

# Insight

IN-DEPTH DISCUSSION

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## **An Early Holiday Boost to Low-Wage Silicon Valley Workers?: San José Passes “Opportunity to Work” Ordinance and Accelerates The City’s Minimum Wage Increase**

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The New Year will bring significant changes to the local employment laws affecting Silicon Valley-area employers, with measures aimed at reducing the expansion of the part-time workforce and increasing the minimum wage.<sup>1</sup>

In the midst of the tumultuous national election on November 8, San José voters adopted a sweeping measure designed to force medium-sized and large employers to halt the growth of the part-time workforce, and possibly even reduce the numbers of part-time workers already employed. Clearly intended to combat the “gig economy,” and allow more employees to become eligible for coverage under the Affordable Care Act, compliance with the “Opportunity to Work” ordinance (Measure E on the San José ballot) is already presenting challenges to employers trying to understand and plan for its requirements, though it is not scheduled to go into effect until Spring 2017.

In addition to this development, a week after the general election, San José’s City Council voted to join many other Silicon Valley cities in accelerating the march to a \$15 per hour minimum wage. While state law is already scheduled to bring the minimum wage for nearly all workers in the State of California to \$15.00/hour by 2023, the City Council, reacting to the high cost of living in the area and a consensus reached with other South Bay cities, is speeding up the increase locally, raising the City minimum wage to \$10.50/hour on January 1, 2017, to \$12.00/hour on July 1, 2017, and eventually to \$15.00/hour by 2019.

While both measures are likely to complicate business for many San José employers in the New Year, there is still time to plan for compliance.

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<sup>1</sup> For the full text of the law and the City’s ballot summary, see <http://sanjoseca.gov/DocumentCenter/View/54088>.

## Measure E: The “Opportunity To Work” Ordinance

### Background

The Opportunity to Work ordinance was authored by “Silicon Valley Rising,” which has been described as “a coalition of labor, community and religious leaders who have pledged to increase wages and win basic benefits for the working poor.”<sup>2</sup> It was inspired by similar legislation passed in both Seattle<sup>3</sup> and San Francisco,<sup>4</sup> but will have much broader application than either of its predecessors. Despite its controversial nature (Measure E was opposed by four city council members and San José Mayor Sam Liccardo), the measure was approved overwhelmingly by San José voters, 64% to 36%.

At its core, the law requires employers, regardless of industry, to offer part-time workers additional hours before hiring more employees. That San José, like many other cities, has passed a law more protective than that found at the state or federal level is not unprecedented. What is unprecedented is that San José is the first jurisdiction—city, state, or federal—to pass this kind of requirement affecting part-time workers in all industries, wages, and skill levels.<sup>5</sup>

### What Does The Law Require?

Section 4.101.040(A) of the new law (“Access To Hours Of Work For Qualified Part-Time Employees”) law provides that:

[b]efore hiring additional Employees or subcontractors, including hiring through the use of temporary services or staffing agencies, an Employer must offer additional hours of work to existing Employees who, in the Employer’s good faith and reasonable judgment, have the skills and experience to perform the work, and shall use a transparent and nondiscriminatory process to distribute the hours of work among those existing Employees.

The law further requires that employers maintain, in effect, compliance records for four years.<sup>6</sup> Specifically, it requires that, for any “new hire of Employees or subcontractors,” employers keep “documentation of the offer of additional hours of work to existing Employees prior to completing the hire.”<sup>7</sup> Employers must allow “the City” access to their records of compliance, “with appropriate notice and at a mutually agreeable time,” so “the City” may monitor compliance with Measure E’s requirements.<sup>8</sup> Employers also must post a notice of employee rights under the Ordinance, which notice will be prepared by the City’s Office of Equality Assurance.<sup>9</sup>

Finally, the law prohibits employers from retaliating against anyone who “exercises rights” protected under the Ordinance. “Exercise” includes filing a complaint, informing “any person about any party’s alleged noncompliance,” and informing any person of his or her “potential rights” and to assist him or her in

2 See Rodriguez, “Ballot Measure in San Jose Would Boost Hours for Part-Time Workers,” San Jose Mercury News, Jan. 25, 2016.

