville's Fair Workweek policy.

Emeryville passed one of the strongest Fair Workweek laws in the country. Unfortunately, the proposed Regulations have two major problems: **(1) loopholes allowing employers to change schedules without compensating employees and (2) no process for investigating and resolving complaints.**

1. **The Council closed predictability pay loopholes – now the proposed rules add new ones.**

The Fair Workweek ordinance requires employers to set schedules with two weeks' notice. After that, employers can change the schedule – but they have to pay employees extra for each change. *The purpose of predictability pay is to reduce unnecessary changes to employee work schedules and compensate employees fairly when necessary schedule changes disrupt their lives and reduce expected income.* In the face of opposition, the Council stood firm and included in the ordinance only limited exceptions: businesses don't have to pay predictability pay when stores shut down due to threats, utility failures, or crisis (earthquake, flood, etc.). or when employees swap shifts. **For all other employer-initiated changes, workers earn compensation.**

Now the proposed rules are trying to change the ordinance by adding exceptions and **severely weaken the policy**. These proposed rules would allow employers to **flout the intent of the ordinance** by:

- Extending a shift without predictability pay when the worker earns commission and needs to work longer to complete the sale. This means a manager could assign an employee to work with a customer just five minutes before the end of her shift, requiring her to stay late with no additional pay.

- Cutting a shift short due to discipline and send a worker home early without predictability pay. Managers might use this loophole to punish workers for nothing – just so they can send them home early and save money when the store is slow.

Hotels, Food Service,
Gaming

- Offering extra shifts without paying predictability pay. The goal of the ordinance is to give employees schedules they can count on. This exception works against that goal. If managers have to pay predictability pay for cancelled shifts but not added shifts, they will post a bare-bones schedule and fill the remaining shifts at the last minute. With so many part-time workers needing more hours, managers know someone will pick up the shift. And workers will face the same last-minute scheduling the ordinance was intended to curb.

The rules are intended to implement the ordinance's intent - by law, the rules CANNOT change the Ordinance by depriving employees of compensation that they would otherwise be owed. **The above exceptions must be removed before the Regulations are finalized.**

2. **The City should outline how it intends to investigate violations.**

Emeryville chose to contract out the important work of enforcing workplace protections to a private for-profit company. **Yet the proposed Regulations set no standards for how the contractor will respond to complaints, investigate companies, or communicate with workers.** We know when the enforcement process and timeline is unclear, workers who take great risk in filing a complaint have even LESS confidence that their complaints will be taken seriously by the City.

The Regulations should contain provisions to **make the law real** by:

- Allowing worker to access records that show whether their employer is complying with the law, and create a presumption that the company is in violation if it ignores a request from workers or the enforcement contractor to produce records.

- Requiring the contractor to send a "demand letter" to an employer within two weeks of receiving a complaint alleging violations of law, giving the company ten days to respond to the allegations.

- Prioritizing investigations into complaints that workers have been retaliated against for asserting their rights under the ordinance. When an employee who stands up to the boss loses her job or suffers a cut in hours. her income is at risk and her coworkers may be too frightened to speak up for their own rights. It is essential that the city intervene quickly.

We encourage you to stay within the original intent of the Fair Workweek ordinance and reject these loopholes in the proposed regulations. **We ask you to remove the**

exceptions to predictability pay, and outline a clear timeline for enforcement in the regulations for Emeryville's Fair Workweek policy.

Sincerely,

Ty Hudson
Senior Research Analyst

Cc: Mayor Donahue, Vice Mayor Bauters, Councilmembers Martinez. Medina, and Patz

Michael Guina
City Attorney
1333 Park Ave.
Emeryville, CA 94608

July 11, 2017

Comments from ACCE, EBASE and CPD on Emeryville's Draft Fair Workweek Regulations

Dear Mr. Guina,

The Center for Popular Democracy (CPD), East Bay Alliance for a Sustainable Economy (EBASE), and Alliance of Californians for Community Empowerment (ACCE) have been central to the development and implementation of Emeryville's Fair Workweek Ordinance ("the Ordinance"). Our organizations collaborated to release a report in March 2016 on the impacts of scheduling practices on Emeryville's retail workforce that galvanized the City Council to take action. We bring deep knowledge of the problems the Council sought to address and the intent to provide stable, predictable work hours and good jobs in Emeryville. We write to suggest modifications to the Draft Fair Workweek Regulations ("draft regulations" or "rules") to clarify the Ordinance's requirements. **We also wish to call your attention to instances in which the rules appear to be inconsistent with the Ordinance's language and legislative intent.**

CPD's Fair Workweek Initiative supports efforts across the country to restore a workweek that enables working families to thrive. We are nationally recognized for our policy, research and employer-engagement expertise on issues relating to hours and wages. CPD played a central role in the implementation of the San Francisco Retail Workers Bill of Rights and the enactment of Fair Workweek ordinances in Emeryville, Seattle, New York City and the first state-level Fair Workweek law in Oregon, and assisted initiative proponents in drafting San Jose's Opportunity to Work Ordinance. Our staff has deep expertise in the industries where work-hours issues are most prevalent and understand both the business models that have generated these practices and the negative impact on workers and their families.

ACCE is a grassroots, member-led community organization, working with more than 10,000 members across California to create transformative community change. ACCE has been supporting workers in Emeryville since May 2015. Because of ACCE's commitment to member leadership, retail and fast food workers actively participated in the development of Emeryville's Fair Work Week Ordinance. To date, ACCE has had one-on-one conversations with over 1,000 retail and fast food workers, collected contact information of nearly 500 workers, and activated more than 50 workers to take leadership and address challenges in their workplaces. ACCE's Emeryville staff team have deep experience in the retail and fast food industries.

EBASE is nonprofit, community-based organization dedicated to building a just economy based on good jobs and healthy communities. EBASE has had a long-term commitment to workers' rights and labor standards in Emeryville, working to pass Measure C, the hotel living wage ballot measure in 2005, the

Emeryville minimum wage and paid sick day policy in 2015, and the Fair Workweek ordinance in 2016. EBASE builds coalitions among workers, residents, and people of faith to address economic inequality in the East Bay, and along with ACCE and CPD, garnered endorsements for the Fair Workweek ordinance from organizations like Residents United for a Livable Emeryville, the Alameda Labor Council AFL-CIO, Parent Voices, and UNITE HERE 2850.

