

3-10-17

San Jose's Opportunity to Work Ordinance
--PRELIMINARY--
Frequently Asked Questions

The City of San Jose's Office of Equality Assurance (Office of Equality Assurance) is providing the following information as a public service. This information and related materials are presented to give the public access to information on the San Jose Opportunity to Work Ordinance (Ordinance) which was passed by City of San Jose voters on November 8, 2016 and becomes effective March 13, 2017.

Please be aware that while we attempt to keep the information timely and accurate, there may be a delay between official publications of the materials and modification of these pages. Additionally, the City of San Jose is in the preliminary stages of implementing the Ordinance adopted as Measure E, so the City reserves the right to modify or supplement this document as the need arises and further information is developed. Therefore, we make no express or implied guarantees regarding the accuracy of the information.

Although we make every effort to correct any errors brought to our attention, you are directed to

<http://www.sanjoseca.gov/DocumentCenter/View/54088> for the full text of the Ordinance.

You may also obtain a copy of the Ordinance from the Office of Equality Assurance. The Office of Equality Assurance's contact information is:

Address: 200 East Santa Clara Street, Fifth Floor
San Jose CA 95113

Email: opportunitytowork@sanjoseca.gov

Phone: 408-535-8430

Questions and answers are grouped in the following categories: Definitions; General; Employer Related; Employee Related; and Administrative and Enforcement.

DEFINITIONS

Q1: What is the definition of a "Small Business Enterprise?"

A1: San Jose Municipal Code Section 4.1.060 defines a Small Business Enterprise as a local business that has thirty-five (35) or fewer total employees.

Q2: What is the definition of a “Chain” business?

A2: A Chain is a set of businesses that share a common brand or are characterized by standardized options of décor, marketing, packaging, products or services. Examples of “Chain” businesses: MACY’s; Nordstrom; Target; Safeway; Trader Joe’s; Lowe’s; Home Depot; Michael’s; Il Fornaio; Chili’s; Red Lobster; Morton’s Steakhouse.

Q3: What is the definition of an “Employee?”

A3: An Employee is any person who:

- (1) In a calendar week performs at least two (2) hours of work for an Employer;
- (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.

Q4: What is the definition of an “Employer?”

A4: An Employer is any person, including corporate officers or executives as defined California Labor Code Section 18, who:

- (1) Directly or indirectly through any other person, including through the services of a temporary employment agency, staffing agency or similar entity, employs or exercises control over the wages, hours or working conditions of any Employee; and
- (2) Is either subject to the Business License Tax Chapter 4.76 of the San Jose Municipal Code **or** has a place of business in the City which is exempt under state law from the tax imposed by Chapter 4.76.

Q5: What is the definition of a “Franchise?”

A5: California Business and Professions Code Section 20001 defines a Franchise as a contract or agreement, either expressed or implied, whether oral or written, between two or more persons by which:

- (1) A Franchise is granted the right to engage in the business of offering, selling or distributing goods or services under a marketing plan or system prescribed in substantial part by a franchisor; and
- (2) The operations of the Franchisee’s business pursuant to that plan or system is substantially associated with the franchisor’s trademark, service mark, trade name, logotype, advertising or other commercial symbol designating the franchisor or its affiliate; and
- (3) The franchisee is required to pay, directly or indirectly, a franchise fee.

Q6: What is the definition of a “Franchisee?”

A6: California Business and Professions Code Section 20002 defines a Franchisee as a person to whom a Franchise is granted.

Q7: What is the definition of a “Franchisor?”

A7: California Business and Professions Code Section 20003 defines a Franchisor as a person who grants or has granted a Franchise.

Q8: What is the definition of a “Shift?”

A8: A Shift means the consecutive hours an Employer requires an Employee to work or to be on-call to work. Breaks totaling two (2) hours or less shall not be considered an interruption of consecutive hours.

Q9: What is the definition of “Full-Time” employment?

A9: Per California Labor Code Section 515(c), Full-Time employment means employment in which an Employee is employed for 40 hours per week.

