



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Richard Doyle
Norberto L. Dueñas

SUBJECT: OPPORTUNITY TO WORK

DATE: September 15, 2017

SUPPLEMENTAL

REASON FOR SUPPLEMENTAL

This supplemental memorandum provides additional information regarding the “Opportunity to Work” Ordinance, including an analysis relating to its applicability to governmental entities, including the City of San Jose.

BACKGROUND

In November 2016, San Jose voters passed citizen initiated Measure E, also known as the “Opportunity to Work” Initiative, which requires employers to offer additional work hours to existing qualified part-time employees before hiring new employees, including subcontractors or use of temporary staffing services. The Initiative was codified by ordinance in Chapter 4.101 of the San Jose Municipal Code.

ANALYSIS

The “Opportunity to Work” Ordinance requires certain employers to offer additional work hours to existing qualified part-time employees before hiring new employees. Small business enterprises with 35 or fewer employees are exempt from the Ordinance.

Definition of Employer under the Opportunity to Work Ordinance

Subject to limited exceptions, the definition of “employer” determines the applicability of the Ordinance on local businesses. Under San Jose Municipal Code Section 4.101.030(D), the term employer is defined as follows:

“Employer” shall mean any person, including corporate officers or executives, as defined in Section 18 of the California Labor Code, 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;
2. Is either subject to the business tax Chapter 4.76 of the 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.

Under California Labor Code Section 18, a “person” means any person, association, organization, partnership, business trust, limited liability company or corporation. This list does not include various governmental entities, like the State of California, county, incorporated city, or town or other municipal corporation. Thus, the City of San Jose, as a municipal corporation, does not fall within the definition of Section 18.

Moreover, under subsection 2 of Section 4.101.030(D), the Ordinance applies to businesses that are subject to the City’s business tax or businesses that have a place in San Jose which are exempt by state law from the imposition of the City’s business tax. This requirement covers private employers, as well as non-profit employers, but it does not cover the City or other government agencies.

Furthermore, state agencies, such as counties, cities, school districts, public utility districts, water districts, to name a few, are immune from local regulation of their governmental activities absent an express legislative or constitutional waiver of that immunity. With respect to federal agencies, the United States Constitution’s supremacy clause preempts local regulations, unless federal law expressly requires compliance with local regulations.

Collective Bargaining Agreements under the Opportunity to Work Ordinance

Pursuant to Section 4.101.110, the requirements of the Ordinance 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. The City’s collective bargaining agreements do not explicitly waive the provisions under the Opportunity to Work Ordinance.

Amending the Opportunity to Work Ordinance

The Opportunity to Work Ordinance was a citizen initiative passed by the City of San Jose voters on November 8, 2016. California Elections Code Section 9217 provides that no ordinance proposed by initiative petition and adopted by the voters shall be repealed or amended except by a vote of the people, unless provision is otherwise made in the original ordinance.

Section 4.101.120 of the San Jose Municipal Code provides for the authority by the City Council to allow an amendment without a vote of the people with regards to the implementation or enforcement of the Ordinance in order to achieve its purpose, but not in a manner that lessens the substantive requirements or its scope of coverage.

While state and federal laws restrict the City's ability to apply the Ordinance to other governmental entities, the City may amend the Opportunity to Work Ordinance to apply to itself or adopt its requirements by policy.

Offering Additional Hours to Part-Time Staff

As noted above, the "Opportunity to Work" Ordinance requires employers to offer additional work hours to existing qualified part-time employees before hiring new employees; there is no requirement that existing qualified part-time employees accept the offer of additional work hours. The requirement to offer additional work hours does not apply where the existing qualified part-time employees would be paid overtime or other premium rate under any law or collective bargaining agreement. The Ordinance does not prevent an employer from creating as many new or different part-time shifts that result in additional hours as the employer may want or need, but only that any new or different shifts that result in additional hours are first offered to existing qualified part-time employees before hiring new staff. The Ordinance does not provide an exemption for seasonal hiring or special youth oriented hiring programs. As such, seasonal positions in the City's Parks, Recreation and Neighborhood Services Department (PRNS) and other City sponsored youth hiring programs would first need to be offered to existing part-time employees before additional temporary staff could be hired.

Duty to "Meet and Confer" with Affected Bargaining Units

The Meyers-Milias-Brown Act (MMBA) governs the labor-management relations in California local government, including cities, counties, and most special districts. The MMBA provides the right to organize, sets guidelines for such things as the scope of representation and the requirement to meet and confer in good faith. The MMBA states that the governing body of a public agency shall meet and confer in good faith regarding wages, hours and other terms and conditions of employment with representatives of recognized employee organizations (i.e. unions/bargaining units).

The MMBA defines the scope of representation as all matters related to employment conditions and employer-employee relations, including, but not limited to, wages, hours and other terms and conditions of employment, except, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order. Under the MMBA the City has an obligation to “meet and confer” in good faith with the City’s bargaining units regarding wages, hours and other terms and conditions of employment. The City Manager has delegated the authority to meet and confer to the Office of Employee Relations.

Generally, there are different benefit levels for part-time employees with a corresponding maximum hours limit that an employee can work during the calendar year. For example, the City’s [Memorandum of Agreement \(MOA\)](#) with the [Municipal Employees’ Federation, AFSCME Local 101 \(MEF\)](#) provides for the following benefit levels for part-time employees:

Part-Time Employee Benefit Level	Work Schedule/Paid Hours
75%	30-34 hours per week or 1560-1768 per year
62.50%	25-29 hours per week or 1300-1508 per year
50%	20-24 hours per week or 1040-1248 per year
Part-Time Non-Benefited Employees	Less than 20 hours per week or less than 1040 per year

In addition, it should be noted that, under the Affordable Care Act (ACA), employees who work an average of 30 hours or more per week or 130 hours per month are considered full time. Employers with 50 full-time equivalent (FTE) employees are required to offer affordable healthcare for these employees.

Accordingly, if the terms of the “Opportunity to Work” Ordinance were to apply to the City, it would be subject to meet and confer with the affected bargaining units.

COORDINATION

This memo has been coordinated with the City Manager’s Budget Office and the Department of Public Works.

COST SUMMARY/IMPLICATIONS

Part-time classifications are assigned a corresponding maximum number of hours that can be worked in payroll calendar year. The total number of allocated part-time hours for each affected classification are subject to funding approval through the City’s annual budget process. Any increase to the number of the part-time hours available to be assigned and worked by part-time employees would be subject to that budgetary process. Additionally, there is insufficient information at this time to determine what impact, if any, may result from the ACA if the “Opportunity to Work” rules were applied to the City.

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CONCLUSION

As a governmental employer, the City of San Jose is not subject to the requirements of the "Opportunity to Work" Ordinance. If the "Opportunity to Work" Ordinance were to apply to the City, it would be subject to meet and confer with the affected bargaining units. The City will be in negotiations in 2018 with the affected bargaining units and will bring forward this issue in closed session to discuss with the City Council prior to beginning those negotiations.

CEQA

Not a Project, File No. PP10-069(c).


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