CPD, EBASE and ACCE are eager to support the smooth implementation of Emeryville's Fair Workweek Ordinance (Emeryville Municipal Code Tit. 5, Ch. 39 ("the Ordinance")). The City has a duty to implement the Ordinance in a manner consistent with its plain language and purpose. (See Gov't Code § 11342.2.) Our organizations hope to assist in making this process as simple as possible for both the City and affected employers while effectuating the will of the Council to provide robust protections for workers. Our analysis and suggested revisions to the draft regulations are based on our understanding of the Ordinance and CPD's experience implementing this policy in other cities.

1. **Exceptions to Predictability Pay**

The draft rules contain several exceptions to the ordinance's predictability pay requirement that have no statutory basis:

- "Where a Covered Employer makes available additional Shifts that Employees may opt to work, where there is no other change to the Employee's schedule, and the Employee on his/her own initiative volunteers to report for that additional Shift." (Draft Rule 3(c).)
- "Where Shifts may run over to accommodate completion of service to a client for which the Employee will receive a Commission or tip, and must complete the service in order to be entitled to the Commission or tip." (Draft Rule 3(d).)
- "Where a Covered Employer requires an Employee to leave work early because the Covered Employer disciplines the Employee for good cause and documents the incident leading to the disciplinary action." (Draft Rule 4(e)(iii).)
- "A Covered Employer is not required to award Predictability Pay for additional work performed under Section 5-39.05, where the Employee's acceptance of the additional work was within fourteen (14) days of the Shift." (Draft Rule 5(d).)

These exceptions not only lack any basis in the ordinance, but contravene the City Council's explicit intent, and therefore must be removed from the final rules.

   a. **The Ordinance Includes Exceptions to Predictability Pay and the Rules Cannot Supply Additional Exceptions**

Section 5-39.04 require Covered Employers to compensate employees "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." (§ 5-49.04(c).) The purpose of predictability pay is twofold: to create an incentive for employers to avoid unnecessary changes to employee work schedules, and to compensate employees fairly when necessary changes to work schedules disrupt their lives and reduce expected income.

The Ordinance specifies four limited exceptions to the general requirement to compensate employees for schedule changes:

> "(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." (§ 5-39.04(d).)

Basic principles of statutory construction prohibit adding exceptions to those listed in the Ordinance. It is a well-known rule of statutory interpretation that if a legislative body enumerates specific items, it is assumed that other items not included were purposely excluded. (See, e.g., *Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 195 "Under the familiar rule of construction, *expressio unius est exclusio alterius*, where exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed."]; *Mutual Life Insurance Company v. City of Los Angeles*, 50 Cal.3d 402, 410 (Cal. 1990) ["The electorate, in excepting from the 'in lieu' provision taxes on real property and motor vehicles, could have made a further exception for taxes incidental to the operation of a commercial real estate business, but they did not."].) **The exceptions listed in section 5-39.04(d) demonstrate that the Council knew that predictability pay might not be warranted in certain circumstances, and carefully designated those circumstances in the Ordinance.**

It is undeniably beyond the discretion of city staff to amend the Ordinance by adding exceptions that the Council chose not to include. The Regulations are intended to implement and clarify the Ordinance; rules that conflicts with the Ordinance's purpose are invalid. (Cal. Gov't Code § 11342.2.) City staff "do not have discretion to promulgate regulations that are inconsistent with the governing statute, or that alter or amend the statute or enlarge its scope." (*Slocum v. State Bd. Of Equalization* (2005) 134 Cal.App.4th 969, 974 (citations omitted). Whatever public policy considerations may have animated these draft rules are immaterial: courts consider "not the wisdom of the agency's rule or policy, but whether it would alter or amend the statute." (*In re Stanley* (1976) 54 Cal.App.3d 1030, 1036.) **In this case, the draft regulations would substantively change the legal rights and obligations under the Ordinance by depriving employees of compensation that they would otherwise be owed.** Therefore, even had the legislative record been silent on the council's intent regarding the scope of predictability pay exceptions, the Draft Regulations' proposed additional exceptions would be contrary to law.

b. The Council Expressly Intended to Limit Predictability Pay Exceptions

Even if it were arguably within the purview of the rulemaking process to expand on the exceptions listed in the ordinance, the legislative history makes abundantly clear that these exceptions subvert express legislative intent. The Council weighed competing policy considerations presented by city staff and stakeholders, and chose to include only limited, narrow exceptions to the predictability pay requirements.

The August 16 Study Session. At a study session on the Fair Workweek policy on August 16, 2016, Economic Development and Housing Manager Chadrick Smalley presented policy options to the Council and elicited feedback. Mr. Smalley presented three options with respect to predictability pay: "Omit Predictability Pay Provisions," "Predictability Pay With Exceptions For Certain Employer-Initiated Changes," or "Predictability Pay For All Employer-Initiated Changes." (August 16, 2016, Fair Workweek Study Session Staff Report, Attachment 5 ("Fair Workweek Ordinance Options"), pp. 5-6.) In support of the first option, Mr. Smalley observed: "Outreach to the business community revealed that predictability pay was universally the most poorly received aspect of a Fair Workweek Ordinance. Businesses characterized the concept as unfair, and said it would be difficult for them to implement." (*Id.*, p. 5.) Under the second option, Mr. Smalley referenced a survey of Emeryville employees that found "that the most frequent type of schedule change, experienced by 58% of employees, is 'getting called in to work a shift you weren't originally scheduled for,'" and suggested that predictability pay could be exempted when the employer seeks coverage for the unplanned absence of a scheduled employee. (*Id.*, p. 6.) Mr. Smalley described the third option, "Predictability Pay For All Employer-Initiated Changes," as follows:

> "This option would remove the exceptions described in the preceding option and require predictability pay for any employer initiated change. Some exceptions, however, are necessary. For example, exceptions should be provided in the event business operations cannot begin or continue due to threats to employees or property, because public utilities fail, or due to a natural disaster. Predictability pay would not be required for employee-initiated changes (taking a sick day, using leave time, mutually agreed shift swaps, employee requests to work different hours than scheduled)." (*Id.* p. 6.)

