



City of Emeryville

CALIFORNIA

MEMORANDUM

DATE: September 19, 2017

TO: Mayor Donahue and Members of the City Council

FROM: Michael A. Guina, City Attorney

SUBJECT: Introduction And First Reading Of An Ordinance Of The City Of Emeryville Amending Section 5-37.04 Of Chapter 37 Of Title 5 Of The Emeryville Municipal Code, "Minimum Wage, Paid Sick Leave, And Other Employment Standards"; CEQA Determination: Exempt Pursuant To CEQA Guideline 15061(b)(3) And 15378(b)(3)

RECOMMENDATION

Staff recommends that the City Council adopt the proposed ordinance, which makes certain findings; amends the definition of "service charge"; and reinstates enforcement provisions.

BACKGROUND

On June 2, 2015, Emeryville unanimously passed the Minimum Wage, Paid Sick Leave, And Other Employment Standards Ordinance (Ord. No. 15-004), codified at Chapter 37 of Title 5 of the Emeryville Municipal Code, and which has been subsequently amended. Chapter 37 mirrors laws enacted by a growing list of public agencies concerned about the impact of the high cost of living in their cities on working families, and features three key provisions: (1) an increase in the minimum wage; (2) enhanced paid sick leave benefits; and (3) a requirement that hospitality businesses distribute service charges to their service employees ("Service Charge Requirement"). The ordinance was enacted because the high cost of living in Emeryville necessitates more robust worker protections than exist at the state level.¹ It accomplishes this objective by assisting working households in Emeryville by providing them with some semblance of economic security.²

A Service Charge is defined as "separately designated amounts collected by a hospitality employer [defined as a restaurant, hotel, or banquet facility] from customers that are for service providing by hospitality workers, or are described in such a way that customers might reasonably believe that the amounts are for those services" ³ Services Charges may "not be retained by the hospitality employer," and must entirely be paid to employees who performed services for a particular customer.⁴

The Service Charge Requirement of the Ordinance was enacted in response to the

¹ City of Emeryville Staff Report, May 5, 2015.

² City of Emeryville Staff Report, May 5, 2015.

³ Emeryville Municipal Code, § 5-37.04(a)(1)

⁴ Emeryville Municipal Code, § 5-37.04(b).

widely identified problem of hospitality businesses—such as hotels, restaurants, and banquet halls—including a line items on their bill described as a “service charge”.⁵ Patrons may be led to believe that the “service charge” is a gratuity that goes to the server when, in fact, it does not.⁶ Instead, unbeknownst to the consumer, employers retain the proceeds of service charges as business revenue, and as a result, reduce or eliminate gratuity payments to service employees, thereby decreasing the income of hospitality employees, who rely heavily on gratuities.⁷

On October 18, 2016, the City Council adopted Ordinance No. 16-005A, which added Chapter 7 to Title 1 of the Emeryville Municipal Code governing citations and administrative fines. The Ordinance also modified Section 5-37.07 of the Emeryville Municipal Code, the enforcement provisions for the Minimum Wage Ordinance. The purpose behind the modifications was to utilize the new administrative citation ordinance.

DISCUSSION

In implementing the Service Charge Requirement, there has been some confusion as to when the service charge may be kept by the hospitality employer versus disbursed to the employee. To clarify the Service Charge Requirement, the proposed ordinance modifies Section 5-37.04(a)(1) as follows, with additions shown as **bold underline** and deletions shown as ~~strikethrough~~.

“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.**

In addition, the proposed ordinance includes findings to explain the context under which the Service Charge Requirement is being adopted to provide better guidance for implementation.

The proposed ordinance also reinstates the prior Minimum Wage Ordinance enforcement regulations, which were modified in October 2016. The modifications have created confusion amongst businesses and employees because the enforcement provisions are no longer in the same Chapter as the Minimum Wage regulations, and introduced a new City process. Staff is recommending that the previous enforcement regulations be reinstated to facilitate compliance and enforcement. The Minimum Wage

⁵ See, e.g., *Davis v. Four Seasons Hotel Ltd.*, 810 F.Supp.2d 1145 (D. Hawaii 2011); *Garcia v. Four Points Sheraton LAX*, 188 Cal.App.4th 364, 377 (2010).

⁶ *Id.*

⁷ See *id.*

enforcement provisions to be reinstated are consistent with the Fair Work Week enforcement provisions. Given that the City has contracted for the implementation and enforcement of the City's Fair Labor Standards (Minimum Wage, Fair Work Week and Measure C), implementation and enforcement is facilitated by making the enforcement regulations consistent with the Fair Labor Standards to the extent possible.

ENVIRONMENTAL REVIEW

Pursuant to Title 14 of the California Administrative Code, section 15061(b)(3) and section 15378(a), 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.

FISCAL IMPACT

There is no increased cost associated with this proposed ordinance.

STAFF COMMUNICATION WITH THE PUBLIC

California Restaurants Association, through their counsel, has provided comments on the ordinance, which staff incorporated.

CONCLUSION

Staff recommends that the City Council: 1) introduce the ordinance by title only, 2) take public comment, and 3) adopt the first reading of the ordinance.

PREPARED BY: Andrea Visveshwara, Assistant City Attorney

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



Michael Guina, City Attorney

ATTACHMENTS

1. Ordinance