



COUNCIL AGENDA: 2/11/2020

ITEM: 3.5

FILE NO: 20-149

Memorandum

TO: HONORABLE MAYOR AND
CITY COUNCIL

FROM: Toni J. Taber, CMC
City Clerk

SUBJECT: SEE BELOW

DATE: February 11, 2020

SUBJECT: Council Policy Priority #16: Wage Theft Prevention Policy.

RECOMMENDATION:

(a) Accept status update and workplan for completion of Council Priority #16 - Update to Wage Theft Prevention Policy.

(b) Accept the Good Jobs First Report analysis.

(c) Direct staff to continue development of Council Priority #16 - Update to Wage Theft Prevention Policy and return to the Council in spring 2020 with recommendations, policy options, and resource requirements.

CEQA: Not a Project, File No. PP17-009, Staff Reports, Assessments, Annual Reports, and Informational Memos that involve no approvals of any City action. (Public Works/Finance/City Manager)

[Deferred from 2/4/20 - Item 3.4 (20-114)]



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Matt Cano
Lee Wilcox
Julia H. Cooper

SUBJECT: COUNCIL PRIORITY #16 -
WAGE THEFT PREVENTION
POLICY UPDATE

DATE: January 22, 2020

Approved

Date

1/24/2020

RECOMMENDATION

- (a) Accept status update and workplan for completion of Council Priority #16 – Update to Wage Theft Prevention Policy.
- (b) Accept the Good Jobs First Report analysis.
- (c) Direct staff to continue development of Council Priority #16 – Update to Wage Theft Prevention Policy and return to the Council in spring 2020 with recommendations, policy options, and resource requirements.

OUTCOME

Approval of this item would direct staff to return to City Council in spring 2020 with policy options, recommendations, and resource requirements for policy implementation regarding Council Priority #16—Update to Wage Theft Prevention Policy (“Policy”).

EXECUTIVE SUMMARY

This report provides an update on staff’s efforts to realize the goals of the City’s Wage Theft Prevention Policy (0-44) as well as staff’s review of the Responsible Contractor Ordinance. The report describes the existing landscape of wage theft enforcement mechanisms at the federal, state, county, and city levels and identifies opportunities within that framework to better protect and support low-wage, vulnerable workers. The report then identifies foundational measures that are crucial for the effective implementation of the Wage Theft Prevention Policy. These

measures include establishing a clear, consistent, and fair standard that is well-defined within the state and county context of wage theft enforcement. These measures also include developing cooperative relationships with federal, state and county enforcement bodies to secure access to data and better support San José workers. Finally, the report describes how these foundational measures facilitate the implementation of the Wage Theft Prevention Policy across the City’s operations, including the expected impacts on the City’s Finance and Public Works Departments.

BACKGROUND

The City’s current policy on wage theft consists of two components: (1) Council Policy 0-44, entitled “Wage Theft Prevention Policy,” and (2) Section 6.02.130.B. San Jose Municipal Code, which authorizes the denial, suspension, and revocation of certain regulatory permits and licenses based on a violation of wage and hour laws. The Wage Theft Prevention Policy (0-44) limits the City’s ability to award contracts to companies that fail to meet an established standard with respect to wage theft violations and unpaid final judgments (a description of violations and judgments is provided in the analysis section below). Public works contracts were explicitly exempted as there is already a proactive and rigorous system in place to ensure workers are paid a prevailing wage on existing public works contracts through the department’s Office of Equality Assurance (OEA). The Policy also enables the City to cancel an existing contract upon discovery that a contractor has failed to meet the standard. The Policy currently operates via a self-reported disclosure requirement. At this time, staff is only directed to actively investigate an employer’s wage theft history upon receipt of a worker complaint against that employer.

At the March 5, 2019 City Council Priority Setting Session, Council prioritized the January 30, 2019 Rules and Open Government Memo¹ authored by Vice Mayor Jones and Councilmembers Peralez, Carrasco, and Jimenez (“Wage Theft Memo”) that proposed modifying the Wage Theft Prevention Policy and adding an ordinance that would apply to private construction. The original January memo was yellow-lighted and referred to the City Council Priority Setting Process. The memo directed the Administration to explore the following policy issues:

- I. Amend the Wage Theft Prevention Policy to achieve the following goals:
 - a. Remove the exclusion of public works contracts; and
 - b. Clarify the existing definition of “Final Judgments, Decisions, and Orders” to also include judgments resulting from Civil Wage and Penalty Assessments (CWPA), from a Bureau of Field Enforcement (BOFE), and citations for serious, willful, and repeat OSHA violations.
- II. Adding an ordinance to the Municipal Code to achieve the following goals:
 - a. Require Developers’ proposed major construction projects disclose wage theft or other violations of labor and employment law committed within the past five

¹ January 30, 2019 update to the San José Wage Theft Prevention Ordinance Memo:

<https://sanjose.legistar.com/LegislationDetail.aspx?ID=3845567&GUID=E563991B-1327-4830-924F-1C4304916B6F&Options=&Search=>

- years by their prime and subcontractors; and if any prime contractor or subcontractor has unpaid wage theft claims or other final unsatisfied judgments, citations, or final administrative decisions against them, that contractor be disqualified from the project until they have complied with back wages owed or other final judgments, citations, or final administrative actions;
- b. If the City provides any economic development incentives to private construction projects, those incentives should be subject to penalties if illegal abuses of workers are committed on the project; and direct staff to return to City Council with recommendations for appropriate penalties for the Developers, prime contractors, and subcontractors such as a “clawback” mechanism allowing the City to revoke all or a portion of the incentive if illegal abuses of workers are committed on the project.

Although not directly related to the prioritized Wage Theft Memo, other activities and Council actions directly intersect with the needed review of the existing Council Wage Theft Prevention Policy. Specifically, at the March 19, 2019 Council meeting for Item 3.7, the Finance Department presented the “Report on Request for Proposals for Financial Services (Banking Services) RFP 17-18-05 and Related Actions,”² which underscored significant challenges in finding qualified proposers to provide required banking services to the City under the existing wage theft policy definition. A summary of the issues discussed is found in the Analysis section.

Importantly, at the November 19, 2019 Council Meeting, Council directed staff to provide a progress report to the City Council on the status of the Wage Theft Prevention Policy updates as well as a progress report on the status of the items raised in the 2017 audit of the Public Works Department of Equality Assurance. The remainder of this memo focuses on a general overview of wage theft, the entities responsible for enforcing labor laws, and the challenges and opportunities available to advance changes to the City’s wage theft prevention efforts.

ANALYSIS

The Wage Theft Memo prioritized through the Council Policy Priority process seeks to prevent wage theft in the construction industry by requiring certain actions of contractors and subcontractors to ensure that workers are fully and appropriately paid for work performed. The Administration seeks to realize the Council’s policy direction by developing robust, viable policy strategies. To that end, it has evaluated the policy direction within a larger context of wage theft to ensure that the solutions offered are not only plausible, but also result in the greatest impact.

² March 19, 2019 Council Meeting memos and related documents on the Banking Services RFP:
<https://sanjose.legistar.com/LegislationDetail.aspx?ID=3877371&GUID=6A09AD2A-3CF6-4C89-AB22-05AD03EFA07E&Options=&Search=>

What is Wage Theft?

Wage theft can occur in a myriad of ways, including when employers pay regular rates for overtime hours, when there is underpayment of minimum, living, or prevailing wage, as well as nonpayment of wages for all hours worked.

Wage theft occurs in every employment sector, and while it affects workers of all income levels, low- and minimum-wage workers are especially vulnerable. For these workers and their families, loss of wages impacts the ability to meet basic needs like food, housing, and health care.

In most cases, the burden of wage theft enforcement falls largely on victims themselves. Though workers can request an investigation of their employer with state or federal agencies, the only way to pursue recourse directly is to engage in a long and complicated formal process. For workers who have already lost crucial income, this process can be extraordinarily burdensome. Even for those who succeed, additional time and resources are often required to recuperate stolen wages.

In many cases, employers are unaware that they have violated wage and hour laws, but for some employers wage theft is a way to cut costs and increase profit. Through its policymaking and enforcement authority, the City of San José aims to prevent wage theft, both accidental and intentional, which requires extensive education for employers and workers alike. Furthermore, a systematic wage theft prevention strategy requires robust partnerships and data sharing across jurisdictions, and targeted enforcement in industries where the practice is most pervasive.

How is Wage Theft Monitored and Enforced?

Wage theft is monitored at the federal level by the U.S. Department of Labor (DOL). At this level, nationwide wage, health, and safety standards are uniformly enforced. Some states, including California, have developed their own institutional infrastructure to monitor and enforce statewide labor standards. In California, the Labor Commissioner's Office—also known as the Division of Labor Standards Enforcement (DLSE)—provides statewide oversight. In addition, the County of Santa Clara recently created an Office of Labor Standards Enforcement, which aims to aid workers in navigating the state-level wage recovery procedure and partners with local community organizations to educate and empower workers in Santa Clara County.

Federal Wage Theft Enforcement – Department of Labor

The DOL enforces all federal labor laws, most notably the Fair Labor Standards Act (FLSA), which regulates federal minimum wage, overtime pay, recordkeeping, and child labor requirements. DOL actively investigates employers: targeting high-risk industries and responding to workers' complaints.

DOL data provides an overview of federal enforcement activity, and cases are coded by location, industry, labor laws violated, and whether the offense was willful or repeat.

