

**FAIR WORKWEEK EMPLOYMENT STANDARDS — CHAPTER 39 OF TITLE 5 OF
THE EMERYVILLE MUNICIPAL CODE**

DRAFT REGULATIONS

~~(All statutory references are to the Emeryville Municipal Code)~~

Pursuant to Emeryville Municipal Code Section 5-39.09(a), the City hereby promulgates regulations to implement and enforce the City's Fair Workweek Employment Standards codified as Chapter 39, of Title of the Emeryville Municipal Code, referred to herein as "Ordinance". All cites to a section refer to a section of the Emeryville Municipal Code unless otherwise stated.

1. Definitions (Section 5-39.01) – The Definitions set forth in the Ordinance shall apply to these regulations and the following definitions shall apply in the interpretation of Section 5-39.01 et seq.

~~"Ordinance" means Chapter 39, "Fair Workweek Employment Standards," of Title 5 of the Emeryville Municipal Code.~~

a. Employee is defined in Section 5-39.01(d).

i. Part-Time Employee means any Employee who works 35 hours or less.

ii. Full-Time Employee means any Employee who works more than 35 hours.

iii. Temporary, On-Call, contract (distinguished from independent contractors) and seasonal Employees who are employed by a Retail Firm or Fast Food Firm are subject to the Ordinance so long as they otherwise meet the definition of Employee set forth in Section 5-39.01(d).

iv. Executive, administrative, and professional Employees who are exempt from overtime requirements and minimum wage coverage under federal and state law, California Industrial Welfare Commission (IWC) Wage Orders, and local ordinance shall not be considered an Employee for purposes of the Ordinance.

b. "Ordinance" means Chapter 39, "Fair Workweek Employment Standards," of Title 5 of the Emeryville Municipal Code.

b.c. "On Call Shift" means any Shift for which an Employee must, less than 24 hours in advance of the start of the Shift, either contact the Covered Employer or wait to be contacted by the Covered Employer, to learn whether the Covered Employer requires the Employee to report to work for the Shift.

~~a. "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)~~

d. **[OPTION A]** “Regular Rate of Pay” is the compensation an Employee normally earns for the work the Employee performs. It includes a number of different kinds of remuneration, such as hourly earnings, salary, piecework earnings and commissions. Regular Rate of Pay is calculated in the same manner as required by federal and state law to determine payment of overtime compensation.

--OR--

[OPTION B] “Regular Rate of Pay” is the Employee’s hourly rate of pay, exclusive of any Commissions earned.

2. Covered Employers (Section 5-39.02)

- a. An Employer shall conduct regular calculations to determine whether it is a Covered Employer.
 - i. Calculation of the number Employees in a given week shall be made on a quarterly (13 week) period basis, beginning with January 1 of that year, to determine whether the Employer is a Covered Employer. Where the number of Employees fluctuates, the calculation should be an average of Employees per week for the given quarter, and that figure should be used going forward for the next quarter.

For example: for four weeks in the first quarter of 2016, a business employed 26 employees within the City limits, and for the remaining nine weeks, the business employed 19 employees. The calculation would be as follows: $(4 \times 26) + (9 \times 19) = 275$, then dividing 275 by 13 (the number of weeks in a quarter). Average number of Employees for that quarter is 21.2, and so the Employer is subject to the Ordinance for the second quarter of 2016.

- ii. No rounding of numbers. Fractional numbers are not rounded. Example: 19.9 Employees shall be considered 19

Employees.

- iii. For those businesses not yet existing as of the effective date of the Ordinance, an initial determination of size is based upon the average number of Employees per week who worked for compensation in the first ninety days after its first Employee commenced work.
- iv. To substantiate and document calculations, all Covered Employers shall maintain a spreadsheet, database or similar record indicating date of hire and date of ~~termination~~separation for each Employee. That record, and any other payroll records, shall be maintained for the period provided in Section 5-39.10(e) and be provided to the City upon request.

b. A Covered Employer's ~~calculations~~ shall ~~include all~~ calculate the number of Employees as defined by Section 5-39.01(d), ~~based on the following:~~

~~v.i.~~ i. Executive, administrative, and professional Employees who are exempt from overtime requirements and minimum wage coverage under federal and state law, California Industrial Welfare Commission (IWC) Wage Orders, and local ordinance shall not be included in a calculation of Employees for purposes of determining whether an Employer is considered a Covered Employer.

~~vi.ii.~~ ii. Temporary, On-Call, and seasonal Employees who work at a Retail Firm or Fast Food Firm, so long as they otherwise meet the definition of Employee set forth in Section 5-39.01(d), shall be included in the calculation to determine whether an Employer is a Covered Employer.

