



Commission on Labor

Agenda

South Berkeley Senior Center
2939 Ellis Street
Berkeley, CA 94703

Wednesday
March 20, 2019
7:00 p.m.

Preliminary Matters

1. Roll Call
2. Public Comments
The public may comment about any item not on the agenda. Public comments regarding agenda items will be heard while the Commission is discussing the item.
3. Approval of February 20, 2018 Meeting minutes (*Attachment 1*)

Action Items

The Commission may take action related to any subject listed on the Agenda. Public comments regarding agenda items will be heard while the Commission is discussing the item.

4. Status Updates:
 - 1) Council Referral: Development of a Homeless Youth Policy-possible updates from Homeless Commission regarding recommendations to City Council
 - 2) Council Referral: May 15, 2018 to Establish Fair Workweek Requirements in Berkeley (also referred to the City Council's Paid Family Leave ad-hoc subcommittee), review Commissioner Schriener's draft ordinance and council report (*Attachment 2*)
 - 3) Council Referral: Paid Family Leave- update regarding Council subcommittee & Commission on the Status of Women actions
 - 4) Commission on the Status of Women (COSOW) Equal Pay update on draft report to council recommending an independent audit of city employee wages
5. Updates regarding Teachers' labor actions in Oakland and other cities
6. Living Wage Ordinance revisions 2nd reading of Ordinance:
https://www.cityofberkeley.info/Clerk/City_Council/2019/03_Mar/Documents/2019-03-12_Item_01_Ordinance_7640.aspx
7. Agenda planning for May 15, 2019 Commission meeting.

Information

8. Staff update regarding the Community Workforce Agreement (aka Project Labor Agreement with the Alameda County Building and Construction Trades Council) and the Center Street Garage final local hire report

Adjournment

Please refrain from wearing scented products to this meeting.

COMMUNICATION ACCESS INFORMATION

This meeting is being held in a wheelchair accessible location. To request a disability-related accommodation(s) to participate in the meeting, including auxiliary aids or services, please contact the Disability Services specialist at 981-6418 (V) or 981-6347 (TDD) at least three business days before the meeting date. Please refrain from wearing scented products to this meeting.

Communications to Berkeley boards, commissions or committees are public record and will become part of the City's electronic records, which are accessible through the City's website. **Please note: e-mail addresses, names, addresses, and other contact information are not required, but if included in any communication to a City board, commission or committee, will become part of the public record.** If you do not want your e-mail address or any other contact information to be made public, you may deliver communications via U.S. Postal Service or in person to the secretary of the relevant board, commission or committee. If you do not want your contact information included in the public record, please do not include that information in your communication. Please contact the commission secretary for further information.

Written material may be viewed in advance of the meeting at the Housing & Community Services Department, 2180 Milvia, 2nd Floor, during regular business hours or at the Berkeley Public Library, Shattuck/Kittredge Streets, during regular library hours at the Reference Desk. The Commission Agenda and Minutes may be viewed on the City of Berkeley website: <http://www.cityofberkeley.info/commissions>.

Secretary:

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Commission on Labor
Delfina Geiken, Secretary
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Berkeley, CA 94704



Commission on Labor

Special Meeting Draft Minutes

South Berkeley Senior Center
2939 Ellis Street
Berkeley, CA 94703

Wednesday
February 20, 2019
7:00 p.m.

Preliminary Matters

1. Roll Call
Meeting called to order @7:05PM
Present: W. Bloom; P. Castelli; J. Fillingim; M. Napoli; K. Schriener; A. Sharenko;
Absent: M. Jones (arrived 7:20PM); N. McClintick (arrived 7:10PM)
Leave of Absence: M. Wilkinson
2. Public Comments
The public may comment about any item not on the agenda. Public comments regarding agenda items will be heard while the Commission is discussing the item.

Oakland teachers' strike begins @ 6:30AM February 21, 2019; rally at Oscar Grant Plaza @11:30AM
3. Approval of January 16, 2018 Meeting minutes

M/S/C (Schriener/Sharenko) to approve January 16, 2019 minutes as submitted
Ayes: W. Bloom; P. Castelli; J. Fillingim; M. Napoli; K. Schriener; A. Sharenko;
Noes: None
Absent: M. Jones (arrived 7:20PM); N. McClintick (arrived 7:10PM)
Leave of Absence: M. Wilkinson

Action Items

The Commission may take action related to any subject listed on the Agenda. Public comments regarding agenda items will be heard while the Commission is discussing the item.

4. Status Updates:
 - 1) Commission on the Status of Women (COSOW) Equal Pay update & draft report to council recommending an independent audit of city employee wages

Update provided by Emmaline Campbell from the COSOW

M/S/C (Castelli/Sharenko) for the Commission on Labor to co-sponsor COSOW council report which recommends to Council that the City conduct an independent audit of the pay of male and female employees in the City of Berkeley city employee workforce.

