



Commission on Labor

ACTION CALENDAR

September 15, 2015

To: Honorable Mayor and Members of the City Council  
 From: Commission on Labor  
 Submitted by: Wendy Bloom, Chairperson, Commission on Labor  
 Subject: Revisions to Minimum Wage Ordinance B.M.C 13.99

RECOMMENDATION

Adopt first reading of an Ordinance amending Berkeley Municipal Code Chapter 13.99 that will ensure the Berkeley Minimum Wage Ordinance is successful in promoting and protecting the rights and the individual self-reliance of working people in Berkeley by raising the minimum wage to a living wage, adding an annual cost of living adjustment, and granting adequate paid sick leave to all workers.

SUMMARY

At the regular meeting of the Commission on labor on July 15, 2015, the commission approved the following motion:

M/S/C (Teter/Sayre) to accept draft ordinance and report with minor edits and to forward to City Council for the September 15, 2015 meeting.

Ayes: S. Frankel, B. Dixon, A. Teter, I. Yu, L. Sayre

Noes: None

Absent: J. Fillingim, S. Kessler

Leave of Absence: W. Bloom

The policy objectives of the amendments recommended by the Commission on Labor are as follows:

1. Expand the wage schedule in order to make the minimum wage a living wage. This is accomplished by continuing to phase in moderate annual increases, comparable to or smaller than those that have already been put into place, until the City's minimum wage reaches parity with the local cost of living in 2020.
2. Include an automatic cost of living adjustment to the City's minimum wage, starting in 2021, in order to keep the policy in step with the regional economy and prevent it from rapidly becoming obsolete.
3. Include a system of mandatory Paid Sick Leave that is fair for both Employers and

Employees, based on the successful policy model used by the City and County of San Francisco, where workers earn Paid Sick Leave based on the number of hours they've worked, with a cap based on the size of their Employer's business.

4. Establish clear rules and regulations around service charges in order to provide clear guidelines for local business owners and protect workers from wage and tip theft, based on the successful policy model used by the City of Oakland.
5. Clarify the existing exemptions within the ordinance. The exemption for job-training programs shall be clarified to specify its application only to temporary job-training positions. Temporary is defined as no more than 1040 working hours in any 365 day period. The exemption for on-call workers is removed in its entirety. The exemption for collective-bargaining agreements is corrected to properly reference federal law.

#### FISCAL IMPACTS OF RECOMMENDATION

The Commission foresees no significant fiscal impact resulting from these recommendations.

In the short term, the primary possible impact of these recommendations would be an increase in the amount of City Staff time spent on implementation and enforcement. However, due to the passive enforcement model utilized by the Minimum Wage Ordinance, wherein investigations are only launched when complaints are filed, and also due to the inclusion of a mechanism for informal resolution between Employees and Employers, which has proven highly effective thus far, this potential impact would be minimized.

In the long term, the City is predicted to directly benefit from the increase in tax revenues brought about by the elevated levels of consumer spending that occur when low-wage workers are lifted out of poverty. The City may also enjoy indirect benefits, financial and otherwise, associated with the resulting reduction in local poverty, such as a drop in crime or a boost to educational achievement, though these effects are difficult to isolate and quantify.

#### CURRENT SITUATION AND ITS EFFECTS

As of October 1<sup>st</sup> 2014, the minimum wage rate in Berkeley is \$10 per hour, which is approximately \$6 per hour less than is necessary for a single full-time worker in Berkeley to be financially self-reliant. In such a minimum wage workers' annual budget, this equates to a shortfall of roughly \$12,500 worth of basic living expenses that they must suffer for lack of, go into debt to cover, or rely on public safety net programs to provide. Government data shows that more than one third of the workers in California's food-retail sector, where minimum wage labor is concentrated, rely on some form of public assistance. The total cost to the state's taxpayers for this assistance, which essentially subsidizes the labor costs of low-wage employers, is in excess of \$662 million each year. The scheduled increase to \$11 per hour in 2015 and \$12.53 per hour in 2016 are each expected to reduce the relative size of this budget shortfall, also

known as the working poverty gap, but they remain far from eliminating it entirely. The gap can reliably be expected to begin widening again in 2017 and each year thereafter, as inflation drives up the local cost of living relative to the fixed minimum wage of \$12.53 per hour. As such, the current version of the Minimum Wage Ordinance lacks a long-term solution to the fundamental problem of working people living in poverty due to stagnant wages.

Current state law regarding Paid Sick Leave allows workers to accumulate one hour of Paid Sick Leave for every 30 hours worked, but allows Employers to limit the use of Paid Sick Leave an Employee can take in one year to 24 hours, or 3 working days. The lack of an adequate amount of Paid Sick Leave means that workers are still likely to go to work while sick, which creates both health and economic hazards for workers, businesses, and consumers.

In response to changes in various municipal minimum wage policies, many businesses in the East Bay region, particularly in the food service sector, where the largest portion of minimum wage labor is concentrated, have altered their price/compensation structures to include automatic “service charges” with each bill. These automatic service charges are often presented or seen as an alternative to customers’ voluntary tipping/gratuity. However, compared to tipping/gratuity, which is very well-defined as the sole property of Employees and protected under both municipal and state law, the legal definition of a “service charge” is ambiguous, and no such labor protections exist regarding how the money is used and/or distributed by Employers. This “non-policy” leaves workers structurally vulnerable to wage and tip theft, creates liability risks for Employers utilizing such a system, and causes confusion among local consumers regarding how the money is being used.

The Commission notes that several of the issues addressed by these recommendations have also been the subject of policies recently enacted at the state level. Although the Berkeley Commission on Labor applauds the work and progress of our state legislature, the Commission feels that it is absolutely necessary for the City of Berkeley to engage these issues at the local level. None of California’s recent state-wide regulations currently go far enough to adequately protect workers, nor are they structurally suited to take into account local economic conditions in Berkeley.

In recognition of this urgent need for action, other cities in the Bay Area, such as San Francisco, San Jose, Oakland, Emeryville, and Richmond, have all begun to raise their own municipal minimum wages and bring them closer to the relative cost of living. In some cases, however, areas with lower costs of living have instated higher minimum wages than currently in place in Berkeley, demonstrating that the City’s relatively new Minimum Wage Ordinance has already begun to lag behind the regional norm.

### BACKGROUND

In April of 2013, Mayor Tom Bates, along with co-sponsoring Councilmembers Jesse Arreguin and Kriss Worthington, introduced a resolution directing the Commission on

Labor to prepare recommendations regarding the implementation of a city-wide minimum wage. The resolution was unanimously passed, and the Commission on Labor began researching, drafting, and conducting public outreach in May 2013. The Commission submitted its original draft of the Minimum Wage Ordinance in January of 2014. The City Council passed an amended version of the ordinance in June of 2014, the first phase of which went into effect on October 1st of that same year, raising the minimum wage in Berkeley to \$10 per hour.