~~vii.iii.~~ iii. Calculation of the number of Employees is based on the number of all individuals employed, and shall not be calculated using the number of FTEs (Full Time Equivalents).

~~b.c.~~ c. For those Covered Employers with multiple locations within the City, the total number of Employees employed within the geographic limits of the City, as opposed to the numbers of Employees at each location, shall be used.

3. Advance Notice of Work Schedules (Section 5-39.03)

a. A good faith estimate of an Employee's Work Schedule includes an estimate that is a reasonable prediction based on forecasts, prior hours worked by a similarly situated Employee(s), or other relevant facts.

a.b. Posting of the Work Schedule shall include any On-Call Shifts as defined herein.

b.c. 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.

e.d. **[OPTION 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.

e. Where Shifts may begin early or run over to accommodate a transition in Shifts:

i. **[OPTION D]** If the accommodation requires a 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.

ii. **[OPTION E]** If the accommodation requires the Employee to work no more than six minutes prior to the beginning of his/her scheduled Shift or work no more than six minutes past scheduled end of his/her Shift, 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.

e.f. A Covered Employer may post and/or transmit Work Schedules earlier than 14 days as provided in Section 5-39.03(b). In that event, the Covered Employer ~~shall~~ is not required to pay Predictability Pay for changes to the Work Schedule made by the Covered Employer prior to the time periods described in Section 5-39.03(c).

g. **[OPTION F]** If an Employee, who is currently working a Shift,

voluntarily initiates a request to leave a Shift prior to the end of the Shift, and the Covered Employer agrees to the Employee leaving the Shift early, the Covered Employer is not required to pay Predictability Pay for the remainder of the scheduled Shift.

**4. Notice, Right to Decline, and Compensation for Schedule Changes
(Section 5-39.04)**

a. Notice of Schedule Changes:

- i. —Where a Covered Employer changes the Employee's Work Schedule, that modification(s) 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.

- i. *, [OPTION G] and that the Covered Employer obtained the Employee's acceptance of the modification(s) to the Schedule. If the modification results solely in a reduction of hours, the Covered Employer does not have to obtain Employee acceptance, provided the Covered Employer complies with all other provisions of the Ordinance and Regulation.* A Covered Employer shall bear the cost of posting and transmitting Work Schedules, and shall not use any methodology that would cause the Employee to incur charges.
 - ii. An electronic scheduling system provided by the Covered Employer to permit Shift-swaps shall not constitute a Covered Employer's addition or subtraction of hours from a Work Schedule for which an Employee is entitled to Predictability Pay.
- b. The specific Employee Right to Decline schedule changes process described by Section 5-39.04(b) shall in no way limit an Employee's rights to decline a Covered Employer's requests to modify work schedules in other circumstances, regardless of timing.
- c. A Covered Employer may not retaliate against an Employee for declining a schedule change under Section 5-39.04(b).
- d. An Employee's exercise of his or her Right to Decline a particular schedule change shall not be interpreted as a declination of future schedule changes.
- e. Particular Cases of Schedule Changes:
 - i. Schedule Changes made because of fluctuating or intermittent need, or other reasons related to the demands of third parties, including but not limited to delivery, installation, instruction, and service cancellations, shall be considered an addition or subtraction of hours initiated by the Covered Employer for which Predictability Pay shall be due.
 - 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.
 - iii. *[OPTION H] 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.

- f. **OPTION II** *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.*
- g. Exemptions listed in Section 5-39.04(d)(1)-(3) shall be limited to the time during which operations cannot begin or continue for the enumerated reasons, and shall cease to apply when those conditions no longer exist.
- h. Predictability Pay Calculations as set forth in Section 5-39.04(c) shall be determined as follows:

Amount of Notice of Schedule Change	Length of Shift Affected	Hours of Predictability Pay (at the Employee's Regular Rate of Pay)
Less than 14 days and more than 24 hours	Any	One hour
Less than 24 hours	Change is a Reduction or Cancellation of Hours	Lesser of: <ul style="list-style-type: none"> The number of hours of the scheduled shift; or Four hours

~~Less than 24 hours~~ ~~All other changes~~ ~~One hour~~

<u>Amount of Notice of Schedule Change</u>	<u>Length of Shift Affected</u>	<u>Hours of Predictability Pay (at Employee's Regular Rate of Pay)</u>
<u>Less than 14 days and more than 24 hours</u>	<u>Any</u>	<u>One hour</u>
<u>Less than 24 hours</u>	<u>Change is a Reduction or Cancellation of Hours</u>	<u>Lesser of:</u> <u>*The number of hours of the scheduled shift;</u> <u>or</u> <u>*Four hours</u>
<u>Less than 24 hours</u>	<u>All other changes</u>	<u>One hour</u>

- i. Predictability Pay shall not be deemed as another hour of work. Calculation of Predictability Pay shall not be affected by, nor shall it impact, the accumulation of Paid Sick Leave or other benefits. While Predictability Pay is calculated using hours, it is not intended to be counted as actual hours of work performed.

