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Do You Know the Way to Pay in San Jose? San Jose Becomes the Fifth – and Largest – U.S. City to Enact Its Own Minimum Wage Ordinance

By Christopher Cobey and Karin Cogbill

At this month's general election, 59 percent of the voters in the City of San Jose, California approved an initiative measure to institute a \$10 per hour minimum wage for covered employers and employees. The ordinance¹ will take effect in early 2013, raising San Jose's minimum wage to two dollars an hour more than California's minimum wage.

San Jose thus becomes the second California city (in addition to San Francisco) and the fifth American city (in addition to Washington, D.C., and Albuquerque and Santa Fe, New Mexico) to institute its own, higher minimum wage.²

Employers Covered by the Ordinance

The ordinance defines an employer as "any person, including corporate officers or executives, as defined in Section 18 of the California Labor Code, who directly or indirectly through any other person, including through the services of a temporary employment agency, staffing agency or similar entity, employs or exercises control over the wages, hours or working conditions of any Employee and who is either subject to the Business License Tax Chapter 4.76 of the Municipal Code or maintains a facility in the City [of San Jose]." (emphasis added). Thus, the ordinance covers all San Jose employers except those that: (1) do not maintain a facility³ in San Jose; or (2) are exempt from the business license tax under the San Jose Municipal Code.

Employees Covered by the Ordinance

The ordinance defines an employee as "any person who: [1.] In a calendar week performs at least two (2) hours of work for an Employer . . . [2.] Qualifies as an employee entitled to payment of a minimum wage from any employer under the California minimum wage law, as provided under

1 The full text of the ordinance is available at www.sanjoseca.gov/clerk/minwage/minwageord.pdf. The City's Municipal Code may be found at <http://www.amlegal.com/library/ca/sanjose.shtml>.

2 At least 20 cities and six counties in California have enacted their own "living wage" ordinances, which require employers contracting with a governmental entity to provide a higher minimum wage and, sometimes, health insurance benefits to their employees.

3 The ordinance contains no definition of the term "facility."

Section 1197 of the California Labor Code and wage orders published by the California Industrial Welfare Commission, or is a participant in a Welfare-to-Work Program.”⁴ The ordinance does not apply to employees who work less than two hours a week for an employer.

If otherwise covered employees are also covered by a collective bargaining agreement (CBA), “all or any portion of the applicable requirements of this [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.”

What The Ordinance Requires of Covered Employers

- Every covered employer must pay every covered employee no less than the specified minimum wage (beginning at \$10.00 per hour) “for each hour worked within the geographic boundaries” of the city.⁵
- Employers must post at the worksite or jobsite where any covered employee works the notice published each year by the City’s Office of Quality Assurance informing employees of the current minimum wage rate, and of their rights under the ordinance. Every employer must post such notices in any language spoken by at least five percent of the employees at the work-place or job site.
- Every covered employer must provide each covered employee, at the time of hire, with the employer’s name, address, and telephone number in writing. (This requirement is duplicative of the existing notice requirements of the California Wage Theft Prevention Act for those employees to whom the Act applies.)
- Employers must retain payroll records pertaining to covered employees for a period of four years.⁶ An employer must allow the City access to such records, with appropriate notice and at a mutually agreeable time, to monitor compliance with the requirements of the law.

Employees Exercising Their Rights Under the Ordinance Are Protected from Retaliation

The rights protected under the ordinance include, but are not limited to, the right to file a complaint or inform any person about any party’s alleged noncompliance with the ordinance, the right to inform any person of his or her potential rights under the ordinance, and to assist him or her in asserting such rights. The ordinance’s retaliation protections extend to any person who mistakenly, but in good faith, alleges noncompliance with the ordinance. Finally, any adverse action taken against a person within 90 days of exercising his or her rights protected under the ordinance creates a rebuttable presumption that an employer retaliated against the individual for exercising his or her rights.

