

ORDINANCE NO.

AN ORDINANCE OF THE CITY OF SAN JOSE AMENDING SECTIONS 3.49.025, 3.49.030, 3.49.040 3.49.050, 3.49.070 AND 3.49.181 OF CHAPTER 3.49 AND SECTIONS 3.50.020, 3.50.030 AND 3.50.040 OF CHAPTER 3.50 OF TITLE 3 OF THE SAN JOSE MUNICIPAL CODE TO PROVIDE THAT COUNCILMEMBERS SHALL NO LONGER ACTIVELY PARTICIPATE IN THE PTC PLAN AND PROVIDE FOR PARTICIPATION BY COUNCILMEMBERS IN THE CITY OF SAN JOSE, CALIFORNIA DEFINED CONTRIBUTION PLAN FOR UNIT 99 EMPLOYEES

WHEREAS, the City of San José proposes to amend the San José Municipal Code to provide that councilmembers shall no longer actively participate in the PTC Deferred Compensation Plan set forth in Chapter 3.50 and provide for participation by councilmembers in the Defined Contribution Plan for Unit 99 Employees set forth in Chapter 3.49; and

WHEREAS, pursuant to the provisions and requirements of the California Environmental Quality Act of 1970, together with related State CEQA Guidelines and Title 21 of the San José Municipal Code (collectively, "CEQA"), it has been determined that the provisions of this Ordinance do not constitute a project, under File No. PP17-008 (General Procedure and Policy Making resulting in no changes to the physical environment); and

WHEREAS, the City Council of the City of San José is the decision-making body for this Ordinance; and

WHEREAS, this Council has reviewed and considered the "not a project" determination under CEQA prior to taking any approval actions on this Ordinance;

NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF SAN JOSE:

SECTION 1. Section 3.49.025 of Chapter 3.49 of Title 3 of the San José Municipal Code is amended to read as follows:

3.49.025 Establishment of Trust

- A. There is hereby established the City of San José defined contribution plan for Unit 99 employees and elected officials trust. The plan and trust shall consist of this Chapter and any plan document adopted by the City to supplement this Chapter.
- B. Notwithstanding any contrary provision of the plan, in accordance with Section 401(a) of the Internal Revenue Code, all assets held in connection with the plan, including all contributions to the plan, all property and rights purchased with such amounts, and all income attributable to such amounts, property, or rights shall be held by the City in trust (or appropriate investment products) for the exclusive benefit of participants and beneficiaries under the plan.
- C. All contributions to the plan shall be transferred to the trust or investment product within a period that is not longer than is reasonable for the proper administration of the accounts of participants and beneficiaries.
- D. Prior to the satisfaction of all liabilities with respect to plan participants and their beneficiaries, no part of the assets or income of the plan shall be used for, or diverted to, purposes other than for the exclusive benefits of the plan

participants and their beneficiaries and defraying reasonable expenses of the administration of the plan.

SECTION 2. Section 3.49.030 of Chapter 3.49 of Title 3 of the San José Municipal Code is amended to read as follows:

3.49.030 Definitions

For the purposes of this plan, certain words or phrases used herein will have the following meanings:

- A. "414(h) pick-up contribution account" shall mean the account maintained for a participant under the plan to which participant contributions pursuant to Section 3.49.040 and the adoption agreement shall be credited.
- B. "Account" shall mean the account maintained for a participant under the plan, which may include the following accounts: the employer contribution account, the 414(h) pick-up contribution account, and the rollover contribution account.
- C. "Beneficiary" shall mean a beneficiary designated pursuant to the plan terms.
- D. "City" shall mean the City of San José, California.
- E. "Employer contribution account" shall mean the account maintained for a participant under the plan to which City contributions pursuant to Section 3.49.080 and the adoption agreement shall be credited.
- F. "Compensation" shall mean:

"Participant's compensation," within the meaning of Internal Revenue Code Section 415(c)(3), required to be reported as actual wages in Box 1 of Form W-2 for a year for services to the City, except as provided in this Section 3.49.030(F), plus any compensation reduction election under Internal Revenue Code Sections 125, 132(f), 401(k), 403(b), or 457(b) (including an election to defer compensation under the City's deferred compensation plan) that is actually paid or includable in gross income during the calendar year. Compensation includes payment for the following:

1. Regular salary;
2. Executive leave;
3. Vacation;
4. Holiday;
5. Sick Leave;
6. Jury duty;
7. Administrative leave;
8. Funeral leave;
9. Paid time off;
10. Personal leave;
11. Witness leave;
12. Cancer screening release time;
13. Military leave;
14. Management performance program retroactive payments; and
15. Any compensation that would be considered a non-pensionable compensation increase under 3.28.030.05(E).