3 See Doug Smith, Littler Insight, “Seattle City Council Approves Secure Scheduling Ordinance,” (Sept. 20, 2016) <http://www.littler.com/publication-press/publication/seattle-city-council-approves-secure-scheduling-ordinance>.

4 See Michael Brewer, Christopher Cobey, and Jason Shapiro, Littler Insight, “San Francisco Ordinance Imposes New Burdens on ‘Formula’ Retail Employers,” (Dec. 9, 2014) <http://www.littler.com/san-francisco-ordinance-imposes-new-burdens-formula-retail-employers>.

5 The ordinances in Seattle and San Francisco are far narrower in scope and application than San José’s measure.

6 Section 4.101.050(B); see, S.J. Muni. Code section 4.100.060(C). Here, as elsewhere, the Opportunity to Work Ordinance adopts and incorporates by reference provisions from the City’s last ground-breaking effort at labor protective legislation, its original Minimum Wage Ordinance, Measure D on the November, 2012 ballot. (In this instance, there is an apparent typographical error in the new Ordinance, however, as the cross-reference is said to be to Municipal Code section “4.100.600(C),” though no such Code section exists; section 4.100.060(C) of the Code, in contrast, contains explicit record-retention requirements enacted with the Minimum Wage.)

7 Section 4.101.050(B)(1).

8 Section 4.101.050(B); see, S.J. Muni. Code section 4.100.060(C).

9 Section 4.101.050(A).

asserting such rights.<sup>10</sup> Notably, and as under the existing Minimum Wage Ordinance, any “adverse action” taken against any person within 90 days of his or her exercise of rights protected by Measure E will be “rebuttably” presumed to be in retaliation for the exercise of such rights.<sup>11</sup>

The law offers one “safe harbor,” of sorts: Employers are not required to offer more hours to a part-time employee if those extra hours would require the employer to pay the employee “at time-and-a-half or other premium rate under any law or collective bargaining agreement. . . .”<sup>12</sup>

### **What Employers Does The Law Cover?**

Under Measure E, a covered employer is defined as any person who (1) employs or exercises direct or indirect control over wages, hours, or working conditions of any employee (“including through the services of a temporary employment agency, staffing agency or similar entity”), and (2) either is (a) *subject to* San José’s business tax or (b) maintains a place of business in San José that state law exempts from San José’s business tax.<sup>13</sup> This latter definition covers banks, insurance companies, and certain nonprofits. An employee, meanwhile, is any person who has performed at least two hours of work for an employer and is entitled to the state minimum wage.<sup>14</sup>

### **Who is Exempted From The Law?**

The law provides three explicit exemptions: for “hardships,” small businesses, and where “all or any portion” of its provisions are expressly waived in a collective bargaining agreement.<sup>15</sup> The new ordinance defines small businesses as those with 35 or fewer employees.<sup>16</sup> For “chain” businesses<sup>17</sup> “not owned by a franchisee,” however, the number of employees is determined by the combined number of employees at every location of the business, regardless of whether or not it is located in San José, or even in the State of California.<sup>18</sup> For franchisees,<sup>19</sup> exemption is determined by the combined number of employees at every location owned by the franchisee, regardless of whether the location is in San José.<sup>20</sup>

Granting a hardship exemption is at the discretion of the City’s Office of Equality Assurance. But to qualify for a hardship, an employer must show that it has “undertaken in good faith all reasonable steps to comply” with the law, and that full and immediate compliance would be “impracticable, impossible, or futile.” Such an exemption may only be granted by the Office “for up to 12 months,” at least initially. Thereafter, the Office may extend the hardship exemption in 12-month increments, provided that “an Employer demonstrates that, despite the Employer’s best effort to come into compliance, hardship conditions continue to exist.”<sup>21</sup>

10 Section 4.101.060; see S.J. Muni. Code section 4.100.070.

11 Section 4.101.060; see S.J. Muni. Code section 4.100.070 (emphasis added).

12 Section 4.101.040(C).

13 Section 4.101.030(D)(1)-(2). San José, as would be imagined, claims very broad powers to tax “businesses” operating in the City, and broadly defines “businesses” subject to its business taxes. See, S.J. Muni. Code sections 4.76.050, 4.76.160.