State of California Enforcement - Division of Labor Standards Enforcement

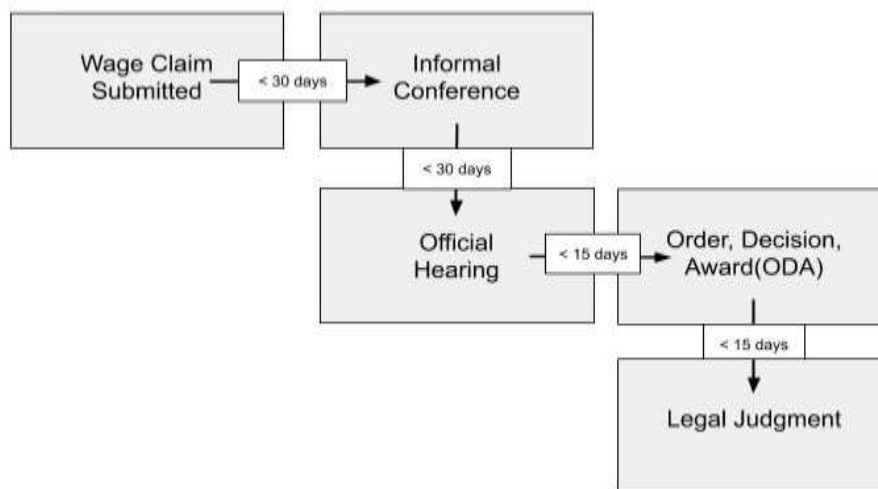
The Division of Labor Standards Enforcement (DLSE) is the main enforcement body for workers in California. DLSE has two main enforcement mechanisms: Wage claim adjudication and the Bureau of Field Enforcement (BOFE). BOFE is the active enforcement arm of DLSE, targeting high-risk areas for inspection; it does not pursue individual claims for wages. When BOFE finds that wages are owed to a group of impacted employees, the division attempts to recover wages on behalf of the entire group.

DLSE - Wage Claim Adjudication

Wage claim adjudication allows workers to file individual claims for unpaid wages or benefits. When a worker submits a wage claim, this initiates a multi-step administrative process through which a worker might be able to recover unpaid wages or benefits (See Fig. 1). Entering this process, however, does not necessarily mean wage theft has occurred; it merely indicates that a dispute exists between an employee and an employer. As such, the relevant parties have opportunities to settle disputes at any point in the wage claim adjudication process. Should this occur, the process ends. If no resolution is found, the process will culminate in a hearing officer making a decision (through an Order, Decision, or Award [ODA]) that may be appealed by either side.³ Should no side appeal within the time allowed, and if the employer does not promptly pay the employee based upon the hearing officer’s final decision, the decision (if violations are found) is mailed to the local Superior Court, making it a final and legally enforceable judgment.

There are employers that promptly comply with a violation (ODA) and pay the award amount to the affected employee(s). Others, despite the violations found, refuse to pay, and their violations

Figure 1 DLSE Wage Claim Adjudication Procedure



³ Appeals are forwarded to the local county Superior Court, removing them from the jurisdiction of the Labor Commissioner’s Office. Appeals must be filed within 15 days from the date on the certification of service by mail, or 20 days if the ODA was served to an address out of state. The Labor Commissioner also mails ODAs that are not appealed to the local Superior Court, making them final legal judgments

become final unpaid judgments. Although these judgments legally entitle workers to the wages owed, they often do not produce this result. The success rate of collecting stolen wages post-process is low.⁴ This happens because the DLSE, though legally entitled to a wide range of judgment collection enforcement tools, places the burden of collecting final judgment monies owed on the wage theft victim. For example, the State has the authority to place a lien on an employer's property, but to use this tool, the employee must collect extensive information on the employer's property and assets and submit several legal forms. For a low-wage worker who has just spent months attempting to recuperate lost wages, navigating this additional bureaucratic maze can be exceedingly difficult.⁵

In October 2015, Governor Brown signed into law Senate Bill No. 588⁶ to address the problem of workers collecting final unpaid judgments. The law provided the Labor Commissioner with the following authorities to target businesses with unpaid wage judgments:

- Preventing such entities from conducting business within the State of California;
- Requiring bonding and/or wage liens from such entities; and
- Requiring that judgments follow individuals and not the business entity.

DLSE – Wage Claim Data

DLSE has not publicly published data on wage claim cases since 2015. To obtain wage claim history for San José, staff must submit data requests directly to DLSE. As such, no reliable or easily accessible means exists for staff to verify whether any given employer is in compliance with a wage theft judgment. However, staff is aware that the County of Santa Clara has received ongoing access to DLSE's database through a Memorandum of Understanding with the State. City staff has contacted DLSE to initiate the process by which the City should be able to gain this access as well.

As DLSE handles most wage claim cases for California workers, it is essential that staff gain access to this dataset. Such access would allow staff to better implement the City's Wage Theft Policy by assessing not only whether a contract applicant has violated California labor laws in the past, but also paid in-full any associated judgments. This access will also allow staff to target education and outreach efforts at high-risk industries and engage in effective cooperation with County and State enforcement bodies.

County of Santa Clara Enforcement - Office of Labor Standards Enforcement (OLSE)

In 2018, the County of Santa Clara established OLSE to help enforce local, state, and federal labor standards. Enforcement within OLSE is complaint based; complaints received are directed to the State of California DLSE for investigations and, should a judgment be issued, the County

⁴ Staff is currently analyzing DOL and DLSE datasets to better understand enforcement activity in San José.

⁵ DLSE published the following pamphlet to help workers navigate the post-hearing process.

https://www.dir.ca.gov/dlse/PubsTemp/DLSE%20Brochures/Collect%20Your%20Award%20from%20the%20Caif%20Labor/Brochure-JE_WEB-EN.pdf

⁶ Employment: nonpayment of wages: Labor Commissioner: judgment enforcement

https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160SB588

OLSE office endeavors to assist workers in recuperating lost wages. OLSE is also engaged in a county-wide community education and co-enforcement program that partners with five local organizations to inform workers of their rights and resources and discover areas where wage theft occurs unreported and unenforced.

Staff met with the County’s OLSE Director to better understand the direction of the office and how the City and County can better collaborate. This includes better coordination on enforcement of local labor laws as well as education and outreach to local businesses.

Superior Courts: Civil Suits

In the state of California, workers can seek recourse either individually or as a group by filing a claim against their employer in civil court. The result of such a procedure, should it conclude in the workers’ favor, is a legal judgment that obligates the defendant—the employer—to pay a specified amount to the plaintiff—the worker(s). The only information that staff has obtained on the outcomes of wage claims made through the civil court system is from the “Grand Theft Paycheck” report from Good Jobs First.⁷ This report is focused on large companies that were the subject of high-profile class-action suits. However, staff is unable to ascertain whether and to what degree this system produces a significant number of wage judgments in comparison with DLSE. Furthermore, staff currently lacks the resources to ascertain whether any given company has any history of involvement in civil wage claim cases.

City of San José Enforcement – City Council Wage Theft Policy

What is the Existing Policy?

In 2016, staff presented its recommendations⁸ and the Council adopted its Wage Theft Ordinance (0-44)⁹ that established the City’s Wage Theft Prevention Policy. The Policy currently applies to solicitations conducted pursuant to Chapter 4.12 and expressly excludes Department of Public Works construction contracts. Public works contracts were explicitly exempted as there is already a proactive and rigorous system in place to ensure workers are paid a prevailing wage on existing public works contracts through the department’s Office of Equality Assurance (OEA). The Policy also gives the City the power to terminate an existing contract if an employer is discovered to be engaging in wage theft. Compliance with the Policy is mandatory with self-reported disclosure requirements on the part of potential contractors and current City vendors. The City’s enforcement of the Policy is complaint driven.

⁷June 2019 “Grand Theft Paycheck” report by Good Jobs First

https://www.goodjobsfirst.org/sites/default/files/docs/pdf/wagetheft_report_revised.pdf

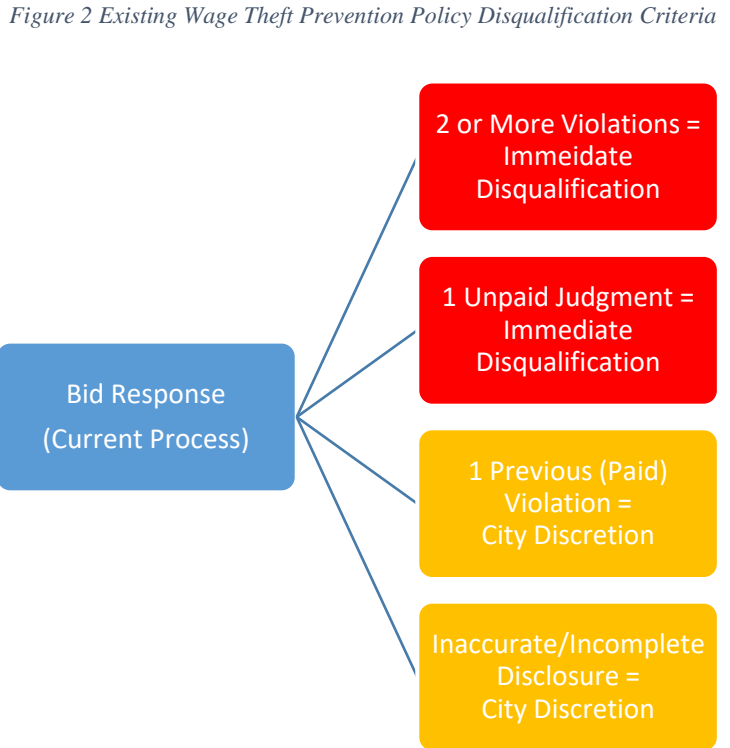
⁸ May 24, 2016 Council memo:

http://sanjose.granicus.com/MetaViewer.php?view_id=&event_id=2137&meta_id=573934

⁹ Council Policy 0-44, “Wage Theft Prevention Policy”: <https://www.sanjoseca.gov/home/showdocument?id=12945>