The draft ordinance attached to the staff report recommended that the ordinance "include 'right to decline' provisions in lieu of Predictability Pay," and that if the Council elected to include predictability pay, recommended an exception when "Another Employee previously scheduled to work that Shift is unable to work due to illness, vacation, or Covered Employer-provided paid or unpaid time off where the Covered Employer did not receive at least seven days' advance notice." (*Id.*, Attachment 5-a pp. 9-10.)

During public comment at the August 16 study session, a spokesperson for Home Depot specifically urged an exception from predictability pay for additional shifts that employees may opt to work:

> "Schedule changes are necessary in retail to ensure out callouts are covered and provide additional hours for our part time associates . . . Unfortunately, we can't foresee some of those schedule changes and we feel that passing this will pretty much inhibit us or penalize us for allowing [part-time] associates to take those additional hours." (August 16, 2016, study session Video/Audio record, at min. 56.)

Having heard these arguments, the Emeryville City Council nevertheless decided upon the third option – predictability pay for all employer-initiated changes, with limited exceptions for clearly specified unusual circumstances: threats, utility failures, acts of God, and employee-initiated shift swaps. Councilmember Jac Asher stated: "I can see, for the purposes of administration, having no exceptions, or

the Acts of God, 1 to 3. But the idea that you don't have to pay predictability pay... People go on vacation, people get ill, people take unpaid time off." Mayor Dianne Martinez interjected, "Yeah, that's the point of predictability pay." After further discussion, Mayor Martinez summarized the direction to staff: "So that is including acts of God, acts of nature, and eliminating number 4," the exception proposed by staff for additional shifts needed to cover unexpected absences. (August 16, 2016, study session Video/Audio record, at min. 3:13.)

The October 18, 2016 first reading. Following the study session, city staff responded to Council direction by preparing a bill for discussion and first reading. The staff report that accompanied the first reading recounted the direction provided by Council: "Predictability pay is not due for schedule changes due to natural disasters, power failures, etc." (October 18, 2016, Staff Report for Item 8.2, p. 2.) CPD, ACCE and EBASE also registered appreciation for the Council's decision to limit predictability pay exceptions, noting that "The exceptions in 5-39.04(c)1)-(3) will be included, but exception (c)(4) (unplanned absences) will not." (*Id.*, Attachment 4, p. 1.) The California Retail Association protested this decision:

> "[T]he ordinance only includes 3 exceptions from predictability pay covering only small portion of circumstances that are out of the employer's control. In San Francisco, several more were included in acknowledgement of the multitudinous scenarios that trigger non-employer initiated schedule changes. These exceptions include employee call outs/time requests off where the employer did not receive advanced notice, changes as a result of disciplinary actions, employee initiated shift exchanges, and for employers who require overtime. The majority of schedule changes made typically come from employees but can also be caused by unforeseen circumstances. It is unreasonable to penalize employers for schedule changes out of their control especially when business operations must still continue." (Public Comment: California Retail Assoc. Opposition Ltr. 101416, p. 2.)

The California Retail Association also predicted that employers would seek "to avoid situations that could trigger predictability pay penalties. As a result, both the employer and employees must cope with last minute unfilled work hours resulting in existing staff to picking up the burden of the workload." (*Id.*, p. 1.) CPD, EBASE and ACCE refuted this claim, noting: "Complaints about challenges forecasting labor needs or adapting to changes in demand run contrary to well-documented industry practice in the retail and food industries. . . . scheduling software can predict sales based on staffing, and retailers would be disincentivized to let shifts go empty instead of paying just one hour of predictability pay" to fill a shift. Public Comment: EBASE ACCE CPD Response To CRA Letter.101716, p. 1.)

Following this exchange, the only change to the predictability pay exceptions in the enacted ordinance was to add section 5-39.04(d)(4), "Mutually agreed-upon work Shift swaps or coverage among Employees." As this extensive record demonstrates, **the Council considered – and rejected – carving out additional exceptions to predictability pay.** To add these exceptions via regulation would contravene explicit legislative intent and exceed the city staff's rulemaking authority.

2. Additional clarifications needed

The rules leave several areas of ambiguity that should be clarified in order to maximize compliance.

a. Good faith estimate of work schedule

The ordinance defines good faith as "a sincere intention to deal fairly with others." (§ 5-39.01(*l*).) The rules should provide guidance on how that definition will be interpreted with respect to particular requirements. We recommend that the rules specify that the good faith estimate required by section 5-39.03(a)(1) must be both reasonable and based on some identifiable facts, rather than conjecture. The regulations should also indicate circumstances that may indicate a lack of good faith – for example, a pattern of significant divergence from the estimate (e.g., median hours over the first year of employment differ by more than 30% from the good faith estimate).

b. Notice of schedule changes.

Draft Rule 4(a) currently provides: "Where a Covered Employer changes the Employee's Work Schedule, that modification shall be made in such a manner as to guarantee the Employee is made aware of the schedule change, and the Covered Employer shall document that the information was transmitted to the Employee." The rule should also specify that Covered Employers must update the written work schedule when changes are made.

c. Right to decline additional shifts

Draft Rule 4(b)-(d) address the employee right to decline additional shifts, but fail to specify how the city will evaluate allegations that this right was infringed. We recommend that the rules require written consent to added shifts (which may include communication transmitted through email, text message or a workforce scheduling system), as already provided in Draft Rule 6(a).

d. Offer of hours to part-time employees

The draft regulations state, "So long as the Covered Employer otherwise complies with the Ordinance, the Covered Employer may offer additional work hours to the Part-time Employees of its own discretion, or may seek out interested Part-time Employees by another method, such as by group posting to its existing Part-time Employees." (Draft Rule 5(a).) This proposed rule is at odds with section 5-39.05(d) of the Ordinance, which specifies a posting process that employers must follow when offering additional hours.