In September of 2014, Councilmembers Linda Maio and Darryl Moore directed the Commission on Labor to review the correspondence and materials received during the public debate and return to City Council with recommendations regarding sick leave, other benefits, and any other features that should be considered and enacted as part of the Minimum Wage. In accordance with this directive, the Commission on Labor and the Sub-Committee on the Minimum Wage conducted extensive outreach with community stakeholders, including representatives of both labor and business (particularly small businesses), in order to gather information and facilitate participation by the public.

#### ENVIRONMENTAL SUSTAINABILITY

The amendments recommended by the Commission on Labor are not expected to have any negative effect on the City's environmental sustainability.

The Commission on Labor notes the existence of an extensive body of scientific literature detailing the relationship between economic and environmental conditions. This research clearly demonstrates that poverty has a negative impact on the environment by incentivizing short-term rewards and the externalization of costs, which impedes the ability of impoverished workers to make sound long-term decisions regarding the health of their environment. If workers cannot sustain themselves on current sub-poverty wage levels, they cannot be realistically expected to help sustain their local environment. To the extent that a sound minimum wage policy combats poverty and enables citizens to both work and live locally, these amendments will promote environmental sustainability in Berkeley.

#### RATIONALE FOR RECOMMENDATION

It is the view of the Commission on Labor that these amendments are necessary for a functional and fair minimum wage policy for the City of Berkeley, and furthermore, that such a policy is necessary for a healthy economy and for the ongoing welfare of the community. Municipal minimum wages have repeatedly demonstrated themselves to be a highly effective means of combating poverty among working families while stimulating the local economy at the same time, significantly benefitting the community as a whole. Critical opposition and predictions of negative impacts resulting from such policies, on the other hand, are largely unsupported by real research and based on anecdotal information promulgated by special interests. The body of sound empirical evidence clearly shows that the overall effect of raising the minimum wage on the local economy is overwhelmingly positive.

Throughout the public outreach process conducted during the drafting process, the Commission received strong support from Berkeley citizens for the proposed amendments. The Commission observed a widespread desire to see Berkeley demonstrate leadership in regard to establishing fair labor practices, and to keep pace with other municipalities in the region as they modernize their own labor policies. Consumer opinions also indicated an interest in ethical consumption and a strong willingness to support businesses they knew were providing livable wages and fair conditions to workers. Berkeley business owners expressed an almost universal desire to pay out higher wages and retain quality workers, but expressed concerns about having to remain economically competitive while doing so. Having a municipal minimum wage tied to the local cost of living is the simplest and most reliable way to address these concerns, protect responsible business owners from unfair competition, and promote an ethically responsible local economy that provides for all the members of the community.

It is almost universally recognized among economists and policymakers that including a cost of living adjustment is fundamentally necessary for a minimum wage policy to work as it was intended. Such provisions are considered good standard practice for minimum wage policies, since, without such a provision, the policy is guaranteed to become obsolete and require amendment at a later date. Similarly, a minimum wage policy that falls short of providing a living wage to workers is fundamentally incapable of solving the problem it sets out to address, i.e. working families living in poverty. The Commission feels that it is imperative for Berkeley to plot a path towards a universal living wage in order to address the root issue of wage stagnancy in our economy and commit itself to overcoming working poverty in our community.

As an issue of rising prominence, service charge regulation was duly discussed during the drafting process. The Labor Commission consulted with several business owners in Berkeley who practice such models multiple times and considered their concerns regarding such regulation. Compared to traditional tipping/gratuities models, service charge models have the distinct advantage of being able to address the often serious inequity in overall compensation between traditional service workers, like bartenders and waitresses (also known as the “front of the house” staff), who receive tips and gratuities and other workers such as cooks and janitors (also known as the “back of the house” staff), who are not legally entitled to participate in tip pools under federal labor law. However, in the absence of other key longstanding legal protections that exist for tips/gratuities under state and federal law, a significant amount of the financial compensation for all the establishment’s workers are vulnerable to theft by Employers. Thus, after much consideration, the Commission came to the conclusion that it was necessary to create clear rules regarding the lawful use of money collected as service charges in order to protect workers, reduce confusion among customers, and avoid liability for employers. The amendments recommended by the Commission on Labor ensure that money collected as service charges ultimately goes to workers in one form or another and cannot be used to increase profits or subsidize mandatory labor costs. This is necessary both to make enforcement manageable for City Staff and to avoid

creating structural loopholes that would allow unethical employers to sidestep decades of established labor regulations in California.

After further research into the nature and conditions of on-call work and on-call workers, it is the opinion of the Commission on Labor that being on-call constitutes a significant demand on a workers' individual freedom, impeding their ability to live their own life and maintain their own welfare, to the degree that it should not be exempt from the requirements of this chapter. On-call work is typically found in part-time, low-wage employment sectors like retail and food service where at-risk workers are concentrated. Additionally, on-call work is typically not considered gainful employment for such workers, due to being unstable by nature and highly disruptive to the rest of their life and schedule. Keeping workers on-call is a way for employers to cut costs, since it shifts a business' labor-related risks onto its workers. Removing the exemption for on-call work will remove the incentive for employers to engage in this harmful practice.

It was the Commission's original intention for the job training exemption to be limited to temporary or part-time positions, in order to ensure that they remained focused on training and graduating workers into higher echelons of the workforce and not used as a loophole for cheap year-round labor. Similarly, it was the Commission's original intention for the collective bargaining waiver provision to be compatible with all federal regulations regarding collective bargaining entities. The recommended amendments to these exemptions more accurately reflect the Commission's original intentions.

#### ALTERNATIVE ACTIONS CONSIDERED

After its initial review of the current Minimum Wage Ordinance, the Commission on Labor considered recommending a wage increase schedule that would have aligned the city-wide minimum wage with the Berkeley Living Wage by 2017. Although there is merit to aligning the City's policies and lifting workers out of poverty rapidly, Commission ultimately discarded this model and opted for a schedule that was more predictable and made increases in more moderate steps in order to make it simpler for business owners to plan for compliance and give them all adequate time to adjust their business models.

In response to the City Council's directive to investigate including healthcare in the Minimum Wage Ordinance, the Commission on Labor considered adding a provision similar to one in the Berkeley Living Wage Ordinance that would have required employers to pay an additional hourly rate to employees in the form of either healthcare or increased wages. In order to simplify enforcement and avoid potential legal issues relating to the federal Employee Retirement Income Security Act, the Commission opted for the single-rate wage model seen in the final draft. The original goal of this policy was to encourage business owners to provide healthcare and reward those already doing so. Since workers can now purchase affordable healthcare individually through the state exchange, the single-rate wage model is more expedient for all parties – workers, employers, and the City. Furthermore, the Commission notes that the healthcare plan (or other forms of health benefits of a given cash value) selected by the employer may not provide an optimal return on value for each of their workers. The Labor Commission

agreed that by giving the cash value of the worker's labor to the worker themselves, they will be able to shop for the health care in the open market and choose the plan most suitable for their personal circumstances.