The Policy includes the following sections for bid and proposal disqualification, which are visually represented in Figure 2 below:

- The City **shall** disqualify a potential contractor based on the disclosed violation if the potential contractor has been found by a court or by final administrative action of an investigatory government agency to have violated applicable wage and hour laws on more than one (1) occasion **or** has one (1) unpaid wage judgment in the past five (5) years prior to the date of submission of a bid or proposal;
- The City, at its sole discretion, **may** disqualify a potential contractor based on the one (1) disclosed judgment **and** the wage and hour judgment has been satisfied in the past five (5) years prior to the date of submission of a bid or proposal;
- Inaccurate or incomplete disclosures constitute a violation of the City’s Wage Theft Prevention Policy and **may** result in immediate disqualification.



Importantly, since the Council’s adoption of this Policy, the City has only received one disclosure of wage theft. This disclosure came from JP Morgan in the Banking Services RFP that is described in greater detail below.

Challenges Implementing the Existing Policy

The current Policy applies to all solicitations conducted by the Finance Department’s Purchasing Division, which has delegated authority to procure supplies, materials, equipment, services, and information technology for the City. While the Banking Services RFP is the first instance wage theft disclosures impacted procurement, research conducted since March 2019 indicates there are significant underlying issues with the measurability, verification, and enforcement of the current Policy.

Banking Services RFP and Review of Good Jobs First Report

On March 19, 2019, the Finance Department presented to Council the dilemma the City faced in procuring Banking Services as a result of the existing Wage Theft Prevention Policy.

Specifically, the RFP resulted in the following issues and consequences:

- **Disclosure Form & Disqualification:** In its RFP submission, JP Morgan disclosed that it had no final court judgments or administrative actions in its commercial banking line, however, they had 20 wage and hour judgments involving its other lines of business in the past five years, all of which had been satisfied.

Consequence: Under the City's existing Policy, JP Morgan would be disqualified for having final judgments in the past five years. JP Morgan was one of two finalists for the RFP. However, proposers who were qualified to respond to this RFP are largely from the banking industry, where wage theft is a widely known issue. Due to the likelihood that the applicability of the Wage Theft Prevention Policy would determine the viability of the RFP process, the issue of disqualification was tabled to allow the RFP evaluation team to consider each proposal on its merits and to provide options to Council. The RFP evaluation produced two finalists (JP Morgan and Wells Fargo) who were deemed qualified to provide the level of services required by the City.

- **Non-Disclosure Requiring Disqualification:** Wells Fargo, the existing banking services vendor that was also a finalist for the RFP, did not disclose any wage theft violations but was confirmed to have a final judgment through a preliminary independent review conducted by staff. Wells Fargo disagreed that any of the claims constituted wage theft, but indicated that all DLSE orders were satisfied.

Consequence: Under the City's existing Policy, Wells Fargo could be disqualified for having final judgments in the past five years and for failing to meet the Policy's mandatory disclosure requirements.

Council ultimately directed staff to reject all proposals, explore the feasibility of an alternative delivery model for banking services, and report back to Council prior to issuing a new RFP.

The Banking Services RFP highlighted several issues with the City's existing Wage Theft Prevention Policy: 1) Definitional ambiguity and inflexibility, and 2) Verification limitations resulting in enforcement challenges.

1. The existing Policy is both ambiguous in its definition of what final judgments constitute wage theft—be they from certain geographic jurisdictions or specific administrative bodies—as well as inflexible in its lack of discretionary authority afforded to staff. In the Banking Services RFP example, qualified proposers were from the banking industry where wage theft is a challenge and a well-publicized issue. As such, applying the existing Policy would have resulted in disqualifying the most qualified finalists capable of successfully providing the City the services it requires. Doing so would undermine the City's ability to operate.

2. Due to the decentralized nature of wage theft enforcement across the various governmental jurisdictions overseeing enforcement, the City is limited in its ability to verify instances of wage theft promptly and accurately. The most relevant and reliable dataset—the State DLSE dataset—is not publicly available, and has not been since 2015. To obtain information, the City must make data requests of DLSE. Given current data access and reliability challenges, the City is limited in its ability to enforce its Policy accurately, fairly, and promptly.

Further confounding implementation, at the March 19, 2019 Council meeting, staff was directed to analyze a June 2018 report by Good Jobs First,¹⁰ which claims many Fortune 500 companies have experienced more than one (1) wage theft violation. As requested by Mayor Liccardo in a memorandum,¹¹ staff compared the list of the City’s vendors procured through the City’s Purchasing Division against the 491 parent companies deemed by Good Jobs First to have \$1 million or more in wage theft penalties¹². This analysis found 91 matches (19%) across dozens of industries, including technology software companies, telecommunications, energy, healthcare, insurance, retail, food service, courier, airlines, rental cars, hospitality, facility management and maintenance services and operations, amongst others. (See Attachment A for a list of matches and research limitations). None of the City’s vendors disclosed previous wage theft violations or existing final judgments. For many industries, it appears highly unlikely the City could find competitors likely to comply with the Policy. Indeed, it is very likely the City would find itself in a position similar to the Banking Services RFP as a direct result of current disqualifying parameters. The upcoming RFP for Janitorial Services is a major concern. As heard by Council on October 22, 2019¹³, the agreements with the current vendor expire October 31, 2020. Staff is currently working on a new RFP to put new agreements in place by that date.

Importantly, when Council first adopted the Wage Theft Prevention Policy in 2016, staff recommended that disqualification from the bid or proposal certification process be discretionary based on an evaluation of a variety of factors. At the time, wage theft judgments were thought to be uncommon, and Councilmembers were concerned that such discretion would cause additional work on staff and invite unforeseen problems with companies who disclosed wage theft issues during the solicitation process. Council ultimately adopted a final Policy without the additional discretionary authority. However, after the Banking RFP experience and the research conducted in conjunction with this update, staff have concluded that the Policy as currently written places a higher risk on city operations (impacting the procurement of essential City services) than previously understood.

¹⁰June 2019 “Grand Theft Paycheck” report by Good Jobs First

https://www.goodjobsfirst.org/sites/default/files/docs/pdf/wagetheft_report_revised.pdf

¹¹ March 19, 2019 Memorandum from Mayor Liccardo:

<https://sanjose.legistar.com/View.ashx?M=F&ID=7107218&GUID=7A8B31CA-614F-48AC-8852-C4D05386CA1A>

¹² Penalty amounts include non-confidential settlements and verdicts in wage and hour lawsuits; fines imposed by the U.S. Department of Labor; and fines imposed by state or local agencies in nine states. This information is also available in the Violation Tracker database at violationtracker.org

¹³ October 22, 2019 Council Memo on Janitorial Services:

<https://sanjose.legistar.com/View.ashx?M=F&ID=7807950&GUID=B838F349-C9CA-49C8-B89D-9266F6F790CD>

Department of Public Works (DPW)

A major policy recommendation of the Wage Theft Memo prioritized by Council during the March 2019 Council Policy Priority Setting Process was the proposal to remove the existing Wage Theft Prevention Policy's exclusion of City public works construction contracts. Public works contracts were explicitly exempted as there is already a proactive and rigorous system in place to ensure workers are paid a prevailing wage on existing public works contracts through the department's Office of Equality Assurance (OEA). However, the program does not include a review of a contractor's history of wage compliance performance within other jurisdictions. Expansion of the City's wage theft policy to include Public Works projects would allow for wage compliance within other jurisdictions to be considered. Staff analyzed the impact of this proposal on DPW through the examination of 110 contractors who are currently or were recently under contract with the City. Of these contractors, nine (9) are either engaged in or have concluded the DLSE wage claim adjudication procedure. None of these contractors have unpaid final judgments. One of these contractors has had four (4) separate cases with DLSE but has paid all appointed back wages within the allotted time frame and as such has not been assigned a single judgment. Staff expects that Senate Bill No. 854, signed into law in 2014, is largely responsible for no contractors in this review having unpaid final judgments. This law requires all contractors, prime and subs, to register with the State of California Department of Industrial Relations (DIR) when bidding or working on public work construction projects. To register with the DIR, contractors must meet various requirements, including having no delinquent unpaid wage or penalty assessments owed to any employee or enforcement agency. As such, if the definition of wage theft is limited to "unpaid final DLSE judgments," the proposal's impact on public works construction will be limited.

