



Office of the City Manager

ACTION CALENDAR
January 29, 2019

To: Honorable Mayor and Members of the City Council
From: Dee Williams-Ridley, City Manager
Submitted by: Kelly Wallace, Interim Director, Health, Housing and Community Services
Subject: Council Referral-Proposed Amendments to Berkeley's Living Wage Ordinance: Berkeley Municipal Code Chapter 13.27

RECOMMENDATION

Adopt first reading of an Ordinance amending BMC Chapter 13.27, which proposes: 1) adding a definition of "Department" in Section 13.27.020, 2) limiting new waivers of the LWO to one year in Section 13.27.040, 3) clarifying language related to wages and benefits in the Section 13.27.050 and adding Section 13.27.110 related to severability.

FISCAL IMPACTS OF RECOMMENDATION

None.

CURRENT SITUATION AND ITS EFFECTS

At its September 16, 2014 City Council meeting, the Council referred to the Commission on Labor policy changes to the city's Living Wage Ordinance. The Commission proposes changes to the LWO that are outlined in the Commission Report and attached Ordinance. Staff has concerns that the changes recommended by the Commission will apply new standards to existing contract partners subject to the LWO and may require these contracts to be renegotiated. For instance, since the LWO applies only to entities via contract with the City, adoption of remedies and procedures governing the City's minimum wage ordinance conflict with negotiated contract terms and may be unenforceable. Unlike enforcement of the minimum wage where the City is a market regulator, the City enforces the LWO as a market participant.

BACKGROUND

The City of Berkeley's LWO was enacted June 21, 2000. The purpose of the ordinance is to ensure businesses in a contractual relationship with the City pay their employees a wage that can support a family at or above the poverty level. The Living Wage Ordinance requires that public funds be expended in such a manner as to facilitate individual self-reliance by employees of City contractors, lessees, recipients of City financial aid and their respective subcontractors. HHCS staff administer the LWO compliance component as part of the city's labor standards and enforcement programs.

ENVIRONMENTAL SUSTAINABILITY

There are no identifiable environmental effects or opportunities associated with the subject of this report

RATIONALE FOR RECOMMENDATION

The changes proposed by the City Manager will add important clarifying information in the Ordinance and allow existing contracts to continue uninterrupted. Labor standards such as definitions and rules related to "Service Charges" for example, are already applicable to all businesses operating in Berkeley as a standard within the MWO. Because the LWO applies to businesses that are contract partners with the City of Berkeley, compliance with the LWO is ensured by city staff as a requirement for continued operation under agreements outlined in the contracts. Other changes to the Ordinance proposed by the Commission are intended to align language in the MWO, however, staff can continue to effectively administer the LWO without the changes and without jeopardizing the existing agreements by applying new rules and standards to operators subject to the LWO. Since the LWO applies only to entities via contract with the City, adoption of remedies and procedures governing the City's minimum wage ordinance conflict with negotiated contract terms and may be unenforceable. Unlike regulation of the minimum wage where the City is a market regulator, the City enforces the LWO as a market participant.

ALTERNATIVE ACTIONS CONSIDERED

Make no changes to the LWO or adopt part or all of the of the Commission's recommendations.

CONTACT PERSON

Nathan Dahl, Community Development Project Coordinator, HHCS 510-981-5405
Delfina Geiken, Employment Programs Administrator, HHCS, 510-981-7551

Attachments:

- 1: Ordinance – Track changes
- 2: Ordinance – Without track changes
- 3: September 16, 2014 City Council Referral to Commission on Labor

ORDINANCE NO. -N.S.

PAYMENT OF LIVING WAGE TO EMPLOYEES OF CITY CONTRACTORS;
AMENDING BERKELEY MUNICIPAL CODE CHAPTER 13.27

BE IT ORDAINED by the Council of the City of Berkeley as follows:

Section 1. That Berkeley Municipal Code Chapter 13.27 is amended to read as follows:

PAYMENT OF LIVING WAGE TO EMPLOYEES OF CITY CONTRACTORS

Sections:

- 13.27.010 Title and purpose.
- 13.27.020 Definitions.
- 13.27.030 Contractors, users of public property, City financial aid recipients and subcontractors subject to the requirements of this chapter.
- 13.27.040 Waivers.
- 13.27.050 Compensation required to be paid to specified employees.
- 13.27.060 Required contract provision.
- 13.27.070 Exemptions.
- 13.27.080 Retaliation and discrimination prohibited.
- 13.27.090 Employee complaints to City.
- 13.27.100 Private rights of action.
- 13.27.110 Severability.

Section 13.27.010 Title and purpose.

This ordinance shall be known as the "Berkeley Living Wage Ordinance." The purpose of this ordinance is to protect the public health, safety and welfare. It does this by requiring that public funds be expended in such a manner as to facilitate individual self-reliance by employees of City contractors, lessees, recipients of City financial aid and their respective subcontractors.

Section 13.27.020 Definitions.

The following definitions shall apply throughout this ordinance:

A. "City financial aid recipients" means all persons or entities that receive from the City direct assistance in the form of grants, loans, or loan guarantees, in-kind services, waivers of City fees, real property or other valuable consideration in an amount of more than \$100,000 in any 12-month period. This term shall not include those who enjoy an economic benefit as an incidental effect of City policies, regulations, ordinances, or charter provisions.

