



City of Emeryville

CALIFORNIA

MEMORANDUM

DATE: November 1, 2016

TO: Carolyn Lehr, City Manager

FROM: Charles S. Bryant, Community Development Director

SUBJECT: **Second Reading Of An Ordinance Of The City Council Of The City Of Emeryville Adding Chapter 39 To Title 5 Of The Emeryville Municipal Code, "Fair Workweek Employment Standards", And Amending Sections 3-11.08 And 3-1.141 Of Chapter 1 Of Title 3 Of The Emeryville Municipal Code, "Business Taxes"**

RECOMMENDATION

Staff recommends that the City Council provide a public overview of an ordinance adding Chapter 39 to Title 5 of the Emeryville Municipal Code, "Fair Workweek Employment Standards" and amending Sections 3-1.108 and 3-1.141 of Chapter 1 of Title 3 of the Emeryville Municipal Code, "Business Taxes" as revised at First Reading, together with opportunity for public comment, followed by a vote by City Council to adopt the Second Reading of the Ordinance.

DISCUSSION

In January 2016, the City Council established Priorities, Goals and Strategies for the period Fiscal Years 2016-2018. One of the Goals is to "Create a community with equity and social justice in relationship to housing and workers in our community." One of the Strategies listed under this Goal is to "Put in place worker protections and policies for equity."

Consistent with the aforementioned City Council Priorities, the Council held a study session on a "Fair Workweek Ordinance" on August 16, 2016. The Council selected various policy and regulatory alternatives and directed staff to prepare an ordinance based on the choices selected. Staff prepared an ordinance based on the Council direction given and brought the item for a first reading on October 18, 2016.

The Council held a public hearing and adopted the first reading of the attached ordinance on October 18, 2016. After hearing a staff presentation and taking public testimony, the Council deliberated and adopted the first reading of the ordinance with modifications. It is standard practice to list the second reading of ordinances as consent calendar items. However, given the significant revisions that were approved during the first reading on October 18, 2016 an opportunity for review and public comment of the revised provisions

is appropriate and consistent with the Council's directive for transparency and robust public participation in the development of a Fair Workweek policy.

The modifications made during the first reading are as follows:

- *Covered Employers*

At the Council's request, the ordinance presented on October 18, 2016 included two options for the definition of "Covered Employer". The Council selected "Option Two" which defines Covered Employers as all retailers with 56 or more employees globally, and all fast food restaurants with 56 or more employees globally and 20 or more employees in Emeryville.

- *Right to Decline Schedule Changes*

Following the study session on August 16, 2016, the Council initially directed that employees of Covered Employers have a right to decline all employer-initiated schedule changes made with less than seven days but 24 hours or more notice to the employee.

At the October 18, 2016 hearing, the Council amended this provision to specify the right to decline employer-initiated schedule changes applies only to changes which add previously unscheduled hours. The right to decline such changes was also expanded to apply to changes that occur with less than 14 days' notice to the employee.

- *Compensation for Schedule Changes (Predictability Pay)*

The Council initially directed that Covered Employers provide predictability pay to employees in the amount of one hour at the employee's regular rate for any employer-initiated schedule changes made with less than 24 hours' notice to the employee.

At the October 18, 2016 hearing, the Council amended this provision to require:

- Predictability pay in the amount of one hour per changed shift for any employer-initiated schedule changes with less than 14 days' notice but 24 hours or more notice to the employee
- Predictability pay in the amount of four hours or the number of hours in the employee's scheduled shift, whichever is less, for employer-initiated schedule changes with less than 24 hours' notice, when the schedule change reduces hours from the scheduled shift
- Predictability pay in the amount of one hour for employer-initiated schedule changes with less than 24 hours' notice for all schedule changes that do not reduce hours

- The Council also added an exception to predictability pay requirements for shift changes which are initiated by employees and not by the employer (i.e. “shift swaps”).

- *Right to Rest*

The Council initially directed that employees of Covered Employers have the right to decline to work hours that occur less than 11 hours after the end of the previous day’s shift or during the 11 hours following the end of a shift that spanned two days (“Clopening Hours”). While the employee had the right to decline, the employee was not otherwise entitled to enhanced payment for accepting work within the Clopening Hours.

On October 18, 2016, the Council amended this provision by adding that Covered Employers must compensate employees at one-and-a-half (1.5) times their regular rate of pay for Clopening Hours when employees agree in writing to work Clopening Hours.

- *Offer of Hours*

The Council initially directed that Covered Employers first offer additional hours of work to existing part time employees before hiring new employees or contract employees. The offer of hours was to be extended if: 1) the part time employee is qualified to do the additional work as reasonably determined by the employer; and 2) the additional work is the same or similar to the work the employee has performed for the employer.

On October 18, 2016, the Council amended this section in two ways. First, by including a requirement that the employer use “good faith” in determining whether the part-time employee to receive the additional hours is qualified; and second, by eliminating the language relating to the additional work being the same or similar to work the employee has performed for the employer.