14 Section 4.101.030(c). According to the City’s impartial analysis of San José’s workforce, there are about 18,000 people who identify as involuntary part-time workers in San José. This from a workforce of 398,000 workers, including 72,000 part-time workers. The City’s analysis also noted, however, that the number of involuntary part-time workers increased by a percentage point in a decade. Thus, while the law looks to affect about 4.3% of the City’s workforce, that figure is expected to grow.

15 Sections 4.101.080, 4.101.090, 4.101.110; see, S.J. Muni. Code section 4.100.050.

16 Section 4.101.090; see, S.J. Muni. Code section 4.12.060 (“small business enterprise” means a local business enterprise that has thirty-five (35) or fewer total employees.)

17 Section 4.101.030 (A). “Chain” is defined for purposes of Measure E to be “a set of businesses that share a common brand or are characterized by standardized options of decor, marketing, packaging, products or services.”

18 Section 4.101.090(A).

19 Section 4.101.030(E).

20 Section 4.101.090(B).

21 Section 4.101.080(A),(B).

Finally, Measure E adopts and incorporates by reference from San José's Minimum Wage Ordinance (MWO) a provision allowing the parties to a union collective bargaining agreement to waive "all or any portion of the applicable requirements" of the Opportunity to Work Ordinance, "provided that such waiver is explicitly set forth in such agreement in clear and unambiguous terms." Perhaps ominously for employers and unions hoping to exercise this right, however, the collective bargaining waiver is qualified, and as in the MWO, it is allowed by Measure E only "to the extent required by federal law, . . . ."

### **When Does The Law Take Effect?**

Fortunately, affected San José employers and City regulators will have some time to consider the Opportunity to Work Ordinance, and plan for compliance. The law does not take effect until the "ninetieth day after it is certified" by the City Clerk.<sup>22</sup> At this writing, the City Clerk estimates that certification will likely not be finished until December 8. If so, the law will not take effect until March 8, 2017.

### **The Law's Uncertainties**

Beyond the uncertainty of how the law will affect employers, the law itself contains a number of textual ambiguities. At the threshold, for example, it is unclear precisely how the statute's basic requirement – that before hiring "additional" employees, employers must offer "additional hours" to existing employees – will be interpreted.<sup>23</sup> Does this apply to the hiring of replacements for employees who have terminated, or only to the addition of new positions? Also unclear is the reach of the statute: it protects any "existing Employee" of a San José "employer," so long as the employee works two hours for the employer.<sup>24</sup> How does this apply to employers with operations both within and outside the City's limits, whose employees work both within and outside the City? Does an employee "headquartered" at a location outside of San José, who has nonetheless worked two hours at a San José location, acquire rights under the statute? If so, where?

Moreover, while Measure E declares that its purpose is to require "Employers to offer hours of work to existing qualified part-time Employees. . . .,"<sup>25</sup> the law defines neither "qualified" nor "part-time." There are therefore concerns that these could be defined to limit the ability of employers to satisfy temporary or otherwise irregular needs, such as seasonal, peak-load, or internships.

There is also uncertainty as to just when and whether employers and unions really can waive the Opportunity to Work Ordinance's requirements in their collective bargaining agreements. Measure E qualifies the right by suggesting such a waiver is allowable only "to the extent required by federal law."<sup>26</sup> When and whether "federal law" would "require" that the parties to a collective bargaining agreement be allowed to waive Measure E's terms is hardly certain, and may ultimately be litigated in the future.

