



October 14, 2016

The Honorable Diane Martinez
Mayor, City of Emeryville
1333 Park Avenue
Emeryville, California 94608

Re: Fair Workweek Draft Ordinance

Dear Mayor Martinez:

The California Restaurant Association (CRA) is the definitive voice of the food service industry in California, and is the oldest restaurant trade association in the nation. On behalf of our members within the City of Emeryville, I respectfully submit this letter to share with you our concerns and opposition to the “Fair Workweek Employment Standards” draft ordinance as written.

This draft legislation proposes imposition of a one-size-fits-all approach to local retail and restaurants, without taking into account that the local restaurant industry has drastically different staffing needs, opportunities, and business models than that of the general retail industry. Restaurants operate at the whim of constant and uncontrollable external factors which frequently require adjustment, especially in staffing needs, due to an influx or decline in consumer demands - most of which cannot be foreseen by the employer.

The result of this proposed policy would require employers to predict long-term outcomes in a completely unpredictable industry, resulting in inflexible working conditions for employees who desire flexible work schedules the most. Putting this new system in place would create substantial hurdles for employers’ ability to offer additional hours, swap shifts for employees when asked, and offer days off to employees when a situation occurs in their personal lives – in essence, it would remove employers’ ability to keep their employees happy.

This draft ordinance would significantly confine the restaurant community employers and employees to a rigid and unworkable scheduling mandate, impose penalties and fines, and expose employers to significantly costly litigation. Furthermore, the drafting errors throughout the draft ordinance expose the city to potential legal risk at local tax payers’ expense. Below

are specific cases where this policy would result in unintended consequences to the employees and constituents of Emeryville.

Language Issues and Vagueness

The vagueness of the language leaves employers and employees without a clean path as to how the city would enforce this policy. By failing to consider that not every “Fast Food Restaurant” as defined in Section 5-39.01 (g) is identical, nor do these establishments operate within the same standardized manner, the proposed ordinance would limit growth within Emeryville. As mentioned in CRA’s previous letter submitted August 12th, simply because select food and beverages are ordered and paid before consuming on or off restaurant premises does not specifically mean that that establishment can be categorized as a “Fast Food Restaurant.” Ordering at a counter and paying before receiving consumable items is becoming an increasingly popular business model, even for restaurants not considered traditionally to be “fast food.” Section 5-39.01 (g) would limit current restaurants within the city from adapting to the popular demand of this business model, now being considered “fast food,” and thereby subjecting the establishment to this restrictive scheduling ordinance.

Section 5-39.03, the advancement of work schedules, does not provide any clarity on key terms which are used throughout the section. Phrases such as “good faith” or “conspicuous place at the workplace” would leave an employer open to potential litigation, as the terms have not been defined at the onset of the ordinance. This section further requires that the employer to grant access to the schedule by electronic means to all employees at the workplace when the schedule is transmitted electronically, this section does not allow for a hard copy of the work schedule to be posted. Likewise, the use of technology, especially within the Bay Area, is evolving daily. Section 5-39.03 as well as 5-39.04 (a) fails to allow for the advancements of technology where employees can create or change their own schedules in a live document.

Due to California state laws surrounding meal and rest periods, employees within the restaurant community are traditionally scheduled to work between four- and six-hour shifts, which they seek and prefer, as this typically fits best with their personal schedules. However, there are instances when employees wish to remain on their shift in order to finish providing dining service to customers or to complete a task at hand. The draft ordinance under Section 5-39.04 (c) would penalize the employer for allowing the employee to work additional time. The employer would be responsible for paying one hour of predictability pay to the employee, as it would be considered a change to the employee’s schedule within less than a 24-hour period. Clarity within the predictability pay section needs to be made in consideration of circumstances like the ones mentioned above.



The most alarming lack of clarity within the draft language is attributed to the nonexistence of information surrounding the timeframe of the exemptions listed in Section 5-39.04 (d). The three exemptions begin with “operations cannot begin or continue,” not addressing the timeframe should operations be allowed to resume. If the public utility company is able to resolve the issue, would predictability pay need to be granted to the employees returning to work? Also, if the intention of the exemptions is to take into consideration circumstances that are out of the employer’s control, then changes initiated by the employee must also be added to the list of exemptions as the employer cannot predict when an employee is going to call out sick much like they cannot predict when the power will fail.

Lastly, the draft language does not define additional terminology such as “qualified” or “similar” within section 5-39.05 (a) which would be instrumental in complying with the ordinance. Leaving the interpretation up to the employer may not satisfy the employee, who then, given section 5-39.10 (b), has the authority to file legal action against the employer. Additionally, outlining the timeframe in which employees have to respond to the offer of additional hours in section 5-39.05 (c) (1-3) is confusing to the employee as well as to the employer. Requiring documentation for both parties is very tedious and will be difficult to maintain when, in the restaurant community, hours are needed to be filled quickly or the restaurant cannot not remain opened. The inability for the draft language to address the points listed above further shows that the path of regulation will not solve the issues the council is attempting to address; rather, it would continue to tie the hands of employers who are desperately trying to retain their talent by giving specialized training, promotions, bonus incentives, “wiggle” room with scheduling needs, and more to their employees.

While this draft proposal in concept is modeled after a San Francisco Ordinance, it is important to note that this specific draft ordinance is stricter than San Francisco or Seattle. This proposal is a massive, untested experiment that would undoubtedly have negative consequences for restaurant operators, employees, and the consuming public. This restrictive scheduling mandate is not only unworkable in the restaurant space, but it comes at a time when the City is aggressively forcing new costs onto the local restaurant community by regulating service charges and imposing unprecedented wage hikes. A rigid scheduling structure directly interferes with employees’ ability to balance important priorities in their lives, such as going to school, working another job, or raising a family. What Emeryville needs are policies that advance the employer-employee relationship, provide flexibility, and improve workplace morale. This draft policy is a massive step backward for a community that strives to be forward-thinking for employers, employees, and consumers alike.

It is for these reasons and others that we are **OPPOSED** to the Fair Workweek Employment Standards Ordinance as written.



Sincerely,



Jessica Lynam

Director, Local Government Affairs Bay Area Region

Government Affairs + Public Policy

Cc: All City Council Members
Chadrick Smalley, Economic and Housing Development Manger