5. Offer of Work to Existing Employees (Section 5-39.05)

- a. So long as the Covered Employer otherwise complies with the Ordinance, the Covered Employer may offer additional work hours to the qualified Part-time Employee(s) pursuant to the Covered Employer's written policy and procedures regarding offering additional work hours. At a minimum, the Covered Employer's written policy and procedures shall address all of the following:

- i. When a vacant full-time position will be offered as additional work to Part-Time Employees of its own discretion, or may seek out interested Part-time in which the Part-Time Employees by another method, such as by group posting to its existing Part-time may accept all or a portion of the additional work as provided in subsection c, and when the vacant full-

time position will be offered as full-time position to Part-Time Employees, which will require the Part-Time employee to accept all hours of work associated with the full-time position.

ii. The reasonable and good faith efforts that the Covered Employer will undertake to determine to when a Part-Time Employee is qualified for the Additional Work.

iii. How the Covered Employer will distribute the written policies and procedures to Employees to inform them of the polices and procedures and any updates or modifications.

iv. Any other policies and procedures necessary to implement the Ordinance or these Regulations.

a-b. _____ No requirement to offer overtime. A Covered Employer is not required to offer a Part-time Employee any additional hours of work for which the Covered Employer must pay the Part-time Employee overtime rates for any part of those additional hours. However, where a Covered Employer does offer such additional hours requiring payment of overtime rates to a Part-time Employee, that Employee shall be compensated at the overtime rate for any applicable portion of the Shift. A Covered Employer may split additional work and so offer portions of the additional work hours to multiple Part-time Employees or New Employees to avoid paying overtime.

~~b-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 the 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.

- i. For example, Covered Employer has two Part-time Employees, Amanda and Bill. Amanda is scheduled to work from noon to 4 p.m. on Saturday. Bill is not scheduled to work on Saturday at all.
- ii. In Scenario 1, an eight-hour shift from 4 p.m. to midnight on Saturday is available. Covered Employer offers the additional work to Amanda and Bill. Bill is unavailable. Amanda says that she can only work the first 30 minutes of the additional work available (i.e., until 4:30 p.m.). Covered Employer must allow Amanda to work those additional 30 minutes, and may hire a new Employee to work the remaining 7 ½ hours.
- iii. In Scenario 2, a four-hour shift from 4 p.m. to 8 p.m. on Saturday is available. Covered Employer offers the additional work to Amanda and Bill. Bill is unavailable. Amanda says that she can only work the first 30 minutes of the additional work available (i.e., until 4:30 p.m.). Covered Employer may hire a new Employee to work the full four- hour shift.

~~d.~~ A Covered Employer is not required to award Predictability Pay for additional work performed under Section 5-39.05; **OPTION JI**, where the Employee's acceptance of the additional work was within more than fourteen (14) days in advance of the Shift. If the Employee's acceptance of the additional work is less than fourteen days in advance of the Shift, the Employee is entitled to Predictability Pay as provided in the Ordinance and these regulations.

~~d.e.~~ A Covered Employer may offer additional work to third parties, including hiring new Employees or contract Employees as described in Section 5- 39.05(a), in the event no qualified Employee accepts an offer of additional work in writing within the time permitted.

~~e-f.~~ The requirement to offer additional work to existing Part-time Employees includes for all locations of a Covered Employer within the

City Limits, and shall not be limited to the specific location that an Employee historically has reported for a Shift.

6. "Clopenings"/Right to Rest (Section 5-39.06)

- a. An Employee's acceptance of Shifts as described in Section 5-39.06(a) shall be in writing. Writing may be in the form of an email or text exchange.
- b. The compensation schedule set forth in Section 5-39.06(b) shall be separate from, and is not exclusive of, an Employee's right to Predictability Pay pursuant to Section 5-39.05 *[OPTION K], and any overtime payment that may be required under federal or state law.*
- c. An example calculation of the 11 hour period is as follows:
 - i. If a Shift ends at 8 p.m. on Monday and Employee is scheduled to start a subsequent shift at 6 a.m. on Tuesday, the Employee is entitled to be paid one-and-a-half times the Employee's regular rate of pay for the one hour period of 6 a.m.-7 a.m., as that would be performed within 11 hours following the 8 *p.m. end of the previous shift.*

p.m.