A.B. "Department" shall mean the Department of Finance or other City department or agency as the City shall by resolution designate.

B.C. "Marina zone" shall mean all land held in trust by the City of Berkeley

pursuant to the Public Trust Tidelands grant from the State of California to the City of Berkeley, Stats. 1962, Ch. 55; specifically, Aquatic Park and all land, including submerged land, which is west of Marina Boulevard as it is presently constructed and as if it were extended, in both northerly and southerly directions, to the Berkeley city limits and all land north of Spinnaker Way as it is presently constructed and as if it were extended to the shoreline, to the east, and to the Berkeley city limits, to the west.

~~C.D.~~ "Non-profit" shall mean a non-profit organization described in Section 501c(3) of the Internal Revenue Code of 1954 which is exempt from taxation under Section 501(c)(3) of that code, or any non-profit educational organization qualified under Section 23701(d) of the Revenue and Taxation Code.

Section 13.27.030 Contractors, users of public property, City financial aid recipients and subcontractors subject to the requirements of this chapter.

The persons and entities described below shall comply with the minimum compensation standards established by this chapter to the employees specified herein:

A. For-profit vendors of services, which employ six or more employees and receive contract(s) for \$25,000 or more in a 12-month period. Compliance shall be required during the term of said contract(s) as to any employees who spend 25% or more of their compensated time engaged in work directly related to the said contract(s).

B. Non-profit vendors of services, which employ six or more employees and receive contracts of \$100,000 or more in a 12-month period. Compliance shall be required during the term of said contract as to any employees who spend 50% or more of their compensated time engaged in work directly related to a City contract.

C. Lessees of public property, licensees, concessionaires, and franchisees, which employ six or more employees and generate \$350,000 or more in annual gross receipts. Compliance shall be required during the lease term with regard to any employees who spend 25% or more of their compensated time on the leased property, or engaged in work directly related to the license, concession or franchise.

D. City financial aid recipients, which receive more than \$100,000 in loans, or other cash and/or non-cash assistance in any 12-month period. Compliance shall be required for a period of five years following receipt of the aid with regard to employees who spend 25% or more of their compensated time engaged in work directly related to the purpose for which the City provided the aid.

E. Entities within the boundaries of the Marina Zone which employ six or more employees and generate \$350,000 or more in annual gross receipts. Compliance shall be required with regard to any employees who spend 25% or more of their compensated time in the Marina Zone.

F. Subcontractors and sublessees of any of the entities, persons, or recipients described in subparagraphs A through D. Compliance shall be required during the term of the contract between the City and the prime contractor, lessee, licensee, concessionaire, franchisee or City financial aid recipient as to any employees who spend 25% or more of their compensated time engaged in work directly related to the City contract, lease, license, concession, franchise or agreement providing financial aid.

Section 13.27.040 Waivers.

The City Council may waive the requirements of this chapter upon a finding and determination that such a waiver is in the best interests of the City. Such waivers may not cover a period longer than 365 days. Such waivers may be granted only once and may not cover a period longer than 365 days.

Section 13.27.050 Compensation required to be paid to specified employees.

Except as provided in Section 13.27.060, an employer subject to this chapter pursuant to Section shall provide to its covered employees the following minimum compensation terms for the duration of the covered period:

~~A. Wages. If the employer pays at least \$1.62 per hour per employee towards an employee medical benefits plan, which allows the employees to receive employer-compensated care from a licensed physician, the employer shall pay employees an hourly wage of not less than \$9.75. If the employer does not provide the employees with such a medical benefit plan, the employer shall pay employees an hourly wage of not less than \$11.37. The hourly wage rate required by this section will be adjusted automatically or modified annually pursuant to subsection D.~~

A. Wages. All employers subject to this chapter shall pay the required Living Wage rate. In addition, all subject Employers shall offer a medical benefit plan, which allows employees to receive employer compensated care from a licensed physician equal to or higher than the medical benefit rate requirement. If the employer does not offer the employees with such a medical benefit plan, the employer shall pay employees an hourly wage of not less than the Living Wage rate plus the value of the medical benefit rate. The hourly wage rate and medical benefit rate required by this section will be adjusted automatically or modified annually pursuant to subsection D. The new rates shall be announced by May 1 of each year and shall become effective on July 1 of that year.

B. Time-off. Employees shall be entitled to at least 22 days off per year for sick leave, vacation, or personal necessity. Twelve of the required days off shall be compensated at the same rate as regular compensation for a normal working day. Ten of the required 22 days may be uncompensated days off. Employees who work part-time shall be entitled to accrue compensated days off in increments proportional to that accrued by full-time employees. Employees shall be eligible to use accrued days off after the first six months of satisfactory employment or consistent with employer policy, whichever is sooner. Paid holidays, consistent with established employer policy, may be counted toward provision of the required 12 compensated days off.

C. Additional compensation permissible. Nothing in this chapter shall be construed to limit an employer's discretion to provide greater wages or time-off to its employees.

D. The wage rates required in subsection A shall be adjusted annually, effective June 30, to reflect increases during the preceding year in the Consumer Price Index for all urban consumers in the San Francisco-Oakland area, as published in April of each year by the U.S. Department of Labor, Bureau of Labor Statistics.