While the DIR registry captures necessary information related to unpaid judgments, the registry would not be sufficient to meet the existing Policy requirements that demand verification not only of unpaid judgments, but also of previous violations against an employer within the last five years (regardless of whether they have been satisfied). The City's existing Policy creates a different threshold that is not recognized by the State regulator (DIR) through its own registry. As noted in the wage adjudication process above, disputes may regularly occur between parties, at the end of which employers who are found to be in violation of a labor law promptly comply, thus never receiving a judgment. Previous violations against a contractor are not captured in the DIR registry. Indeed, wage disputes may be handled through various administrative processes—at the federal, state or local level as well as through the courts. As such, the existing Policy's definitional ambiguity and verification limitations would make it extremely difficult to monitor and enforce the Policy as there is no viable way to track whether wage theft occurred in other jurisdictions. Additionally, should a contractor disclose a wage theft instance outside of DLSE final judgments, or should third parties submit wage theft complaints outside of DLSE's authority, it would take significant staff time to verify and validate these claims. This would

likely result in delays in the procurement process, increase project costs, and delay project construction.

To simultaneously ensure Public Works projects are included in the wage theft policy and that they can continue to move forward without significant delays during the procurement process, the definition of wage theft should be measurable, verifiable, and enforceable. This appears to be possible if the definition of wage theft is focused on DLSE final judgements, and possibly DOL final decisions, pending further analysis of the available DOL datasets. Additionally, as directed by Council, a status update of the 2017 Office of Equality Assurance Audit is provided as Attachment B.

Moving Towards a Measurable, Verifiable and Enforceable Wage Theft Policy

Ideally, in the long-term, a comprehensive strategy toward preventing wage theft and promoting payment of wages owed would consist of strong coordination among the various wage theft enforcement bodies, as well as a robust education campaign for both employees and employers—helping employers understand the various labor laws they must abide by, and helping employees, especially those working in high-risk wage theft industries, understand their rights. Indeed, staff is exploring ways of advancing this comprehensive vision with county and state partners.

In the short-term, staff has identified a set of foundational measures that would enable the Wage Theft Prevention Policy to be implemented consistently, effectively, and fairly within a broader enforcement context. Staff’s recommendations are rooted in the following assumptions associated with the State DLSE wage claim adjudication process:

- 1) Disputes regularly occur between employees and employers related to wages and benefits. Some of those disputes are related to a misinterpretation of labor law or wage calculation errors, others are the result of intentional wage theft.
- 2) The State DLSE offers a multi-step administrative process to resolve these disputes.
- 3) The administrative process offers an employer multiple opportunities to rectify wage-calculation errors or resolve good-faith disputes over the course of the wage claim adjudication process. Once the process has concluded and a final administrative decision has been issued (a violation), an employer has 15 days to make all necessary payments. Only after this period has elapsed is a judgment issued.
- 4) Having an unpaid final judgment represents the most egregious act of the wage claim adjudication process. Not only was a violation(s) found by a hearing officer based on evidence presented, but the employer did not pay the restitution owed in the time allowed.

For these reasons, staff considers an employer who has not complied with a final judgment to be willingly and knowingly committing wage theft. It should be noted that final judgments found in civil courts also satisfy this definition.

To ensure that the City’s existing Wage Theft Prevention Policy has a stronger and broader local impact, it is important that the policy be measurable, verifiable, and enforceable. The current Policy’s definition, while well-intended, is not measurable or verifiable and therefore extremely difficult to enforce. The Policy requires clarity around what judgments determine compliance with the Policy, as well as built-in provisions for staff to respond to unusual circumstances that could have a significant impact on the City’s ability to operate.

Considering staff’s research findings since March 2019, the following preliminary recommendations will be brought forward after additional analysis:

Changes to the existing Wage Theft Prevention Policy should align with the following guiding principles – measurable, verifiable, and enforceable.

Measurable. The Policy requires a clear and accurate definition/scope of what the City believes constitutes wage theft including, geographic parameters, administrative body issuing judgments, and number of violations or unpaid judgments.

As described in the *DLSE - Wage Claim Adjudication* section above, DLSE provides an administrative process to settle wage and benefit disputes between parties. If a violation is found against an employer, and that employer does not comply, the decision (ODA) becomes a final judgment that is legally enforceable and mailed to the local Superior Court. Staff recommends that the City’s focus should be at the point where DLSE decisions become legally enforceable judgments, marking the end of the administrative process.

Removal of the language in the current definition that refers to “final administrative action of an investigatory government agency” would eliminate problematic ambiguity and improve staff’s ability to administer the Wage Theft Prevention Policy. Staff will also consider appropriate language that affords the City flexibility in applying the Policy when no options exist in procuring an essential City service in the rare instance that all qualified proposers have unpaid wage theft judgements.

Recommended Change: To make the City’s Policy measurable, wage theft should be defined as an unpaid final judgment from the State of California’s Division of Labor Standards Enforcement. Unpaid final judgments should not be time-limited, therefore the existing five-year threshold for unpaid final judgments should be removed. After significant review of available databases and discussion with industry partners, staff concluded this is the most measurable definition of wage theft currently available. However, this definition should be considered only a “starting point” that will evolve as comprehensive systems for tracking wage theft

amongst jurisdictions improve. Specifically, staff is interested in adding final judgments from civil court proceedings to its verification process (described below), but does not currently have access to a civil courts judgment database.

Amending the Policy's definition would allow for the current DPW exclusion to be removed.

Additionally, had this definition been in place during the Banking Services RFP, Finance would not have the issues it currently faces, as the RFP respondents indicated they satisfied past violations and have no unpaid final judgments.

[This recommendation requires action from City Council.]

Verifiable. To be effective, staff must have ongoing and reliable access to the data that constitutes wage theft as defined in the Policy. Furthermore, this data must be used in a way that is consistent, transparent, and fair across all City purchasing activity.

Recommended Change: To make the City's Policy verifiable, the City must be able to receive ongoing access to DLSE's database. Staff is exploring legislative solutions at the state level to address access to information between the State and the City, as well as between DLSE and other State agencies, such as the State Contractor's Licensing Board for action against licensees. Staff should also further research and pursue access to final judgment data from the local Superior Courts, as well as from the DOL. Although the DOL does not open as many cases in California as DLSE, staff would like to include DOL final decisions in the definition of wage theft if and when possible. Staff is currently researching available DOL datasets to determine if these datasets are currently capable of being used for this purpose. Staff will report back on these findings when the final policy recommendation is brought forward.

[This recommendation is currently in process.]

Enforceable. With a measurable and verifiable definition of wage theft, staff can enforce the City's Wage Theft Prevention Policy, ensuring that it stands against wage theft in name and practice. This means excluding parties from doing business with the City upon verification that they do not meet the City's clear wage theft standards. A more robust enforcement paradigm should also include better coordination with the State. The State Labor Commissioner (who oversees DLSE) holds extraordinary police powers to prevent wage theft and ensure the payment of final judgments. Upon verifying that a potential vendor who has unpaid final judgments is attempting to do business with the City, DLSE should be notified immediately, allowing them to exercise their enforcement powers.

Recommended Change: To make the City's Policy enforceable, staff requires changes as defined in measurable and verifiable above. Additionally, it must work

with the State to enhance coordination and communication with DLSE. Also, the Council should consider if it wishes to shift towards a more proactive enforcement model that, at a minimum, verifies vendor self-disclosure forms in a randomized manner. A shift from passive enforcement to proactive enforcement or some variation thereof will require additional staff resources in addition to a reliable wage theft dataset.

[This recommendation requires action from City Council.]

Private Construction – (Contractor Ordinance/Development Incentives)

In addition to proposing changes to the City’s Wage Theft Prevention Policy, the prioritized memo also proposed a “Responsible Construction Ordinance,” an example of which was attached to the memo. The proposed ordinance would apply to private construction projects, and specifically to any applicant for a building permit for any construction, alteration, and/or demolition work of greater than 5,000 square feet of floor area within the City. Additionally, permit applicants would be responsible for requiring every contractor or subcontractor with a contract-value of \$50,000 or more to provide a wage theft disclosure form. The proposal includes penalties for violations, such as disqualification, debarment, revocation of construction permits, and/or infraction fees. As staff analyzed the ordinance from an implementation lens, multiple administrative, policy, and legal issues were identified.

Planning, Building, Code Enforcement (PBCE) accepts, reviews, issues, and enforces applications for construction permits issued under technical codes. Violations of the technical codes concern the health and safety of the structure; they are not designed to regulate the wages and working conditions of the people within the permitted area. Additionally, the permit applications can be submitted by a developer, contractor, architect, property owner, or a home resident. The burden of verification of previous wage theft incidents is placed on applicants, imposing upon them the same verification challenges facing the City. The applicant would become jointly responsible for disclosure forms, penalties (up to \$1000 per infraction), and satisfying any wage violations that occur over the course of the building project.

In addition to the administrative and policy issues, the proposed ordinance poses numerous legal issues and concerns, including but not limited to, provisions for denying, suspending, and revoking building permits under Title 24.

Staff requires further time and coordination with PBCE, the City Attorney’s Office, DPW, and stakeholders from South Bay Labor Council, Working Partnerships USA, Santa Clara and San Benito County Building Trades Council, Santa Clara County MEPs, and the Santa Clara County Wage Theft Coalition to address issues and changes before coming back to Council with recommendations on this issue.

CONCLUSION

Wage theft affects all industries and employees at all economic levels; however, it has a disproportionate impact on low-wage workers. Multiple agencies, including the City of San José, State of California, and federal government, have taken steps to address wide-ranging issue. The State of California has enacted multiple enforcement tools over the course of several years to address wage theft across the state, but the application of these enforcement tools is unknown. To be more effective, City staff requires access to information developed and maintained by other agencies, which requires additional coordination. For the City to expand the reach of the existing Wage Theft Prevention Policy, several amendments are required to make the Policy measurable, verifiable, and enforceable. After receiving policy direction from Council, staff will return in spring 2020 with final recommendations.