While researching the issue of service charges, the Commission found that some businesses in Berkeley are already utilizing versions of the service charge models, but in the absence of formal regulation, each business had its own system for collecting and distributing the money. In an attempt to accommodate existing practice whenever possible, the Commission considered the feasibility of alternative regulatory models that would allow employers to receive a portion of the money collected as service charges, based on qualifying criteria relating to Employee compensation. Ultimately, the Commission found this type of alternative policy model to be highly problematic, both because they remain too open to exploitation by bad-faith actors and because they would complicate enforcement considerably for City Staff. Thus, the Commission saw it as necessary to protect money collected as service charges in a manner similar to tips and gratuities and guarantee that 100% of it goes to workers.

During discussions around the review of the ordinance and working conditions in Berkeley, the Commission recognized several other labor issues and aspects of the City's labor policy that require address. Currently, there is an urgent need for a municipal policy regarding fair scheduling and advance notice of work shifts. Provisions regarding these issues were considered for inclusion with these recommendations, but more time was needed for the research and drafting process. The Commission also recognized a need for policy provisions to assist the re-entry of ex-felons into the work force, but decided to split this work off into a separate recommendation, known as Fair Chance/Ban the Box, based on direction from City Council. Lastly, the Commission recognizes a need to go beyond existing state regulations to ensure that workers receive equal pay for equal work, regardless of gender, ethnicity, or sexual orientation, and that workers who are parents receive some form of child-care leave.

#### CITY MANAGER

See City Manager companion report.

#### CONTACT PERSON

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#### Attachments:

1: Ordinance

2: MWO/LWO Subcommittee Recommended Amendments to Berkeley MWO

ORDINANCE NO. -N.S.

REVISIONS TO MINIMUM WAGE ORDINANCE; AMENDING BERKELEY MUNICIPAL  
CODE CHAPTER 13.99

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

Section 1. That Berkeley Municipal Code Section 13.99.030 is amended to read as follows:

**13.99.030 Definitions**

The following terms shall have the following meanings:

- A. "City" shall mean the City of Berkeley.
- B. "Department" shall mean the Department of Finance or other City department or agency as the City shall by resolution designate.
- C. "Employee" shall mean any person who:
  - 1. In a calendar week performs at least two (2) hours of work for an Employer within the geographic boundaries of the City; 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, or is a participant in a Welfare-to-Work Program.
- D. "Employer" shall mean any person, including corporate officers or executives, as defined in Section 18 of the California Labor Code, who directly or indirectly through any other person, including through the services of a temporary employment agency, staffing agency, subcontractor or similar entity, employs or exercises control over the wages, hours or working conditions of any Employee, or any person receiving or holding a business license through Title 9 of the Berkeley Municipal Code.
- E. "Minimum Wage" shall have the meaning set forth in Section 13.99.040 of this Chapter.
- F. "Nonprofit Corporation" shall mean a nonprofit corporation, duly organized, validly existing and in good standing under the laws of the jurisdiction of its incorporation and (if a foreign corporation) in good standing under the laws of the State of California, which corporation has established and maintains valid nonprofit status under Section 501(c)(3) of the United States Internal Revenue Code of 1986, as amended, and all rules and regulations promulgated under such Section, or any nonprofit educational organization qualified under Section 23701 (d) of the Revenue and Taxation code.
- G. "Paid Sick Leave" shall mean paid "sick leave" as defined in California Labor Code § 233(b)(4) as followed: ""Sick leave" means accrued increments of compensated leave provided by an Employer to an Employee as a benefit of the employment for use by the Employee during an absence from the employment for any of the following reasons: (A) The Employee is physically or mentally unable to perform his or her duties due to illness, injury, or a medical condition of the Employee. (B) The absence is for the purpose of obtaining professional diagnosis or treatment for a medical condition of the Employee. (C) The absence is for other medical reasons of the Employee, such as pregnancy or obtaining a physical examination. "Sick leave" does not include any



benefit provided under an Employee welfare benefit plan subject to the federal Employee Retirement Income Security Act of 1974 (Public Law 93-406, as amended) and does not include any insurance benefit, workers' compensation benefit, unemployment compensation disability benefit, or benefit not payable from the Employer's general assets", except that the definition here extends beyond the Employee's own illness, injury, medical condition, need for medical diagnosis or treatment, or medical reason, to also encompass time taken off work by an Employee for the purpose of providing care or assistance to other persons, as specified further in Section B, subsection (1) , with an illness, injury, medical condition, need for medical diagnosis or treatment, or other medical reason.

H. "Small business" shall mean an Employer for which fewer than ten persons work for compensation during a given week. In determining the number of persons performing work for an Employer during a given week, all persons performing work for compensation on a full-time, part-time, or temporary basis shall be counted, including persons made available to work through the services of a temporary services or staffing agency or similar entity.

I. "Service Charge" means all separately-designated amounts collected by an Employer from customers that are described in such a way that customers might reasonably believe that the amounts are for Employees or services rendered by Employees, including but not limited to those charges designated on receipts under the term "service charge," "automatic gratuity charge," "table charge," "delivery charge," or "portage charge."

Section 2. That Berkeley Municipal Code Section 13.99.040 is amended to read as follows:

**13.99.040 Minimum Wage**

A. Employers shall pay Employees no less than the Minimum Wage set forth below for each hour worked within the geographic boundaries of the City.

<u>Date</u>	<u>Minimum Hourly Wage</u>
<u>October 1, 2014</u>	<u>\$10.00</u>
<u>October 1, 2015</u>	<u>\$11.00</u>
<u>October 1, 2016</u>	<u>\$13.00</u>
<u>October 1, 2017</u>	<u>\$14.50</u>
<u>October 1, 2018</u>	<u>\$16.00</u>
<u>October 1, 2019</u>	<u>\$17.50</u>
<u>October 1, 2020</u>	<u>\$19.00</u>

B. For Employers that are Nonprofit Corporations, the requirements of this Chapter shall not take effect until October 1, 2015, at which time the minimum wage will be \$11.00 per hour.

C. A violation for unlawfully failing to pay the Minimum Wage shall be deemed to continue from the date immediately following 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 immediately preceding the date the wages are paid in full.

D. Cost of Living Adjustment. To prevent inflation from eroding its value, beginning on October 1, 2021, and each year thereafter, the Minimum Wage shall increase by an amount corresponding to the prior year's increase, if any, in the cost of living. The prior year's increase in the cost of living shall be measured by the percentage increase, if any, from April 1 of the immediately preceding year to April 1 of the previous year of the Consumer Price Index for urban wage earners and clerical workers for the San Francisco-Oakland-San Jose CA metropolitan statistical area, as published in April of each year by the U.S. Department of Labor, Bureau of Labor Statistics. The adjusted Minimum Wage for all Employers shall be announced by May 1 of each year, and shall become effective as the new minimum wage on October 1 of that year.