The draft rules do not include guidance on employer determinations of which employees are qualified for additional hours under section 5-39.05(a). The rules should clarify that covered employers must exercise their judgment regarding qualifications in good faith and in a reasonable manner. The rules should also provide examples of circumstances in which the decision to hire from an external applicant pool or subcontractors rather than allocating the work to existing employees violates the ordinance because the circumstances indicate bad faith or an unreasonable exercise of judgment. Examples might

include when the missing qualifications are not germane to the job or when the new employee has substantially similar qualifications as the existing employee.

3. **Investigation and enforcement**

The draft rules reference anonymous complaints, but contain no parameters for the city of Emeryville's investigation of complaints alleging noncompliance with the Ordinance. Clear procedures and timelines for investigating and resolving complaints will promote greater 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.

In particular, the Rules should include provisions governing:

a. Access to work sites and records by employees and authorized City representatives for the purpose of monitoring compliance, including a presumption of noncompliance when an Employer fails to timely furnish requested records or denies access.
b. Procedures for the City and its contractors to respond to complaints, including issuing a demand letter to employers within a specified time period of receiving a complaint, and setting a time for the employer to respond.
c. Prioritization of employee complaints regarding retaliation and particularly retaliatory discharge.

Thank you for the opportunity to comment. We look forward to working with you to ensure the successful implementation of this important ordinance.

Sincerely,

Rachel Deutsch
Center for Popular Democracy

Jennifer Lin
East Bay Alliance for a Sustainable Economy

Anthony Panarese
Alliance of Californians for Community Empowerment

Michael Guina
City Attorney
1333 Park Ave.
Emeryville, CA 94608

July 26, 2017

Additional Comments on Emeryville's Draft Fair Workweek Regulations

Dear Mr. Guina,

The Center for Popular Democracy (CPD) appreciates the opportunity to provide feedback on the Draft Fair Workweek Regulations ("draft regulations" or "rules"). Following our discussions at the open forum on July 21 and 22, we offer these additional suggestions to expand on the comments submitted on July 11.

1. **Exceptions to Predictability Pay**

As previously discussed, the exceptions to predictability in the Draft Rules exceed the authority of the City Attorney's office by adding exceptions that the Council chose not to include. These exceptions make it harder for employees to understand when they are entitled to predictability pay and contravene the intent of the policy to predictable work schedules.

- "Where a Covered Employer requires an Employee to leave work early because the Covered Employer disciplines the Employee for good cause and documents the incident leading to the disciplinary action." (Draft Rule 4(e)(iii).)

An exception for discipline could be abused by managers to send employees home early without compensation, particularly because "good cause" is undefined.[1] As you heard from employees at the July 22 forum, employers commonly send employees home for allegedly violating the company's dress code. Examples included a fast-food worker who was provided only one uniform and reported to work with minor stains; a Barnes & Noble employee sent home for a tear in his pants; and Uniqlo employees permitted to dress to express their personal style, except when doing so transgresses some undefined boundary. The intense pressure on managers to stay within a labor budget set by corporate leadership would result in managers searching for reasons to discipline employees in order to send them home early without compensation. In addition to undermining the ordinance's goal of allowing employees to budget based on expected hours, but could make it harder for employees to advance in their careers due to unwarranted performance issues in their personnel records.

[1] If Council had chosen to include this exception in the Ordinance, we would urge the City to define "good cause" pursuant to long-established principles: Fair notice of the rule and consequences for violation; prior enforcement of the rule; due process (a chance for the employee to explain); substantial proof that the rule was violated; proportionality of violation and consequences; and equal treatment of employees who violate the rule.

- "Where a Covered Employer makes available additional Shifts that Employees may opt to work, where there is no other change to the Employee's schedule, and the Employee on his/her own initiative volunteers to report for that additional Shift." (Draft Rule 3(c).)
- "A Covered Employer is not required to award Predictability Pay for additional work performed under Section 5-39.05, where the Employee's acceptance of the additional work was within fourteen (14) days of the Shift." (Draft Rule 5(d).)

Underemployment is rampant in the retail and fast food industries, where many employers pursue a business model predicated on maintaining a large pool of part-time employees who are desperate for additional hours. If employers owe predictability pay for cancelling or reducing the length of shifts, but can add hours without compensating employees for their flexibility in picking up shifts, employers will be incentivized to publish bare-bones schedules and rely on "volunteers" to fill additional shifts, resulting in the unpredictable schedules the Council sought to remedy.

2. Additional clarifications needed

We recommend adding language to the rules to support compliance where the Ordinance is ambiguous.

a. Good faith estimate of work schedule

The good faith estimate of work schedule is intended to discourage the practice of offering employees jobs that are characterized as full-time, then scheduling only part-time hours after an initial training period. The ordinance defines good faith as "a sincere intention to deal fairly with others." (§ 5-39.01(*l*).) We recommend that the rules specify how the City will evaluate compliance with the requirement to provide a good faith estimate under section 5-39.03(a)(1). For example, Seattle's Secure Scheduling Ordinance requires employers to update the good faith estimate when there is a significant change (Seattle Municipal Code 14.22.025.A.1), and defines significant change as "a difference of at least 30% between the good faith estimate and the median number of scheduled hours in the written work schedules required by SMC 14.22.040 over the course of one or more three-month increments." (SHRR 120-130(3).) We recommend adding the following language to the Rules:

> The good faith estimate is a reasonable, fact-based prediction; employers may choose to base it on forecasts, prior hours worked by a similarly-situated employee(s), or other information. An inability to identify a factual basis for the estimate, or a pattern of significant divergence from the estimate (median hours over the six months of employment differ by more than 30% from the good faith estimate) shall give rise to an inference that the estimate was not made in good faith.

b. Offer of hours to part-time employees

The draft regulations state, "So long as the Covered Employer otherwise complies with the Ordinance, the Covered Employer may offer additional work hours to the Part-time Employees of its own discretion, or may seek out interested Part-time Employees by another method, such as by group posting to its existing Part-time Employees." (Draft Rule 5(a).) In fact, the Ordinance requires employers to post a notice or communicate the hours to all employees in writing (§ 5-39.05, subdivision (d)) but after posting, employers retain discretion to distribute hours among interested employees provided that distribution is neither discriminatory nor violates the Patient Protection and Affordable Care Act (*id.*, subdivision (b)). We therefore recommend adding the following language:

> The employer must post or otherwise communicate written notice of available hours of work. The employer may proceed with hiring if no qualified employee has accepted the hours within the time period required by section 5-39.05 subdivision (c), or earlier if the employer receives written confirmation from all such employees that they are not interested in accepting the additional hours of work.