E. Notification of rights under chapter. Employers subject to this chapter pursuant to Section 13.27.030, shall give written notification to each current and new employee of his or her potential rights under this chapter in a form provided by the City. Such notice shall also be posted prominently in areas where it will be seen by all employees. (Ord. 6765-NS § 1, 2003; Ord. 6583-NS § 2, 2000; Ord. 6548-NS § 2, 2000)

Section 13.27.060 Required contract provision.

Every City contract, lease, license, concession agreement, franchise agreement or agreement for financial aid with an employer described in Section 13.27.030 or amendment thereto shall contain provisions requiring it to comply with the requirements of this chapter as they exist on the date when the employer entered its agreement with the City or when such agreement is amended. Such contract provisions shall address the employer's duty to promptly provide to the City documents and information verifying its compliance with the requirements of this chapter, and sanctions for non-compliance.

Section 13.27.070 Exemptions.

The requirements of this chapter shall not be applicable to the following employees:

A. An employee participating in a temporary job-training program in which a significant component of the employee's training consists of acquiring specialized job readiness knowledge, abilities or skills (e.g., the importance of proper work attire, punctuality and workplace demeanor.)

B. An employee who is under 18 years of age, employed by a non-profit entity for after school or summer employment or as a trainee for a period not longer than 120 days.

C. An employee working for the employer for a period not exceeding six months in aggregate during any 12-month period.

D. Volunteers.

E. Employees of contractors on City public works projects subject to the requirements of Division 2, Part 7, of the California Labor Code, when said code requires compensation greater than that required by this chapter.

F. Employees who are standing by or on-call according to the criteria established by the Fair Labor Standards Act, 29 U.S.C. Section 201. This exemption shall apply only during the time when the employee is actually standing by or on-call.

G. An employee for whom application of the requirements of this chapter is prohibited by state or federal law.

H. An employee subject to a bona fide collective bargaining agreement where the waiver of the provisions of this chapter are set forth in clear and unambiguous terms in such an agreement.

Section 13.27.080 Retaliation and discrimination prohibited.

A. No employer shall retaliate or discriminate against an employee in his or her terms and conditions of employment by reason of the person's status as an employee protected by the requirements of this chapter.

B. No employer shall retaliate or discriminate against a person in his or her terms and conditions of employment by reason of the person reporting a violation of this chapter or for prosecuting an action for enforcement of this chapter. (Ord. 6548-NS § 2, 2000)

Section 13.27.090 Employee complaints to City.

A. An employee who alleges violation of any provision of the requirements of this chapter may report such acts to the City. The City Manager may establish a procedure for receiving and investigating such complaints and take appropriate enforcement action.

B. Any complaints received shall be treated as confidential matters, to the extent permitted by law. Any complaints received and all investigation documents related thereto shall be deemed exempt from disclosure pursuant to California Government Code, Sections 6254 and 6255.

Section 13.27.100 Private rights of action.

A. An employee claiming violation of this chapter may bring an action in the municipal court or superior court of the State of California, as appropriate, against an employer and obtain the following remedies:

1. Back pay for each day during which the employer failed to pay the compensation required by this chapter.
2. Reinstatement, compensatory damages and punitive damages.
3. Reasonable attorney's fees and costs.

B. Notwithstanding any provision of this chapter or any other ordinance to the contrary, no criminal penalties shall attach for any violation of this article.

C. No remedy set forth in this chapter is intended to be exclusive or a prerequisite for asserting a claim for relief to enforce any rights hereunder in a court of law. This chapter shall not be construed to limit an employee's right to bring a common law cause of action for wrongful termination.

D. Nothing in this chapter shall be interpreted to authorize a right of action against the City.

13.27.110 Severability.

If any word, phrase, sentence, part, section, subsection, or other portion of this Chapter, or any application thereof to any person or circumstance is declared void, unconstitutional, or invalid for any reason, then such word, phrase, sentence, part, section, subsection, or other portion, or the proscribed application thereof, shall be severable, and the remaining provisions of this chapter, and all applications thereof, not having been declared void, unconstitutional or invalid, shall remain in full force and effect. The City Council hereby declares that it would have passed this title, and each section, subsection, sentence, clause and phrase thereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses or phrases had been declared invalid or unconstitutional.

Section 2. Copies of this Ordinance shall be posted for two days prior to adoption in the display case located near the walkway in front of Council Chambers, 2134 Martin Luther King Jr. Way. Within 15 days of adoption, copies of this Ordinance shall be filed at each branch of the Berkeley Public Library and the title shall be published in a newspaper of general circulation.

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B. "Department" shall mean the Department of Finance or other City department or agency as the City shall by resolution designate.

C. "Marina zone" shall mean all land held in trust by the City of Berkeley pursuant to

the Public Trust Tidelands grant from the State of California to the City of Berkeley, Stats. 1962, Ch. 55; specifically, Aquatic Park and all land, including submerged land, which is west of Marina Boulevard as it is presently constructed and as if it were extended, in both northerly and southerly directions, to the Berkeley city limits and all land north of Spinnaker Way as it is presently constructed and as if it were extended to the shoreline, to the east, and to the Berkeley city limits, to the west.

D. "Non-profit" shall mean a non-profit organization described in Section 501c(3) of the Internal Revenue Code of 1954 which is exempt from taxation under Section 501(c)(3) of that code, or any non-profit educational organization qualified under Section 23701(d) of the Revenue and Taxation Code.