EVALUATION AND FOLLOW-UP

Upon receiving Council policy direction, staff will return to Council with final recommendations in spring 2020. These recommendations will be embedded in a comprehensive strategy to address wage theft in the City of San José, which will include recommendations for enhancing the City's partnership with the U.S. Department of Labor, County of Santa Clara's OLSE, the State's DLSE, as well as the local Superior Court.

Should the Council approve staff's current recommendation related to making the existing Wage Theft Prevention Policy more measurable, verifiable, and enforceable, staff will return to Council with the required ordinance and policy changes in advance of the larger body of recommendations later in the spring.

CLIMATE SMART SAN JOSE

The recommendation in this memo has no effect on Climate Smart San José energy, water, or mobility goals.

PUBLIC OUTREACH

Staff performed outreach through phone-calls, e-mails, and in-person meetings with the U.S. Department of Labor; State of California Division of Labor Standards Enforcement; Santa Clara County Office of Labor Standards Enforcement; and stakeholders from the Santa Clara County Wage Theft Coalition; South Bay Labor Council and Working Partnerships USA. Additional outreach was made to the City of San Francisco's Office of Labor Standards Enforcement and other California cities.

COORDINATION

Staff coordinated with the City Attorney’s Office and the Department of Planning, Building and Code Enforcement Department.

COMMISSION RECOMMENDATION/INPUT

No commission recommendation or input is associated with this action.

CEQA

Not a Project, File No. PP17-009, Staff Reports, Assessments, Annual Reports, and Informational Memos that involve no approvals of any City action.

/s/

MATT CANO
Director of Public Works

/s/

JULIA H. COOPER
Director of Finance

/s/

LEE WILCOX
Chief of Staff, City Manager’s Office

For general wage theft questions or questions regarding Public Works, please contact Christopher Hickey, Division Manager, at (408) 535-8481. For questions regarding the Finance Department procurement process contact, Jennifer Cheng at (408) 535-7059.

Attachments

- Attachment A Analysis of Good Jobs Report
- Attachment B Office of Equality Assurance 2017 Audit Update
- Attachment C Contractor Requirements to Register with the Department of Industrial Relations
- Attachment D Memo Prioritized at the Council Policy Priority Setting Session

Attachment A
Analysis of Good Jobs Report

#	Companies from Good Jobs First Report matched with City Purchase Orders and Agreements (2016-2019) ¹⁴	Total Penalties (From Good Jobs First report)	Number of Cases (From Good Jobs First report)	Industry group
1	FedEx	\$502,165,827	15	Courier Services
2	Bank of America	\$381,499,089	34	Banking & Financial Services
3	Wells Fargo	\$205,403,723	24	Banking & Financial Services
4	JPMorgan Chase	\$160,459,643	22	Banking & Financial Services
5	State Farm Insurance	\$140,000,000	2	Insurance
6	AT&T	\$139,390,011	34	Telecommunications
7	United Parcel Service	\$138,077,624	8	Courier Services
8	ABM Industries	\$128,599,312	43	Facility Management
9	Allstate	\$122,000,000	2	Insurance
10	Citigroup	\$110,005,835	8	Banking & Financial Services
11	Farmers Insurance Exchange	\$102,909,208	3	Insurance
12	Microsoft	\$102,855,841	2	Enterprise/Cloud Software
13	Morgan Stanley	\$102,695,000	4	Banking & Financial Services
14	Oracle	\$92,268,000	10	Enterprise/Cloud Software
15	CVS Health	\$87,691,026	43	Healthcare
16	IBM Corp.	\$72,604,764	4	Enterprise/Cloud Software
17	Dollar Tree	\$63,960,057	11	Retail
18	Lowe's	\$52,989,375	7	Retail
19	Starbucks	\$46,088,966	5	Foodservice
20	Verizon Communications	\$38,727,966	12	Telecommunications
21	Cintas	\$32,169,806	7	Maintenance, Repair, Operations, and Industrial Supplies
22	Home Depot	\$29,679,541	8	Retail
23	Lyft	\$28,950,000	2	Transportation Network Company
24	Costco	\$27,898,467	8	Retail
25	Kaiser Permanente	\$27,757,368	9	Healthcare
26	HSBC	\$23,162,188	11	Banking & Financial Services
27	PepsiCo	\$20,849,491	11	Food and Beverage
28	Siemens	\$20,611,043	9	Industrial Conglomerate
29	Robert Half International	\$19,615,000	2	Temporary Staffing
30	Kelly Services	\$17,513,094	9	Consulting
31	PG&E Corp.	\$17,327,748	2	Energy

¹⁴ Good Jobs First report: https://www.goodjobsfirst.org/sites/default/files/docs/pdfs/wagetheft_report_revised.pdf

32	MetLife	\$17,197,296	7	Insurance
33	ConocoPhillips	\$15,500,000	1	Energy
34	Bloomberg	\$15,498,887	6	Financial Services
35	Aon	\$15,495,234	4	Insurance
36	Comcast	\$14,556,683	13	Telecommunications
37	Target	\$13,363,520	8	Retail
38	Transdev	\$12,949,003	6	Transportation Management
39	Marriott International	\$11,079,096	20	Hospitality
40	Office Depot	\$10,707,424	7	Retail
41	Fastenal	\$10,000,000	1	Maintenance, Repair, Operations, and Industrial Supplies
42	Nestle	\$9,583,762	10	Food and Beverage
43	Hertz	\$8,919,084	167	Rental Vehicles
44	Enterprise Holdings	\$8,875,000	2	Rental Vehicles
45	Veritiv	\$8,500,000	1	Facility Management
46	Johnson Controls	\$8,170,840	13	Maintenance, Repair, Operations, and Industrial Supplies
47	Hensel Phelps	\$8,135,905	2	Construction
48	AECOM	\$7,964,334	26	Consulting
49	Avis Budget Group	\$7,806,706	2	Rental Vehicles
50	KBR	\$7,152,129	6	Construction
51	Cisco Systems	\$6,700,000	1	Telecommunications
52	Liberty Mutual Insurance	\$6,551,864	4	Insurance
53	Anthem	\$6,491,398	4	Healthcare
54	Delta Air Lines	\$5,665,444	2	Airlines
55	Hewlett Packard Enterprise	\$5,500,000	1	Computer/Network Hardware
56	Progressive	\$5,446,000	2	Insurance
57	SP Plus Corporation	\$5,411,797	4	Parking Facility Management
58	Quest Diagnostics	\$5,151,553	7	Healthcare
59	BrightView Landscapes	\$4,971,778	2	Landscape
60	ManufacturingZone	\$4,819,804	4	Retail
61	Conduent	\$4,720,254	7	Transportation Management
62	Toyota	\$4,636,961	1	Automobiles
63	Cheesecake Factory	\$4,510,710	2	Foodservice
64	Ross Stores	\$4,500,000	3	Retail
65	General Dynamics	\$4,361,876	11	Consulting
66	Illinois Tool Works	\$4,200,000	1	Maintenance, Repair, Operations, and Industrial Supplies
67	Arthur J. Gallagher & Co.	\$3,900,000	1	Insurance
68	Honda	\$3,557,750	2	Automobiles
69	KB Home	\$3,490,793	4	Construction

70	W.W. Grainger	\$3,465,000	2	Maintenance, Repair, Operations, and Industrial Supplies
71	G4S	\$3,114,848	20	Security
72	Medtronic	\$3,020,674	2	Manufacturing
73	Public Storage	\$3,000,000	1	Real Estate
74	Lennar	\$2,919,709	2	Construction
75	Lufthansa	\$2,850,000	2	Airlines
76	Red Robin Gourmet Burgers Inc.	\$2,746,430	4	Foodservice
77	Penske Truck Leasing	\$2,697,251	12	Rental Vehicles
78	E-Trade Financial	\$2,400,000	2	Financial Services
79	Western Digital	\$2,094,813	2	Computer/Network Hardware
80	Maximus Inc.	\$1,552,780	1	Temporary Staffing
81	Parsons	\$1,544,536	3	Transportation Management
82	CenturyLink	\$1,518,613	5	Telecommunications
83	Sutter Health	\$1,507,000	1	Healthcare
84	Deloitte Touche Tohmatsu	\$1,500,000	1	Consulting
85	PricewaterhouseCoopers	\$1,500,000	1	Consulting
86	NextEra Energy	\$1,350,000	2	Energy
87	Intercontinental Hotels	\$1,119,897	8	Hospitality
88	Schneider Electric	\$1,085,000	1	Maintenance, Repair, Operations, and Industrial Supplies
89	Accenture	\$1,025,000	1	Consulting
90	Becton Dickinson	\$1,000,000	1	Maintenance, Repair, Operations, and Industrial Supplies
91	Southwest Airlines	\$1,000,000	1	Airlines

Research Methodology and Limitations

It is important to note that the comparison analysis in Attachment A does not include the following: a) parent companies where the City has likely conducted business with their subsidiaries (i.e. Yum brands) or where the City purchases products through distributors instead of the parent company (i.e. Apple, 3M, Coca-Cola, etc) and; b) procurement Card (P-Card) transactions which facilitates departments' purchase of low-dollar value items which are not subject to the competition or entering into a contract. In FY 18-19, over 50,000 transactions and \$14 million in expenditures occurred on p-cards. While the Finance Department administers the P-Card Program, proper usage, including procurement, of P-Card transactions lies with City departments. These caveats underscore the limitations staff face in identifying the types of business entities that can be practically identified and subject to the Wage Theft Prevention policy.