Related to this modification, the Council added a definition of “Good Faith” to the ordinance. For purposes of the ordinance, “Good Faith” means “a sincere intention to deal fairly with others”.

- *Fair Workweek Certification*

The Council initially wished to include a means of alternative compliance through obtaining “fair workweek certification” through a to-be-developed program. Certified businesses were excluded from the definition of Covered Employer.

At the October 18, 2016 hearing, the Council eliminated the alternative compliance concept by striking this provision from the definition of covered employer, and suggested staff develop a program in the future that is independent of the ordinance.

The modifications outlined above are incorporated into the attached ordinance. The staff report for the October 18, 2016 City Council meeting, which provides a detailed explanation and background regarding the proposed ordinance is attached for reference (see Attachment 1). The EBASE-ACCE-CPD proposed amendments which the Council adopted are included as Attachment 2. A red-line of the ordinance showing the edits between the versions of October 18, 2016, and November 1, 2016, is included as Attachment 3.

ENVIRONMENTAL REVIEW

This ordinance is exempt from the requirements of the California Environmental Quality Act (CEQA) under Section 15061(b)(3) and Section 15378(a) of the State CEQA Guidelines in that it is not a Project that has the potential for causing a significant effect on the environment. This action is further exempt from the definition of a Project in Section 15378(b)(3) in that it concerns general policy and procedure making.

FISCAL IMPACT

As part of the August 16, 2016 study session, staff presented a rough estimate of the policy development and implementation costs for the various policy option scenarios. It was noted that the estimate for the Regulation with Incentive Program policy option was difficult to determine, due to the wide array of options that could impact the resource-intensiveness of the ordinance. Upon reviewing the ordinance options selected, staff believes the initial estimate of \$95,000 annually for ongoing implementation is not sufficient to adequately implement the ordinance as presented.

At the October 18, 2016 City Council meeting, staff advised that the principal drivers of the costs of ordinance implementation are the number of covered employers and the incidence of predictability pay. Staff's initial estimate of costs in August 2016 was developed in the context of staff's recommendation to cover the 11 largest retailers and provide a right to decline schedule changes in lieu of predictability pay.

As currently proposed, the ordinance covers approximately 90 employers and requires predictability pay for employee initiated but employer implemented schedule changes. For example, if an employee calls in sick, and the employer requests another employee to cover the shift, predictability pay will be due to the called-in employee. Research suggests that this circumstance may account for 60%-80% of late notice schedule changes. It is notable that neither the San Francisco nor the Seattle scheduling ordinances require predictability pay for this circumstance. Seattle's ordinance specifically provides that if the availability of the shift is communicated to all employees and is expressly voluntary, no predictability pay is required. Consequently, the costs of implementation in those jurisdictions may not be useful in determining the costs of implementation in Emeryville because the incidences that trigger predictability pay with the Emeryville ordinance are expected to be much more frequent.

The revisions made during the October 18, 2016 first reading of the ordinance doubled the number of businesses covered. Additionally, the revisions result in substantially deeper protections for employees covered. These revisions therefore require greater City funding for administering and enforcing the ordinance. At the earliest opportunity, staff will bring forward its analysis of the fiscal impact of the ordinance as adopted to ask the Council for re-prioritization of funding City services and/or identification of a new revenue source. A preliminary estimate of program costs after reviewing budgeted costs from Seattle and San Francisco suggests a requirement of \$300,000 - \$400,000 annually, considering the relative size of Emeryville.

ALTERNATIVES

The ordinance has been presented to the City Council in three forms: first at the August 16, 2016 study session, second at the October 18, 2016 first reading, and third with this November 1, 2016 report. As evidenced in the preceding discussion, there is substantial variation between each version of the ordinance provided to the public. Staff has received communication from stakeholders that express a high degree of confusion and lack of understanding of the provisions of the ordinance, its applicability, and the process by which it was developed.

In light of these circumstances, the Council may wish to consider three alternatives for action at this time, as follows. The Council could:

- A) elect to adopt the second reading of the attached ordinance (the version adopted on first reading on October 18, 2016) as presented,
- B) decline to adopt the ordinance, or
- C) delay the second reading of the attached ordinance to provide additional time for stakeholder review, outreach and education, and discussion of budget impact to City services.

CONCLUSION

In summary, the Council may consider approval, denial or delay of the attached Fair Workweek Ordinance. Should the Council elect to adopt the ordinance, implementation activities including securing third party assistance for program development, budget adjustments, and program roll-out and administration would commence immediately thereafter.

PREPARED BY: Chadrick Smalley, Economic Development and Housing Manager

**APPROVED AND FORWARDED TO THE
CITY COUNCIL OF THE CITY OF EMERYVILLE:**



Carolyn Lehr, City Manager

Attachment: 1. City Council Staff Report Dated October 18, 2016
2. EBASE-ACCE-CPD Proposed Amendments to Ordinance
3. Red-Line Version of Ordinance
4. Clean Version of Ordinance