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B. Non-profit vendors of services, which employ six or more employees and receive contracts of \$100,000 or more in a 12-month period. Compliance shall be required during the term of said contract as to any employees who spend 50% or more of their compensated time engaged in work directly related to a City contract.

C. Lessees of public property, licensees, concessionaires, and franchisees, which employ six or more employees and generate \$350,000 or more in annual gross receipts. Compliance shall be required during the lease term with regard to any employees who spend 25% or more of their compensated time on the leased property, or engaged in work directly related to the license, concession or franchise.

D. City financial aid recipients, which receive more than \$100,000 in loans, or other cash and/or non-cash assistance in any 12-month period. Compliance shall be required for a period of five years following receipt of the aid with regard to employees who spend 25% or more of their compensated time engaged in work directly related to the purpose for which the City provided the aid.

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F. Subcontractors and sublessees of any of the entities, persons, or recipients described in subparagraphs A through D. Compliance shall be required during the term of the contract between the City and the prime contractor, lessee, licensee, concessionaire, franchisee or City financial aid recipient as to any employees who spend 25% or more of their compensated time engaged in work directly related to the City contract, lease, license, concession, franchise or agreement providing financial aid.

Section 13.27.040 Waivers.

Such waivers may not cover a period longer than 365 days. Such waivers may be

granted only once and may not cover a period longer than 365 days.

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B. Time-off. Employees shall be entitled to at least 22 days off per year for sick leave, vacation, or personal necessity. Twelve of the required days off shall be compensated at the same rate as regular compensation for a normal working day. Ten of the required 22 days may be uncompensated days off. Employees who work part-time shall be entitled to accrue compensated days off in increments proportional to that accrued by full-time employees. Employees shall be eligible to use accrued days off after the first six months of satisfactory employment or consistent with employer policy, whichever is sooner. Paid holidays, consistent with established employer policy, may be counted toward provision of the required 12 compensated days off.

C. Additional compensation permissible. Nothing in this chapter shall be construed to limit an employer's discretion to provide greater wages or time-off to its employees.

D. The wage rates required in subsection A shall be adjusted annually, effective June 30, to reflect increases during the preceding year in the Consumer Price Index for all urban consumers in the San Francisco-Oakland area, as published in April of each year by the U.S. Department of Labor, Bureau of Labor Statistics.

E. Notification of rights under chapter. Employers subject to this chapter pursuant to Section 13.27.030, shall give written notification to each current and new employee of his or her potential rights under this chapter in a form provided by the City. Such notice shall also be posted prominently in areas where it will be seen by all employees. (Ord. 6765-NS § 1, 2003; Ord. 6583-NS § 2, 2000; Ord. 6548-NS § 2, 2000)

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B. An employee who is under 18 years of age, employed by a non-profit entity for after school or summer employment or as a trainee for a period not longer than 120 days.

C. An employee working for the employer for a period not exceeding six months in aggregate during any 12-month period.

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G. An employee for whom application of the requirements of this chapter is prohibited by state or federal law.

H. An employee subject to a bona fide collective bargaining agreement where the waiver of the provisions of this chapter are set forth in clear and unambiguous terms in such an agreement.

Section 13.27.080 Retaliation and discrimination prohibited.

A. No employer shall retaliate or discriminate against an employee in his or her terms and conditions of employment by reason of the person's status as an employee protected by the requirements of this chapter.

B. No employer shall retaliate or discriminate against a person in his or her terms and conditions of employment by reason of the person reporting a violation of this chapter or for prosecuting an action for enforcement of this chapter. (Ord. 6548-NS § 2, 2000)

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A. An employee claiming violation of this chapter may bring an action in the municipal court or superior court of the State of California, as appropriate, against an employer and obtain the following remedies:

1. Back pay for each day during which the employer failed to pay the compensation required by this chapter.

2. Reinstatement, compensatory damages and punitive damages.

3. Reasonable attorney's fees and costs.

B. Notwithstanding any provision of this chapter or any other ordinance to the contrary, no criminal penalties shall attach for any violation of this article.

C. No remedy set forth in this chapter is intended to be exclusive or a prerequisite for asserting a claim for relief to enforce any rights hereunder in a court of law. This chapter shall not be construed to limit an employee's right to bring a common law cause of action for wrongful termination.

D. Nothing in this chapter shall be interpreted to authorize a right of action against the City.

13.27.110 Severability.

If any word, phrase, sentence, part, section, subsection, or other portion of this Chapter, or any application thereof to any person or circumstance is declared void, unconstitutional, or invalid for any reason, then such word, phrase, sentence, part, section, subsection, or other portion, or the proscribed application thereof, shall be severable, and the remaining provisions of this chapter, and all applications thereof, not having been declared void, unconstitutional or invalid, shall remain in full force and effect. The City Council hereby declares that it would have passed this title, and each section, subsection, sentence, clause and phrase thereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses or phrases had been declared invalid or unconstitutional.

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CONSENT CALENDAR
September 16, 2014

To: Honorable Mayor and Members of the City Council

From: Councilmember Jesse Arreguin

Subject: Referral to Commission on Labor: Amendments to Living Wage Ordinance (Berkeley Municipal Code Chapter 13.27)

RECOMMENDATION:

Refer to the Commission on Labor the following suggested amendments to the Living Wage Ordinance, Berkeley Municipal Code Chapter 13.27:

1. Amend Section 13.27.050.A to allow an employee the right to opt out of an employer provided medical benefit plan and still receive the higher compensation amount (currently \$15.99 per hour) as cash in lieu if they provide proof of alternative coverage under a medical benefit plan.
2. Amend the posting requirements, retaliation, complaint process, and enforcement sections to conform to the language in the recently adopted Minimum Wage Ordinance.