Ayes: W. Bloom; P. Castelli; J. Fillingim; M. Jones; N. McClintick ; M. Napoli; K. Schriener; A. Sharenko

Noes: None

Absent:

Leave of Absence: M. Wilkinson

2) Draft report of the subcommittee on Development of a Homeless Youth Policy

M/S/C (Fillingim/Sharenko) to co-sponsor the Homeless Commission's report to Council

Ayes: W. Bloom; P. Castelli; J. Fillingim; M. Jones; N. McClintick; K. Schriener; A. Sharenko

Noes: None

Abstain: M. Napoli (not on commission during previous discussions of subject)

Leave of Absence: M. Wilkinson

3) Anti-Sweatshop Procurement Ordinance Annual Update from Finance Department

Shari Hamilton provided review of the report. No action.

5. Officer Elections

M/S/C (Castelli/Fillingim) to elect Margy Wilkinson as Chairperson

Ayes: W. Bloom; P. Castelli; J. Fillingim; M. Jones; N. McClintick ; M. Napoli; K. Schriener; A. Sharenko

Noes: None

Absent: None

Leave of Absence: M. Wilkinson

M/S/C (Sharenko/Jones) to elect Kyle Schriener as Vice-Chairperson

Ayes: W. Bloom; P. Castelli; J. Fillingim; M. Jones; N. McClintick ; M. Napoli; K. Schriener; A. Sharenko

Noes: None

Absent: None

Leave of Absence: M. Wilkinson

6. Agenda planning for March 20, 2019 meeting

- Status update of Homeless Youth Policy & Homeless Commission report to Council
- Update regarding Teachers' strike
- Update on Council February 19, 2019 action regarding Living Wage Ordinance
- Review of Fair Work Week draft council report
- Update re: COSOW's recommendation to Council
- Agenda planning for May 15, 2019 Commission meeting

Adjournment

Meeting adjourned @8:35PM

Minutes Approved on _____

Commission Secretary

Secretary:

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Mailing Address:

Commission on Labor
Delfina Geiken, Secretary
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[ACTION] CALENDAR
[Meeting Date (MM dd, yyyy)]

To: Honorable Mayor and Members of the City Council
From: Commission on Labor
Submitted by: Margy Wilkinson, Chairperson, Commission on Labor
Subject: Fair Workweek Employment Standards Ordinance

RECOMMENDATION

Conduct a public hearing and upon conclusion, adopt the first reading of the Proposed Fair Workweek Employment Standards Ordinance.

FISCAL IMPACTS OF RECOMMENDATION

The Proposed Biennial Budget for the City of Berkeley for fiscal years 2018 & 2019 projects revenues for fiscal year 2019 from business license taxes of \$18,727,959 (p. 76). If every business license taxpayer (employer) complies with the Fair Workweek Ordinance, it would result in a decrease of 25% of business license tax revenue, which is \$4,681,989. The potential reduction represents a 2.68% decrease in the proposed budget (\$175m) for the fiscal year 2019.

CURRENT SITUATION AND ITS EFFECTS

Currently, employers are not required to (1) provide advance notice of work schedules, (2) provide notice and right to decline changes to work schedules, and (3) offer work to existing employees. Additionally, employees do not have the right to decline “clogenings” and request a flexible working arrangement. The proposed Fair Workweek Employment Standards Ordinance would change all of this and would do so in a novel way—by rewarding employers with a 25% discount on their business license tax instead of penalizing them for non-compliance.

BACKGROUND

According to the Fair Workweek Initiative, fair workweek policies ensure that working people have stable and predictable work hours, more opportunities to work full-time, healthier schedules with adequate rest, and a fair voice in when and how much they work. These basic standards can be reached by establishing modern work-hours policy including:

- **Predictable Schedules** that employees and their families can count on.
- **Opportunity to Work** enough hours for a livable paycheck.

- **Healthy Schedules** for time to sleep, commute, and care for employees and their families.
- **Flexibility** to be there for employees' families.

Many jurisdictions have passed fair workweek ordinances with varying degrees of success. The ordinances are difficult and costly to enforce and compliance is a problem. Furthermore, all existing ordinances only apply to medium to large employers within a few specific industries. All these ordinances are enforced using a complex system of penalties for non-compliant employers.

There is a better way: Berkeley can be the first city in the country to achieve the considerable benefits of a fair workweek ordinance using a reward for compliance instead of a penalty for non-compliance.

The Proposed Fair Workweek Employment Standards Ordinance would reward compliant employers with a 25% discount on their business license tax. Berkeley can lead the way and show that cooperation between labor and business results in greater compliance to employees in all industries instead of a few, which will result in a much greater benefit to the community.

ENVIRONMENTAL SUSTAINABILITY

No impact.

RATIONALE FOR RECOMMENDATION

See above.

ALTERNATIVE ACTIONS CONSIDERED

None.

CITY MANAGER

Refer to the City Manager.

