



October 31, 2016

City of Emeryville  
Mayor and City Council  
1333 Park Ave  
Emeryville, CA 94608

***RE: Fair Workweek Ordinance 2<sup>nd</sup> Reading--Oppose***

Dear Honorable Mayor and Members of the City Council:

The California Retailers Association (CRA) and its members operating in the City of Emeryville strongly oppose the proposed fair workweek ordinance which eliminates flexibility in the workplace for both employers and employees, denies employees the opportunity to work additional hours if desired, limits an employer's ability to accommodate customer demands, and subjects employers to unnecessary penalties, investigative actions, and costly litigation.

While we appreciate the extended date of July 1, 2017 for implementation, it is certainly no concession for the amount of harm this policy imposes on retailers and retail employees in Emeryville. As we've stated previously, there isn't a one-size-fits all scheduling model. The proposed ordinance is misguided and fails to consider retailers who have less predictability in their business model or do not have the ability to accurately forecast customer traffic, shipping schedules, and other workload issues.

Several broad sweeping amendments were hastily adopted during the first reading without any significant stakeholder input. We hope you consider our comments and recommended changes.

**Predictive Scheduling**

CRA opposes the aggressive compensation schedule adopted granting an hour of Predictability Pay for any changes made within 2 weeks and the lesser of four hours/number of hours in scheduled shift for changes made with less than 24 hours notice. Policies such as these are far from justifiable when schedule changes are already voluntary in nature--meaning employees have a right to decline them--and majority of them are employee-initiated. Overall, the concept of predictability pay simply creates numerous and costly avenues of enforcement and litigation without providing any real material benefit to employees. Pursuant to this ordinance, fines of \$500 per violation may be assessed for 1)

failure to provide notice of Employees' rights, 2) failure to provide initial work schedule and all subsequent changes to that schedule, 3) failure to provide predictability pay, 4) failure to offer additional hours to existing employees before hiring new employees, 5) failure to maintain payroll records, 6) details explaining the reason for those schedule changes, 7) and employee consent to work those hours to name a few. Retailers will have to engage in onerous recordkeeping of the aforementioned to mitigate any of the consequences associated with noncompliance. Even for a small retailer, this level of specificity necessary to comply with predictability pay requirements is impossible to do, especially in addition to all their existing responsibilities to keep business operations running. As a result, retailers are less flexible rather than risk the enforcement and litigation.

### **Exceptions**

To achieve some level of manageability with respect to the schedule changes under this ordinance, we recommend the inclusion of additional exceptions as follows:

- Employee call outs/time requests off where the employer did not receive advanced notice must be incorporated. 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 made within 2 weeks that are out of their control, especially when business operations must still continue.
- Additional time requests by employers to address unanticipated customer needs contingent upon employee consent. Under this ordinance, voluntary schedule requests to accommodate unexpected increases in customer traffic would trigger predictability pay. These circumstances are out of the employer's control and such requests of employees would be voluntary in nature. These scenarios are inadvertently captured under the ordinance and should be exempt.
- Schedule changes as a result of disciplinary action. Employers should not be liable for predictability pay if disciplinary is taken against an employee, resulting in subsequent schedule changes.
- Shift swaps must be pre-approved. Without allowing a manager to review mutually agreed upon shift swaps, some scenarios can trigger other violations under this ordinance. For example, a shift swap could result in an employee working a "clopening," leaving the employer responsible to pay time and a half for that shift without having any input in the decision.
- Employers must be able to assist employees in attaining shift swaps. Managers are typically obliged to accommodate last minute employee-initiated schedule requests, but employees may face difficulties finding coverage. This exception will allow managers who have extensive knowledge of the overall workforce and employee availability to relieve the employee of the stress of finding coverage and facilitate a shift swap expeditiously.

### **Additional Hours for Part-Timers**

CRA opposes the strikeout of language which allowed additional hours to be offered to existing employees of the same or similar work classification. Once again, there is no one-size-fits all approach. Not all retailers engage in cross training, leaving certain hourly classifications inappropriate to offer to the entire existing workforce. For example, it would be unreasonable to offer additional deli hours to all workers if the others have not undergone the food safety training necessary for the job. We strongly urge the Council to undo this strikeout because it doesn't provide a meaningful benefit to employees. Furthermore, we urge the Council to consider exceptions to the posting of additional hours for seasonal hires and community programs. Those additional hours are necessary to meet the seasonal needs of the business where more workers are required rather than longer shifts.

### **Fair Workweek Certified Business**

CRA strongly opposes the omission of the certification program from the ordinance as an alternative means to achieve compliance. During several public discussions on this topic, some members of the Council expressed their desire to not affect the good actors. The fact is, removing any pathway for the good actors to be relieved of such an onerous and penalizing ordinance accomplishes two things: it damages the equilibrium of flexibility these good actors have established with their workforce and erodes at their confidence in this City Council. Certification under a program operating parallel to a punitive ordinance doesn't bear any significance if these good actors must still make the investments to comply when those funds could be redirected to provide more valuable employee services.

During the October 18<sup>th</sup> hearing, Mayor Martinez reassured the audience of the City's rulemaking process as another pathway to address implementation issues. First and foremost, rulemaking processes are inherently guidance driven. Indeed rulemaking can clear up some the confusion surrounding the ordinance, but it still functions well within the parameters of what is adopted. The proposed ordinance requires significant substantive changes which should not be left up to a rule-making process, but clarified within the law itself.

Furthermore, the lack of process exhibited during the October 18 hearing and last minute consideration of significant amendments without input from the business community casts serious doubt over the rule-making process the City of Emeryville has to offer. Our members question whether it will be robust and thorough since this was not demonstrated during the legislative process with respect to the recent amendments. For this reason, we urge the City Council to grant final consideration of this ordinance for a later date to allow further stakeholder input.

If the Council decides to move towards final adoption without allowing for additional changes, a strong message will be sent to the business community about their governing body's view of business in the City of Emeryville. Despite our willingness to work with the Council in good faith and identify areas of improvement in retail scheduling, the door for conversations was abruptly shut by the actions taken on October 18. The recent amendments demonstrate a complete disregard of the retail voices in the City and the good

actors who, with no fault of their own, are penalized by being subject to the strictest scheduling ordinance in California.

In an effort to preserve a working relationship with the business community in the City, we would urge the Council to take your time and consider alternatives/modifications to the proposed ordinance. This is a complex policy area and the Council should be careful and take the right course of action during the legislative process while the opportunity remains. Thank you for your consideration of our position and comments.

The California Retailers Association is the only statewide trade association representing all segments of the retail industry including general merchandise, department stores, mass merchandisers, supermarkets, fast food restaurants, chain drug and convenience stores, as well as specialty retailers such as auto, book and home improvement stores. CRA works on behalf of California's retail industry, which currently operates over 164,200 stores with sales in excess of \$571 billion annually and employing 2,776,000 people – nearly one fifth of California's total employment.

If you have any questions, please feel free to contact me at 916-443-1975 or [amanetti@calretailers.com](mailto:amanetti@calretailers.com).

Sincerely,

A handwritten signature in black ink, appearing to read 'A. Manetti', with a stylized flourish at the end.

Angie Manetti  
Director, Government Affairs

cc: Sheri Hartz, City Clerk  
Chadrick Smalley, Economic and Housing Development Manager, Emeryville