#### E. Distribution of Service Charges

1. Service Charges shall not be retained by the Employer but shall be paid over in their entirety, in the form of hourly wages above the minimum or other non-mandatory benefits or forms of compensation, to the Employees performing services for the customers from whom Service Charges are to be collected. No part of these charges may be paid to Employers or supervisors except for any portion of their work time spent on nonsupervisory work serving these customers, and then at no higher rate of compensation than the average of what is paid other Employees performing similar customer service. The Service Charges shall be distributed to the Employees not later than the next payroll following the work or collection of the charge from the customer, whichever is later. Without limitation of the foregoing:

a. Service charges collected for banquets or catered meetings shall be paid to the Employees who actually work the banquet or catered meeting;

b. Service charges collected for room service shall be paid to the Employees who actually deliver food and beverage associated with the charge; and

c. Service charges collected for portage service shall be paid to the Employees who actually carry the baggage associated with the charge.

2. This section does not apply to any tip, gratuity, money, or part of any tip, gratuity, or money that has been voluntarily paid or given to or left for an Employee by customers over and above the actual amount due for services rendered or for goods, food, drink, or articles sold or served to the customer. No part of this chapter shall be construed to limit or prohibit the amount of any tip or gratuity left for an Employee.

3. No Employer or agent thereof shall deduct any amount from wages due an Employee on account of a Service Charge, or require an Employee to credit the amount, or any part thereof, of a Service Charge against and as a part of the wages due the Employee from the Employer.

4. Each Employer shall disclose in writing to each employee its plan of distribution of service charges to employees and shall report to employees on each payroll date on the amount of service charges collected and amounts distributed to employees for the pay period in question. Nothing in this chapter shall be construed to limit an employer's discretion to include all of their Employees performing non-supervisory work in this plan of distribution.

5. This Section shall not be applied to any events for which the employer already had a contract in place at the time the employer received notice of the proposed ordinance giving rise to this Section from which service charge revenues would be retained by the employer.

**Section 3.** That Berkeley Municipal Code Section 13.99.045 is added to read as follows:

### **13.99.045 Paid Sick Leave**

#### **A. Accrual of Paid Sick Leave.**

1. Employees shall begin to accrue Paid Sick Leave on October 1, 2016, or at the commencement of employment with the Employer, whichever is later.

2. For every 30 hours worked after Paid Sick Leave begins to accrue for an Employee, the Employee shall accrue one hour of Paid Sick Leave. Such leave shall accrue only in hour-unit increments; there shall be no accrual of a fraction of an hour of such leave.

3. For Employees of Small Businesses, there shall be a cap of 40 hours of accrued Paid Sick Leave. For Employees of other Employers, there shall be a cap of 72 hours of accrued Paid Sick Leave. Accrued Paid Sick Leave for Employees carries over from year to year (whether calendar year or fiscal year), but is limited to the aforementioned cap.

4. An Employer is not required to provide financial or other reimbursement to an Employee upon the Employee's termination, resignation, retirement, or other separation from employment, for accrued Paid Sick Leave that the Employee has not used.

5. The rate of pay shall be the Employee's hourly wage. If the Employee in the 90 days of employment before taking accrued sick leave had different hourly pay rates, was paid by commission or piece rate, or was a nonexempt salaried Employee, then the rate of pay shall be calculated by dividing the Employee's total wages, not including overtime premium pay, by the Employee's total hours worked in the full pay periods of the prior 90 days of employment.

#### **B. Use of Paid Sick Leave.**

1. An Employee may begin using Paid Sick Leave 90 calendar days after commencement of employment.

2. An Employee may use Paid Sick Leave not only when he or she is ill or injured or for the purpose of the Employee's receiving medical care, treatment, or diagnosis, as specified more fully in California Labor Code § 233(b)(4), but also to aid or care for the following persons when they are ill or injured or receiving medical care, treatment, or diagnosis: Child; parent; legal guardian or ward; sibling; grandparent; grandchild;

and spouse, registered domestic partner under any state or local law, or designated person. The Employee may use all or any percentage of his or her Paid Sick Leave to aid or care for the aforementioned persons. The aforementioned child, parent, sibling, grandparent, and grandchild relationships include not only biological relationships but also relationships resulting from adoption; step-relationships; and foster care relationships. "Child" includes a child of a domestic partner and a child of a person standing in loco parentis.

3. An Employer may not require, as a condition of an Employee's taking Paid Sick Leave, that the Employee search for or find a replacement worker to cover the hours during which the Employee is on Paid Sick Leave.

4. If the need for paid sick leave is foreseeable, the Employee shall provide reasonable advance notification. If the need for paid sick leave is unforeseeable, the Employee shall provide notice of the need for the leave as soon as practicable.

5. An Employer may lend paid sick days to an Employee in advance of accrual, at the Employer's discretion and with proper documentation.

6. If an Employee's use of Paid Sick Leave extends beyond 48 consecutive hours, an Employer may request verification that an Employee's use of Paid Sick Leave is lawful. An Employer may only take reasonable measures to verify or document that an Employee's use of Paid Sick Leave is lawful, and shall not require an Employee to incur expenses in excess of \$5 in order to show his or her eligibility for such paid leave.

7. An Employer may not require that the documentation explain the nature of the illness or the details of the use of the Paid Sick Leave.

8. The Employer shall not delay the taking of earned sick time or delay pay for the period in which earned sick time was taken for Employees entitled to pay under Section 40, Subsection A, on the basis that the Employer has not yet received the certification.

9. An Employer shall provide payment for sick leave taken by an Employee no later than the payday for the next regular payroll period after the sick leave was taken.

10. It shall be unlawful for any Employer to interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right provided under or in connection with this section, including, but not limited to, by using the taking of earned sick time under this section as a negative factor in any employment action such as evaluation, promotion, disciplinary action or termination, or otherwise subjecting an Employee to discipline for the use of earned sick time under this section

11. Employers who provide their Employees paid time off under a paid time off, vacation or other paid leave policy who make available an amount of paid time off sufficient to meet the accrual requirements of section A that may be used for the same purposes and under the same conditions as earned paid sick time under this section are not required by this Chapter to provide additional earned paid sick time.

Section 4. That Berkeley Municipal Code Section 13.99.050 is amended to read as follows:

**13.99.050 Waiver Through Collective Bargaining.**

To the extent required or allowed by federal 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.

Section 5. That Berkeley Municipal Code Section 13.99.060 is amended to read as follows:

**13.99.060 Notice, Posting and Payroll Records.**

A. By August 1 of each year, the Department shall publish and make available to Employers a bulletin announcing the adjusted Minimum Wage rate, which shall take effect on October 1 of that year. In conjunction with this bulletin, the Department shall by August 1 of each year publish and make available to Employers, in all languages spoken by more than five percent of the work force in the City, a notice suitable for posting by Employers in the workplace informing Employees of the current Minimum Wage rate and of their rights under this Chapter.

B. Every Employer shall post in a conspicuous place at any workplace or job site in the City where any Employee works the notice published each year by the Department informing Employees of the current Minimum Wage rate and of their rights under this Chapter, including Paid Sick Leave. Every Employer shall post such notices in any language spoken by at least five percent of the Employees at the work-place or job site. In instances where an Employee does not have a regular physical location where they perform their work, the Employer shall provide a copy of the MWO public notice to the Employee when they are hired or assigned to complete work within the City of Berkeley. The notice shall be provided to the employee before they commence work within the city limits and must be provided in the language most easily comprehended by the Employee. 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 Section 90, Subsection A, of this Chapter.