CONTACT PERSON

Margy Wilkinson, Commission Chairperson (510) 219-2567
Delfina M. Geiken, Commission Secretary (510) 981-7551

Attachments:

1: Ordinance

**CHAPTER 13.105
FAIR WORKWEEK EMPLOYMENT STANDARDS**

Sections:

- 13.105.010 Definitions.
- 13.105.020 Applicability.
- 13.105.030 Alternative Compliance - Waiver through Collective Bargaining
- 13.105.040 Advance Notice of Work Schedules.
- 13.105.050 Notice, and Right to Decline, and Compensation for Schedule Changes.
- 13.105.060 Offer of Work to Existing Employees.
- 13.105.070 Right to Rest.
- 13.105.080 Right to Request a Flexible Working Arrangement.
- 13.105.090 Notice and Posting~~Prohibition on Refusing Hours to Prevent the~~
Application of Benefits.
- 13.105.100 Notice and Posting~~Implementation.~~
- 13.105.110 Discount on Business License Tax~~Implementation.~~
- ~~13.105.120 Enforcement.~~
- ~~13.105.130 Private Rights of Action.~~
- 13.105.140 Remedies~~Retaliation Barred.~~
- ~~13.105.150 Retaliation Barred.~~
- ~~13.105.160 Retention of Records.~~
- 13.105.170 City Access~~No Preemption of Higher Standards.~~
- 13.105.180 Severability~~No Preemption of Higher Standards.~~
- ~~13.105.190 Severability.~~

13.105.010 Definitions.

As used in this chapter, the following terms shall have the following meanings:

- A. "Calendar week" shall mean a period of seven (7) consecutive days starting on Sunday.
- B. "City" shall mean the City of Berkeley.
- C. "Department" shall mean the Department of Finance or other City department or agency as the City shall by resolution designate.
- D. "Employee" shall mean any person who:
 - 1. In a calendar week performs at least two (2) hours of work within the geographic boundaries of the City of Berkeley for an employer; and
 - 2. Qualifies as an employee entitled to payment of a minimum wage from any employer under the California minimum wage law, as provided under Section 1197 of the California Labor Code and wage orders published by the California Industrial Welfare Commission. Employees shall include learners, as defined by the California Industrial Welfare Commission.
- E. "Employer" shall mean any person, association, organization, partnership, business trust, limited liability company, or corporation who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of any

~~person, any person (including a natural person, corporation, nonprofit corporation, general partnership, limited partnership, limited liability partnership, limited liability company, business trust, estate, trust, association, joint venture, agency, instrumentality, or any other legal or commercial entity, whether domestic or foreign) who directly or indirectly (including through the services of a temporary services or staffing agency or similar entity) employs or exercises control over the wages, hours or working conditions of any employee.~~

Commented [KS1]: DLSE definition

~~F. "Establishment" shall mean a business or industrial unit at a single location that distributes goods or performs services.~~

~~G. "Restaurant" shall mean a Food Service Establishment as defined in BMC Section 23F.04.010.~~

~~H. "Firm" shall mean a business organization or entity consisting of one (1) or more establishments under common ownership or control. In the case of a franchise, the franchisor shall be considered the firm.~~

~~I. "Franchise" shall have the meaning in California Business and Professions Code Section 20001.~~

~~J. "Franchisee" shall have the meaning in California Business and Professions Code Section 20002.~~

~~K. "Franchisor" shall have the meaning in California Business and Professions Code Section 20003.~~

~~L.F. "Good faith" shall mean a sincere intention to deal fairly with others.~~

~~M. "Hotel" shall mean a Boarding House, Hostel, Tourist Hotel, Residential Hotel, or Motel, but not a Bed and Breakfast Establishment, as defined in BMC Section 23F.04.010.~~

~~N. "Predictability pay" shall mean wages paid to an employee, calculated on an hourly basis at the employee's regular rate of pay as that term is used in 29 U.S.C. Section 207(e), as compensation for schedule changes made by an employer to an employee's schedule pursuant to Section 13.105.04, in addition to any wages earned for work performed by that employee.~~

~~O. "Retail" shall mean a Retail Products Store as defined in BMC Section 23F.04.010.~~

~~P. "Shift" shall mean the consecutive hours an employer requires an employee to work including employer-approved meal periods and rest periods.~~

~~Q.G. "Work schedule" shall mean all of an employee's shifts, including specific start and end times for each shift, during a calendar week.~~

13.105.020 Applicability.

~~A. All sections of this chapter shall apply to all employers in the City of Berkeley, other than as specified in subsections (B) and (C) of this Section, and in Section 13.105.030.~~

~~B. Sections 13.105.040 and 13.105.050 shall apply only to employers for which at least one~~

of the following is true:

~~G.— Greater than **XX** persons work for compensation for the employer during a given week.~~

~~1.— The employer is a franchisee associated with a franchisor or a network of franchisees with franchisees with more than twelve (12) locations globally.~~

~~D.— Section 13.105.060 shall apply only to employers for which both of the following are true:~~

~~1.— The employer satisfies the criteria for application of subsection (B) of this section.~~

~~2.— The employer qualifies as either a Retail, Hotel, or Restaurant firm, or a combination of these.~~

~~E.— Sections 13.105.040, 13.105.050, and 13.105.060 shall apply to the following employers, regardless of whether they fall under the provisions of subsections B and C above.~~