These and other uncertainties embedded in the statute make its reach and ultimate effect on employers problematic. How they are resolved will determine just how disruptive Measure E could become.

### **Possible Solutions to the Law's Uncertainties**

There are two main options to address Measure E's uncertainties. First, the law authorizes the City Council to amend the Ordinance "without a vote of the people," but limits this power to the law's implementation or enforcement, not its scope or coverage.<sup>27</sup> Second, the City's Office of Equality Assurance may adopt guidelines or rules to "to coordinate [the] implementation and enforcement of" the new law, and "establish procedures for ensuring fair, efficient and cost-effective implementation of" the Opportunity to Work

<sup>22</sup> Section 2.

<sup>23</sup> Section 4.101.040(A).

<sup>24</sup> Section 4.101.030(C); see, S.J. Muni. Code section 4.100.030(B).

<sup>25</sup> Section 4.101.070.

<sup>26</sup> Section 4.101.110; see, S.J. Muni. Code section 4.100.050.

<sup>27</sup> Section 4.101.120.

Ordinance, “including supplementary procedures for helping to inform Employees of their rights under this Chapter.”<sup>28</sup>

But even with these options, clarity or certainty is not assured. Nothing requires either the City Council or the Office of Equality Assurance to step in and provide clarity: each entity is merely given the discretion to do so. While it would arguably be in everyone’s interest if either party were to exercise this discretion, and would no doubt ease the City’s enforcement burden if they did (to say nothing of eliminating some of the uncertainties facing San José employers), it is too early to tell whether either will.

### **Enforcement of the New Law**

Under the statute, the City does have an enforcement obligation. Beyond its discretion to establish guidelines and regulations, the Office of Equality Assurance is charged with taking complaints of violations of the Ordinance from “an Employee or any other person,” and investigating “any possible violations of” the law “by an Employer or other person.”<sup>29</sup> The Office may also issue administrative fines and penalties for non-compliance, or initiate administrative enforcement proceedings.<sup>30</sup>

The City itself may bring a civil action in a court of law for injunctive relief and damages to enforce the Ordinance’s terms.<sup>31</sup> A civil action may also be brought by any person or “entity a member of which is aggrieved by a violation,” or by any person “or entity” acting on behalf of the public or the City, regardless of whether the individual has been personally harmed by an employer’s non-compliance.<sup>32</sup>

Finally, the law allows “any person aggrieved by a violation” of Measure E to bring a private cause of action on his or her own behalf. The statute provides that, in addition to recovering “such legal or equitable relief as may be appropriate,” an aggrieved individual may also recover “any back wages unlawfully withheld” and a civil penalty of \$50 to each Employee “or person whose rights under this Chapter were violated for each day that the violation occurred or continued,” and where appropriate “reinstatement in employment and/or injunctive relief.” Any person or entity who sues on the statute and prevails is also entitled to its attorney’s fees and costs.<sup>33</sup>

Beyond its effects upon San José employers, Measure E may prove a harbinger of things to come for the rest of the state. On the first day of the California Legislature’s 2017-2018 session (December 5, 2016), the chair of the Assembly Appropriations Committee (Lorena Gonzalez, D-San Diego) introduced a bill (AB 5) which would incorporate the principles of Measure E into an amendment of the California Labor Code. While it is too early to predict the likely fortunes of this bill in the Legislature, developments there, and in San José, bear watching by all California employers.

## **Amendment To The Minimum-Wage Ordinance**

### **Background of the MWO**

Earlier this year, San José Mayor Sam Liccardo led a proposal for San José and 12 other Santa Clara County cities to accelerate the increase in the minimum wage to \$15.00/hour ahead of the schedule set by the state Legislature in SB 3, which was enacted by the Legislature and signed by the Governor in April.<sup>34</sup> This

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28 Section 4.101.060; see, S.J. Muni. Code section 4.100.080(A).

