

ORDINANCE NO. 7,668-N.S.

REPEALING AND REENACTING BERKELEY MUNICIPAL CODE CHAPTER 13.104,
WAGE THEFT PREVENTION

Section 1. That Berkeley Municipal Code Chapter 13.104 is hereby repealed and reenacted as follows:

Chapter 13.104
WAGE THEFT PREVENTION

Sections:

- 13.104.010 Findings.
- 13.104.020 Definitions.
- 13.104.030 Pay Transparency Acknowledgments from Permit Applicant, Contractor, and Qualifying Subcontractor.
- 13.104.040 Pay Transparency Attestations Following Project Completion.
- 13.104.050 Posting of Ordinance.
- 13.104.060 Determination of Construction Pay Transparency Compliance.
- 13.104.070 Issuance of a Certificate of Occupancy.
- 13.104.080 Private Right of Action.
- 13.104.090 City Manager Regulations.
- 13.104.100 Severability.

13.104.010 Findings.

A. The City of Berkeley is committed to protecting the public health, safety and welfare. The construction industry involves unique labor standards compliance challenges. Construction workers who do not receive all of their wages and mandatory benefits are likely to discover that despite the best efforts of State enforcement officials, many employees continue to be victims of wage theft because they are unaware of their rights or the State lacks adequate resources to advocate on their behalf. General contractors and Developer/Owners who receive City-issued permits and licenses and who benefit from the construction workers' labor may disclaim responsibility for making underpaid workers whole.

B. Testimony presented to the State of California's "Little Hoover" Commission stated that existing studies suggest that "the underground economy" is at least a \$10 billion problem in California. Statewide, the construction industry is the industry with the second highest level of labor standards violations (as measured by State Labor Commissioner penalty assessments), surpassed only by the restaurant industry. Deputy Labor Commissioners conducted 985 inspections in the private construction industry in 2012-13, yielding 595 citations that assessed \$5.3 million in penalties. Enforcement actions, however, are dwarfed by the number of contractors and projects in California, including projects in Berkeley. Over 300,000 state-licensed contractors performed about \$48 billion worth of private construction work in the State in 2014. The mismatch between the resources of the State and the scope of the issue of fundamental wage projections through disclosure and transparency requires the involvement of local

government police powers.

C. Assembly Bill 469, also known as the Wage Theft Protection Act of 2011, went into effect on January 1, 2012, adding section 2810.5 to the Labor Code. The act requires that all employers provide each employee with a written notice containing specified information at the time of hire.

D. This Chapter will ensure compliance with the Wage Theft Protection Act of 2011 by requiring confirmation by owners, contractors and subcontractors of the rate of pay and other legally required information regarding mandatory and voluntary fringe benefits pursuant to Labor Code section 2810.5.

13.104.020 Definitions.

Whenever used in this chapter, the following terms shall have the meanings set forth below.

A. "City" shall mean the City of Berkeley.

B. "Completion of the project" means that construction is complete and the project is eligible for a Certificate of Occupancy or Temporary Certificate of Occupancy.

C. "Contractor" shall mean the prime contractor for the Project.

D. "Labor Commissioner" shall mean the Office of the Labor Commissioner within the State of California's Department of Industrial Regulations.

E. "Owner" shall mean the person or persons, firm, corporation or partnership exercising ownership of the Project.

F. "Permit Applicant" shall mean Owner, developer, or Contractor who applied for the building permit for the Project.

G. "Project" shall mean a new construction project of greater than 30,000 square feet that is not subject to local, state or federal prevailing wage requirements or does not have a valid Project Labor or Community Workforce Agreement.

H. "Project construction employees" shall mean employees of the Contractor or Subcontractor.

I. "Qualifying Subcontractor" shall mean a subcontractor of any tier whose portion of the work exceeds \$100,000 or one percent (1%) of the value of the construction cost of the Project.

J. "Responsible Representative" shall mean an officer (if a corporation), general partner (if a partnership or a limited partnership), managing member (if a limited liability company) or qualifying person associated with the Owner, contractor and/or subcontractor. A qualifying person is defined in Section 7068 of the California Business and Professions Code.

13.104.030 Pay Transparency Acknowledgments from Permit Applicant, Contractor, and Qualifying Subcontractor.

A. Within 30 days of issuance of a building permit, the Permit Applicant shall provide to the City a Permit Applicant Pay Transparency Acknowledgment on a form approved by the City for this purpose. The form shall include an attestation under penalty of perjury under the laws of the State of California by a Responsible Representative of the Permit Applicant that: (i) the Permit Applicant has reviewed Chapter 13.104 of the Berkeley

Municipal Code; and (ii) following Project completion, if the City cannot make a finding of compliance with the provisions of this Chapter pursuant to section 13.104.060, the Permit Applicant will be responsible for demonstrating either (a) compliance with Labor Code sections 226 and 2810.5 or (b) the existence of a Labor Payment or a Lien Release Bond(s) pursuant to 13.104.070(B).