~~1.— The City of Berkeley~~

~~2.— The Berkeley Rent Stabilization Board~~

~~F.— In determining the number of employees performing work for an employer during a given week, all employees performing work for the employer for compensation on a full-time, part-time, or temporary basis shall be counted, including employees made available to work through the services of a temporary services or staffing agency or similar entity.~~

~~G.— For the purposes of determining whether an employer falls under the provisions of subsections (B) and (C) of this section, separate entities that form an integrated enterprise shall be considered a single employer under this chapter. Separate entities will be considered an integrated enterprise and a single employer under this chapter where a separate entity controls the operation of another entity. The factors to consider in making this assessment include, but are not limited to:~~

~~1.— Degree of interrelation between the operations of multiple entities;~~

~~2.— Degree to which the entities share common management;~~

~~3.— Centralized control of labor relations; and~~

~~4.— Degree of common ownership or financial control over the entities.~~

~~There shall be a presumption that separate legal entities, which may share some degree of interrelated operations and common management with one another, shall be considered separate employers for purposes of this chapter as long as:~~

~~1.— the separate legal entities operate substantially in separate physical locations from one another, and~~

~~2.— each separate legal entity has partially different ultimate ownership.~~

13.105.030 Alternative Compliance – Waiver through Collective Bargaining

To the extent permitted 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.

13.105.040 Advance Notice of Work Schedules.

A. Prior to or on commencement of employment, an employer shall provide each employee with a good faith estimate in writing of the employee's work schedule.

B. Prior to or on commencement of employment, the employee may request that the employer modify the estimated work schedule provided under subsection A of this section. The employer shall consider any such request, and in its sole discretion may accept or reject the request; provided, that the employer shall notify the employee of employer's determination in writing prior to or on commencement of employment.

C. An employer shall provide its employees with at least two (2) weeks' notice of their work schedules by doing one (1) of the following at least every fourteen (14) days (on a "biweekly schedule"):

1. posting the work schedule in a conspicuous place at the workplace that is readily accessible and visible to all employees; or
2. transmitting the work schedule by electronic means, so long as all employees are given access to the electronic schedule at the workplace.

D. For new employees, an employer shall provide the new employee prior to or on his or her first day of employment with an initial work schedule that runs through the date that the next biweekly schedule for existing employees is scheduled to be posted or distributed. Thereafter, the employer shall include the new employee in an existing biweekly schedule with other employees. If the employer changes an employee's work schedule after it is posted and/or transmitted, such changes shall be subject to the notice and compensation requirements set forth in this chapter.

13.105.050 Notice, ~~and Right to Decline, and Compensation for Schedule Changes.~~

A. An employer shall provide an employee notice of any change to the employee's posted or transmitted work schedule. The employer shall provide such notice by in-person conversation, telephone call, email, text message, or other electronic communication. This notice requirement shall not apply to any schedule changes the employee initiates, such as employee requested sick leave, time off, shift trades, or additional shifts.

B. Subject to the exceptions in subsection (D) of this section, an employee has the right to decline any previously unscheduled hours that the employer adds to the employee's schedule, and for which the employee has been provided advance notice of less than fourteen (14) days.

~~C. Subject to the exceptions in subsection (D) of this section, an employer shall provide an employee with the following compensation per shift for each previously scheduled shift that the~~

~~employer adds or subtracts hours, moves to another date or time, cancels, or each previously unscheduled shift that the employer adds to the employee's schedule:~~

- ~~1.—with less than fourteen (14) days' notice, but twenty-four (24) hours or more notice to the employee: one (1) hour of predictability pay;~~
- ~~2.—with less than twenty-four (24) hours to the employee
 - ~~a.—four (4) hours or the number of hours in the employee's scheduled shift, whichever is less, when hours are canceled or reduced;~~
 - ~~b.—one (1) hour of predictability pay for all other changes. The compensation required by this subsection shall be in addition to the employee's regular pay for working that shift.~~~~

~~D.—Exceptions. The requirements of section C above shall not apply under any of the following circumstances:~~

- ~~1.—Operations cannot begin or continue due to threats to employers, employees or property, or when civil authorities recommend that work not begin or continue;~~
- ~~2.—Operations cannot begin or continue because public utilities fail to supply electricity, water, or gas, or there is a failure in the public utilities or sewer system;~~
- ~~3.—Operations cannot begin or continue due to: acts of nature (including but not limited to flood, fire, explosion, earthquake, tidal wave, drought), war, civil unrest, strikes, or other cause not within the employer's control;~~
- ~~4.—Mutually agreed-upon work shift swaps or coverage among employees.~~
- ~~5.—To accommodate the following transitions in shifts:
 - ~~a.—If an employee works past the end of a scheduled shift to complete service to a customer, which service would entitle the employee to receive a commission, tip, or other incentive pay based on the completion of that service, provided the employee is compensated at their regular rate of pay for the additional work performed by the employee.~~
 - ~~b.—An employee begins or ends their scheduled shift no more than ten minutes prior to or after the scheduled shift, provided the employee is compensated at their regular rate of pay for the additional work performed by the employee.~~~~
- ~~6.—Employee initiated voluntary shift modifications, such as voluntary requests to leave a scheduled shift prior to the end of the shift.~~

~~E.C.~~ Nothing in this section shall be construed to prohibit an employer from providing greater advance notice of employee's work schedules and/or changes in schedules than that required by this section.