Q10: What is the definition of a “Work Schedule?”

A10: A Work Schedule means all of an Employee’s regular and on-call shifts including specific start and end times for each Shift during a consecutive seven-day period.

Q11: What constitutes a “Welfare-to-Work Program?”

A11: A Welfare-to Work Program means the CalWORKS Program, County Adult Assistance Program (CAAP) which includes the Personal Assisted Employment Services (PAES) Program, General Assistance Program and any successor programs that are substantially similar.

Q12: What constitutes “Retaliation?”

A12: Retaliation means any form of intimidation, threat, reprisal, harassment, discrimination or adverse employment action including discipline, discharge, suspension, transfer or assignment to a lesser position in terms of job classification, job security or other condition of employment, reduction in pay or hours or denial of additional hours, information another Employer that the person has engaged in activities protected by this Ordinance 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 because the Employee or former Employee exercises a right under the Opportunity to Work Ordinance.

It is unlawful for an Employer to retaliate against Employees who assert their right to be offered additional work hours under the Opportunity to Work Ordinance. There shall be rebuttable presumption of retaliation if any adverse action is taken against a person within ninety (90) days of the person exercising their rights protected under the Ordinance.

GENERAL

Q1: What is the San Jose Opportunity to Work Ordinance?

A1: The San Jose Opportunity to Work Ordinance was an Initiative Ordinance on the November 2016 General Election ballot approved by 63.94% of San Jose voters requiring employers to offer additional work hours to existing qualified part-time employees before hiring new employees including subcontractors or the use of temporary staffing services.

Q2: What does the San Jose Opportunity to Work Ordinance require?

A2: The Ordinance requires employers of 36 or more employees to offer additional work hours to existing qualified part-time employees before hiring new employees including subcontractors or the use of temporary staffing services.

Q3: What is the effective date of the Opportunity to Work Ordinance?

A3: March 13, 2017.

Q4: When must Employers begin complying with the Opportunity to Work Ordinance?

A4: March 13, 2017.

Q5: Which businesses are covered by the Opportunity to Work Ordinance?

A5: The Opportunity to Work Ordinance applies to Employers which the Ordinance in Section 4.101.030 generally defines as any person who is either subject to the Business License Tax Chapter 4.76 of the San Jose Municipal Code **or** has a place of business in the City which is exempt under state law from the tax imposed by Chapter 4.76. This definition covers private and non-profit employers. This definition does not cover government employers.

Example: Businesses such as nonprofits, health organizations, religious and faith organizations, arts organizations, manufacturers and other private businesses who have 36 or more employees.

Q6: Does the Ordinance specify which Employees should be counted to determine whether an Employer meets the threshold of 36 Employees?

A6: Yes. Employers must count individual Employees, both part-time and full-time.

For a Chain business that is not owned by a Franchisee, the number of Employees shall be determined by the combined total number of Employees at every location of that Chain business, whether or not located within the City of San Jose.

Example: There are three Trader Joe's Markets located in San Jose. Location 1 employs 20 people, Location 2 employs 35 people and Location 3 employs 40. The three locations employ a total of 95 people which meets the 36-employee threshold under the Ordinance and is subject to the Ordinance.

For a Franchisee, the number of Employees shall be determined by the combined total number of Employees at every location owned by that Franchisee and operated under the same Franchisee, whether or not located within the City of San Jose.

Example 1: Franchisee A owns two McDonald's franchises in San Jose. One location employs five people and the other employs 31 people. Franchisee A meets the 36-employee threshold under the Ordinance and is subject to the Ordinance.

Example 2: Franchisee B owns one McDonald franchise in San Jose and two McDonald franchises in Palo Alto. The San Jose location employs 5 people and the two Palo Alto locations employ 10 people each. Franchisee B employs a total of 25 people which does not meet the 36-employee threshold under the Ordinance and is not subject to the Ordinance.

Q7: Does the Ordinance apply to executive, administrative and professional employees who are exempted from overtime requirements and minimum wage coverage in the California Industrial Welfare Commission Wage Orders?