The draft rules should include guidance on employer determinations of employee qualifications for additional hours under section 5-39.05(a). The rules should provide examples of decisions to hire from an external applicant pool or subcontractors that presumptively violate the ordinance because the circumstances indicate bad faith or an unreasonable exercise of judgment, as well as employer actions which would establish a presumption of good faith. We recommend adding the following language:

> A decision to hire new employees from an external applicant pool or subcontractors rather than allocating the work to existing employees violates the ordinance when the circumstances indicate bad faith or an unreasonable exercise of judgment.
>
> Example 1: An employer posts an opportunity for additional hours with a notice that states that the position requires experience in both cashier and inventory. The only existing employee who expresses a desire for the hours is Melanie, who works in a cashier position and has two years of inventory experience in a previous job. The manager rejects her as unqualified and hires a new employee who has two years of inventory experience. This action appears to violate the requirement to determine qualifications reasonably and in good faith, because the new employee has similar qualifications as Melanie – two years of inventory experience from a previous job.
>
> Example 2: An employer rejects an existing employee as not qualified for additional hours on the basis of poor performance. The employee's personnel file indicates no disciplinary issues, and performance reviews categorize the employee's work as "fair" to "good." The employer's decision appears to violate the requirement to determine qualifications reasonably and in good faith, because the employer had previously assessed the employee's performance as satisfactory.
>
> Example 3: An employer posts an opportunity for additional hours with a notice that states that the hours will occur on the night shift. No existing employees express interest in the additional

hours. The employer hires Matt, but assigns Matt to exclusively morning and afternoon shifts during the first 6 months of employment. The night shift language in the posting appears to violate the requirement to determine qualifications reasonably and in good faith.

Example 4: An employer offers cross-training so that each employee has an opportunity to be trained in cashier, inventory, and floor/customer assistance. The employer posts an opportunity for additional hours with a notice that states that the position requires experience in inventory. Ellen, the only person who is available during the hours described in the posting has declined previous opportunities to be trained in inventory. The employer will be deemed to act in good faith if it decides to hire an outside applicant with experience in inventory.

3. Investigation and enforcement

The draft rules should establish standards for the city of Emeryville's investigation of complaints alleging noncompliance with the Ordinance. We recommend including the following provisions:

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.

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 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.

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.

Thank you for the opportunity to comment. We look forward to working with you to ensure the successful implementation of this important ordinance.

Sincerely,

Rachel Deutsch
Center for Popular Democracy

RILA

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July 26, 2017

Michael Guina
City Attorney, City of Emeryville
1333 Park Ave.
Emeryville, CA 94608

Re: Comments regarding Emeryville's Fair Workweek Ordinance

Dear Mr. Guina:

On behalf of the Retail Industry Leaders Association (RILA) and our members who operate stores within the city of Emeryville, I want to thank you for the opportunity to submit comments regarding the city's Fair Workweek ordinance. We believe public comments are a critical component in ensuring that ordinances such as these are fully vetted and their impacts on both employees and employers are understood. In the following sections, you will find questions, concerns, and recommendations on varying components of the ordinance that we feel warrant your thoughtful consideration and addressing.

Definitions – Regular Rate of Pay (Section 5-39.01(d))

The term "regular rate of pay" is not clear and is somewhat ambiguous. Ambiguity will continue to cause a lot of questions and concerns regarding the ordinances applicability. Specifically, in circumstances where bonuses are earned during weeks with minimal/no hours and predictability pay is owed, using regular rate calculation to pay predictability pay can create an artificially inflated rate and or create an impossible rate calculation if no hours have been worked.

Example A: An associate earns a bonus in a week where all shifts have been canceled and zero hours worked, the regular rate calculation would require it to be divided by 0 hours worked.

We request that you amend your definition of "regular rate" to "Employee's hourly rate of pay, exclusive of commissions, non-discretionary and discretionary bonuses."

Additionally, we request that you add the following qualifying statement at the end of (d): "Commissions" shall not include bonuses or other incentive payments of any kind.

Covered Employees (Section 5-39.02)

Currently, the City's regulations do not touch upon the differences between exempt and non-exempt employees and which category of employees this law applies to. Providing clear and unambiguous clarity would be helpful to not just employers, but employees as well, and is something we have seen and appreciated in other ordinances.

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We suggest the inclusion of language in the regulations and Frequently Asked Questions (FAQs) that clarifies that the ordinance does not apply to executive, administrative and professional and salaried employees who are exempted from overtime requirements and minimum wage coverage in the California IWC Wage Orders.

For example, in the San Francisco ordinance the FAQs include the following:

Q: Do executive, administrative and professional employees who are exempted from overtime requirements and minimum wage coverage in the California IWC Wage Orders count toward the 20-employee threshold under the Ordinances?

A: No. See Section IV on covered employees below. Only employees covered by the relevant state law are included in the count.

Q: Do the Ordinances apply to executive, administrative and professional employees who are exempted from overtime requirements and minimum wage coverage in the California IWC Wage Orders?

A: No. See the DIR website for more information about these exemptions.