13.105.060 Offer of Work to Existing Employees.

Subject to the limitations herein, before hiring new employees or contract employees, including hiring through the use of temporary services or staffing agencies, an employer shall first offer additional hours of work to existing part-time employee(s) if the part-time employee(s) are qualified to do the additional work, as reasonably and in good faith determined by the employer. This section requires employers to offer to part-time employees only up to the number of hours required to give the part-time employee thirty-five (35) hours of work in a calendar week.

~~An employer has discretion to divide the additional work hours among part-time employees consistent with this section; provided, that: (1) the employer's system for distribution of hours must not discriminate on the basis of race, color, creed, religion, ancestry, national origin, sex, sexual orientation, gender identity, disability, age, marital or familial status, nor on the basis of family caregiving responsibilities or status as a student; and (2) The employer may not distribute hours in a manner intended to avoid the application of the Patient Protection and Affordable Care Act, 42 U.S.C. Section 18001 or the granting of any other benefits that an employee earns based on hours worked.~~

~~A. A part-time employee may, but is not required to, accept the employer's offer of additional work under this section.~~

~~1. For additional work for an expected duration of more than two (2) weeks, the part-time employee shall have seventy-two (72) hours to accept the additional hours, after which time the employer may hire new employees to work the additional hours.~~

~~2. When the employer's offer of additional work under this section is for an expected duration of two (2) weeks or less, the part-time employee shall have twenty-four (24) hours to accept the additional hours, after which time the employer may hire new employees to work the additional hours.~~

~~3. The twenty-four (24) or seventy-two (72) hour periods referred to in this subsection begin either when the employee receives the written offer of additional hours, or when the employer posts the offer of additional hours as described in subsection (d) of this section, whichever is sooner. A part-time employee who wishes to accept the additional hours must do so in writing.~~

~~B. When this section requires an employer to offer additional hours to existing part-time employees, the employer shall make the offer either in writing or by posting the offer in a conspicuous location in the workplace where notices to employees are customarily posted. Employers may post the notice electronically on an internal website in a conspicuous location and which website is readily accessible to all employees. The notice shall include the total hours of work being offered, the schedule of available shifts, whether those shifts will occur at the same time each week, and the length of time the employer anticipates requiring coverage of the additional hours, and the process by which part-time employees may notify the employer of their desire to work the offered hours.~~

~~C. The employer shall retain each written offer no less than three (3) years as required under Section 13.105.150.~~

~~D. This section shall not be construed to require any employer to offer employees work hours paid at a premium rate under California Labor Code Section 510 nor to prohibit any employer from offering such work hours.~~

13.105.070 Right to Rest.

An employee has the right to decline work hours that occur:

1. Less than eleven (11) hours after the end of the previous day's shift; or
2. During the eleven (11) hours following the end of a shift that spanned two (2) days.

~~A. An employee who agrees in writing to work hours described in this section shall be compensated at one and one-half (1-1/2) times the employee's regular rate of pay for any hours worked less than eleven (11) hours following the end of a previous shift.~~

13.105.080 Right to Request a Flexible Working Arrangement.

An employee has the right to request a modified work schedule, including but not limited to additional shifts or hours; changes in days of work or start and/or end times for the shift; permission to exchange shifts with other employees; limitations on availability; part-time employment; job sharing arrangements; reduction or change in work duties; or part-year employment. ~~An employer shall not retaliate against an employee for exercising his or her rights under this section.~~

~~13.105.090 Prohibition on Refusing Hours to Prevent the Application of Benefits.~~

~~Employers may not distribute new hours or refuse employees additional hours for the reason that such an increase in hours would result in the application of the Patient Protection and Affordable Care Act, 42 U.S.C. Section 18001 or the granting of any other benefits that an employee earns based on hours worked, with the exception of overtime benefits.~~

13.105.090 Notice and Posting.

A. The Department shall publish and make available to employers, in English and other languages as provided in any implementing regulations, a notice suitable for posting by employers in the workplace informing employees of their rights under this chapter.

B. Each employer shall give written notification to each current employee and to each new employee at time of hire of his or her rights under this chapter. The notification shall be in English and other languages as provided in any implementing regulations, and shall also be posted prominently in areas at the work site where it will be seen by all employees. Every employer shall also provide each employee at the time of hire with the employer's name, address, and telephone number in writing. ~~Failure to post such notice shall render the employer subject to administrative citation, pursuant to the provisions of this chapter.~~ The Department is authorized to prepare sample notices and employer use of such notices shall constitute compliance with this subsection.