Attachment B

Update- 2017 Office of Equality Assurance (PW) Audit

As directed by City Council, the following is an update on the progress and work completed based on the findings and recommendations outlined in the 2017 Audit of the Office of Equality Assurance.

Background

At the April 11, 2017 City Council meeting (Item 4.1), the City Auditor presented the audit report and findings of the Office of Equality Assurance (OEA) within the Department of Public Works (DPW) that included eight recommendations. DPW agreed with the Auditor's 2017 findings and recommendations. Multiple findings discussed the current process for reviewing prevailing/living wage payrolls and the time resources dedicated for such review. By decreasing the time resources required for manual payroll sorting, review, and file storage, staff would have increased time for site visits and employee/employer outreach, both of which are crucial to ensuring employees are paid fairly and in full.

Recommendation #1: (A) Software, (B) Risk-based strategy for site visits, and (C) Supervisory Resources

Status: Partly Implemented

(A). OEA began development of a cloud-based data storage software solution to increase efficiency with the assistance of the City Manager's Office (CMO), Department of Information Technology, and InnoActive Group Inc. Through the Startup in Residency (STIR) program, the CMO released an RFI with OEA specific issues and received multiple responses. OEA reviewed and interviewed each responder and determined that the InnoActive Group provided the greatest understanding and abilities to provide the best solution. OEA entered into an agreement with InnoActive Group in March 2019.

Over the course of several months, staff worked with InnovActive Group in development of a web-based, e-mail focused payroll submittal application that is both user-friendly and intuitive. The application was tested by internal staff, multiple contractors of various types (small, large, local, non-local, etc.), and with partners from the Santa Clara and San Benito County Building Trades Council. The application was named "DIRECT" and was launched on FOUR (4) projects in late 2019. All future construction projects will be added to the DIRECT upon award. Staff will provide annual updates on DIRECT with expanded data points in the CIP annual report.

DIRECT is a City maintained application that allows contractors to submit certified payrolls and other labor compliance documents electronically through a web-portal that can be reviewed, accepted, or denied by City staff. Prime contractor and subcontractor profiles are provided access to the project file at time of contract award and will be required to upload all payroll and employee data monthly. Staff is notified of the submittal by e-mail; one-click acceptance, denial, and clarifications from staff generate e-mail responses to the contractors. This feature

allows contractors to know whether they are in compliance with City requirements and removes time intensive e-mail drafting or telephone calls by staff.

DIRECT provides staff time savings by filing and storing all documents, consistency communication from contractors and the City, and data collection and analysis through reports on location and crafts of the employees. For example, once all City construction projects are using DIRECT, staff can state how many employees are from San Jose and/or how many carpenters, plumbers, or laborers are working on our projects, which staff was unable to provide without an immense amount staff time to collect.

DIRECT was developed to assist staff in prevailing and living wage review, however, staff also focused on the stakeholders and the needs of the contracting community. DIRECT was designed to allow contractors who have never performed public works or had to pay prevailing wages to learn and comply. Contractors may submit .XML files similar to the State of California, City of San Francisco, and City of Oakland, or they can manually enter information on DIRECT forms, thus, allowing all contractors to use the application efficiently.

(B). OEA has developed a risk-based strategy for site visits to inform and ensure prevailing wage compliance. Site visits allow staff to speak with workers, view the work performed, and identify any inconsistencies with payrolls records and actual work performed. These visits are vital to ensuring compliance, however, with the manual review of paperwork staff had little time to perform these important visits. OEA has allocated eight (8) hours of staff time for site visits to multiple locations per week. Sites to visit are based on the total contract value, type of work, number of employees and crafts performing work (e.g. more site visits for higher valued contracts that require more workers and multiple crafts).

(C). OEA has not added supervisory positions.

Recommendation #2- Develop concerted and ongoing outreach to employees and employers about wage compliance

Status: Partly Implemented

Public Works has launched the Public Works Academy, which focuses on outreach/engagement and education with the local contracting community. The Academy had two graduating classes with another beginning in May 2020. Public Works has partnered with the Small Business Development Center, Hispanic Chamber of Commerce, Black Chamber of Commerce, SCORE Association, work2future, and BusinessOwnerSpace.com. Public Works will continue to develop programs to outreach and engage the employee community to educate and provide networking services. The current outreach efforts have been primarily focused on the requirements for contracting with the City and prevailing and living wage.

Recommendation #3- Rededicate the 2.0 FTE originally budgeted to assist in the City's Wage Theft Prevention Policy and Opportunity to Work Ordinance

Status: Not Implemented

OEA has ten (10) dedicated staff consisting of a one (1) Division Manager, one (1) Contract Compliance Coordinator, seven (7) Contract Compliance Specialist and one (1) Contract Compliance Assistant. The seven (7) Contract Compliance Specialist actively enforce major and minor public works construction (prevailing wage) and service and maintenance contracts (living wage). The Contract Compliance Coordinator enforces City of San Jose Minimum Wage Ordinance, Opportunity to Work Ordinance, and supervisory responsibilities of the Contract Compliance Specialist. The Division Manager oversees OEA staff, current and future policy development (e.g. Council Priority #1- Local Hire, Council Priority #3- Disadvantage Business Enterprise, Council Priority #16- Wage Theft Prevention Policy, etc.), Project Labor Agreements, Private Workforce Standards, Disadvantage Business Enterprise goal setting, and is the City's Americans with Disabilities Act (ADA) Coordinator. The Contract Compliance Assistant supports OEA staff on prevailing, living, and minimum wage compliance. OEA does not have dedicated staff to enforce Wage Theft.

As detailed above, the development of DIRECT automates labor compliance requirements and eliminates many of the time consuming processes of a paper submittal review. Time saved through the automation process allows staff the ability to focus on site visits, worker interviews, and education, which has a large impact on wage compliance. Thus, time saving from the automation process does not provide adequate staffing resources to enforce additional City policies.

Development, implementation, administration, and enforcement of updates and expansion of City policies would require additional staff and budgetary resources. For example, expansion of the Wage Theft Prevention Policy would require development and maintenance of a database with Division of Labor Standards Enforcement final unpaid wage judgements, education to businesses and employees, and relationship development with federal, state and local agencies.

Recommendation #7- Simplify the contract notification process (Finance)

Status: Implemented

OEA coordinated with the Finance Department on procedures for wage rate determinations for purchase orders and agreement review. Wage rates provided by OEA are advisory and OEA will not initiate project review files until the purchase orders or agreements are executed. Previous procedures had OEA initiate project review files for purchase orders and agreements that failed to be executed, executed under a different project title, or combined with another project, all of which required staff time that was not necessary.

Recommendations not currently implemented

The following recommendations are not yet implemented. The status of each is briefly described below.

- Recommendation #4- Ensure Continuity and Consistency in Practices
- Recommendation #5 – Develop decision making criteria to avoid inconsistencies in the treatment of contractors: These recommendations focus on creating better and more

comprehensive guidance documents for the various procedures within the division. A portion of this work was completed with the creation of the DIRECT system discussed earlier in this document as it codified the process for wage submittals and review. However, a significant amount of work remains in order to complete the documentation outlined in this recommendation. Staff will continue to look for opportunities to move this forward to completion.

- Recommendation #6- Clarify the City's formal enforcement mechanisms: Staff anticipates clarifying the policy for assessment of liquidated damages with the City Attorney's Office by the end of 2020.
- Recommendation #8- Add FTE position for City-wide contracting program, Local Hire policy, and Americans with Disabilities Act compliance program: Staff will continue to evaluate opportunities to increase staffing levels to address these and other new policy priorities during the annual city budget processes.

COORDINATION

This memorandum was coordinated with the City Manager's Office and the City Attorney's Office. This memorandum has been reviewed by the City Auditor's Office who will be reporting on the status of these and all other recommendations during the regular recommendation follow-up process.

Attachment C

Contractor Requirements to Register with the Department of Industrial Relations

State of California Department of Industrial Relations (DIR) when working on public work construction projects. To register with the DIR, all contractors must meet the following:

- Must have workers' compensation coverage for any employees and only use subcontractors who are registered public works contractors;
- Must have Contractors State License Board license if applicable to trade;
- Must have no delinquent unpaid wage or penalty assessments owed to any employee or enforcement agency;
- Must not be under federal or state debarment;
- Must not be in prior violation of this registration requirement once it becomes effective. However, for the first violation in a 12-month period, a contractor may still qualify for registration by paying an additional penalty.