Notwithstanding anything to the contrary, compensation does not include payment for the following:

1. Bilingual pay;
2. Auto allowances;
3. Taxable cellular phone and data stipends;
4. Medical and dental in lieu payments;
5. Higher class management pay;
6. Retention payments;
7. Management performance program bonuses;
8. Premium-related payments;
9. Severance pay; and
10. Vacation balance payoffs.

Compensation also includes certain additional amounts if paid no later than two and one-half (2½) months after severance from employment or the end of the calendar year that includes a participant's severance from employment that, absent a severance from employment, would have been paid to the participant while the participant continued in employment with the City. The compensation of each participant for any plan year shall not exceed Two Hundred Fifty Thousand Dollars (\$250,000) (for 2012), as adjusted for cost of living increases in accordance with Internal Revenue Code Section 401(a)(17)(B). The cost of living adjustment in effect for a calendar year applies to compensation for the determination period that begins with or within such calendar year. Amounts of compensation shall be determined without regard to any community property laws.

- G. "Employee" shall mean any officer or employee of the City of San José, California, who is an executive management or professional employee in Unit 99 who is first hired on or after January 20, 2013, except:

1. Effective July 26, 2020, any officer or employee of the City of San José, who is first hired on or after November 4, 2014 in the following Unit 99 positions:
 - a. Chief ~~e~~Executive ~~e~~Officer, or its equivalent, in the ~~e~~Office of ~~r~~Retirement ~~s~~Services;
 - b. Chief ~~i~~Investment ~~e~~Officer, or its equivalent, in the ~~e~~Office of ~~r~~Retirement ~~s~~Services; and
 - c. Investment professional staff, or their equivalent, in the ~~e~~Office of ~~r~~Retirement ~~s~~Services.

- H. "Normal retirement age" shall mean age sixty-five (65).

- I. "Participant" shall mean any eligible employee and elected official who fulfills the requirements of enrollment into the plan contained in Section 3.49.050, and has not yet received a distribution of his or her entire account under the plan.

- J. "Participation agreement" shall mean the agreement executed and filed by an employee or elected official with City, pursuant to Section 3.49.050, in which an employee or elected official elects to become a participant in the plan.

- K. "Payroll period" shall mean the normally scheduled payroll for Unit 99 and elected officials.

- L. "Plan document" shall mean any document, including a basic plan and adoption agreement, that is adopted by the City to set forth additional plan provisions.

- M. "Plan year" shall mean a calendar year.
- N. "Rollover contribution account" shall mean the account maintained for a participant under the plan to which rollovers pursuant to Section 3.49.058 and the adoption agreement shall be credited.
- O. "Separation from service" shall mean a severance of a participant's employment with the City for any reason, including retirement. A participant shall be deemed to have separated from service with the City for purposes of the plan when, in accordance with the established personnel practices of the City, the employment relationship is considered actually terminated. If a participant has not been terminated, but the participant has not performed services for the City for a period of six (6) consecutive months and the participant is not on a paid leave of absence, the participant shall be deemed separated from service for purposes of this plan at the end of the six (6) month period.

SECTION 3. Section 3.49.040 of Chapter 3.49 of Title 3 of the San José Municipal Code is amended to read as follows:

3.49.040 Participant Contributions

- A. During each payroll period in which an employee or elected official is a participant in the plan, the City shall deduct the percentage of the employee's or elected official's compensation specified in the adoption agreement and contribute such amount to the plan. Although designated as employee contributions, the contributions made under this Subsection A. are picked up and paid by the City via salary reductions in accordance with Internal Revenue Code Section 414(h)(2). A participant may not receive any amounts paid under this section directly instead of having the amounts paid to the plan.

