

ORDINANCE NO. 17-

AN ORDINANCE OF THE CITY OF EMERYVILLE AMENDING SECTIONS 5-37.04 AND 5-37.07 OF CHAPTER 37 OF TITLE 5 OF THE CITY OF EMERYVILLE MUNICIPAL CODE WITH RESPECT TO THE DEFINITION OF HOSPITALITY SERVICE CHARGES

WHEREAS, on June 2, 2015, the Emeryville City Council adopted Ordinance No. 15-004, the Minimum Wage, Paid Sick Leave, And Other Employment Standards Ordinance, codified at Chapter 37 of Title 5 of the Emeryville Municipal Code; and

WHEREAS, Section 5-37.04 of Chapter 37 of Title 5 of the Emeryville Municipal Code requires Hospitality Employers to distribute service charges to the Hospitality Workers that perform the service for which the Hospitality Employer imposes a service charge (“Service Charge Requirement”); and

WHEREAS, tipped employees are concentrated overwhelmingly in the restaurant and hospitality sectors. According to the Economic Policy Institute, 70 percent of tipped workers are employed in food service, hotels, restaurants, or banquet facilities;¹ and

WHEREAS, many tipped restaurant employees in the Bay Area make low wages. According to a survey conducted by the Restaurant Opportunities Center, 22% of tipped restaurant employees in San Francisco and Oakland had earnings that placed them below the poverty line;² and

WHEREAS, as Bay Area cities, including Emeryville, have increased municipal minimum wages to more accurately reflect the local cost of living, many businesses in the hospitality sector have moved to a “service charge” model for employees who have historically relied on tips.³ While state law makes clear that tips or gratuities are the property of the employee for whom they are left, state law provides no similar rule for service charges. Thus, absent direction from the City, replacing tips with service charges can lead to lower income for regularly tipped workers, can undercut the City’s minimum-wage requirements, and can be misleading to consumers; and

WHEREAS, when customers see a “service charge” included in or attached to their bill, they may assume that the service charge is in lieu of gratuity, and do not leave a tip over and above the amount they pay for the service charge;⁴ and

WHEREAS, consumers that pay service charges are often misled into thinking they are

¹ *Id.* at Table A-2, p. 23.

² Restaurant Opportunities Centers United, *Behind the Kitchen Door: The Promise of Opportunity in the San Francisco and Oakland Bay Area Restaurant Industry* (New York, NY: ROC United, 2016).

³ Luke Tsai, “The Tipping Point: When Oakland’s new minimum wage kicks in on March 2, many restaurants plan to raise prices — and, in a few cases, eliminate tips altogether,” *EAST BAY EXPRESS*, February 18, 2015; George Avalos, “Service charges instead of tips? Some Bay Area restaurants give it a try,” *THE MERCURY NEWS*, January 5, 2015; Michael Bauer, “More restaurants explore tipless models,” *SAN FRANCISCO CHRONICLE*, October 13, 2015.

⁴ Julie Watts, “Chez Panisse ‘Service Charge’ Not What Many Customers Believe It To Be,” *CBS SF Bay Area*, February 23, 2013.

distributed to service employees, like tips, because the word “service” indicates that the charge is for the service provided and is paid to the wait staff or server, like a tip;⁵ and

WHEREAS, courts have determined that customers are misled by “service charges” left on their bills if the charges are not paid over to service employees in lieu of gratuity;⁶ and

WHEREAS, Hawaii’s Senate Committee on Labor found that “it is generally understood that service charges applied to the sale of food and beverages by hotels and restaurants are levied in lieu of a voluntary gratuity, and are distributed to the employees providing the service. Therefore, most consumers do not tip for services over and above the amounts they pay as a service charge;”⁷ and

WHEREAS, in adopting a law similar to the Service Charge Requirement, the City of Los Angeles found that “in recent years, hotels in the LAX area have instituted the practice of adding a “service charge” of 15% to 20% of the bill for banquets and other large group events.... Since hotels have instituted the practice of adding service charges to bills, many hotel workers have reported a significant reduction in the gratuities they receive from hotel guests.”⁸ This occurs because “many hotel customers reduce or eliminate gratuities (tips) they would otherwise pay to service workers because they assume that the workers receive the ‘service charges,’ which are added to their bills;”⁹ and

WHEREAS, the definition of “Service Charges” set forth below is narrowly tailored to achieve the City’s interests in protecting the wages of tipped employees, ensuring the equitable disbursement of hospitality service charges, and preventing consumers from being misled by service charges included on their bills that are not paid to service employees in lieu of gratuities; and