Administrative Enforcement of the Ordinance

The Office of Quality Assurance (OQA) within the City’s Department of Public Works are charged with enforcing the ordinance. The OQA may issue future guidelines or rules for the ordinance, which will have the effect of law.

The OQA will encourage reporting of violations of the ordinance by keeping confidential, to the maximum extent permitted by applicable laws, the name and other identifying information of the covered employee or person reporting the violation.

The OQA will strive to resolve any complaints within one year and before commencing an enforcement action.

Penalties for Noncompliance

- Where an employer does not maintain or retain adequate records documenting wages paid as required by the ordinance, or does not allow the City reasonable access to such records, the employee’s account of how much he or she was paid will be presumed to be accurate, absent clear and convincing evidence otherwise.

4 The ordinance defines a “Welfare-to-Work Program” as: (1) the CalWORKS Program, (2) County Adult Assistance Program (CAAP), which includes the Personal Assisted Employment Services (PAES) Program, (3) the General Assistance Program, and (4) any successor programs that are substantially similar to them.

5 California’s minimum wage is \$8 per hour; the federal minimum wage is \$7.25 per hour; San Francisco’s minimum wage in 2013 will be \$10.55 per hour.

6 This exceeds the three-year retention requirement found in California Labor Code section 226(a) for wage statements (*i.e.*, pay stubs).

- When a complaint is being investigated by the OQA, an employer is required to post or otherwise notify its employees that the OQA is conducting an investigation, on a form provided by the city.
- To secure compliance with the ordinance:
 - The OQA may issue an administrative citation with a fine of not more than \$50 for each day or portion thereof that a violation occurs, and for each employee or person as to whom the violation occurred or continued;
 - The OQA may initiate a proceeding by issuing a compliance order; or
 - The City may initiate a civil action for injunctive relief and damages and civil penalties in state court.
- Any person aggrieved by a violation of the ordinance, any entity a member of which is aggrieved by a violation of the ordinance, or any other person or entity acting on behalf of the public as provided for under applicable state law, may bring a civil action in state court against an employer or other person violating the ordinance. An aggrieved party that prevails will be awarded reasonable attorneys' fees and costs, and will be entitled to such legal or equitable relief as may be appropriate to remedy the violation including, without limitation, the payment of any back wages unlawfully withheld, the payment of an additional sum as a civil penalty in the amount of \$50 to each employee or person whose rights under the ordinance were violated for each day that the violation occurred or continued, reinstatement of employment and/or injunctive relief.

Any person or entity enforcing the ordinance on behalf of the public will, upon prevailing, be entitled only to equitable, injunctive, or restitutionary relief to employees, and reasonable attorneys' fees and costs.

- The City may revoke or suspend any registration permits or licenses held or requested by an employer until such time as the violation is remedied.
- Remedies may include reinstatement, payment of back wages, civil penalties, interest on unpaid wages, reimbursement of the City's administrative costs, and the award of attorney's fees.

When The Ordinance Takes Effect

The ordinance takes effect 90 days after the election results are certified. Practically speaking, the ordinance is expected to take effect in late February or early March 2013. The ordinance is intended to have prospective effect only.

Adjustments to the City's Minimum Wage

The City is required to announce on October 1 of each year the new minimum wage, if any, that will be effective the following January 1. The minimum wage will be increased by an amount corresponding to the prior year's increase, if any, in the cost of living, which will be measured based on the change in a version of the Consumer Price Index during the preceding year.

Additional Recommended Action Items for Covered Employees

- If your enterprise uses an outside professional payroll service provider, make sure the provider is aware of and will comply with all requirements of the ordinance when it takes effect.
- Train your payroll staff on the ordinance's requirements, including the longer, four-year records retention period for payroll records of covered employees.

[Christopher E. Cobey](#) is Special Counsel, and [Karen Cogbill](#) is an Associate, in Littler Mendelson's San Jose office. If you would like further information, please contact your Littler attorney at 1.888.Littler or info@littler.com, Mr. Cobey at ccobey@littler.com, or Ms. Cogbill at kcogbill@littler.com.