- B. Participant contributions will be subject to the applicable limit under Internal Revenue Code Section 415, as provided by Section 3.049.045 and the plan.

SECTION 4. Section 3.49.050 of Chapter 3.49 of Title 3 of the San José Municipal Code is amended to read as follows:

3.49.050 Participation in the Plan

- A. Each employee hired on or after January 20, 2013 has a one-time irrevocable election to either: (1) become a participant in this plan and make mandatory employee contributions to this plan, or (2) become a participant as a Tier 2 member in the ~~f~~Federated ~~e~~Employees' ~~r~~Retirement ~~p~~Plan under Chapter 3.28, by executing a written election form on or before his or her first day of employment with the ~~e~~City. If the employee fails to timely file a written election form with the ~~e~~City on or before that date, the employee will be deemed to have elected to participate as a Tier 2 member in the ~~f~~Federated ~~e~~Employees' ~~r~~Retirement ~~p~~Plan under Chapter 3.28.
- B. Each employee shall have only one election (including a default election) to participate in the plan, and that election cannot be changed for any reason. If an employee who has made an election (including a default election) under this ~~s~~Section leaves employment with the ~~e~~City and later returns to ~~e~~City employment in a capacity/position that would be covered by the plan, the employee's prior election will determine whether or not the employee participates in this plan.
- C. An employee or elected official who becomes a participant in this plan (and any survivors of such a participant) shall not be eligible for retiree medical, dental, or other health and welfare benefits under Part 16 and Part 17 of Chapter 3.28.

D. Effective October 3, 2021, elected officials who are not members of the California Public Employees Retirement System shall become members of this plan. Subsections (A) and (B) of this Section 3.49.050 shall not apply to elected officials.

SECTION 5. Section 3.49.070 of Chapter 3.49 of Title 3 of the San José Municipal Code is amended to read as follows:

3.49.070 Defined Contribution Fund

- A. The Ccity shall establish a defined contribution fund to which all contributions to the plan shall be credited, and to which all direct rollover amounts accepted by the plan shall be credited as received. Separate accounts will be established for each employee and elected official participating, which will show all amounts of contributions, direct rollover amounts, investments made, shares acquired and earnings and gains on investments. Each account will be valued at least semiannually.
- B. On executing the participation agreement, the employee-participant shall designate his or her investment objective prospectively only. The Ccity may select for investment of accounts the types of investments set forth in Sections 53601 and 53602 of the Government Code of the State of California and in corporate stocks, bonds, and securities, mutual funds, savings and loan accounts, credit union accounts, life insurance policies, variable and fixed annuities, mortgages, deeds of trust, or other security interests in real or personal property. Nothing in this Ssection shall be construed to permit any type of investment prohibited by the Constitution of the State of California.

- C. From time to time, the Ccity Manager (or his or her designee) shall determine the available investment funds for participants (or beneficiaries upon the death of the participant). The participants may direct the investment of their accounts among the investment funds so selected. Unless otherwise directed by the participant (or beneficiary), in accordance with procedures established by the Ccity Manager (or his or her designee), a participant's (or beneficiary's) employer contribution account, and rollover contribution account, shall be invested in the same manner as the participant's (or beneficiary's) 414(h) pick-up contribution account. The Ccity Manager (or his or her designee) shall follow the participants' (or beneficiaries') directions with respect to the investment of the accounts, except that the Ccity Manager (or his or her designee) shall direct the investment of a participant's (or beneficiary's) account to a default investment when there is no valid investment direction on file.
- D. In the event that a participant does not have a valid investment direction on file for any portion of the amount in that participant's account, that portion of the account shall be invested in any default option or options as determined by the Ccity Manager (or his or her designee). In such event, the participant shall be deemed to have directed that option (or options) for investment of such portion of their account. The Ccity Manager (or his or her designee) intends to establish one or more default options based upon various factors, including but not limited to, market risk, stability and rate of return. If the Ccity Manager (or his or her designee) has appropriately exercised their fiduciary duty in selecting a default option(s), they have no liability for any loss sustained by a participant or beneficiary whose account in whole or in part is invested in the default option(s).
- E. All amounts of compensation deferred pursuant to the plan, all property and rights acquired or purchased with such amounts and all income attributable to

such amounts, property or rights held as part of the plan, shall be transferred to the Ccity to be held, managed, invested and distributed as part of the fund in accordance with the provisions of the plan. All contributions to the plan must be transferred by the Ccity to the fund. All benefits under the plan shall be distributed solely from the fund pursuant to the plan.