BACKGROUND:

The Berkeley City Council adopted a Living Wage Law in 2000 to require for-profit and non-profit businesses (at a certain threshold), that are under a City contract, to pay their employees a living wage and provide health insurance and paid time off. The current Living Wage rate is **\$13.71 per hour plus a medical benefit equivalent to at least \$2.28 per hour**. If the employer does not provide the employee at least \$2.28 per hour toward an employee medical benefits plan, the employer shall pay an hourly wage of not less than **\$15.99**. If an employer pays for health coverage and an employee elects not to receive coverage, the employer is permitted to pay the lower hourly rate.

Two recent complaints filed by former and current employees of LAZ Parking, a city contractor who manages the City's public parking garages, have alleged that the employer failed to pay the full rate of compensation and denied breaks and paid days off.

The complaint made by Mr. Julio Castro alleging that LAZ Parking was required to provide Mr. Castro with the higher compensation amount because it did not provide actual medical coverage has raised issues regarding the loopholes in the current Living Wage Ordinance. Mr. Castro opted to not take the employer provided medical insurance plan, because he paid for another plan that was less costly. Nevertheless, despite the fact that the employer never directly provided health insurance coverage, they were able to pay Mr. Castro the lower wage, rather than include the differential for lack of

health coverage. Apparently, under city law all an employer has to do is offer health coverage but not directly provide it in order to pay the lower wage amount.

Nowhere in the current Living Wage Ordinance does it state that the employer would pay the whole amount of the medical insurance plan. The employee would still pay a premium which depending on the cost of the insurance may be significant, and as result decrease the amount of take home pay an employee would be entitled to. The current language of the law provides incentives for employers to offer more expensive insurance plans with higher employee premiums in order to avoid paying a higher wage.

The law was clearly written with the goal of extending benefits to employees, not taking them away. Similar to city employees, including City Councilmembers, contract employees subject to the Living Wage Ordinance, should be allowed to pay for alternative insurance and receive cash in lieu equivalent to the higher wage amount if they provide proof of insurance coverage. In addition, the City should explore changing the law to say that only if an employee is covered under an insurance plan can the employer pay the lower wage amount. These changes would close the existing loophole and ensure that contract employees are afforded the same rights as our city employees.

In addition, the recently adopted Minimum Wage Ordinance included stronger language on posting of notices, notification of rights, making complaints, retaliation and enforcement. Since the Living Wage Ordinance was adopted in 2000 before the Minimum Wage Law, and since it affectively accomplishes the same goals - fair wages for employees - the City should amend the Living Wage law to conform to the notice, complaint, retaliation and enforcement requirements of the new Minimum Wage Ordinance.

One of the issues alleged is the lack of proper notification of employees covered under the Living Wage Ordinance. The Minimum Wage Ordinance standards are stronger and require better notification and enforcement. Given that the City will be creating an enforcement position to implement both the Minimum Wage and Living Wage Ordinance, there should be consistency of the requirements for ease of enforcement.

Also the notification requirements must be strengthened. There is no requirement for annual notification, so employees may not necessarily know what the wage amount has increased due to inflation. There is also no requirement that the notice provided to workers and required to be posted, has to include information on how to file a complaint and contact information on where to make a complaint. Providing better information on the wages, benefits, complaint process, and protection against retaliation will ensure that workers know their rights and can help prevent potential violations in the future.

FINANCIAL IMPLICATIONS:

Staff time involved in presenting the City Council's referral to the Commission on Labor, analyzing the proposed changes, and proposing recommendations to the Commission and City Council.

CONTACT PERSON:

Jesse Arreguin, Councilmember, District 4 981-7140

Attachments:

1. Current Living Wage Ordinance (B.M.C. Chapter 13.27) with sections highlighted to be changed
2. July 9, 2014 East Bay Express Article "Berkeley Sides with Living Wage Law Violators"

Chapter 13.27
PAYMENT OF LIVING WAGE TO EMPLOYEES OF CITY CONTRACTORS

Sections:

- [13.27.010](#) Title and purpose.
- [13.27.020](#) Definitions.
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13.27.010 Title and purpose.

This ordinance shall be known as the "Berkeley Living Wage Ordinance." The purpose of this ordinance is to protect the public health, safety and welfare. It does this by requiring that public funds be expended in such a manner as to facilitate individual self-reliance by employees of City contractors, lessees, recipients of City financial aid and their respective subcontractors. (Ord. 6548-NS § 2, 2000)

13.27.020 Definitions.

The following definitions shall apply throughout this ordinance:

A. "City financial aid recipients" means all persons or entities that receive from the City direct assistance in the form of grants, loans, or loan guarantees, in-kind services, waivers of City fees, real property or other valuable consideration in an amount of more than \$100,000 in any 12-month period. This term shall not include those who enjoy an economic benefit as an incidental effect of City policies, regulations, ordinances, or charter provisions.