C. Employers shall retain payroll records pertaining to Employees for a period of four years, and shall allow the City access to such records, with appropriate notice and at a mutually agreeable time, to monitor compliance with the requirements of this Chapter. Where an Employer does not maintain or retain adequate records ~~documenting wages paid~~ or does not allow the City reasonable access to such records, the Employee's account of how much he or she was paid shall be presumed to be accurate, absent clear and convincing evidence otherwise. Furthermore, failure to maintain such records or to allow the City reasonable access shall render the Employer subject to administrative citation, pursuant to Section 90, Subsection A, of this Chapter. Such records shall include the amount of hours worked, wages paid, and Paid Sick Leave accrued.

D. If a violation of this Chapter has been finally determined, the City shall require the Employer to post public notice of the Employer's failure to comply in a form determined by the City. Failure to post such notice shall render the Employer subject to administrative citation, pursuant to Section 90, Subsection A, of this Chapter.

E. Reporting of Paid Sick Leave. Employers shall include the number of hours of Paid Sick Leave accrued to date in such records that they provide to Employees at the end of each pay period. Failure to provide such records shall render the Employer subject to administrative citation, pursuant to Section 90, Subsection A, of this Chapter.

F. Reporting of Service Charges. Every Employer shall post a notice in a conspicuous place at any workplace or job site in the City where any Employee works explaining how Service Charges are distributed among Employees. Employers shall report the amount of money collected as Service Charges to Employees no later than the end of the pay period when they were collected. In order to ensure that the distribution of Service Charges is lawful, Employers shall, upon request by an Employee, make available their records of sales and associated Service Charges in a given pay period.

Section 6. That Berkeley Municipal Code Section 13.99.070 is amended to read as follows:

**13.99.070 Retaliation Prohibited.**

A. It shall be unlawful for an Employer or any other party to discriminate in any manner or take any adverse action (including action relating to any term, condition or privilege of employment) against any person in retaliation for exercising rights protected under this Chapter. Rights protected under this Chapter include, but are not limited to: the right to file a complaint or inform any person about any party's alleged noncompliance with this Chapter; and the right to inform any person of his or her potential rights under this Chapter or otherwise educate any person about this Chapter or to assist him or her in asserting such rights. Protections of this Chapter shall apply to any person who mistakenly, but in good faith, alleges noncompliance with this Chapter. Taking adverse action against a person within ninety (90) days of the person's exercise of rights protected under this Chapter shall raise a rebuttable presumption of having done so in retaliation for the exercise of such rights. Failure to comply with this provision shall render the Employer subject to administrative citation, pursuant to Section 90, Subsection A, of this Chapter.

B. No Employer may fund increases in compensation required by this Chapter, nor otherwise respond to the requirements of this Chapter, by reducing the compensation of any non-management employees nor by reducing the pension, vacation, or other non-wage benefits of any such employees, nor by increasing charges to them for parking, meals, uniforms or other items. If an employer makes such adverse changes after receiving notice of the proposed ordinance giving rise to this Section, then upon the effective date of this Section such employer shall restore the conditions of the status quo ante.

Section 7. That Berkeley Municipal Code Section 13.99.090 is amended to read as follows:

**13.99.090 Enforcement.**



A. 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:

1. 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:

a. 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.

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

i. Failure to post notice of the Minimum Wage rate

ii. Failure to provide notice of investigation to Employees

iii. Failure to post notice of violation to public

iv. Failure to maintain payroll records for four years

v. Failure to allow the City access to payroll records

[vi. Failure to provide record of accrued Paid Sick Leave to Employees](#)

[vii. Failure to provide record of the amount and distribution of collected Service Charges to Employees](#)

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

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

a. 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.

b. 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.

c. 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.

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

B. The City or Any person aggrieved by a violation of this Chapter, any entity a member of which is aggrieved by a violation of this Chapter, or any other person or entity acting on behalf of the employee and all other employees affected by the employer's violations or on behalf of the public as provided for under applicable state law, may bring a civil action in a court of competent jurisdiction against the Employer or other person violating this Chapter and, upon prevailing, shall be awarded reasonable attorneys' fees and ~~costs~~ expenses and shall be entitled to such legal or equitable relief as may be appropriate to remedy the violation including, without limitation, the payment of any back wages unlawfully withheld, the payment of an additional sum as a civil penalty in the amount of \$50 to each Employee or person whose rights under this Chapter were violated for each day that the violation occurred or continued, reinstatement in employment and/or injunctive relief. Provided, however, that any person or entity enforcing this Chapter on behalf of the public as provided for under applicable state law shall, upon prevailing, be entitled only to equitable, injunctive or restitutionary relief to Employees, and reasonable attorneys' fees and costs.

C. This Section shall not be construed to limit an Employee's right to bring legal action for a violation of any other laws concerning wages, hours, or other standards or rights nor shall exhaustion of remedies under this Chapter be a prerequisite to the assertion of any right.



D. Except where prohibited by state or federal law, City agencies or departments may revoke or suspend any registration certificates, permits or licenses held or requested by the Employer until such time as the violation is remedied. The City shall not renew any such license of an Employer with outstanding violations, as finally determined under this Chapter, until such time as the violation is remedied.

E. The remedies for violation of this Chapter include but are not limited to:

1. Reinstatement, the payment of back wages unlawfully withheld, and the payment of an additional sum as a civil penalty in the amount of \$50 to each Employee or person whose rights under this Chapter were violated for each day or portion thereof that the violation occurred or continued, and fines imposed pursuant to other provisions of this Code or state law.

2. 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, the City may require the Employer to pay an additional sum as a civil penalty in the amount of \$50 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.

F. 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, civil or criminal, that may be brought to abate a violation or to seek compensation for damages suffered.

Section 8. That Berkeley Municipal Code Section 13.99.110 is hereby repealed.

**~~13.99.110 Application Of Minimum Wage To Welfare-To-Work Programs.~~**

~~The Minimum Wage established under this Chapter shall apply to the Welfare-to-Work programs under which persons must perform work in exchange for receipt of benefits. Participants in Welfare-to-Work Programs within the City of Berkeley shall not, during a given benefits period, be required to work more than a number of hours equal to the value of all cash benefits received during that period, divided by the Minimum Wage.~~

Section 9. That Berkeley Municipal Code Section 13.99.130 is amended to read as follows:

**13.99.130 Exemptions.**

The requirements of Section 40, Subsection A of this chapter shall not apply to the following Employees:

- ~~1. 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.~~
2. Job training program participants up to 25 years of age in temporary youth job training programs operated by Nonprofit Corporations or governmental agencies. This exemption shall not apply to participants that work an excess of 1040 hours in the program within a consecutive 365 day period.

Section 10. 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.