13.105.100 Implementation.

A. The Department shall be authorized to coordinate implementation and enforcement of this Chapter and shall promulgate appropriate guidelines or rules for such ~~purposes within 90 days of the date on which this Chapter becomes effective. The Department shall seek out partnerships with community based organizations and collaborate with the Berkeley Labor~~

Commented [KS2]: Retaliation not permitted for entire Chapter.

Commented [KS3]: Scheduling employees to avoid the ACA employer mandate likely violates ERISA. Dave & Buster's has a proposed \$7.4 million settlement regarding this issue.

Commission to facilitate effective implementation and enforcement of this Chapter. Any guidelines or rules promulgated by the Department shall have the force and effect of law and may be relied on by Employers, Employees and other parties to determine their rights and responsibilities under this Chapter. Any guidelines or rules may establish procedures for ensuring fair, efficient and cost-effective implementation of this Chapter, including supplementary procedures for helping to inform Employees of their rights under this Chapter, for monitoring Employer compliance with this Chapter, and for providing administrative hearings to determine whether an Employer or other person has violated the requirements of this Chapter.

B. An Employee or any other person may report to the Department in writing any suspected violation of this Chapter. The Department shall encourage reporting pursuant to this subsection by keeping confidential, to the maximum extent permitted by applicable laws, the name and other identifying information of the Employee or person reporting the violation. Provided, however, that with the authorization of such person, the Department may disclose his or her name and identifying information as necessary to enforce this Chapter or other Employee protection laws. In order to further encourage reporting by Employees, if the Department notifies an Employer that the Department is investigating a complaint, the Department shall require the Employer to post or otherwise notify its Employees that the Department is conducting an investigation, using a form provided by the Department. Failure to post such notice shall render the Employer subject to administrative citation, pursuant to Section 90, Subsection A, of this Chapter.

C. The Department shall be responsible for investigating any possible violations of this Chapter by an Employer or other person. The Department shall have the authority to inspect workplaces, interview persons and request the City Attorney to subpoena books, papers, records, or other items relevant to the enforcement of this Chapter.

D. The Department shall make every effort to resolve complaints informally, in a timely manner, and shall have a policy that the Department shall take no more than six months to resolve any matter, before initiating an enforcement action. The failure of the Department to meet these timelines within six months shall not be grounds for closure or dismissal of the complaint.

13.105.110 Discount on Business License Tax.

A. An employer with more than one employee who complies with this Chapter 13.105 for a calendar year shall be entitled to a twenty-five percent (25%) reduction in its business license tax under Chapter 9.04, unless the employer has more than ten (10) valid complaints filed with the City in the calendar year in which the discount is sought. Complaints by different employees shall be counted separately. Complaints by the same employee based on different circumstances or a different time period shall also be counted separately.

B. An employee may file a complaint with the City if the employee's employer is in violation with this Chapter 13.105. The complaint shall state with specificity the facts, witnesses, and dates underlying the violation.

C. The City shall track complaints. If an employer accumulates more than ten (10) valid complaints in a calendar year, the employer is ineligible for the discount on its business license described in subsection A.

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D. The City need not determine whether a complaint is valid, unless an employer requests a hearing to determine the validity of the complaints filed against it in a calendar year.

13.105.110 Enforcement.

~~Where prompt compliance is not forthcoming, the City and the Department shall take any appropriate enforcement action to secure compliance, including but not limited to the following:~~

~~A. The City may issue an Administrative Citation pursuant to Chapter 1.28 of the Berkeley Municipal Code. The amount of this fine shall vary based on the provision of this Chapter being violated, as specified below:~~

~~1. A fine of one thousand dollars (\$1,000.00) may be assessed for retaliation by an Employer against an Employee for exercising rights protected under this Chapter for each Employee retaliated against.~~

~~2. A fine of five hundred dollars (\$500.00) may be assessed for any of the following violations of this Chapter:~~

~~a. Failure to provide notice of employees' rights under this chapter.~~

~~b. Failure to timely provide an initial work schedule or to timely update work schedules following changes.~~

~~c. Failure to provide predictability pay for schedule changes with less than twenty-four (24) hours' advance notice.~~

~~d. Failure to offer work to existing employees before hiring new employees or temporary staff or to award work to a qualified employee.~~

~~e. Failure to maintain payroll records for the minimum period of time as provided in this chapter.~~

~~f. Failure to allow the Department access to payroll records.~~

~~3. A fine equal to the total amount of appropriate remedies, pursuant to section 13.105.130. 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 Department in a prompt manner.~~

~~B. Alternatively, the City may pursue administrative remedies in accordance with the following procedures:~~

~~1. Whenever the City determines that a violation of any provision of this Chapter is occurring or has occurred, the City may issue a written compliance order to the Employer responsible for the violation.~~

~~a. A compliance order issued pursuant to this chapter shall contain the following information:~~

- i. The date and location of the violation;
 - ii. A description of the violation;
 - iii. The actions required to correct the violation;
 - iv. The time period after which administrative penalties will begin to accrue if compliance with the order has not been achieved;
 - v. Either a copy of this Chapter or an explanation of the consequences of noncompliance with this Chapter and a description of the hearing procedure and appeal process;
 - vi. A warning that the compliance order shall become final unless a written request for hearing before the City is received within fourteen days of receipt of the compliance order.
- b. Following receipt of a timely request for a hearing, the City shall provide the Employer responsible for the violation with a hearing and, if necessary, a subsequent appeal to the City Council that affords the Employer due process. During the pendency of the hearing and any subsequent appellate process, the City will not enforce any aspect of the compliance order.