B. "Marina zone" shall mean all land held in trust by the City of Berkeley pursuant to the Public Trust Tidelands grant from the State of California to the City of Berkeley, Stats. 1962, Ch. 55; specifically, Aquatic Park and all land, including submerged land, which is west of Marina

Boulevard as it is presently constructed and as if it were extended, in both northerly and southerly directions, to the Berkeley city limits and all land north of Spinnaker Way as it is presently constructed and as if it were extended to the shoreline, to the east, and to the Berkeley city limits, to the west.

C. "Non-profit" shall mean a non-profit organization described in Section 501c(3) of the Internal Revenue Code of 1954 which is exempt from taxation under Section 501(c)(3) of that code, or any non-profit educational organization qualified under Section 23701(d) of the Revenue and Taxation Code. (Ord. 6583-NS § 2, 2000: Ord. 6548-NS § 2, 2000)

13.27.030 Contractors, users of public property, City financial aid recipients and subcontractors subject to the requirements of this chapter.

The persons and entities described below shall comply with the minimum compensation standards established by this chapter to the employees specified herein:

A. For-profit vendors of services, which employ six or more employees and receive contract(s) for \$25,000 or more in a 12-month period. Compliance shall be required during the term of said contract(s) as to any employees who spend 25% or more of their compensated time engaged in work directly related to the said contract(s).

B. Non-profit vendors of services, which employ six or more employees and receive contracts of \$100,000 or more in a 12-month period. Compliance shall be required during the term of said contract as to any employees who spend 50% or more of their compensated time engaged in work directly related to a City contract.

C. Lessees of public property, licensees, concessionaires, and franchisees, which employ six or more employees and generate \$350,000 or more in annual gross receipts. Compliance shall be required during the lease term with regard to any employees who spend 25% or more of their compensated time on the leased property, or engaged in work directly related to the license, concession or franchise.

D. City financial aid recipients, which receive more than \$100,000 in loans, or other cash and/or non-cash assistance in any 12-month period. Compliance shall be required for a period of five years following receipt of the aid with regard to employees who spend 25% or more of

their compensated time engaged in work directly related to the purpose for which the City provided the aid.

E. Entities within the boundaries of the Marina Zone which employ six or more employees and generate \$350,000 or more in annual gross receipts. Compliance shall be required with regard to any employees who spend 25% or more of their compensated time in the Marina Zone.

F. Subcontractors and sublessees of any of the entities, persons, or recipients described in subparagraphs A through D. Compliance shall be required during the term of the contract between the City and the prime contractor, lessee, licensee, concessionaire, franchisee or City financial aid recipient as to any employees who spend 25% or more of their compensated time engaged in work directly related to the City contract, lease, license, concession, franchise or agreement providing financial aid. (Ord. 6583-NS § 2, 2000; Ord. 6548-NS § 2, 2000)

13.27.040 Waivers.

The City Council may waive the requirements of this chapter upon a finding and determination that such a waiver is in the best interests of the City. (Ord. 6548-NS § 2, 2000)

13.27.050 Compensation required to be paid to specified employees.

Except as provided in Section [13.27.060](#), an employer subject to this chapter pursuant to Section [13.27.030](#) shall provide to its covered employees the following minimum compensation terms for the duration of the covered period:

A. **Wages.** If the employer pays at least \$1.62 per hour per employee towards an employee medical benefits plan, which allows the employees to receive employer-compensated care from a licensed physician, the employer shall pay employees an hourly wage of not less than \$9.75. If the employer does not provide the employees with such a medical benefit plan, the employer shall pay employees an hourly wage of not less than \$11.37. The hourly wage rate required by this section will be adjusted automatically or modified annually pursuant to subsection D.

B. **Time-off.** Employees shall be entitled to at least 22 days off per year for sick leave, vacation, or personal necessity. Twelve of the required days off shall be compensated at the same rate as regular compensation for a normal working day. Ten of the required 22 days may be uncompensated days off. Employees who work part-time shall be entitled to accrue compensated days off in increments proportional to that accrued by full-time employees.

Employees shall be eligible to use accrued days off after the first six months of satisfactory employment or consistent with employer policy, whichever is sooner. Paid holidays, consistent with established employer policy, may be counted toward provision of the required 12 compensated days off.

C. Additional compensation permissible. Nothing in this chapter shall be construed to limit an employer's discretion to provide greater wages or time-off to its employees.

D. The wage rates required in subsection A shall be adjusted annually, effective June 30, to reflect increases during the preceding year in the Consumer Price Index for all urban consumers in the San Francisco-Oakland area, as published in April of each year by the U.S. Department of Labor, Bureau of Labor Statistics.

E. Notification of rights under chapter. Employers subject to this chapter pursuant to Section [13.27.030](#), shall give written notification to each current and new employee of his or her potential rights under this chapter in a form provided by the City. Such notice shall also be posted prominently in areas where it will be seen by all employees. (Ord. 6765-NS § 1, 2003; Ord. 6583-NS § 2, 2000; Ord. 6548-NS § 2, 2000)

13.27.060 Required contract provision.

Every City contract, lease, license, concession agreement, franchise agreement or agreement for financial aid with an employer described in Section [13.27.030](#) or amendment thereto shall contain provisions requiring it to comply with the requirements of this chapter as they exist on the date when the employer entered its agreement with the City or when such agreement is amended. Such contract provisions shall address the employer's duty to promptly provide to the City documents and information verifying its compliance with the requirements of this chapter, and sanctions for non-compliance. (Ord. 6548-NS § 2, 2000)

13.27.070 Exemptions.

The requirements of this chapter shall not be applicable to the following employees:

A. An employee participating in a temporary job-training program in which a significant component of the employee's training consists of acquiring specialized job readiness knowledge, abilities or skills (e.g., the importance of proper work attire, punctuality and workplace demeanor.)