Berkeley Labor Commission - MWO/LWO Subcommittee  
Recommended Amendments to Berkeley MWO

## **Chapter 13.99**

# **MINIMUM WAGE**

Sections:

- [13.99.010](#) Title and Purpose.
- [13.99.020](#) Authority.
- [13.99.030](#) Definitions.
- [13.99.040](#) Minimum Wage.
- [13.99.045](#) Paid Sick Leave
- [13.99.050](#) Waiver Through Collective Bargaining.
- [13.99.060](#) Notice, Posting and Payroll Records.
- [13.99.070](#) Retaliation Prohibited.
- [13.99.080](#) Implementation.
- [13.99.090](#) Enforcement.
- [13.99.100](#) Relationship to Other Requirements.
- [13.99.110](#) Application Of Minimum Wage To Welfare-To-Work Programs.
- [13.99.120](#) Fees.
- [13.99.130](#) Exemptions.

### **13.99.010 Title and Purpose.**

This ordinance shall be known as the "Minimum Wage Ordinance."

The purpose of this ordinance is to protect the public health, safety and welfare. It does this by requiring that Employees are compensated by their Employers or respective subcontractors in such a manner as to enable and facilitate their individual self-reliance within the City of Berkeley. (Ord. 7352-NS § 1 (part), 2014)

### **13.99.020 Authority.**

This Chapter is adopted pursuant to the powers vested in the City of Berkeley under the laws and Constitution of the State of California but not limited to, the police powers vested in the City pursuant to Article XI, Section [7](#) of the California Constitution and Section 1205(b) of the California Labor Law. (Ord. 7352-NS § 1 (part), 2014)

### **13.99.030 Definitions.**

The following terms shall have the following meanings:

- A. "City" shall mean the City of Berkeley.
- B. "Department" shall mean the Department of Finance or other City department or agency as the City shall by resolution designate.
- C. "Employee" shall mean any person who:
  - 1. In a calendar week performs at least two (2) hours of work for an Employer within the geographic boundaries of the City; 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, or is a participant in a Welfare-to-Work Program.
- D. "Employer" shall mean any person, including corporate officers or executives, as defined in Section [18](#) of the California Labor Code, who directly or indirectly through any other person, including through the services of a temporary employment agency, staffing agency, subcontractor or similar entity, employs or exercises control over the wages, hours or working conditions of any Employee, or any person receiving or holding a business license through Title [9](#) of the Berkeley Municipal Code.
- E. "Minimum Wage" shall have the meaning set forth in Section [13.99.040](#) of this Chapter.
- F. "Nonprofit Corporation" shall mean a nonprofit corporation, duly organized, validly existing and in good standing under the laws of the jurisdiction of its incorporation and (if a foreign corporation) in good standing under the laws of the State of California, which corporation has established and maintains valid nonprofit status under Section 501(c)(3) of the United States Internal Revenue Code of 1986, as amended, and all rules and regulations promulgated under such Section, or any non-profit educational organization qualified under Section [23701](#) (d) of the Revenue and Taxation code.
- G. "Paid Sick Leave" shall mean paid "sick leave" as defined in California Labor Code § 233(b)(4) as followed: "Sick leave" means accrued increments of compensated leave provided by an Employer to an Employee as a benefit of the employment for use by the Employee during

an absence from the employment for any of the following reasons: (A) The Employee is physically or mentally unable to perform his or her duties due to illness, injury, or a medical condition of the Employee. (B) The absence is for the purpose of obtaining professional diagnosis or treatment for a medical condition of the Employee. (C) The absence is for other medical reasons of the Employee, such as pregnancy or obtaining a physical examination. "Sick leave" does not include any benefit provided under an Employee welfare benefit plan subject to the federal Employee Retirement Income Security Act of 1974 (Public Law 93-406, as amended) and does not include any insurance benefit, workers' compensation benefit, unemployment compensation disability benefit, or benefit not payable from the Employer's general assets", except that the definition here extends beyond the Employee's own illness, injury, medical condition, need for medical diagnosis or treatment, or medical reason, to also encompass time taken off work by an Employee for the purpose of providing care or assistance to other persons, as specified further in Section B, subsection (1) , with an illness, injury, medical condition, need for medical diagnosis or treatment, or other medical reason.

H. "Small business" shall mean an Employer for which fewer than ten persons work for compensation during a given week. In determining the number of persons performing work for an Employer during a given week, all persons performing work for compensation on a full-time, part-time, or temporary basis shall be counted, including persons made available to work through the services of a temporary services or staffing agency or similar entity.

I. "Service Charge" means all separately-designated amounts collected by an Employer from customers that are described in such a way that customers might reasonably believe that the amounts are for Employees or services rendered by Employees, including but not limited to those charges designated on receipts under the term "service charge," "automatic gratuity charge," "table charge," "delivery charge," or "portage charge."

**13.99.040 Minimum Wage.**

A. Employers shall pay Employees no less than the Minimum Wage set forth below for each hour worked within the geographic boundaries of the City.

<b>Date</b>	<b>Minimum Hourly Wage</b>
October 1, 2014	\$10.00
October 1, 2015	\$11.00
<u>October 1, 2016</u>	<u>\$13.00</u>
<u>October 1, 2017</u>	<u>\$14.50</u>
<u>October 1, 2018</u>	<u>\$16.00</u>
<u>October 1, 2019</u>	<u>\$17.50</u>
<u>October 1, 2020</u>	<u>\$19.00</u>

B. For Employers that are Nonprofit Corporations, the requirements of this Chapter shall not take effect until October 1, 2015, at which time the minimum wage will be \$11.00 per hour.

C. A violation for unlawfully failing to pay the Minimum Wage shall be deemed to continue from the date immediately following 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 immediately preceding the date the wages are paid in full. (Ord. 7352-NS § 1 (part), 2014)

D. Cost of Living Adjustment. To prevent inflation from eroding its value, beginning on October 1, 2021, and each year thereafter, the Minimum Wage shall increase by an amount corresponding to the prior year's increase, if any, in the cost of living. The prior year's increase in the cost of living shall be measured by the percentage increase, if any, from April 1 of the immediately preceding year to April 1 of the previous year of the Consumer Price Index for urban wage earners and clerical workers for the San Francisco-Oakland-San Jose CA metropolitan statistical area, as published in April of each year by the U.S. Department of Labor, Bureau of Labor Statistics. The adjusted Minimum Wage for all Employers shall be announced by May 1 of each year, and shall become effective as the new minimum wage on October 1 of that year.

#### E. Distribution of Service Charges

1. Service Charges shall not be retained by the Employer but shall be paid over in their entirety, in the form of hourly wages above the minimum or other non-mandatory benefits or forms of compensation, to the Employees performing services for the customers from whom Service Charges are to be collected. No part of these charges may be paid to Employers or supervisors except for any portion of their work time spent on nonsupervisory work serving these customers, and then at no higher rate of compensation than the average of what is paid other Employees performing similar customer service. The Service Charges shall be distributed to the Employees not later than the next payroll following the work or collection of the charge from the customer, whichever is later. Without limitation of the foregoing:

a. Service charges collected for banquets or catered meetings shall be paid to the Employees who actually work the banquet or catered meeting;

b. Service charges collected for room service shall be paid to the Employees who actually deliver food and beverage associated with the charge; and

c. Service charges collected for portage service shall be paid to the Employees who actually carry the baggage associated with the charge.