29 Section 4.101.060; see, S.J. Muni Code section 4.100.080

30 Section 4.101.060; see, S.J. Muni Code section 4.100.090(A)(1), (2).

31 Section 4.101.060; see, S.J. Muni Code section 4.100.090(A)(3).

32 Section 4.101.060; see, S.J. Muni Code section 4.100.090(B).

33 Section 4.101.060; see, S.J. Muni Code section 4.100.090(B).

34 See, Stats 2016, chap. 4 (SB 3), effective January 1, 2017.

proposal was a response to concerns regarding the rising cost of living in Silicon Valley, the area's increasing issues surrounding inequality, and the risk of balkanized economic regulation among regional cities.<sup>35</sup>

The cities' initial plan was to raise the minimum wage to \$15.00/hour together by January 2019, with no exemptions, so that no city would be "left behind" or obtain an economic advantage over its neighbors. When this attempt at unity fell apart, cities went their own way. Los Altos, Palo Alto, and Cupertino, for example, have adopted ordinances to reach \$15.00/hour by January, 2019, while Mountain View and Sunnyvale have charted a quicker path to \$15 by 2018. San José amended its Ordinance in December, as described below. Other area cities seem content to live under the schedule set in SB 3.

For now, accordingly, employers operating at multiple locations throughout the Valley will have to contend with a patchwork of different minimum wages, and local minimum wage regulations.

### **How Will the Minimum Wage Increase? Steps, Off-Ramp, and CPI**

Effective January 1, 2017, the minimum wage in San José rises to \$10.50/hour, to match the rise in the state minimum wage. Then, on July 1, 2017, it becomes \$12.00/ hour. On January 1, 2018, it rises again to \$13.50/ hour. Finally, on January 1, 2019, the minimum wage arrives at \$15.00/hour.<sup>36</sup>

Beyond accelerating the timetable for increases to the \$15.00/hour minimum wage, San José's scheme deviates from state law in another significant way. The City minimum wage does not distinguish between employers employing 25 or fewer employees and those employing 26 or more. While the state softens the blow of the increases for employers of 25 or fewer workers by reducing the amount of the yearly minimum wage increase, and delaying the progress to \$15.00/hour until 2023, San José makes no distinction between employers based on the size of their workforces. While the first jump in the state minimum wage on January 1, 2017 (to \$10.50/hour) is the same for employers of all sizes, thereafter the state minimum wage increases for smaller employers proceed more gradually.<sup>37</sup> The scheduled San José increases, in contrast, will be applicable to all employers, regardless of size.<sup>38</sup>

San José does, however, borrow the "off ramp" feature of SB 3. Under the City's version of the off ramp, if increases to the City's minimum wage cause, or correlate with, certain adverse economic conditions, the City may take an "off-ramp" to delay the step increases to \$15 per hour. Each year, the City's Office of Equality Assurance will determine and certify to the City whether "economic conditions can support a minimum wage increase." This determination depends on the occurrence of two particular state-wide economic developments set forth in the ordinance.<sup>39</sup> If these occur, the City Manager may "temporarily suspend the minimum wage increase scheduled for the following year."<sup>40</sup>

After January 1, 2020, an increase in the minimum-wage is keyed to the Bay Area CPI (Urban Wage Earners and Clerical Workers, San Francisco-Oakland-San José, CA for all items). Unlike the national CPI, on which San José's minimum wage has up to now been based, the Bay Area CPI will generally raise the minimum wage at a higher and faster rate. But however high the Bay Area CPI may rise, the ordinance caps any CPI increase to the minimum wage at five percent.<sup>41</sup>

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35 For a chart that shows the differences in minimum wages among South Bay Area cities, see <https://www.sanioseca.gov/minimumwage>.