WHEREAS, the Service Charge Requirement, as enacted and amended by this Ordinance, protects the public health, safety and welfare by requiring that Hospitality Workers are compensated in such a manner as to enable and facilitate their individual self-reliance within the City of Emeryville; and

WHEREAS, the City Council wishes to reinstate enforcement regulations for consistency with other City of Emeryville labor standards regulations;

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF EMERYVILLE HEREBY ORDAINS AS FOLLOWS:

⁵ See City of Santa Monica, California, Staff Report 1530— Introduction for First Reading an Ordinance Setting a Minimum Wage to be Effective in the City of Santa Monica, January 12, 2016; City of Berkeley, Staff Report, 01b, “Proposed Amendments to the Minimum Wage Ordinance; Amending Berkeley Municipal Code Chapter 13.99,” November 10, 2015.

⁶ *Copantitla v. Fiskardo Estiatorio, Inc.*, 788 F.Supp.2d 253 (S.D.N.Y. 2011); *Samiento v. World Yacht, Inc.*, 10 N.Y. 3d 70 (Feb. 14, 2008).

⁷ *Davis v. Four Seasons Hotel Ltd.*, 122 Hawai’i 423, 228 P.3d 303, 313 (2010)

⁸ City of Los Angeles Muni. Code, § 184.00

⁹ *Id.*

SECTION ONE. RECITALS AND FINDINGS

The above recitals and findings are true and correct, are material to the adoption of this Ordinance, and are incorporated herein by reference.

SECTION TWO. AMENDING SECTION 5-37.04 OF CHAPTER 37 OF TITLE 5 OF THE CITY OF EMERYVILLE MUNICIPAL CODE

Subdivision (a)(1) of Section 5-37.04 of the City of Emeryville Municipal Code titled "Hospitality Service Charges" is hereby amended in its entirety to read as follows:

(a) Definitions. The following definitions shall apply to this section:

(1) "Service charge" means all separately-designated amounts collected by a Hospitality Employer from customers that are for service provided by Hospitality Workers, or are described in such a way that customers might reasonably believe that the amounts are for those services, including but not limited to those charges designated on receipts under the term "service charge," "delivery charge," or "portage charge;" but does not include those charges for which the Hospitality Employer clearly discloses to the customer that the charge is being used to pay for costs or expenses other than wages and gratuity of hospitality employees.

SECTION THREE. AMENDING SECTION 5-37.07 "ENFORCEMENT" OF CHAPTER 37 OF TITLE 5 OF THE EMERYVILLE MUNICIPAL CODE

Section 5-37.07 of the Emeryville Municipal Code is hereby amended as follows. Additions are in **bold underline** text. Deletions are in ~~strikeout~~ text. Those portions not specifically amended remain unchanged:

(a) Enforcement by City. Where compliance with the provisions of this chapter is not forthcoming, the City may take any appropriate enforcement action to ensure compliance, including but not limited to the following:

(1) The City may issue an administrative citation and fine pursuant to provisions of the Emeryville Municipal Code. **The amount of this fine shall vary based on the provision of this chapter violated, as specified below:**

(i) A fine may be assessed for retaliation by an employer against an employee for exercising rights protected under this chapter. The fine shall be one thousand dollars (\$1,000.00) for each employee retaliated against.

(ii) A fine of five hundred dollars (\$500.00) may be assessed for any of the following violations of this chapter:

(A) Failure to post notice of the minimum wage rate.

(B) Failure to provide notice of right to designate person in lieu of spouse or registered domestic partner to use paid sick leave to aid or care for that person.

(C) Failure to maintain payroll records for the minimum period of time as provided in this chapter.

(D) Failure to allow the City access to payroll records.

(iii) A fine equal to the total amount of appropriate remedies, pursuant to subsection (c) of this section. Any and all money collected in this way that is the rightful property of an employee, such as back wages, interest, and civil penalty payments, shall be disbursed by the City in a prompt manner.

(32) The City may initiate a civil action for injunctive relief and damages and civil penalties in a court of competent jurisdiction.

(b) Private Rights of Action. An employee claiming harm from a violation of this chapter may bring an action against the employer in court to enforce the provisions of this chapter and shall be entitled to all remedies available to remedy any violation of this chapter, including but not limited to back pay, reinstatement, injunctive relief, and/or civil penalties as provided herein. The prevailing party in an action to enforce this chapter is entitled to an award of reasonable attorney's fees, witness fees and costs.

(c) Remedies.

(1) The remedies for violation of this chapter include but are not limited to:

(i) Reinstatement, the payment of back wages unlawfully withheld, and the payment of an additional sum as a civil penalty in the amount of fifty dollars (\$50.00) to each employee whose rights under this chapter were violated for each day or portion thereof that the violation occurred or continued, and fines imposed pursuant to other provisions of this chapter or State law.