2. This section does not apply to any tip, gratuity, money, or part of any tip, gratuity, or money that has been voluntarily paid or given to or left for an Employee by customers over and above the actual amount due for services rendered or for goods, food, drink, or articles sold or served to the customer. No part of this chapter shall be construed to limit or prohibit the amount of any tip or gratuity left for an Employee.

3. No Employer or agent thereof shall deduct any amount from wages due an Employee on account of a Service Charge, or require an Employee to credit the amount, or any part thereof, of a Service Charge against and as a part of the wages due the Employee from the Employer.

4. Each Employer shall disclose in writing to each employee its plan of distribution of service charges to employees and shall report to employees on each payroll date on the amount of service charges collected and amounts distributed to employees for the pay period in question. Nothing in this chapter shall be construed to limit an employer's discretion to include all of their Employees performing non-supervisory work in this plan of distribution.

5. This Section shall not be applied to any events for which the employer already had a contract in place at the time the employer received notice of the proposed ordinance giving rise to this Section from which service charge revenues would be retained by the employer.

### **13.99.045 Paid Sick Leave**

#### **A. Accrual of Paid Sick Leave.**

1. Employees shall begin to accrue Paid Sick Leave on October 1, 2016, or at the commencement of employment with the Employer, whichever is later.

2. For every 30 hours worked after Paid Sick Leave begins to accrue for an Employee, the Employee shall accrue one hour of Paid Sick Leave. Such leave shall accrue only in hour-unit increments; there shall be no accrual of a fraction of an hour of such leave.

3. For Employees of Small Businesses, there shall be a cap of 40 hours of accrued Paid Sick Leave. For Employees of other Employers, there shall be a cap of 72 hours of accrued Paid Sick Leave. Accrued Paid Sick Leave for Employees carries over from year to year (whether calendar year or fiscal year), but is limited to the aforementioned cap.

4. An Employer is not required to provide financial or other reimbursement to an Employee upon the Employee's termination, resignation, retirement, or other separation from employment, for accrued Paid Sick Leave that the Employee has not used.

5. The rate of pay shall be the Employee's hourly wage. If the Employee in the 90 days of employment before taking accrued sick leave had different hourly pay rates, was paid by commission or piece rate, or was a nonexempt salaried Employee, then the rate of pay shall be calculated by dividing the Employee's total wages, not including overtime premium pay, by the Employee's total hours worked in the full pay periods of the prior 90 days of employment.

#### **B. Use of Paid Sick Leave.**

1. An Employee may begin using Paid Sick Leave 90 calendar days after commencement of employment.

2. An Employee may use Paid Sick Leave not only when he or she is ill or injured or for the purpose of the Employee's receiving medical care, treatment, or diagnosis, as specified more fully in California Labor Code § 233(b)(4), but also to aid or care for the following persons when they are ill or injured or receiving medical care, treatment, or diagnosis: Child; parent; legal guardian or ward; sibling; grandparent; grandchild; and spouse, registered domestic partner under any state or local law, or designated person. The Employee may use all or any percentage of his or her Paid Sick Leave to aid or care for the aforementioned persons. The aforementioned child, parent, sibling, grandparent, and grandchild relationships include not only biological relationships but also relationships resulting from adoption; step-relationships; and foster care relationships. "Child" includes a child of a domestic partner and a child of a person standing in loco parentis.

3. An Employer may not require, as a condition of an Employee's taking Paid Sick Leave, that the Employee search for or find a replacement worker to cover the hours during which the Employee is on Paid Sick Leave.

4. If the need for paid sick leave is foreseeable, the Employee shall provide reasonable advance notification. If the need for paid sick leave is unforeseeable, the Employee shall provide notice of the need for the leave as soon as practicable.

5. An Employer may lend paid sick days to an Employee in advance of accrual, at the Employer's discretion and with proper documentation.

6. If an Employee's use of Paid Sick Leave extends beyond 48 consecutive hours, an Employer may request verification that an Employee's use of Paid Sick Leave is lawful. An Employer may only take reasonable measures to verify or document that an Employee's use of Paid Sick Leave is lawful, and shall not require an Employee to incur expenses in excess of \$5 in order to show his or her eligibility for such paid leave.

7. An Employer may not require that the documentation explain the nature of the illness or the details of the use of the Paid Sick Leave.

8. The Employer shall not delay the taking of earned sick time or delay pay for the period in which earned sick time was taken for Employees entitled to pay under Section 40, Subsection A, on the basis that the Employer has not yet received the certification.

9. An Employer shall provide payment for sick leave taken by an Employee no later than the payday for the next regular payroll period after the sick leave was taken.

10. It shall be unlawful for any Employer to interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right provided under or in connection with this



section, including, but not limited to, by using the taking of earned sick time under this section as a negative factor in any employment action such as evaluation, promotion, disciplinary action or termination, or otherwise subjecting an Employee to discipline for the use of earned sick time under this section

11. Employers who provide their Employees paid time off under a paid time off, vacation or other paid leave policy who make available an amount of paid time off sufficient to meet the accrual requirements of section A that may be used for the same purposes and under the same conditions as earned paid sick time under this section are not required by this Chapter to provide additional earned paid sick time.

### **13.99.050 Waiver Through Collective Bargaining.**

To the extent required or allowed by federal 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. (Ord. 7352-NS § 1 (part), 2014)

### **13.99.060 Notice, Posting and Payroll Records.**

A. By August 1 of each year, the Department shall publish and make available to Employers a bulletin announcing the adjusted Minimum Wage rate, which shall take effect on October 1 of that year. In conjunction with this bulletin, the Department shall by August 1 of each year publish and make available to Employers, in all languages spoken by more than five percent of the work force in the City, a notice suitable for posting by Employers in the workplace informing Employees of the current Minimum Wage rate and of their rights under this Chapter.

B. Every Employer shall post in a conspicuous place at any workplace or job site in the City where any Employee works the notice published each year by the Department informing Employees of the current Minimum Wage rate and of their rights under this Chapter, including Paid Sick Leave. Every Employer shall post such notices in any language spoken by at least five percent of the Employees at the work-place or job site. In instances where an Employee does not have a regular physical location where they perform their work, the Employer shall provide a copy of the MWO public notice to the Employee when they are hired or assigned to complete work within the City of Berkeley. The notice shall be provided to the employee before they commence work within the city limits and must be provided in the language most easily comprehended by the Employee. 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 Section 90, Subsection A, of this Chapter.

C. Employers shall retain payroll records pertaining to Employees for a period of four years, and shall allow the City access to such records, with appropriate notice and at a mutually agreeable time, to monitor compliance with the requirements of this Chapter. Where an Employer does not maintain or retain adequate records ~~documenting wages paid~~ or does not

allow the City reasonable access to such records, the Employee's account of how much he or she was paid shall be presumed to be accurate, absent clear and convincing evidence otherwise. Furthermore, failure to maintain such records or to allow the City reasonable access shall render the Employer subject to administrative citation, pursuant to Section 90, Subsection A, of this Chapter. Such records shall include the amount of hours worked, wages paid, and Paid Sick Leave accrued.