B. Within 30 days of the issuance of a building permit if the Contractor(s) and Qualifying Subcontractors have been selected by that date, but in any event no later than the Contractor or Qualifying Subcontractor's first day of work on the Project, for each Contractor and Qualifying Subcontractor, the Permit Applicant shall provide to the City a Contractor Pay Transparency Acknowledgment on a form approved by the City for this purpose. On each Contractor Pay Transparency Acknowledgment, a Responsible Representative of the Contractor or Qualifying Subcontractor must attest under penalty of perjury under the laws of the State of California, that: (i) the Contractor or Qualifying Subcontractor has reviewed Chapter 13.104 of the Berkeley Municipal Code; and (ii) either (a) Project construction employees will receive Labor Code Section 2810.5 compliant notices and Labor Code Section 226(a) compliant itemized wage statements, or (b) Project construction employees meet one or more of the criteria of Labor Code section 2810.5(c).

13.104.040 Pay Transparency Attestations Following Project Completion.

Within 10 days of the completion of the Project, for each Contractor and Qualifying Subcontractor, Permit Applicant shall provide to the City a Pay Transparency Attestation on a form approved by the City for this purpose. On each Pay Transparency Attestation, a Responsible Representative of the Contractor or Qualifying Subcontractor must attest under penalty of perjury under the laws of the State of California that: (i) the Contractor or Qualifying Subcontractor complied with Chapter 13.104 of the Berkeley Municipal Code; and (ii) either (a) Project construction employees received complete and accurate information pursuant to Labor Code Sections 226 and 2810.5, or (b) Project construction employees met one or more of the criteria of Labor Code section 2810.5(c).

13.104.050 Posting of Ordinance.

Each day work is performed on the Project, the Permit Applicant shall post and keep posted in a conspicuous location frequented by Project construction employees, and where the notice may be easily read by Project construction employees during the hours of the workday, a notice that: (i) contains the text of Chapter 13.104 of the Berkeley Municipal Code; (ii) explains that workers can report violations of Labor Code sections 226 and 2810.5 to the Labor Commissioner of the State of California; and (iii) provides current contact information, including office address, telephone number, and email address of the Labor Commissioner of the State of California.

13.1040.060 Determination of Construction Pay Transparency Compliance.

Prior to approval of a Certificate of Occupancy for the Project, the City shall make a finding of compliance with the provisions of this Chapter. Such finding shall be issued if: (i) the City determines after review of the information provided pursuant to

sections 13.104.030 and 13.104.040 that the Permit Applicant, Contractor and all Qualifying Subcontractor(s) have complied with the provisions of this Chapter; and (ii) the City has not received any information that a complaint is pending before the Labor Commissioner, or that the Labor Commissioner has issued a final order of enforcement, regarding violations of Labor Code Sections 226 or 2810.5 by any Contractor or Qualifying Subcontractor at the Project.

13.104.070 Issuance of a Certificate of Occupancy.

A. The City shall issue a Certificate of Occupancy to the Permit Applicant if it makes a finding of Construction Pay Transparency Compliance pursuant to 13.104.060 and all requirements of the building code are met.

B. If the City cannot make a finding of compliance with the provisions of this Chapter pursuant to section 13.104.060 , the City will approve a Certificate of Occupancy only if:

- (i) the Permit Applicant demonstrates that the Permit Applicant, Contractor, and all Qualifying Subcontractors have complied with Labor Code sections 226 and 2810.5; or
- (ii) the Permit Applicant demonstrates the existence of a Labor Payment or a Lien Release Bond(s) for the Project. The bond shall be in an amount equal to 20 percent of the combined value of the contract(s) of all Contractor(s) and/or Qualifying Subcontractor(s) for which the City lacks Pay Transparency Acknowledgment or Attestations, or 125 percent of the amount of any Project-related, Labor Commissioner issued Civil Wage and Penalty Assessment(s) or mechanics lien(s), whichever is greater.

13.104.080 Private Right of Action.

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

13.104.090 City Manager Regulations.

The City Manager may promulgate regulations for the administration and enforcement of this Chapter.

13.104.100 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 the Maudelle Shirek Building, 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.

At a regular meeting of the Council of the City of Berkeley held on June 11, 2019, this Ordinance was passed to print and ordered published by posting by the following vote:

Ayes: Bartlett, Davila, Droste, Hahn, Harrison, Kesarwani, Robinson, Wengraf, and Arreguin.

Noes: None.

Absent: None.