(ii) Interest on all due and unpaid wages at the rate of interest specified in subdivision (b) of Section 3289 of the California Civil Code, which shall accrue from the date that the wages were due and payable as provided in Part1 (commencing with Section 200) of Division 2 of the California Labor Code, to the date the wages are paid in full.

(iii) Reimbursement of the City's administrative costs of enforcement and reasonable attorney's fees.

(iv) If a repeated violation of this chapter has been finally determined in a period from July 1 to June 30 of the following year, the City may require the employer to pay an additional sum as a civil penalty in the amount of fifty dollars (\$50.00) to the City for each employee or person whose rights under this chapter were violated for each day or portion thereof that the violation occurred or continued, and fines imposed pursuant to other provisions of this Code or State law.

(2) The remedies, penalties and procedures provided under this chapter are cumulative and are not intended to be exclusive of any other available remedies, penalties and procedures established by law which may be pursued to address violations of this chapter. Actions taken pursuant to this chapter shall not prejudice or adversely affect any other action, administrative or judicial, that may be brought to abate a violation or to seek compensation for damages suffered.

(3) No criminal penalties shall attach for any violation of this chapter, nor shall this chapter give rise to any cause of action for damages against the City.

(d) Retaliation Barred.

(1) An employer shall not discharge, reduce the compensation of nor otherwise discriminate against any employee for making a complaint to the City, participating in any of the City's proceedings, using any civil remedies to enforce his or her rights, or otherwise asserting his or her rights under this chapter. Within one hundred twenty (120) days of an employer being notified of such activity, it shall be unlawful for the employer to discharge any employee who engaged in such activity unless the employer has clear and convincing evidence of just cause for such discharge.

(2) No employer may fund increases in compensation required by this chapter, nor otherwise respond to the requirements of this chapter, by reducing the wage rate paid to any non-exempt employee, nor by increasing charges to them for parking, meals, uniforms or other items, nor by reducing the vacation or other nonwage benefits of any such employee, except to the extent such prohibition would be preempted by the Federal Employee Retirement Income Security Act. For purposes of this subsection, "nonexempt employee" means an employee who is nonexempt under Federal or State wage and hour laws.

(e) Waiver.

(1) Waiver Through Collective Bargaining. Except to the extent required by law, all or any portion of the applicable requirements of this chapter may be waived in a bona fide collective bargaining agreement; provided, that such waiver is explicitly set forth in such agreement in clear and unambiguous terms that the parties thereto intend to and do thereby waive all of or a specific portion(s) of this chapter.

(f) Retention of Records. Each employer shall maintain for at least three (3) years for each employee a record of his or her name, hours worked, pay rate, paid sick leave accrual and usage, and service charge collection and distribution. Each employer shall provide each employee a copy of the records relating to such employee upon the employee's reasonable request.

(g) City Access. Each employer shall permit access to work sites and relevant records for authorized City representatives for the purpose of monitoring compliance with this chapter and investigating employee complaints of noncompliance, including production for inspection and copying of its employment records, but without allowing social security numbers to become a matter of public record.

SECTION FOUR. CEQA DETERMINATION

The City Council finds, pursuant to Title 14 of the California Administrative Code, section 15061(b)(3) and section 15378(a), that this Ordinance is exempt from the requirements of the California Environmental Quality Act (CEQA) 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.

SECTION FIVE. SEVERABILITY

Every section, paragraph, clause, and phrase of this Ordinance is hereby declared severable. If, for any reason, any section, paragraph, clause, or phrase is held to be invalid or unconstitutional, such invalidity or unconstitutionality shall not affect the validity or constitutionality of the remaining sections, paragraphs, clauses, or phrases.

SECTION SIX. EFFECTIVE DATE

This Ordinance shall take effect thirty (30) days after its final passage. The City Clerk is directed to cause copies of this Ordinance to be posted or published as required by Government Code section 33693.

SECTION SEVEN. CODIFICATION

Sections Two and Three of this Ordinance shall be codified in the Emeryville Municipal Code. Sections One, Four, Five, Six, and Seven shall not so be codified.

This Ordinance was introduced and first read by the City Council of the City of Emeryville at a regular meeting held on September 19, 2017, and PASSED AND ADOPTED by the City Council at a regular meeting held on October 3, 2017.

AYES: _____
NOES: _____
ABSTAIN: _____
ABSENT: _____

ATTEST:

MAYOR



CITY CLERK

CITY ATTORNEY