D. If a violation of this Chapter has been finally determined, the City shall require the Employer to post public notice of the Employer's failure to comply in a form determined by the City. Failure to post such notice shall render the Employer subject to administrative citation, pursuant to Section 90, Subsection A, of this Chapter. (Ord. 7352-NS § 1 (part), 2014)

E. Reporting of Paid Sick Leave. Employers shall include the number of hours of Paid Sick Leave accrued to date in such records that they provide to Employees at the end of each pay period. Failure to provide such records shall render the Employer subject to administrative citation, pursuant to Section 90, Subsection A, of this Chapter.

F. Reporting of Service Charges. Every Employer shall post a notice in a conspicuous place at any workplace or job site in the City where any Employee works explaining how Service Charges are distributed among Employees. Employers shall report the amount of money collected as Service Charges to Employees no later than the end of the pay period when they were collected. In order to ensure that the distribution of Service Charges is lawful, Employers shall, upon request by an Employee, make available their records of sales and associated Service Charges in a given pay period

### **13.99.070 Retaliation Prohibited.**

A. It shall be unlawful for an Employer or any other party to discriminate in any manner or take any adverse action (including action relating to any term, condition or privilege of employment) against any person in retaliation for exercising rights protected under this Chapter. Rights protected under this Chapter include, but are not limited to: the right to file a complaint or inform any person about any party's alleged noncompliance with this Chapter; and the right to inform any person of his or her potential rights under this Chapter or otherwise educate any person about this Chapter or to assist him or her in asserting such rights. Protections of this Chapter shall apply to any person who mistakenly, but in good faith, alleges noncompliance with this Chapter. Taking adverse action against a person within ninety (90) days of the person's exercise of rights protected under this Chapter shall raise a rebuttable presumption of having done so in retaliation for the exercise of such rights. Failure to comply with this provision shall render the Employer subject to administrative citation, pursuant to Section 90, Subsection A, of this Chapter. (Ord. 7352-NS § 1 (part), 2014)

B. No Employer may fund increases in compensation required by this Chapter, nor otherwise respond to the requirements of this Chapter, by reducing the compensation of any non-management employees nor by reducing the pension, vacation, or other non-wage benefits of any such employees, nor by increasing charges to them for parking, meals, uniforms or other items. If an employer makes such adverse changes after receiving notice of the proposed ordinance

giving rise to this Section, then upon the effective date of this Section such employer shall restore the conditions of the status quo ante.

### **13.99.080 Implementation.**

A. Guidelines. The Department shall be authorized to coordinate implementation and enforcement of this Chapter and may promulgate appropriate guidelines or rules for such purposes. The Department shall seek out partnerships with community-based organizations and collaborate with the Labor 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. Reporting Violations. 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. Investigation. 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. Informal Resolution. 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. (Ord. 7352-NS § 1 (part), 2014)

### **13.99.090 Enforcement.**

A. 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:

1. 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:

a. 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.

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

i. Failure to post notice of the Minimum Wage rate

ii. Failure to provide notice of investigation to Employees

iii. Failure to post notice of violation to public

iv. Failure to maintain payroll records for four years

v. Failure to allow the City access to payroll records

vi. Failure to provide record of accrued Paid Sick Leave to Employees

vii. Failure to provide record of the amount and distribution of collected Service Charges to Employees

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

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

a. 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.

b. 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.

c. 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.

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

B. ~~The City or~~ Any person aggrieved by a violation of this Chapter, any entity a member of which is aggrieved by a violation of this Chapter, or any other person or entity acting on behalf of the employee and all other employees affected by the employer's violations or on behalf of the public as provided for under applicable state law, may bring a civil action in a court of competent jurisdiction against the Employer or other person violating this Chapter and, upon prevailing, shall be awarded reasonable attorneys' fees and ~~costs~~ expenses and shall be entitled to such legal or equitable relief as may be appropriate to remedy the violation including, without limitation, the payment of any back wages unlawfully withheld, the payment of an additional sum as a civil penalty in the amount of \$50 to each Employee or person whose rights under this Chapter were violated for each day that the violation occurred or continued, reinstatement in employment and/or injunctive relief. Provided, however, that any person or entity enforcing this Chapter on behalf of the public as provided for under applicable state law shall, upon prevailing, be entitled only to equitable, injunctive or restitutionary relief to Employees, and reasonable attorneys' fees and costs.

C. This Section shall not be construed to limit an Employee's right to bring legal action for a violation of any other laws concerning wages, hours, or other standards or rights nor shall exhaustion of remedies under this Chapter be a prerequisite to the assertion of any right.

D. Except where prohibited by state or federal law, City agencies or departments may revoke or suspend any registration certificates, permits or licenses held or requested by the Employer until such time as the violation is remedied. The City shall not renew any such license of an Employer with outstanding violations, as finally determined under this Chapter, until such time as the violation is remedied.

E. The remedies for violation of this Chapter include but are not limited to:

1. Reinstatement, the payment of back wages unlawfully withheld, and the payment of an additional sum as a civil penalty in the amount of \$50 to each Employee or person whose rights under this Chapter were violated for each day or portion thereof that the violation occurred or continued, and fines imposed pursuant to other provisions of this Code or state law.

2. 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, the City may require the Employer to pay an additional sum as a civil penalty in the amount of \$50 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.

F. 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, civil or criminal, that may be brought to abate a violation or to seek compensation for damages suffered. (Ord. 7352-NS § 1 (part), 2014)

### **13.99.100 Relationship to Other Requirements.**

This Chapter provides for payment of a local Minimum Wage and shall not be construed to preempt or otherwise limit or affect the applicability of any other law, regulation, requirement, policy or standard that provides for payment of higher or supplemental wages or benefits, or that extends other protections. (Ord. 7352-NS § 1 (part), 2014)

### **~~13.99.110 Application Of Minimum Wage To Welfare-To-Work Programs.~~**

~~The Minimum Wage established under this Chapter shall apply to the Welfare to Work programs under which persons must perform work in exchange for receipt of benefits. Participants in Welfare to Work Programs within the City of Berkeley shall not, during a given benefits period, be required to work more than a number of hours equal to the value of all cash benefits received during that period, divided by the Minimum Wage. (Ord. 7352-NS § 1 (part), 2014)~~

### **13.99.120 Fees.**

Nothing herein shall preclude the City Council from imposing a cost recovery fee on all Employers to pay the cost of administering this Chapter. (Ord. 7352-NS § 1 (part), 2014)

### **13.99.130 Exemptions.**

The requirements of Section 40, Subsection A of this chapter shall not apply to the following Employees:

1. ~~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.~~

2. Job training program participants up to 25 years of age in temporary youth job training programs operated by Nonprofit Corporations or governmental agencies. This exemption shall not apply to participants that work an excess of 1040 hours in the program within a consecutive 365 day period. (Ord. 7352-NS § 1 (part), 2014)

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