36 Ordinance No. 29829, S.J. Muni Code section 4.100.040(C), (D).

37 Stats 2016, chap. 4 (SB 3), section 3(b)

38 Ordinance No. 29829, section 4; S.J. Muni. Code, section 4.100.040

39 (1) California state retail sales and use tax cash receipts from a 3.9375-percent tax rate for the July 1 to June 30, inclusive, period ending one month prior to the September 1 determination date is less than retail sales and use tax cash receipts from a 3.9375-percent tax rate for the July 1 to June 30, inclusive, period ending 14 months prior to the September 1 determination date, and (2) (a) total nonfarm employment, seasonally adjusted, decreased over the three-month period from April to June, inclusive, before the September 1 determination or (b) total nonfarm employment for California, seasonally adjusted, decreased over the six-month period from January to June, inclusive, before the September 1 determination. Ordinance No. 29829, S.J. Muni Code section 4.100.040(F).

40 Ordinance No. 29829, section 2, S.J. Muni Code section 4.100.040(G).

41 Ordinance No. 29829, S.J. Muni Code section 4.100.040(E)

## **Who is Covered by the MWO?**

With one exception, San José's MWO applies, generally, to the same employers and employees covered by the new Opportunity to Work Ordinance: the latter statute largely borrows the former's definitions and coverage requirements. The exception, of course, is that unlike Measure E, San José's MWO has applied, and will continue to apply, to all "employers" as defined in the City statute, irrespective of their size. The sole exception in the existing MWO, left undisturbed by December's amendments, is the "collective bargaining exemption," whereby employers and unions can negotiate an explicit waiver from "all or any portion" of the law's requirements "to the extent required by federal law." As noted above, however, what the latter qualification means is uncertain.

## **The MWO's Exceptions for "Youth Training Program" Employees**

The December amendments to San José's MWO also introduced another, partial exemption from their requirements. What will not increase, either by the Bay Area CPI or by the new minimum-wage rates, is the minimum wage that must be paid by Youth Training Program Employers "serving disadvantaged youth."<sup>42</sup> For these employers, the minimum wage will remain at \$10.00 and rise with the National CPI.<sup>43</sup> Note, however, that San José employers are still governed by both state and federal minimum wage laws: unless a similar whole or partial exemption can be found from both the federal minimum wage requirements under the Fair Labor Standards Act, or the state minimum wage requirements under the Labor Code, those minimum wage levels must be observed.

## **Recommendations for Employers**

- Once the Office of Equality Assurance finishes the notice poster for Measure E, download and post the required poster.<sup>44</sup>
- Download and post the MWO-required poster in any language spoken by more than five percent of your workforce.
- Ensure that personnel records include documentation of the offer of additional hours of work to existing employees before completing "additional" hires and retain these records for four years.
- Remember that, under the still-existing Affordable Care Act, employees who work an average of 30 hours or more a week or 130 hours a month are considered full-time. Employers with 50 full-time equivalent employees are required to offer affordable healthcare for these employees or pay the "shared responsibility" penalty/tax.
- Monitor the City's and its Office of Equality Assurance's websites for future updates on critical regulatory developments.
- Ensure that your payroll records for San José employees are retained for a period of at least four years.
- Confirm that any employee who does not receive the standard California Labor Code section 2810.5 notice receives the notice required by the MWO containing the employer's name, address, and telephone number.

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42 Ordinance No. 29829, S.J. Muni Code section 4.100.045(A). "Serving disadvantaged youth" is undefined.

43 Under the ordinance, "Youth Training Program" means "any temporary youth employment program through which persons aged seventeen years or younger are employed by or engaged in employment and trained for future employment that is coordinated by a nonprofit or governmental entity." An employee of such a program, to come within the exemption, must be someone 17 years or younger who is employed no more than 120 days during a calendar year. The ordinance does not define "serving disadvantaged youth." Ordinance No. 29829, S.J. Muni Code section 4.100.030(F), (G).

44 Available at <http://www.sanioseca.gov/index.aspx?NID=351>.