- B. An employee who is under 18 years of age, employed by a non-profit entity for after school or summer employment or as a trainee for a period not longer than 120 days.
- C. An employee working for the employer for a period not exceeding six months in aggregate during any 12-month period.
- D. Volunteers.
- E. Employees of contractors on City public works projects subject to the requirements of Division 2, Part 7, of the California Labor Code, when said code requires compensation greater than that required by this chapter.
- F. Employees who are standing by or on-call according to the criteria established by the Fair Labor Standards Act, 29 U.S.C. Section 201. This exemption shall apply only during the time when the employee is actually standing by or on-call.
- G. An employee for whom application of the requirements of this chapter is prohibited by state or federal law.
- H. An employee subject to a bona fide collective bargaining agreement where the waiver of the provisions of this chapter are set forth in clear and unambiguous terms in such an agreement. (Ord. 6548-NS § 2, 2000)

13.27.080 Retaliation and discrimination prohibited.

A. No employer shall retaliate or discriminate against an employee in his or her terms and conditions of employment by reason of the person's status as an employee protected by the requirements of this chapter.

B. No employer shall retaliate or discriminate against a person in his or her terms and conditions of employment by reason of the person reporting a violation of this chapter or for prosecuting an action for enforcement of this chapter. (Ord. 6548-NS § 2, 2000)

13.27.090 Employee complaints to City.

A. An employee who alleges violation of any provision of the requirements of this chapter may report such acts to the City. The City Manager may establish a procedure for receiving and investigating such complaints and take appropriate enforcement action.

B. Any complaints received shall be treated as confidential matters, to the extent permitted by law. Any complaints received and all investigation documents related thereto shall be deemed exempt from disclosure pursuant to California Government Code, Sections 6254 and 6255. (Ord. 6548-NS § 2, 2000)

13.27.100 Private rights of action.

A. An employee claiming violation of this chapter may bring an action in the municipal court or superior court of the State of California, as appropriate, against an employer and obtain the following remedies:

1. Back pay for each day during which the employer failed to pay the compensation required by this chapter.
2. Reinstatement, compensatory damages and punitive damages.
3. Reasonable attorney's fees and costs.

B. Notwithstanding any provision of this chapter or any other ordinance to the contrary, no criminal penalties shall attach for any violation of this article.

C. No remedy set forth in this chapter is intended to be exclusive or a prerequisite for asserting a claim for relief to enforce any rights hereunder in a court of law. This chapter shall not be construed to limit an employee's right to bring a common law cause of action for wrongful termination.

D. Nothing in this chapter shall be interpreted to authorize a right of action against the City. (Ord. 6548-NS § 2, 2000)

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Berkeley Sides With Living Wage Violators

The city has brushed aside numerous labor complaints against a city contractor — and has now revised its policy in a way that benefits employers and shortchanges low-wage workers.

By Sam Levin @SamTLevin



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Since 2000, businesses that have contracts with the City of Berkeley have been subject to a living wage ordinance that establishes minimum standards of pay and employee health benefits for employees. The intent is simple: to ensure that city contractors pay their workers wages that can support a family at or above the poverty level. In 2012, for the first time since the living wage law was enacted, an employee of a city contractor filed a complaint with the city, alleging violations of the ordinance. The alleged offender was LAZ Parking, a private company that manages three city-owned garages, and the complaint, from former employee Julio Castro, only came to light earlier this year when the city council began discussions about expanding LAZ's contract.

According to Castro, the company had underpaid him and other employees in violation of the law, and despite his persistent complaints to the city, officials did little to help him. His struggle exposed Berkeley's lack of an effective living wage enforcement mechanism. When I first reported on Castro's story (see "The Failure of Berkeley's Living Wage Law," 4/23) city spokesperson Matthai Chakko declined to comment, saying a report would be sent to the city council, detailing an investigation into LAZ Parking. The city finally produced the report last month, and the document, according to a number of labor advocates, reveals just how deeply flawed the city's living wage policy and enforcement system really are. For starters, the city's report sides with LAZ Parking in Castro's dispute, despite significant evidence that the company underpaid him, and notwithstanding a state ruling last year in Castro's favor. What's more, the city has used its report as an opportunity to reinterpret a critical part of the living wage law in a manner that benefits contractors and hurts low-wage workers.

"The living wage ordinance was made to help employees," said Castro, a sixty-year-old Concord resident and former LAZ Parking cashier. "It's the city's job to make sure things are done right."

Castro's case — and the city's new interpretation of the living wage law —

center on the health care contribution requirements laid out in the ordinance. At current rates, employers must pay an hourly wage of \$13.71 plus a medical benefit equivalent to at least \$2.28 per hour. If an employer does not provide an employee with the medical benefit, then it must pay the additional \$2.28, meaning an hourly wage of \$15.99, according to the law.