Memorandum

TO: RULES AND OPEN GOVERNMENT
COMMITTEE

FROM: Councilmember Raul Peralez
Vice-Mayor Charles "Chappie" Jones
Councilmember Magdalena Carrasco
Councilmember Sergio Jimenez

SUBJECT: SEE BELOW

DATE: 01-24-2019

Approved by:

SUBJECT: Update to San José's Wage Theft Prevention Ordinance

RECOMMENDATIONS:

1. Approve the attached ordinance (Attachment 1) updating San Jose's existing Wage Theft Prevention Ordinance to achieve the following goals:
 - a. Require Developers proposed major construction projects to disclose wage theft or other violations of labor and employment law committed in the past five years by their prime contractors and their subcontractors; and if any prime contractor or subcontractor has unpaid wage theft claims or other final unsatisfied judgments, citations, or final administrative decisions against them, disqualify that contractor from the project until they have complied with back wages owed or other final judgments, citations, or final administrative decisions.
 - b. If the City provides any economic development incentives to private construction projects, those incentives should be subject to penalties if illegal abuses of workers are committed on the project. And direct staff to return to City Council with recommendations for appropriate penalties for Developers, prime contractors, and subcontracts, such as a "clawback" mechanism allowing the City to revoke all or a portion of the incentive if illegal abuses of workers are committed on the project.
2. Adopt the attached amendments (Attachment 2) updating San Jose's existing Wage Theft Prevention Policy to achieve the following goals:
 - a. Remove the exclusion of public works contracts from the policy.
 - b. Clarify that the existing definition of "Final Judgments, Decisions, and Orders" also includes judgments resulting from a Civil Wage and Penalty Assessment (CWPA) or from a Bureau of Field Enforcement (BOFE)

citation, as well as citations for serious, willful, and repeat OSHA violations.

BACKGROUND

In June 2015, The City Council ranked wage theft prevention as the City's number one policy priority in its annual Priority setting process. In 2016, the City Council unanimously approved the Wage Theft Prevention Policy to help address a pervasive problem affecting San José workers, families and businesses: wage theft. The Council's ordinance focused on using the City's available tools.

Noting that "83% of employees who receive a favorable judgement from the State Division of Labor Standards Enforcement receive zero payment from their employers"¹, the Council established two avenues to help hold businesses accountable for wages owed: (1) amending the City's bidding and contracting policies and process to prevent wage theft by City contractors and (2) adding the authority to suspend revoke permits for designated businesses with unpaid final wage theft judgements or administrative actions.

The 2016 Wage Theft Prevention Policy was an important step towards protecting San José's workers and supporting the vast majority of law-abiding businesses. However, the initial policy excluded one of the industry's most negatively affected by wage theft: construction.

Wage theft in the construction industry is rampant. One in six California construction workers is a victim of wage theft; Latino and Asian immigrants are especially likely to be affected, and often face threats of retaliation if they speak out. In the Bay Area, since 2011, approximately 7,000 construction workers at over 500 companies have been victims of wage theft - and that includes only documented cases resulting in final federal administrative decisions and/or state judgements.² Contractors cheating workers out of their pay pushes more and more of these workers and their families into poverty and deprives them of the ability to work their way into the middle-class. It's an unfortunate reality of the underground and illegal economy that permeates the construction industry.

How does it happen? Unscrupulous contractors refuse to pay workers for overtime hours, for meal and rest breaks and/or misclassification of hourly workers as "independent contractors" to get around paying overtime and providing benefits. In worst case scenarios, this has tragically occurred in San José. Criminal contractors have held workers against their will and failed to pay them for work on construction projects. The most recent example, is the discovery of construction workers forced into human slavery to build the luxurious Silvery Towers. Due to developers and contractors have little, to no, oversight, the workers experienced wage theft and retaliation. The subcontractor was

¹ May 26, 2016. City of San José Memorandum, Councilmembers Kalra, Peralez, Carrasco, and Rocha. Actions Related to Wage Theft Prevention. http://sanjose.granicus.com/MetaViewer.php?meta_id=575454

² "Construction in San Jose: Crisis & Opportunity" by Working Partnerships USA, pg. 19. March 2018

not licensed and owed \$650,000 in unpaid citations and judgements. We as the City have a responsibility to act.

We must act by expanding our existing Wage Theft Prevention policy and ordinance to cover all major construction projects, both public and private. For City-funded projects, this means adding public works to the other types of City contracts designated by the existing Wage Theft Prevention Policy. For major private developments, we must extend the current ordinance, which provides the authority to suspend or revoke Title 6 permits (police permits) for the worst offenders, to apply an equivalent standard to Title 24 permits (building permits). The expanded ordinance must also include a provision requiring contractors and developers that engage in wage theft who received any taxpayer subsidy to repay that subsidy, with interest.

The proposed provisions and amendments to the existing policy and ordinance will ensure that another Silvery Towers does not occur again and that the City is not blindsided by another atrocity.

The signers of this memorandum have not had, and will not have, any private conversation with any other member of the City Council, or that member's staff, concerning any action discussed in the memorandum, and that each signer's staff members have not had, and have been instructed not to have any such conversation with any other member of the City Council or that member's staff.

Attachment 1

Responsible Construction Ordinance

1. Definitions

For purposes of this ordinance:

A. "Building permit holder" means a person or entity that has received a permit to undertake a major construction project. A building permit holder does not include an owner self-performing work on the owner's residence.

B. "Building permit applicant" means a person or entity that has applied for a permit to undertake a major construction project. A building permit applicant does not include an owner self-performing work on the owner's residence.

C. "Covered party" means a developer, building permit holder, or building permit applicant.

D. "Developer" means an entity or person who owns or controls a major construction project. Developer does not include an owner self-performing work on the owner's residence.

E. "Final judgment, final administrative decision, or citation" means either of the following:

i. A judgment, decision, determination, order, or citation including but not limited to a California Division of Labor Standards Enforcement's Bureau of Field Enforcement's citation, a California Division of Labor Standards Enforcement's Public Works' CWPA, or an OSHA citation that was issued by a court of law, an investigatory government agency authorized by law to enforce an applicable law, an arbitrator, or an arbitration panel and for which all appeals have been exhausted or the time period to appeal has expired.

ii. An admission of guilt or finding of guilt in a criminal proceeding.

F. "Financial Assistance" means any financial incentive or investment provided by the city or a city-controlled entity or political subdivision to facilitate or support a Major Construction Project, including:

i. Taxes, fees, costs, rents, insurance or bond premiums, loans, interest rates, inclusionary housing obligations, inclusionary housing in-lieu fees, or other obligations that would normally be required in the execution of the contract, that are paid, reduced, charged at less than fair market value, waived, rebated or forgiven by the city, including those provided under the existing Downtown High-Rise Incentive Program, as well as

any other city tax or fee break programs available to new developments or to a particular sub-category of developments.

ii. The payment of money or the equivalent of money for the design, development, construction, financing or any other component related to development of the project, including, but not limited to, infrastructure costs, preconstruction costs, demolition costs, construction costs, financing costs, equipment costs, design costs, environmental review costs, and environmental mitigation costs; and

iii. Any loan or loan guarantee.

G. "Major construction project" means a project that will involve construction, alteration, and/or demolition work of greater than 5,000 square feet of floor area within the city.

H. "Unsatisfied final judgment, final administrative decision, or citation" means a final judgment or citation that requires the payment of money, and that has not been fully satisfied, except that an unsatisfied judgment, decision or citation shall not disqualify a contractor or subcontractor if its enforcement against the contractor or subcontractor is stayed by court order or operation of law.

2. Bidding and Contracting Requirements

A. A covered party shall require, in all solicitations or invitations for bids to perform work on a major construction project, and prior to awarding any contract to perform work on a major construction project, that every contractor and subcontractor performing work in excess of \$50,000 on the project must complete and return to the covered party the disclosure form required by this ordinance. The completed form shall be verified by a representative of the contractor or subcontractor under penalty of perjury.

B. A covered party shall disqualify a contractor or subcontractor from entering into a contract to perform work, and from performing such work, if the required disclosure form has not been submitted, if the disclosure form is materially false or incomplete, or if the disclosure form reports that the contractor or subcontractor has an unsatisfied final judgment, final administrative decision, or citation. Nothing in this ordinance shall preclude a covered party from disqualifying a contractor or subcontractor for additional reasons.

C. A developer or building permit holder subject to this ordinance shall file a copy of the completed disclosure forms required by this ordinance with the city prior to the contractor or subcontractor performing work on the project. The completed disclosure forms for a project shall be available from the city as public records.

D. A contractor or subcontractor performing work for which a disclosure form is required must complete the disclosure form prior to entering into a contract to perform the work.

E. Upon notification from the city to a covered party that a contractor or subcontractor performing work for which a disclosure form is required has not completed a disclosure form, or has submitted a disclosure form that is incomplete, the covered party shall remove the contractor or subcontractor from the project within 48 hours and bar the contractor or subcontractor from performing further work on the project until such time the contractor submits a complete disclosure form.

G. Upon notification from the city to a covered party that a contractor or subcontractor performing work for which a disclosure form is required has submitted a disclosure form that is materially false, or has submitted a disclosure form that reports an unsatisfied final judgment, final administrative decision, or citation, the covered party shall remove the contractor or subcontractor from the project within 48 hours and bar the contractor or subcontractor from performing further work on the project.

H. A contractor or subcontractor which has been ordered removed and/or barred from a project due to failure to submit a complete and accurate disclosure form, or due to failure to satisfy a final judgement, administrative decision, or citation may request an administrative hearing before the Appeals Hearing Board.

3. Access Requirements

A. A covered party shall provide investigators for the city with access to the project jobsite upon request, and with the right to inspect payroll records and interview workers upon request, for the purpose of verifying compliance with any labor standards laws applicable to workers on the project.