Advanced Notice of Work Schedules (Section 5-39.03)

Sub-section "b." should explicitly note that Employees being able to modify their schedules to reflect mutually agreed-upon shift swaps or coverage among employees will not trigger predictability pay, as is already the case within the ordinance, but difficult to find and could be easily missed. We recommend the below inclusion in red:

"Whether posting of Work Schedules is in hard copy, electronic format, or another permissible method, Employees shall be able to modify the Work Schedule to reflect any mutually agreed-upon Shift swaps or coverage among Employees without triggering predictability pay."

Additionally, we were hoping you could provide some clarity on a grace period for shifts that run may run over.

In sub-section "d.", it seems an effort was made to address this; however, it reads to only apply to an Employee that may receive a commission or tip, not one who does not.

In Seattle's ordinance, they determine that employer initiated changes of 15 minutes or less, predictability pay is not required. A specific and explicit statement about the grace period length and which Employees it specifically covers would be helpful as Employers try to implement these changes in stores. Additionally, an inclusion of grace period like this would be much more practical and ensure that Employees are able to best serve customers.

Example: A cashier is scheduled to leave at 4p.m., the manager asks the associate to stay to help ring up the remaining customers. The associate agrees and stays an extra 10 minutes, clocking out at 4:10 p.m. Is predictability pay required for this employer initiated change? YES

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that would require such a penalty. Predictability pay of 1 hour, which was the total reduction, in this scenario would result in said Employee receiving his full pay for the his originally scheduled shift and is much more logical.

San Francisco's requirements were similar in that the statute language indicated that predictability pay was owed based on length of the scheduled shift. The final rules interpreted this to mean the number of hours subtracted from the original shift.

Finally, we would request that the City consider exempting predictability pay requirements if the open shift is due to an employee failing to fulfill their posted schedule.

Offering of Work to Existing Employees (Section 5-39.05)

Sub-section "c." of this section is in direct contradiction with ordinance which states that an Employer has the discretion to divide additional work hours among part-time Employees and should be struck from the rules. This provision would remove the discretion given to Employers and create enormous administrative burdens.

The contradiction occurs from section 5-39.05 (b), which reads:

(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 based on race, color, creed, religion, ancestry, national origin, sex, sexual orientation, gender identity, disability, age, marital or familiar status, nor based on 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.

Sub-section "f." does not address a scenario of a Covered Employer who may have more than one location in Emeryville. Clarity is needed as to whether this ordinance would apply to site specific personnel or would said Covered Employer must offer hours to all Emeryville employees?

Additionally, we would recommend adopting a standby list in light of this section, which is something that Oregon recently implemented in their state-wide ordinance. By nature, retail stores are a dynamic work environment. Everything from unforeseen inclement weather, sporting events, or even just local gatherings can lead to understaffed stores, which hurts both customers and employees.

Key language we believe should be adopted includes:

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Notice, Right to Decline, and Compensation for Schedule Changes (Section 5-39.04)
Sub-section "f." of this section is double-dipping, plain and simple, and should be removed from the ordinance. We do not believe that an employer should be penalized twice as they are already paying a premium for overtime (1.5 times the Employee's hourly rate) and shouldn't have to pay predictability pay in addition to overtime pay. The City of San Francisco addressed this in their FAQs:

Q: Pursuant to 3300G.4(e)(6) (Exception #6), if an Employer requires an Employee to work overtime, must the Employer pay the Employee predictability pay for the overtime hours?

A: No. Example 1. An Employee is scheduled to work eight hours on Monday. When the Employee shows up to work on Monday, the Employer informs the Employee that the Employee will be required to work 10 hours on Monday. The Employer need not provide the Employee with predictability pay.

Example 2. An Employee is scheduled to work four hours on Monday. When the Employee shows up to work on Monday, the Employer informs the Employee that the Employee will be required to work 6 hours on Monday. In addition to the Employee's regular pay for working that shift, the Employer must provide the Employee with two hours of predictability pay at the Employee's regular hourly rate.

Specifically, their ordinance included the following exceptions:

Employers do not have to provide "predictability pay" or payment for on-call shifts if any of the following conditions apply:

a) Operations cannot begin or continue due to threats to Employees or property;

b) Operations cannot begin or continue because public utilities fail;

c) Operations cannot begin or continue due to an Act of God (such as an earthquake);

d) Another Employee previously scheduled to work that shift is unable to work and did not provide at least seven days' notice;

e) Another Employee failed to report to work or was sent home;

f) The Employer requires the Employee to work overtime; or

g) The Employee trades shifts with another Employee or requests a change in shifts.

Sub-section "h." of this section, specifically related to a sub-24-hour change that is a reduction of hours is misguided and would be more logical if it was based off the reduction in hours if the reduction in hours is under 4 hours total.

For example, if a scheduled shift is to take place from 12 pm noon to 8 pm, but the shift is then reduced to 12 pm noon to 7 pm, a reduction of 1 hour, currently the ordinance would require 4 hours of predictability pay. From a practical standpoint however, a change such as this would not likely result in a serious disruption with an Employees life and schedule

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1. *An Employer may maintain a standby list of Employees whom the Employer will request to work additional hours to address unanticipated customer needs or unexpected employee absences if the listed Employees have requested or agreed in writing to be included on the standby list and the Employer notifies each employee in writing:*
    a. *That the list is voluntary and how an employee may request to be removed from the list;*
    b. *How the Employer will notify a standby list Employee of additional hours available and how an Employee may accept the additional hours;*
    c. *That the Employee is not required to accept the additional hours offered, and;*
    d. *That the Employee on the standby list is not eligible for additional compensation under section 5-39.04 of this ordinance for the changes to the employee's written work schedule resulting from the Employee's acceptance of hours offered to the employee as a result of being on the standby list.*
2. *An Employer shall provide an Employee on the standby list with notice of additional hours available by in-person conversation, telephone call, electronic mail, text message, or other accessible electronic or written format.*
3. *An Employee who receives notice of additional hours available under this section may decline to accept the additional hours offered.*
4. *An Employee who consents to work additional hours in response to an Employer's request under this section is not eligible for any additional compensation under section 5-39.04 of this ordinance for the resulting change in the Employee's written schedule.*
5. *An Employee may request to be removed from the standby list at any time.*
6. *An Employer may not retaliate against an Employee who:*
    a. *Does not request or agree to be added to the standby list;*
    b. *Requests to be removed from the standby list, or*
    c. *Declines an Employer's request that the Employee work additional hours as a result of the Employee being on the standby list.*
7. *The standby list is not a list of Employees scheduled for on-call shifts and the Employer is not required to include a list of employees on the standby list in the written work schedule described in section 5-39.03.*

General Questions and Concerns

As noted earlier, ordinances like these can have huge impacts on operations in retail stores. We believe the above comments are sound recommendations that speak to the practicality of implementation within retail stores.