LAZ Parking, as Castro outlined in formal allegations in 2012, paid him the lower rate, which was \$12.76 per hour when he started working for the company in July 2011. But LAZ did not pay for his health benefits. That's because the package LAZ offered, Castro said, would have been significantly more expensive for him than his insurance plan with Contra Costa County (the Contra Costa Health Plan). That meant that LAZ, according to his complaints, was obligated to pay him the higher rate — at that time, \$14.88 per hour. After discussions with his managers and multiple city officials got him nowhere, Castro filed a complaint with the state labor commissioner's office in 2012. And in 2013, the state issued a ruling in his favor, declaring that LAZ had violated Berkeley's living wage law and should have paid the higher rate, amounting to a total of \$2,245 in back wages. LAZ has since paid Castro this amount.

But in the city's recent report on LAZ, Berkeley City Manager Christine Daniel wrote that the state's decision in support of Castro was "incorrect" and contrary to the living wage ordinance. Because LAZ had *offered* Castro health care benefits, the company was allowed to pay him the lower \$12.76 rate, Daniel wrote. And to ensure that employees understand this in the future, the report continued, the city has revised its living wage website to include this statement: "If an employer pays for health coverage and an employee elects not to receive coverage, the employer is permitted to pay the lower hourly rate."

Because this is a new statement on the website — and one that is nowhere to be found in the actual ordinance — the revision has alarmed labor advocates who argue that the city is not only endorsing LAZ's decision to underpay employees, but is going a step further and establishing this practice as acceptable policy. "It essentially eviscerates the law," said Carole Vigne, director of the wage protection program of the Legal Aid Society-Employment Law Center. "This new interpretation ... feels like a tremendous loophole."

Vigne is one of several Employment Law Center attorneys who have represented Castro in the course of his multi-year fight against LAZ. The labor commissioner's office also ruled last year that the company also owed Castro \$939.24 for denying him rest breaks, a violation separate from the living wage concerns. Castro has further alleged retaliation, because LAZ terminated him in 2012 after he complained about the living wage violations; a decision in this separate retaliation case is pending, after labor hearings concluded last month.

In its 2013 ruling on Castro's living wage complaint, the California labor commissioner's office noted that when employers don't provide medical benefits, there is a "clear directive" in the Berkeley living wage ordinance that employers "shall" pay the higher rate: "There is nothing in the Ordinance that allows an employee entitled to its benefits to waive his right to those benefits," the state hearing officer wrote.

Vigne, too, argued that, regardless of the city's elaborations on its website, the enforceable language of the ordinance says employers must "provide" medical benefits or the higher wage: "Provide means to give, it doesn't just mean to offer," she said. Vigne also shared with me printouts of older versions of Berkeley's living wage web pages, pointing out that, even in the city's detailed FAQ section on the law, "there was no suggestion anywhere on their website that this is how the living wage ordinance was intended to be interpreted."

It's unclear why exactly the city is taking a position that shortchanges low-wage workers. In her report, Daniel cited a September 2000 city memo on the living wage ordinance that said employers could pay the lower hourly

rate when employees decline an offer of health coverage. But Vigne sent me a June 2000 memo from the Berkeley commission on labor that emphasized that one of the objectives of the living wage law was to help employees access "reasonable health insurance." And regardless of the debates around interpretation, living wage laws should not prevent low-wage workers from buying a health-care plan that is cheaper than the one offered by the employer, said Gina Gemello, an Employment Law Center project attorney who has also represented Castro. "If an employee can get insurance coverage for half of what the employer offers, then why would the city stand against them?" said Castro.

Berkeley City Councilmember Jesse Arreguín — who has been in contact with Castro for years and has repeatedly asked the city to address complaints against LAZ — said he also disagrees with the city's new interpretation of the law and plans to introduce legislation later this year that would revise the ordinance to make clear that contractors must provide health care or pay the higher wage. "If an employee is able to get health care at a much cheaper rate, the employer should help contribute to that," he said, adding, "I was very surprised when the city took a position trying to disprove the state. ... The law was intended to favor the worker, not management."

In response to Daniel's report, Arreguín issued a memo last week questioning why the city has been so slow to respond to complaints about LAZ and why its report ignores Castro's allegations of retaliation entirely. The living wage law explicitly prohibits retaliation and discrimination against a person who reports a violation, meaning the city's enforcement of the law and investigation into LAZ should have addressed concerns of retaliation. Arreguín's memo also questioned whether the city has followed up on a complaint from another former LAZ employee, Chauncy Taylor, who, like Castro, said she was paid the lower rate and did not receive health benefits.

Though Taylor outlined her situation in great detail to Arreguín's office — which forwarded the claims to the city manager more than a year ago — Taylor has not received any back wages and it's unclear if the city has done any investigation into her case. Taylor said in an interview that no city official other than Arreguín's office has ever contacted her about her claims. Further, Taylor said LAZ never even offered her health benefits in the first place because she was technically a part-time employee. That means that, even with the city's new interpretation of the law, she could have a strong case. And her situation is a clear illustration of the impacts of a flawed living wage law: When she worked for LAZ, she was uninsured.

"It would really help if they could come through," said Taylor, noting that her landlord just raised her rent and that she continues to struggle to make ends meet. "I am praying and hoping that they come around. At this point, I'd be okay if they just gave me half. Times are so hard."

Chakko declined to answer any questions about LAZ Parking or the living wage law, saying the city plans to issue a response to Arreguín's memo. LAZ representatives did not respond to multiple requests for comment.

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