SECTION 6. Section 3.49.181 of Chapter 3.49 of Title 3 of the San José Municipal Code is amended to read as follows:

3.49.181 Conforming Domestic Relations Orders

- A. A “domestic relations order” means any judgment, decree or order, including approval of a property settlement agreement or separation agreement issued by a court of competent jurisdiction which relates to the provision of marital property rights of a participant, and is made pursuant to the state domestic relations law of the state where the marital dissolution or separation occurred.
- B. The plan shall only recognize domestic relations orders that the Ccity, in accordance with its authority under Section 3.49.060 and the plan, determines are conforming domestic relations orders.
- C. A “conforming domestic relations order” is a domestic relations order that the Ccity determines conforms with the following guidelines:
 - 1. The order may provide for the establishment of a separate account for the nonparticipant spouse under the plan. For purposes of this Ssection, "nonparticipant spouse" equally refers to current or former spouse of a plan participant.

2. The order may provide, with respect to any separate account established for the nonparticipant spouse, that the nonparticipant spouse shall have the right:
 - a. To direct the investment of the account in accordance with the provisions of the plan;
 - b. To elect the time and form of distribution from the options available under the plan, provided that distributions shall not commence earlier than provided in paragraph C.3. below;
 - c. To designate beneficiaries of the separate account in the event of the nonparticipant spouse's death, in accordance with the procedures provided under the plan;
 - d. To have all distributions from the account of the nonparticipant spouse made directly to the nonparticipant spouse or his or her beneficiary.

3. To conform, the order:
 - a. May not accelerate or increase any benefit provided under the plan or create any rights greater than the participant's rights under the plan and under Section 401(a) of the Internal Revenue Code of 1986, and may not conflict in any other way with the plan's distribution provisions or the requirements and limitations of Section 401(a)(9) of the Internal Revenue Code of 1986 as amended; provided that after December 31, 2001, the nonparticipant spouse who has been awarded a separate account

- may elect to commence distribution of the nonparticipant spouse's separate account prior to the occurrence of a severance event for the participant;
- b. May not allow the nonparticipant spouse to make contributions to the plan except to the extent the nonparticipant spouse is an employee or elected official otherwise authorized to become a participant under the plan; and
 - c. May provide that all distributions made to the nonparticipant spouse shall be made directly to the nonparticipant spouse or beneficiary, as applicable, subject to any direct rollover rights;
4. The order shall also conform with such additional guidelines as the Ceity shall establish from time to time including, with regard to the following:
- a. Provision for the withholding of taxes required by applicable law;
 - b. Provision that the participant and/or the nonparticipant spouse be required to pay any expenses incurred by the Ceity in connection with the order, including, without limitation, the costs of any legal action taken by the Ceity relating to the order;
 - c. Any requirement that the nonparticipant spouse provide the Ceity with such written requests, consents or instructions as the Ceity may require in accordance with the provisions of the plan; and

- d. Provision expressly acknowledging that the Ccity's obligation to the participant is reduced to the extent that payments are to be made to the nonparticipant spouse.

SECTION 7. Section 3.50.020 of Chapter 3.50 of Title 3 of the San José Municipal Code is amended to read as follows:

3.50.020 Purpose

The purpose of the PTC Plan is to provide part-time, temporary and contract employees, ~~City Councilmembers~~ and Council Assistants (who are not members of a City retirement plan other than an eligible deferred compensation plan) with a retirement program by requiring them to enter into agreement with the City of San José which will provide for deferral of payment of a portion of their current compensation until death, disability, retirement, termination of employment or other event as provided herein, in accordance with the applicable provisions of the Internal Revenue Code.