A7: No. Executive, administrative and professional employees are not covered by the Opportunity to Work Ordinance and the Employer is not required to offer additional hours of work to these Employees. Please see DIR website for more information about these exemptions – <http://www.dir.ca.gov/IWC/WageOrderIndustries.htm>

Q8: Do executive, administrative and professional employees who are exempted from overtime requirements and minimum wage coverage in the California Industrial Welfare Commission Wage Orders count toward the 36-employee threshold under the Ordinance?

A8: Yes. However, executive, administrative and professional employees are not covered by the Opportunity to Work Ordinance and the Employer is not required to offer additional hours of work to these Employees. Please see DIR website for more information about these exemptions – <http://www.dir.ca.gov/IWC/WageOrderIndustries.htm>

Q9: Under what circumstances does an individual qualify as an Employee under the Ordinance?

A9: An individual qualifies as an Employee if:
(1) In a calendar week, the individual performs at least two hours of work for an Employer within the geographic boundaries of San Jose; and
(2) The Employee qualifies as an employee entitled to payment of a minimum wage under California minimum wage law.

Q10: Does the Ordinance apply to temporary or seasonal employees?

A10: The Ordinance applies to temporary and seasonal Employees so long as the Employee satisfies the definition of Employee in the Ordinance in Section 4.100.030 B.

EMPLOYER RELATED

Q1: What obligations does the Opportunity to Work Ordinance impose on Employers before they may hire new employees, contractors or a temporary services or staffing agency to perform work?

A1: Before hiring additional Employees or subcontractors, including hiring through the use of temporary services or staffing agencies, an Employer must offer additional hours of work to existing Employees who, in the Employer's good faith and reasonable judgment, have the skills and experience to perform the work, and shall use a transparent and nondiscriminatory process to distribute the hours or work among those existing Employees. Please see **Steps Employers Can Take to be Compliant with the City of San Jose's Opportunity to Work Ordinance**

- Q2: Are Employers required to post a notice informing Employees of their rights under the Opportunity to Work Ordinance?**
- A2:** Yes. Employers are required to post a Notice at the workplace informing Employees of their rights in a location where Employees can read it easily. The Notice is available at <http://www.sanjoseca.gov/DocumentCenter/View/65743>. The Notice is to be published in four languages; English, Spanish, Vietnamese and Cantonese. Translations are available on the City's website at <https://www.sanjoseca.gov/index.aspx?NID=5360>.
- Q3: Does the Opportunity to Work Ordinance limit an Employer to achieve fast hiring to serve peak demand?**
- A3:** No. The Ordinance places virtually no restrictions on an Employer's ability to meet its requirements expeditiously. There are no timing requirements at all on the Employer to execute the Ordinance's primary mandate; i.e., to offer extra hours to existing Employees.
- Example:** If peak demand unexpectedly occurs, an Employer is free to email existing Employees at 9 am and notify them they must respond by 12 noon that day in order to secure additional hours that may become available. Such notice fully satisfies the Ordinance's requirements. The only constraints on how new hours are distributed is that the process be transparent and nondiscriminatory.
- Q4: Once an Employer communicates the opportunity for additional hours of work to existing Part-Time Employees, how long does an existing Part-Time Employee have to respond to the opportunity for additional hours?**
- A4:** The Ordinance places no restrictions on an Employer. However, Employers should provide Part-Time Employees a meaningful opportunity to respond to the opportunity for additional hours depending on the nature and type of work to be performed.
- Q5: Is an Employer required to offer an Employee work hours if the Employer would be required to compensate the Employee at time-and-a-half or other premium rate under any law or collective bargaining agreement?**
- A5:** No. An Employer is not required to offer an Employee work hours if the Employer would be required to compensate the Employee at time-and-a-half or other premium rate under any law or collective bargaining agreement. However, an Employer is not prohibited from offering such work hours.
- Q6: If an Employer has multiple locations in San Jose, must the employer offer additional hours that become available at one location to Part-Time Employees working at other locations?**
- A6:** To the extent feasible, Employers with multiple locations may offer additional hours that become available at one location to Part-Time Employees working at other locations.
- Q7: What records must Employers retain to comply with the Opportunity to Work Ordinance? How long must Employers retain those records?**
- A7:** Employers must retain the following records (either written and/or electronic) for no less than four years:

- Work schedules and employment and payroll records pertaining to current and former Employees;
- Copies of written offers to current and former Part-Time Employees for additional work hours; and
- Any other records the Office of Equality Assurance may require that Employers maintain to demonstrate compliance.