B. A covered party shall require its contractors and subcontractors to provide investigators for the city with access to the project jobsite upon request, and with the right to inspect payroll records and interview workers upon request, for the purpose of verifying compliance with any labor standards laws applicable to workers on the project.

C. A contractor or subcontractor performing work on a project subject to this ordinance shall provide investigators for the city with access to the project jobsite upon request, and with the right to inspect payroll records and interview workers upon request, for the purpose of verifying compliance with any labor standards laws applicable to workers on the project.

D. The city may contract with a non-profit organization to conduct investigations on behalf of the city for purposes of this ordinance and such investigators shall be provided with the jobsite access and right to inspect payroll records and interview workers that are provided this ordinance.

E. Upon notification from the city to a covered party that a contractor or subcontractor refuses to provide the city with the jobsite access and right to inspect payroll records and interview workers that are required by this ordinance, the covered

party shall remove the contractor or subcontractor from the project within 48 hours and bar the contractor or subcontractor from performing further work on the project.

4. Prohibition on Retaliation

No covered party, contractor or subcontractor shall discriminate or retaliate against any person or entity for cooperating with an investigation under this ordinance or for making a complaint concerning an alleged violation of this ordinance.

5. Guarantee Against Wage Theft

A. A covered party shall be jointly responsible for satisfying any unpaid final judgment, final administrative decision, or citation issued against a contractor or subcontractor on its project to the extent it awards wages, benefits, penalties, interest, and attorneys' fees to a worker on account of the worker's performance of work on the project.

B. Upon notice from the city of an unpaid final judgment, final administrative decision or citation subject to subdivision A, a covered party shall provide the city within 30 days with proof that the judgment, administrative decision or citation, or relevant portion thereof, has been satisfied. If the covered party fails to provide such proof, the city may, in addition to pursuing any other remedies, suspend any building permits or business license issued to the covered party until the covered party provides proof that the judgement, administrative decision or citation has been satisfied.

C. A covered party which has been subjected to a suspension of its building permit due to failure to satisfy a final judgement, administrative decision, or citation may request an administrative hearing before the Appeals Hearing Board.

6. Compliance

A. A building permit applicant subject to this ordinance shall complete and submit with their building permit application a copy of the Disclosure Form for each contractor or subcontractor that has been awarded a contract on the project.

i. The City shall not issue the building permit until a complete Disclosure Form has been filed for each contractor and subcontractor. If no contracts have yet been awarded for the project, the applicant shall submit to the City an attestation to that effect with the building permit application.

ii. If additional contracts or subcontracts are awarded after issuance of the building permit, the permit holder shall submit a copy of the Disclosure Form for each contractor or subcontractor prior to commencing work on the project.

iii. As part of the application for a building permit, every applicant subject to this ordinance shall agree to comply with all applicable portions of this ordinance, including submittal of all required Disclosure Forms.

B. A covered party, contractor, or subcontractor shall be subject to a civil fine payable to the city of up to \$1,000 for each violation of this ordinance.

C. Any person injured by a violation of this ordinance may bring a civil action against a covered party, contractor, or subcontractor for damages in any court of competent jurisdiction.

D. Any person who contends that a contractor or subcontractor is performing work for which a disclosure form is required by this ordinance and that no such disclosure form was filed with the city may file a complaint with the city supported by evidence to show the violation. The city shall promptly provide a copy of the complaint to the contractor or subcontractor and to the covered party and request a response within seven days. Unless the contractor or subcontractor provides a completed disclosure form within seven days, or establishes to the satisfaction of the city that no violation occurred, the city shall give notice to the covered party that the contractor or subcontractor must be removed from the project within 48 hours and barred from performing further work on the project.

E. Any person who contends that a contractor or subcontractor performing work for which a disclosure form is required by this ordinance has provided a disclosure form that is materially false or incomplete may file a complaint with the city supported by evidence to show the violation. The city shall promptly provide a copy of the complaint to the contractor or subcontractor and to the covered party and request a response within seven days. Unless the contractor or subcontractor establishes to the satisfaction of the city that no violation occurred, the city shall give notice to the covered party that the contractor or subcontractor must be removed from the project within 48 hours and barred from performing further work on the project.

F. For any major construction project receiving Financial Assistance, if a covered party is found to have an unsatisfied final judgment, final administrative decision, or citation, then in addition to any other penalties, the City shall issue an assessment requiring the recipient to repay the full amount of the Financial Assistance provided for that project, including but not limited to the full amount of any tax and fees that were reduced, suspended, or waived as part of an economic incentive program. Any such repayments shall be deposited in the fund which was the source of the incentive, or in the case of tax and fee breaks, in the fund to which the tax or fee would have been directed.

7. Disclosure form.

The disclosure form required by this ordinance shall be the form contained in Appendix A to this ordinance and shall be completed under penalty of perjury.

Appendix A

City Responsible Construction Ordinance Disclosure Form

To be completed by contractor or subcontractor. A separate form must be completed for each project.

1. Name of Contractor or Subcontractor:
2. Address:
3. Responsible managing officer:
4. State Contractor's License Number:
5. Project name:
6. Project location:
7. Project owner or developer:
8. Party who retained contractor/subcontractor to perform work on the project:
9. Approximate date work by contractor/subcontractor is scheduled to commence on project:
10. During the five years prior to completion of this form, has contractor/subcontractor been found liable by any court or administrative agency for failing to pay wages or benefits to an employee or for violating any wage and hour provisions of the California Labor Code or the Fair Labor Standards Act? If so, list all such judgments and administrative awards and attach copies to this form. Do not list or attach judgments or administrative awards that have been overturned.
11. During the five years prior to completion of this form, has contractor/subcontractor been subject to any citations or penalties imposed by the U.S. Department of Labor, California Department of Industrial Relations, California Labor Commissioner or California Division of Occupational Safety and Health? If so, list all such citations and penalty assessments and attach copies to this form. Do not list or attach citations or penalty assessments that have been overturned.
12. During the five years prior to completion of this form, has contractor/subcontractor been subject to any cause findings by the Department of Fair Employment and Housing or the Equal Employment Opportunity Commission for the laws enforced by those agencies? If so, list all such findings and attach copies to this form. Do not list cause findings that have been overturned.

13. During the five years prior to completion of this form, has contractor/subcontractor been found liable for failing to maintain worker's compensation insurance or for engaging in fraudulent activity related to worker's compensation insurance? If so, list and attach copies of all such determinations. Do not list or attach determinations that have been overturned.

14. During the five years prior to completion of this form, has contractor/subcontractor been found liable by any court or administrative agency for retaliating or discriminating against a worker for making a complaint about a violation of laws enforced by the Labor Commission, Department of Labor, the Department of Fair Employment and Housing, or the Equal Employment Opportunity Commission? If so, list all such judgments and administrative awards and attach copies to this form. Do not list or attach judgments or administrative awards that have been overturned.

15. During the five years prior to completion of this form, has contractor/subcontractor been found liable by any court or administrative agency for failing to pay any payroll taxes? If so, list all such judgments and administrative awards and attach copies to this form. Do not list or attach judgments or administrative awards that have been overturned.

16. During the five years prior to completion of this form, has contractor/subcontractor been found liable, admitted guilt, or been found guilty by any court or administrative agency for violating any laws relating to human trafficking? If so, list all such judgments and administrative awards and attach copies to this form. Do not list or attach judgments or administrative awards that have been overturned.

17. During the five years prior to completion of this form, has contractor/subcontractor been found by the Contractors State License Board to have performed covered work without a contractor's license or to have performed work without the appropriate license for the classification of work? If so, list all such citations and orders. Do not list citations or administrative awards that have been overturned.

18. Have any judgments, decisions, determinations, orders, or citations been issued against the contractor/subcontractor by a court of law, an investigatory government agency authorized by law to enforce an applicable law, an arbitrator, or an arbitration panel, that 1) require the payment of money by the contractor/subcontractor, and 2) have not been fully satisfied, and 3) are no longer subject to appeal? If so, list and attach copies of all such unsatisfied judgments, decisions, determinations, orders, or citations. Has enforcement of the unsatisfied judgment, decision, determination, order, or citation against the contractor/subcontractor been stayed by court order or operation of law? If so, attach proof of the stay.

Summary of recommended edits to Council Policy 0.44:

1. Under Bid or Proposal Disqualification Circumstances, which currently applies to bids or proposals submitted pursuant to San José Municipal Code Chapter 4.12 (Procurements of Goods and Services), add bids or proposals submitted pursuant to Chapter 14.04 (Public Works);
2. Replaced the sentence stating that “This Policy does not apply to any “public works” contracts as defined in City Charter Section 1217” with “This Policy also applies to any “public works” contracts as defined in City Charter Section 1217”;
3. Under “REVOCATION OF PERMITS, LICENSES AND REGISTRATIONS”, which adds an additional ground to deny, suspend or revoke a permit or license for permits issued under Title 6 (Business Licenses and Regulations), add “or Title 24” (Technical Codes); and
4. Make other minor or technical clarifications, including:
 - a. Replace “contractor with “contractor or business” where applicable.
 - b. Under the definition of “Final Judgments, Decisions, or Orders”, add: “Final judgment, decision, or order also refer to Civil Wage and Penalty Assessments (CWPA's) by the California Division of Labor Standards Enforcement Public Works and California Division of Labor Standards Bureau of Field Enforcement (BOFE) citations for which all appeals have been exhausted or the time period to appeal has expired.”