SECTION 8. Section 3.50.030 of Chapter 3.50 of Title 3 of the San José Municipal Code is amended to read as follows:

3.50.030 Definitions

For the purposes of this plan, certain words or phrases used herein will have the following meanings:

- A. "Account" shall mean a sub-account maintained for a participant to hold and account for the contributions which are the proceeds of deferral of compensation from the City, including any adjustment for earnings and expenses.

- B. “Alternative normal retirement age” shall mean any age irrevocably designated in writing by the participant which is:
1. Not earlier than the earliest age at which the participant has the right to retire under a retirement plan of the City and receive immediate retirement benefits without actuarial or similar reduction for early retirement; and
 2. No later than age seventy and one-half (70-1/2).
- C. “Alternate payee” shall mean any person who is recognized by a domestic relations order as having a right to receive all, or a portion of, the benefits payable under the Plan with respect to a participant within the meaning of Internal Revenue Code Section 414(p).
- D. “Basic Plan Document” shall mean the written basic plan document, as amended and restated from time to time, for the City of San José, PTC Deferred Compensation Plan.
- E. “Beneficiary” shall mean a beneficiary designated by the participant to receive payment of benefits under the Plan, or if no beneficiary is so designated, the participant’s estate.
- F. “City” shall mean the City of San José, California.
- G. “City Manager” shall mean the City Manager or the City Manager’s designee.
- H. “Committee” or “Advisory Committee” shall mean the Deferred Compensation Advisory Committee.

I. "Compensation" prior to April 9, 2021 shall mean includible compensation. Effective April 9, 2021, "compensation" shall mean the following:

1. Regular Salary;
2. Executive Leave;
3. Personal Leave;
4. Vacation;
5. Holiday;
6. Sick Leave;
7. Administrative Leave;
8. Funeral Leave;
9. Paid Time Off;
10. Witness Leave;
11. Cancer Screening Release Time;
12. Military Leave;
13. Retroactive Salary Payments;
14. POST Pay;
15. Anti-Terrorism Pay; and
16. Any compensation that would be considered a non-pensionable compensation increase under Chapters 3.28.030.05(E) and/or 3.36.020.3(A) of Title 3 of the San José Municipal Code.

Notwithstanding anything to the contrary, compensation does not include payment for any purpose not included above, including, but not limited to, the following:

1. Bilingual pay;
2. Auto allowances;

3. Taxable cellular phone and data stipends;
 4. Medical and dental in lieu payments;
 5. Higher class pay;
 6. Retention payments;
 7. Management Performance Bonus Program;
 8. Premium-related payments;
 9. Severance pay;
 10. Vacation balance payoffs;
 11. Compensatory time off payoffs;
 12. Sick leave payoffs;
 13. Reimbursements;
 14. Allowances for equipment;
 15. Safety purchases;
 16. Moving expenses;
 17. Professional development;
 18. Education reimbursement; and
 19. Overtime.
- J. "Eligible Deferred Compensation Plan" means a plan which meets the requirements of Internal Revenue Code section 457(b).
- K. "Includible compensation" shall mean:
1. Prior to January 1, 2002, "includible compensation" shall mean the compensation for services performed for the City which (taking into account the provisions of Sections 457 and 403(b) of the Internal Revenue Code) is currently includible in gross income. Amounts of compensation shall be determined without regard to any community property laws.

2. After December 31, 2001, "includible compensation" shall have the meaning given to the term "participant's compensation" by Section 415(c)(3) of the Internal Revenue Code. Amounts of compensation shall be determined without regard to any community property laws.

3. Effective January 1, 2009, "includible compensation" includes differential wage payments while the participant is performing qualified military service (as defined in Chapter 43 of Title 38, United States Code) to the extent required by the provisions of Internal Revenue Code Sections 3401(h) and 414(u)(12), the Treasury regulations thereunder and any subsequent guidance issued under Internal Revenue Code Section 414(u)(12). A participant receiving differential wage payment from the City shall be treated as employed by the City and the differential wage payment shall be treated as compensation for purposes of applying the maximum amount which may be deferred under Code Sections 457(b)(2) and 457(b)(3). Furthermore, effective January 1, 2008, "includible compensation" includes amounts paid after the employee's severance event if paid by the later of two and one-half (2 ½) months after the employee's severance event, or the end of the calendar year that includes the date of the employee's severance event subject to the following requirements:
 - a. The payment is regular compensation for services during the employee's regular working hours, or compensation for services outside the employee's regular working hours (such as overtime or shift differential), commissions, bonuses, or other similar payments and the payment would have been made to the employee prior to a severance event if the employee had continued in employment with the City.