Please see **Steps Employers Can Take to be Compliant with the City of San Jose’s Opportunity to Work Ordinance**

Q8: Does the Opportunity to Work Ordinance apply to Employees covered by an existing collective bargaining agreement?

A8: Yes. The Opportunity to Work Ordinance is a minimum standard and a law of general application that applies to all Employees covered by the Ordinance whether or not represented by a bargaining unit or union. However, under the San Jose Minimum Wage Ordinance (Section 4.100.050), the provisions of the Opportunity to Work Ordinance may be waived by a collective bargaining agreement. The Ordinance requires that the waiver must be in a bona fide collective bargaining agreement and must be in clear and unambiguous terms.

The parties to a collective bargaining agreement are free to negotiate any language they desire and the City of San Jose shall not interfere with or participate in the negotiation of such language.

There may be many different ways to accomplish an effective waiver in a collective bargaining agreement. Here is an example of a waiver the City’s Office of Equality Assurance would recognize.

Example: “Waiver of San Jose Opportunity to Work Ordinance: To the fullest extent permitted, this Agreement shall operate to waive any provisions of the San Jose Opportunity to Work Ordinance and shall supersede and be considered to have fulfilled all requirements of said Ordinance as presently written, and or amended during the life of this Agreement.”

Q9: Does the Opportunity to Work Ordinance limit Employer flexibility to determine the duration and time period of work Shifts?

A9: No. The Opportunity to Work Ordinance does not prevent an Employer from creating as many new or different part-time Shifts as they may want or need.

Example: An Employer can decide to establish 50 new shifts from 1 am to 4 am on Mondays and Thursdays if he/she wishes to. The Ordinance requirements focus only in regard to “who” is offered the opportunity to work those Shifts. The Ordinance simply requires that qualified existing Employees be offered the additional work and then only if they can do so without requiring overtime.

Q10: Who determines whether an Employee is Qualified to be hired for additional work hours?

A10: The Opportunity to Work Ordinance states that it is the Employer’s judgment which determines whether an Employee has the skills and experience to perform a specific job.

The only modifiers of the exercise of Employer judgment is that it be exercised in good faith and in a reasonable manner. The City of San Jose shall not interfere regarding an Employee's skills for those of an Employer.

EMPLOYEE RELATED

Q1: Does the Opportunity to Work Ordinance require part-time Employees to work additional hours?

A1: No. Many workers prefer to work part-time for various reasons and the Opportunity to Work Ordinance shall not affect an Employee's ability to remain part-time if they so choose.

Q2: For Welfare-to-Work participants, what are the possible forms a "written statement" to opt out of Section 4.101.040 take?

A2: A written statement, signed and dated, from a Welfare-to-Work participant to his/her Employer stating his/her request to opt out of Section 4.101.040 of the Opportunity to Work Ordinance.

Example: An effective opt out statement the City's Office of Equality Assurance would recognize for purposes of enforcement is as follows: "Opt out of San Jose Opportunity to Work Ordinance: Per Section 4.101.040 of the San Jose Opportunity to Work Ordinance, I, full name, respectfully request to not be included in being offered additional hours of work."

ADMINISTRATIVE AND ENFORCEMENT

Q1: Who in the City is responsible for implementation and enforcement of the Opportunity to Work Ordinance?

A1: The City's Office of Equality Assurance is responsible for implementation and enforcement of the Opportunity to Work Ordinance. The Office of Equality Assurance's phone number is 408-535-8430 and the Opportunity to Work email address is opportunitytowork@sanjoseca.gov.