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

13.105.120 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.

13.105.130 Remedies.

A. The remedies for violation of this chapter include but are not limited to:

- 1. Reinstatement, the payment of predictability pay 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.
- 2. 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 Part 1 (commencing with Section 200) of Division 2 of the California Labor Code, to the date the wages are paid in full.

~~3.—Reimbursement of the City’s administrative costs of enforcement and reasonable attorney’s fees.~~

~~4.—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 Department 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.~~

~~B.—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.~~

~~C.—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.~~

13.105.140 Retaliation Barred.

~~It shall be unlawful for an employer to take adverse action against any person in retaliation for exercising rights under this Chapter 13.105. An employer shall not discharge, reduce the compensation of, discriminate against, or take any adverse employment action against an employee, including discipline, suspension, transfer or assignment to a lesser position in terms of job classification, job security, or other condition of employment, reduction of hours or denial of additional hours, informing another employer that the person has engaged in activities protected by this chapter, or reporting or threatening to report the actual or suspected citizenship or immigration status of an employee, former employee or family member of an employee to a Federal, State or local agency, for making a complaint to the Department, participating in any of the Department’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.~~

13.105.150 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, initial posted schedule and all subsequent changes to that schedule, consent to work hours where such consent is required by this chapter, and documentation of the time and method of offering additional hours of work to existing staff. Each employer shall provide each employee a copy of the records relating to such employee upon the employee’s reasonable request.~~

13.105.160 City Access.

~~Each employer shall permit access to work sites and relevant records for authorized Department 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.~~

13.105.170 No Preemption of Higher Standards.

The purpose of this chapter is to ensure minimum labor standards. This chapter does not preempt or prevent the establishment of superior employment standards (including higher wages) or the expansion of coverage by ordinance, resolution, contract, or any other action of the City. This chapter shall not be construed to limit a discharged employee's right to bring a common law cause of action for wrongful termination.

13.105.180 Severability.

If any part or provision of this ordinance, or the application of this ordinance to any person or circumstance, is held invalid, the remainder of this ordinance, including the application of such part or provisions to other persons or circumstances, shall not be affected by such a holding and shall continue in full force and effect. To this end, the provisions of this ordinance are severable.

**CHAPTER 13.105
FAIR WORKWEEK EMPLOYMENT STANDARDS**

Sections:

- 13.105.010 Definitions.**
- 13.105.020 Applicability.**
- 13.105.030 Alternative Compliance - Waiver through Collective Bargaining**
- 13.105.040 Advance Notice of Work Schedules.**
- 13.105.050 Notice and Right to Decline.**
- 13.105.060 Offer of Work to Existing Employees.**
- 13.105.070 Right to Rest.**
- 13.105.080 Right to Request a Flexible Working Arrangement.**
- 13.105.090 Notice and Posting.**
- 13.105.100 Implementation.**
- 13.105.110 Discount on Business License Tax.**
- 13.105.140 Retaliation Barred.**
- 13.105.170 No Preemption of Higher Standards.**
- 13.105.180 Severability.**

13.105.010 Definitions.

As used in this chapter, the following terms shall have the following meanings:

- A. "Calendar week" shall mean a period of seven (7) consecutive days starting on Sunday.
- B. "City" shall mean the City of Berkeley.
- C. "Department" shall mean the Department of Finance or other City department or agency as the City shall by resolution designate.
- D. "Employee" shall mean any person who:
 - 1. In a calendar week performs at least two (2) hours of work within the geographic boundaries of the City of Berkeley for an employer; and
 - 2. Qualifies as an employee entitled to payment of a minimum wage from any employer under the California minimum wage law, as provided under Section 1197 of the California Labor Code and wage orders published by the California Industrial Welfare Commission. Employees shall include learners, as defined by the California Industrial Welfare Commission.
- E. "Employer" shall mean any person, association, organization, partnership, business trust, limited liability company, or corporation who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of any person.
- F. "Good faith" shall mean a sincere intention to deal fairly with others.
- G. "Work schedule" shall mean all of an employee's shifts, including specific start and end times for each shift, during a calendar week.

13.105.020 Applicability.

A. All sections of this chapter shall apply to all employers in the City of Berkeley.

13.105.030 Alternative Compliance – Waiver through Collective Bargaining

To the extent permitted 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.

13.105.040 Advance Notice of Work Schedules.

A. Prior to or on commencement of employment, an employer shall provide each employee with a good faith estimate in writing of the employee's work schedule.

B. Prior to or on commencement of employment, the employee may request that the employer modify the estimated work schedule provided under subsection A of this section. The employer shall consider any such request, and in its sole discretion may accept or reject the request; provided, that the employer shall notify the employee of employer's determination in writing prior to or on commencement of employment.