- ii. *If a Shift spans from 10 p.m. on Friday, to 2 a.m. on Sunday, and the Employee is scheduled to start a subsequent shift on that same Sunday at 11 a.m., the Employee is entitled to be paid one-and-a-half times the Employee's regular rate of pay for the two hour period of 11:00 a.m.-1:00 p.m., as that would be performed within 11 hours following the 2 a.m. end of the previous shift.*

~~end of the previous shift.~~

7. Right to Request a Flexible Working Arrangement (Section 5-39.07)

- a. An Employee's request for a modified work schedule may be a combination of adjustments and is not limited to the enumerated options in the Ordinance. ~~The~~*Unless required by federal or state law,* ~~the~~ Covered Employer is not required to fulfill all requests, and may suggest a variation or portion of the Employee's request as a counter request instead of declining the request.
- b. Employees may provide documentation supporting their requests under this Section, but are not required to do so. *However, these regulations shall not be construed to limit the Covered Employer's right to require documentation related to requests, which the Covered Employer may be required to accommodate under federal or state*

laws, such as the Family Medical Leave Act, California Family Rights Act, etc.

~~b-c.~~ Retaliation barred in Section 5-39.07 includes but is not limited to any of those conditions enumerated in Section 5-39.10(d).

~~e-d.~~ Both an Employee's request under this Section, and the Covered Employer's timely response thereto, shall be made in writing, with those records to be maintained as set forth in Section 5-39.10(e) to document compliance with the Ordinance.

8. Notice and Posting (Section 5-39.08)

- a. Any notices required under the Ordinance shall be posted in English and Spanish so as to ensure that all Employees are informed of their rights and opportunities.

9. Implementation (Section 5-39.09)

- a. The City may also accept anonymous or orally reported complaints. However, anonymous complainants shall be informed at the time of the report that the City is unable to collect Predictability Pay on the complainants' behalf if they choose to remain anonymous.
- b. The City may issue compliance orders, administrative fines, or any other remedy described in Section 5-39.10, without a hearing unless the Employer timely requests one by filing an Appeal.
- c. Appeal: Any appeal filed by the Employer shall contain the following information:
 - i. The name, address, and signature of the Employer appealing the Compliance Order;
 - ii. A brief statement in ordinary and concise language of the specific item that is contested, together with any supporting facts;
 - iii. A brief statement in ordinary and concise language of the relief sought and the reason why the Compliance Order should be rescinded, modified, or otherwise set aside; and
 - iv. Any supporting documentation or evidence supporting the appeal.

- d. Any request for a hearing with an Appeal form that fails to provide all of the information described above is incomplete. The Employer who filed the incomplete appeal form shall be notified of defects in writing and shall have an opportunity to amend the appeal form. The Employer shall have 10 days after service of the notification to submit an amended Appeal form.
- e. Failure of an Employer to appeal the Compliance Order or submit a complete Appeal request within the timeframe provided for by this section shall result in a waiver of any right to administrative hearing, and failure to exhaust administrative remedies. In that case, the Compliance Order shall serve as a final determination and conclusive evidence of the Employer's liability for violation of the Ordinance.
- f. Hearing Officers
 - i. Hearing officers shall be appointed by the City Manager.
 - ii. The decision of the hearing officer shall be final, and may uphold, modify, or dismiss the compliance order, including assessment of fines, in whole or in part.
- g. Employees may seek advice from an attorney and/or file a lawsuit against their Employer independent of filing a complaint with the City.

10. Documentation and Record Retention (Section 5-39.10)

- a. The City may create forms for voluntary use by Covered Employers to facilitate compliance with this Ordinance and associated regulations.
- b. Covered Employers shall retain records to document compliance with this Ordinance and associated regulations for no less than three years. The absence of record(s) of compliance shall create the rebuttable presumption of non-compliance.
- b-c. The following is a non-exhaustive list of documentation that each Employer shall retain under the Ordinance:
 - i. Spreadsheets or databases used for calculation of number of employees;
 - ii. Calculations of Employee Rates of Pay, including commission analysis;

- iii. Work schedules transmitted to Employees, including correspondence with Employees regarding schedule changes, regardless of timing;
- iv. Any postings of additional hours available, and correspondence with Employees regarding the same;
- v. Correspondence with Employees regarding their requests for flexible working arrangements; and
- vi. Any other records referenced in these Regulations or the Ordinance.