- b. Includible compensation shall include all payments to an individual who does not currently perform services for the City by reason of qualified military service (within the meaning of Internal Revenue Code Section 414(u)(1)) to the extent these payments do not exceed the amounts the individual would have received if the individual had continued to perform services for the City rather than entering qualified military service.

- 4. Effective April 9, 2021, "includible compensation" shall mean a participant's actual wages for services performed for the employer the year reported in box 1 of Form W-2, increased by any compensation reduction election under Internal Revenue Code Sections 125, 132(f), 401(k), 403(b) or 457(b) (including an election to defer compensation under this plan). Includible compensation is determined without regard to any community property laws.

- L. Participant" shall mean any eligible PTC employee who fulfills the requirements of enrollment into the Plan, and who is or has enrolled in the plan and who retains the rights to benefits under the Plan. On or after October 3, 2021, City councilmembers are no longer PTC employees (and are no longer active Participants), but will continue to be Participants under the Plan as long as the councilmember maintains an Account.

- M. "Participation Agreement" shall mean the agreement executed and filed by a PTC employee with the City or Plan Administrator, pursuant to the Basic Plan Document, in which a PTC employee becomes a participant in the Plan.

- N. "Payroll period" shall mean a biweekly compensation period.

- O. "Percentage limitation" shall mean:
1. Prior to January 1, 2002, thirty-three and one-third percent (33 1/3%) of the participant's includible compensation for the taxable year.
 2. After December 31, 2001, one hundred percent (100%) of the participant's includible compensation for the taxable year.
- P. "Plan administrator" shall mean the City Manager or the entity designated by the City Manager to carry out certain nondiscretionary administrative functions of the Plan.
- Q. "Plan year" shall mean a calendar year.
- R. "PTC employee" shall mean any part-time, temporary, or contract employee, ~~or any city councilmember~~ of the City of San José, California, and shall include any council assistant until such time as the council assistant becomes a member of a city retirement plan other than an eligible deferred compensation plan. Prior to October 3, 2021, a PTC employee includes any City councilmember of the City of San José, California, but on or after October 3, 2021, City councilmembers shall no longer be included as a PTC employee under this Plan.
- S. "Severance event" shall mean:
1. Prior to January 1, 2002, severance of the participant's employment with the City that constitutes a "separation from service" the meaning of Internal Revenue Code Section 402(e)(4)(D)(iii).

2. After December 31, 2001, a severance of the participant's employment with the City within the meaning of Internal Revenue Code Section 457(d)(1)(A)(ii).

T. "Trustee" shall mean the City of San José and Advisory Committee based on the duties set forth in Chapter 3.50.060 of Title 3 of the San José Municipal Code. shall be determined without regard to any community property laws.

SECTION 9. Section 3.50.040 of Chapter 3.50 of Title 3 of the San José Municipal Code is amended to read as follows:

3.50.040 Deferral of Compensation

- A. During each payroll period in which a PTC employee is a participant in the Plan:
1. 3.75% of the participant's compensation shall be deferred and paid to the Plan (mandatory deferrals); and
 2. For PTC employees ~~other than City councilmembers~~, the City shall contribute 3.75% of the participant's compensation to the plan. Prior to October 3, 2021 for City councilmembers, the City shall contribute 6.55% of the participant's compensation to the Plan ("City contributions").
- B. Notwithstanding any provision of the Plan to the contrary, contributions to the Plan and additions to accounts of participants shall be limited to the percentage limitation and as provided in Internal Revenue Code Section 457 and any other relevant Internal Revenue Code Sections, as detailed in the Basic Plan Document.

PASSED FOR PUBLICATION of title this _____ day of _____, 2021, by the following vote:

AYES:

NOES:

ABSENT:

DISQUALIFIED:

SAM LICCARDO
Mayor

ATTEST:

TONI J. TABER, CMC
City Clerk