C. An employer shall provide its employees with at least two (2) weeks' notice of their work schedules by doing one (1) of the following at least every fourteen (14) days (on a "biweekly schedule"):

1. posting the work schedule in a conspicuous place at the workplace that is readily accessible and visible to all employees; or
2. transmitting the work schedule by electronic means, so long as all employees are given access to the electronic schedule at the workplace.

D. For new employees, an employer shall provide the new employee prior to or on his or her first day of employment with an initial work schedule that runs through the date that the next biweekly schedule for existing employees is scheduled to be posted or distributed. Thereafter, the employer shall include the new employee in an existing biweekly schedule with other employees. If the employer changes an employee's work schedule after it is posted and/or transmitted, such changes shall be subject to the notice and compensation requirements set forth in this chapter.

13.105.050 Notice and Right to Decline.

A. An employer shall provide an employee notice of any change to the employee's posted or transmitted work schedule. The employer shall provide such notice by in-person conversation, telephone call, email, text message, or other electronic communication. This notice requirement shall not apply to any schedule changes the employee initiates, such as employee requested sick leave, time off, shift trades, or additional shifts.

B. Subject to the exceptions in subsection (D) of this section, an employee has the right to decline any previously unscheduled hours that the employer adds to the employee's schedule, and for which the employee has been provided advance notice of less than fourteen (14) days.

C. Nothing in this section shall be construed to prohibit an employer from providing greater advance notice of employee's work schedules and/or changes in schedules than that required by this section.

13.105.060 Offer of Work to Existing Employees.

Subject to the limitations herein, before hiring new employees or contract employees, including hiring through the use of temporary services or staffing agencies, an employer shall first offer additional hours of work to existing part-time employee(s) if the part-time employee(s) are qualified to do the additional work, as reasonably and in good faith determined by the employer. This section requires employers to offer to part-time employees only up to the number of hours required to give the part-time employee thirty-five (35) hours of work in a calendar week.

13.105.070 Right to Rest.

An employee has the right to decline work hours that occur:

1. Less than eleven (11) hours after the end of the previous day's shift; or
2. During the eleven (11) hours following the end of a shift that spanned two (2) days.

13.105.080 Right to Request a Flexible Working Arrangement.

An employee has the right to request a modified work schedule, including but not limited to additional shifts or hours; changes in days of work or start and/or end times for the shift; permission to exchange shifts with other employees; limitations on availability; part-time employment; job sharing arrangements; reduction or change in work duties; or part-year employment.

13.105.090 Notice and Posting.

A. The Department shall publish and make available to employers, in English and other languages as provided in any implementing regulations, a notice suitable for posting by employers in the workplace informing employees of their rights under this chapter.

B. Each employer shall give written notification to each current employee and to each new employee at time of hire of his or her rights under this chapter. The notification shall be in English and other languages as provided in any implementing regulations, and shall also be posted prominently in areas at the work site where it will be seen by all employees. Every employer shall also provide each employee at the time of hire with the employer's name, address, and telephone number in writing. The Department is authorized to prepare sample notices and employer use of such notices shall constitute compliance with this subsection.

13.105.100 Implementation.

A. The Department shall be authorized to coordinate implementation and enforcement of this Chapter and shall promulgate appropriate guidelines or rules for such.

13.105.110 Discount on Business License Tax.

A. An employer with more than one employee who complies with this Chapter 13.105 for a calendar year shall be entitled to a twenty-five percent (25%) reduction in its business license tax under Chapter 9.04, unless the employer has more than ten (10) valid complaints filed with the City in the calendar year in which the discount is sought. Complaints by different employees shall be counted separately. Complaints by the same employee based on different circumstances or a different time period shall also be counted separately.

B. An employee may file a complaint with the City if the employee's employer is in violation with this Chapter 13.105. The complaint shall state with specificity the facts, witnesses, and dates underlying the violation.

C. The City shall track complaints. If an employer accumulates more than ten (10) valid complaints in a calendar year, the employer is ineligible for the discount on its business license described in subsection A.

D. The City need not determine whether a complaint is valid, unless an employer requests a hearing to determine the validity of the complaints filed against it in a calendar year.

13.105.140 Retaliation Barred.

It shall be unlawful for an employer to take adverse action against any person in retaliation for exercising rights under this Chapter 13.105.

13.105.170 No Preemption of Higher Standards.

The purpose of this chapter is to ensure minimum labor standards. This chapter does not preempt or prevent the establishment of superior employment standards (including higher wages) or the expansion of coverage by ordinance, resolution, contract, or any other action of the City. This chapter shall not be construed to limit a discharged employee's right to bring a common law cause of action for wrongful termination.

13.105.180 Severability.

If any part or provision of this ordinance, or the application of this ordinance to any person or circumstance, is held invalid, the remainder of this ordinance, including the application of such part or provisions to other persons or circumstances, shall not be affected by such a holding and shall continue in full force and effect. To this end, the provisions of this ordinance are severable.