Another thing I want to specifically note is that the City should state precisely when educational posters are prepared. Our members due a lot of due diligence when educating store managers and employees about these ordinances, however many of them cannot post non-official information on their employee information boards.

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Our Background

RILA is the trade association of the world's largest and most innovative retail companies who operate many of the storefronts and represent hundreds of employees throughout Emeryville. These companies have made substantial investments in the city and provide city residents with jobs and access to the services and consumer goods they both want and need.

As always, please do not hesitate to reach out with any questions and we appreciate your willingness to hear from the business and retail community.

Sincerely,

Brian Rose
Director, State Affairs and Advocacy
Retail Industry Leaders Association

CALIFORNIA RETAILERS ASSOCIATION

CALIFORNIA RESTAURANT ASSOCIATION

July 31, 2017

Michael Guinea
City Attorney, City of Emeryville
1333 Park Ave
Emeryville, CA 94608

RE: Draft Fair Workweek Regulations

Dear Mr. Guinea,

The California Retailers Association (CRA) and the California Restaurant Association (CRA) and our members operating in the City of Emeryville appreciate the opportunity to comment on the proposed regulations. Implementing an ordinance that seeks to regulate a very complicated aspect of our industries certainly doesn't fall short of its challenges. From our experiences in San Francisco, it is imperative for the regulations to provide as much guidance to employers as possible. This will help ensure the highest level of compliance.

The final version of the ordinance was hastily adopted during the first reading without any meaningful opportunity for stakeholder input, especially from the businesses in Emeryville. During public comment, our organizations cited, within the minute of time allotted, the implementation challenges the new ordinance language posed. The City Council was not inclined to entertain statutory changes to address these issues, however, then-Mayor Martinez reassured that our challenges can be resolved through a robust rulemaking process. We strongly urge the City Council to keep their commitment and work in good faith with the business community in Emeryville to comply with this new law. Please find our comments below to the proposed regulations.

The California Retailers Association is the only statewide trade association representing all segments of the retail industry including general merchandise, department stores, mass merchandisers, restaurants, convenience stores, supermarkets and grocery stores, chain drug, and specialty retail such as auto, vision, jewelry, hardware and home stores. CRA works on behalf of California's retail industry, which currently operates over 418,840 retail establishments with a gross domestic product of $330 billion annually and employs 3,211,805 people—one fourth of California's total employment.

The California Restaurant Association is the definitive voice of the food service industry in California and is the oldest restaurant trade association in the nation. The CRA strives to improve the business environment for restaurants, advocating on a slate of national, state and local issues. We are committed to keeping restaurateurs in Emeryville informed about the latest rules and regulations affecting their businesses. California is home to more than 90,000 eating and drinking places that employ 1.6 million workers, making restaurants an indisputable driving force in the state and local.

1. Definitions (Section 5-39.01)
d. "Regular Rate of Pay" includes Commissions earned. "Commissions" (whether based on a percentage of total sales or of sales in excess of a specified amount, or some other formula) are payments for hours worked and must be included in the Regular Rate of Pay; and regardless of whether the Commission is the sole source of the Employee's compensation or is paid in addition to a guaranteed salary or hourly rate, or on some other basis; and regardless of the method, frequency, or regularity of computing, allocating and paying the Commission. Commission earnings may be computed daily, weekly, biweekly, semimonthly, monthly, or at some other interval. The fact that the Commission is paid on a basis other than weekly, and that payment is delayed for a time past the Employee's normal pay day or pay period, does not excuse the Covered Employer from including this payment in the Employee's Regular Rate of Pay. (29 CFR 778.117)

Comments: Should the proposed definition of "Regular Rate of Pay" be used to calculate predictability pay, then we strongly recommend that the definition be consistent with the California Department of Labor Standards Enforcement's definition as it applies to overtime calculations and have regular rate of pay classified as the hourly compensation based on the Employee's sales activity or work performance. In addition, we recommend that commissions should exclude discretionary bonuses and other incentive payments of any kind, as these are not appropriate to be reflected in predictability pay.

2. Covered Employers (Section 5-39.02)

Comments: Currently, these regulations do not differentiate between exempt and non-exempt employees and which category of employees this law applies to. We do not believe this was the intent of the ordinance and suggest the inclusion of language in the regulations that the ordinance does not apply to executive, administrative and professional employees who are exempted from overtime requirements and minimum wage coverage in the California IWC Wage Orders.

3. Advance Notice of Work Schedules (Section 5-39.03)
b. Whether posting of Work Schedules is in hard copy, electronic format, or another permissible method, Employees shall be able to modify the Work Schedule to reflect any mutually agreed-upon Shift swaps or coverage among Employees. The Covered Employer may require that it pre-approve Shift swaps or coverage and may assist Employees in finding such arrangements so long as it is at the request of the Employee. Assistance shall be limited to helping an Employee identify other Employees who may be available to provide coverage or Shift swap and does not include the Covered Employer arranging the Shift swap or coverage.

Comments: Both CRA's appreciate the allowance for Employers to pre-approve shift swaps. We strongly believe shift swaps must be done in accordance with another employee's skill set or job title. For some of our industries, not all shifts are interchangeable such as those for cooking staff vs. the host position. Pre-approval helps protect employees from assuming shifts they are not trained for and ensures the business can proceed with operations in an efficient and safe manner. Furthermore, the explicit allowance for Employers to assist Employees in finding shift swap arrangements is a very beneficial addition. Many times, managers are aware of their workforce's

most recent schedule needs and are best positioned to assist employees in finding coverage for their shifts. We simply ask that the regulation also explicitly state that such activity will not trigger predictability pay.

c. Covered Employers may post additional hours for which Employees may volunteer to work in addition to regularly scheduled Shifts. No Predictability Pay is required where a Covered Employer makes available additional Shifts that Employees may opt to work, where there is no other change to the Employee's schedule, and the Employee on his/her own initiative volunteers to report for that additional Shift.