Q2: What are the Opportunity to Work Ordinance administrative and enforcement responsibilities of the City?

A2: The City's Office of Equality Assurance is responsible for administration and enforcement of the Opportunity to Work Ordinance. The Office of Equality Assurance shall accept reports of suspected violations and investigate suspected violations where there appears to be a reasonable basis for the complaint.

As appropriate, the Office of Equality Assurance may:

- (1) Issue Administrative Citations and compliance orders;
- (2) File a lawsuit in court; and

(3) Seek reimbursement of City's administrative costs of enforcement.

Q3: How would someone report an alleged violation of the Opportunity to Work Ordinance?

A3: Any suspected or alleged Opportunity to Work Ordinance violations may be reported in writing, in person, by telephone or by email to the Office of Equality Assurance by an employee or any other person. The Office of Equality Assurance shall keep confidential the name and identifying information of the employee or person reporting the alleged violation to the fullest extent possible.

Complainants shall be asked to provide the following information to the Office of Equality Assurance: full name; mailing address; phone number; name, address and phone number of company where person works; name of manager or business owner; type of work performed/classification; work schedule.

Q4: What remedies are available to persons harmed by a violation of the Opportunity to Work Ordinance?

A4: The Opportunity to Work Ordinance references the remedies available for a violation of the Minimum Wage Ordinance in Chapter 4.100 of the San Jose Municipal Code. The Minimum Wage Ordinance provides the following:

- (1) Right to sue in court to enforce the right to be offered additional work hours;
- (2) Award of back wages;
- (3) Civil penalties in the amount of \$50.00 per day to each Employee harmed; and
- (4) Recovery of reasonable attorneys' fees and costs.

Q5: What is the implication of a first violation of the Opportunity to Work Ordinance?

A5: No fines, fees or civil penalties shall be assessed for an Employer's first violation of the Ordinance. For the first violation, a warning shall be issued.

Q6: What is the implication of a second or repeated violations of the Opportunity to Work Ordinance?

A6: Should the Office conclude the Employer failed to comply with the Ordinance and it is the Employer's second or repeated violation, fines and penalties shall be assessed in accordance with the City's Fine and Fee Schedule.

Q7: Can the Ordinance be amended?

A7: Yes. The Opportunity to Work Ordinance can be amended by the City Council without a vote of the people with regard to the implementation or enforcement, to achieve the purposes of the Ordinance but not in a manner that lessens the substantive requirements of the Chapter or its scope of coverage. Any other amendment to the Ordinance would require voter approval pursuant to Elections Code Section 9217.

Q8: Is there a hardship exemption?

A8: Yes. The Office of Equality Assurance may grant a hardship exemption for up to twelve months to an Employer who demonstrates that:

- (1) That the Employer has undertaken in good faith all reasonable steps to comply; and
- (2) Full and immediate compliance would be impracticable, impossible or futile.

The Hardship Exemption Application form can be found at

<https://www.sanjoseca.gov/DocumentCenter/View/65902>.

Q9: Is there a fee to file a hardship exemption application form?

A9: No.

Q10: What constitutes a hardship exemption?

A10: A hardship exemption may be granted where the work or need is unpredictable or requires a specialized skill and there is a need to essentially have Employees “on call.” Determination of a hardship exemption shall be made on a cases by case basis. The following scenario of hardship is provided below and is intended as an example only.

Scenario: An Employer has a specialized, specific task/operation that is performed by part-time Employees at a specific time each day (from noon to 4 pm). Due to increased volume, the Employer needs to hire more people to perform this specialized function. It is impracticable for the Employer to offer additional hours to his/her current part-time Employees since they are already working the 4-hour Shift.

Q11: Can a hardship exemption be extended beyond twelve months?

A11: Yes. The Office of Equality Assurance may extend the hardship exemption in twelve-month increments if an Employer demonstrates that, despite the Employer’s best effort to come into compliance, hardship conditions continue to exist.