Comments: We support this clarification in the regulation because it promotes an employee's ability to manage their schedules and assume more hours if they choose to. By enforcing the inverse, Employers will not be incentivized to offer additional hours on the bi-weekly posting if those shifts would trigger predictability pay. Although we disagreed with the City Council's broad decision to exclude other employer-initiated schedule changes from predictability pay, we believe the scenario described above is consistent with the City Council's intent since the Employee initiates such schedule changes.

d. Where Shifts may run over to accommodate completion of service to a client for which the Employee will receive a Commission or tip, and must complete the service in order to be entitled to the Commission or tip, the Covered Employer is not required to include that period of time in the posted Work Schedule and the Employee is not entitled to Predictability Pay for that additional work. However, the Employee shall be compensated at the Regular Rate of Pay for any additional time he or she is performing work.

Comments: In our dynamic and highly competitive industries, both constantly responding to consumer demand, we find these scenarios common and employees are always compensated for their time. The intent and goal of the ordinance was to ensure that the Employer grants Employees as much advance notice as seemingly possible through posting schedules 2 weeks ahead. There is no way for Employers to predict customer service scenarios that may not end in accordance to an Employees scheduled shift. By allowing Employees to complete their services, they benefit through tips or commissions received. If such scenarios would be subject to predictability pay, employers would immediately relieve employees at the end of their shifts to avoid such penalties, which under the ordinance would be 4 hours. Such restrictive scheduling practices will not only disadvantage the business from a customer service perspective, but also the employee who may have spent the latter portion of their shift providing exemplary customer service but forced to leave the job unfinished, potentially resulting in lost commissions or tips. For these reasons, we strongly support this clarification in the regulations.

4. Notice, Right to Decline, and Compensation for Schedule Changes (Section 5-39.04)
e. Particular Cases of Schedule Changes:
ii. No Predictability Pay shall be due where a Covered Employer requires an Employee to leave work early, where the Employee receives regular compensation for the entire scheduled Shift. However, Predictability Pay may be required for the Employee who covers that Shift.

Comments: We support this clarification, as it is a similar rule in San Francisco's Formula Retail Employee Rights Final Rules. There are instances where Employee's may have to leave work early or if business operations are slow. Employees are made whole by being compensated for the remainder of their scheduled shift. To apply predictability pay to this scenario would be an overreach which is why we support this language.

iii. Discipline-related schedule changes may give rise to Predictability Pay. No Predictability Pay is required where a Covered Employer requires an Employee to leave work early because the Covered Employer disciplines the Employee for good cause and documents the incident leading to the disciplinary action. However, should the Covered Employer then require another Employee to cover that Shift, or a portion thereof, that covering Employee is entitled to Predictability Pay.

Comments: Disciplinary actions should never be considered an employer-initiated schedule change since Employers are simply complying with their policies and procedures, which is why we support this language. Such actions are never pleasant for either party involved, but many times, business operations must continue. We ask that the regulations not penalize employers for these scenarios when recruiting coverage for such shifts, but that predictability pay is not owed if an employee voluntarily provides coverage.

f. A Covered Employer's requirement that an Employee work previously unscheduled overtime hours shall give rise to Predictability Pay in addition to the payment of overtime rates.

Comments: We believe this provision is ambiguous and essentially penalizes employers twice. An employer is already paying a premium for overtime (1.5x) and shouldn't have to pay predictability pay in addition to overtime pay. San Francisco's Formula Retail Employee Rights Final Rules offered an exemption for predictability pay where overtime was required. We request the same rule apply here.

5. Offer of Work to Existing Employees (Section 5-39.05)
c. Employee need not accept full portion of additional hours offered. When a Covered Employer offers additional work to an existing Part-time Employee, if no single Part-time Employee is available to work for the entire portion of additional hours, the Covered Employer must allow the existing Part time Employee to work a portion of the additional hours so long as: 1) the total number of additional hours for which the part time Employee is scheduled is more than four (4) consecutive hours; and (2) the remainder of the additional hours that the Part-time Employee cannot work is not less than four (4) consecutive hours.

Comment: Splitting shifts in this manner is not an efficient scheduling practice and interferes with the employer's ability to manage its workforce and business needs. The intent of the ordinance was to provide employees predictability in respect to scheduling, and additional hours if desired so employees may attain full-time status. The process prescribed in this rule is contrary to the legislative intent and could result in the creation of more part-time jobs, to the detriment of full time employment opportunities. Furthermore, it is in direct contradiction to the ordinance which states that an employer has the discretion to divide additional work hours among part time employees.

To avoid creating tremendous administrative burdens, we recommend the following the principle be established: If the entire available shift cannot be fulfilled by utilizing only one part-time employee, then the employer has fulfilled their obligation for satisfying Section 539.05.

We urge your serious consideration of our comments and suggestions to make implementation of this complicated ordinance smoother. Given the incredibly expeditious path to adoption of the final ordinance, we hope the City will take more time to consider our recommendations. Please consider the administrative burden this law places on businesses in Emeryville if such clarification is not provided in the regulations.

Sincerely,

Angie Manetti
Director, Government Affairs
California Retailers Association

Matt Sutton
Senior Vice President, Government Affairs + Public Policy
California Restaurant Association

cc: The Honorable Mayor Scott Donahue
The Honorable Vice Mayor John J. Bauters
The Honorable Dianne Martinez
The Honorable Ally Medina
The honorable Christian R. Patz
Sheri Hartz, City Clerk
Carolyn Lehr, City Manager
Chadrick Smalley, Economic and Housing Development Manager, Emeryville