

March 7, 2013

Increased Minimum Wage Is on Its Way: The City of San Jose's New Minimum Wage Ordinance Takes Effect on March 11

by Christopher Cobey and Karin Cogbill

This past November, voters in the City of San Jose, California ("City") approved their own minimum wage ordinance (MWO) – the largest city in the United States to take this action. The ordinance takes effect on **Monday, March 11, 2013**, and requires covered employers to pay covered employees a minimum wage of \$10.00 an hour.¹

Since the passage of the ordinance, the responsible City agency, the Office of Equality Assurance (OEA), has been developing frequently asked questions (FAQs) to provide further guidance regarding the application of the MWO. The FAQs address issues concerning which entities are covered by the ordinance, what the ordinance requires, employee rights under the ordinance, administrative and enforcement issues, and questions related to the San Jose Business Tax. At this writing, five versions of the FAQs have been released by the OEA since late January. The current version, dated February 27, 2013, is 10 pages long and has 41 FAQs.² This article summarizes the current version of the FAQs.

As a reminder, the MWO applies to most, but not all, San Jose employers. (FAQ 9) Any employer who either maintains a facility in the City³ **or** is subject to the San Jose **Business Tax** must pay the minimum wage of \$10.00 per hour to each employee who performs work in the City for **at least two hours per week**. (FAQ 11) If a company does not maintain a facility in the City, but *conducts business in the City* and is required to pay the Business Tax, the company must pay the minimum wage to covered employees. (FAQ 23)

Covered employers *may not use tips or fringe benefits* as a credit towards the employer's obligation under the ordinance. (FAQs 15 & 16) *Commissions*, on the other hand, may be counted towards the payment of the minimum wage. (FAQ 19) No employee may *agree to work for less* than the City's minimum wage. (FAQ 27).

1 For basic information concerning the ordinance, see Christopher Cobey and Karin Cogbill, [Do You Know The Way To Pay In San Jose?: San Jose Becomes The Fifth – And Largest – US City To Enact Its Own Minimum Wage Ordinance](#), Littler ASAP (Nov. 15, 2012).

2 The MWO's FAQs are available at the City's MWO informational website, www.sanjoseca.gov/index.aspx?NID=3491.

3 The City's MWO website includes a detailed map of the San Jose City limits, to be used in determining whether a location is within or outside the City's borders..

Application to Certain Employees

The OEA has sought to provide the following guidance regarding the MWO's application to certain categories of employees. These include the following:

- The MWO applies to both *full-time and part-time* employees, and *adult and minor* employees. (FAQ 10 & 13)
- The MWO applies to employees who work in San Jose but are not San Jose residents. (FAQ 14)
- Employees who are *exempted from California minimum wage requirements* are excluded from the San Jose minimum wage. (FAQ 17)
- The MWO applies to employees covered by existing *collective bargaining agreements*, although the MWO may be waived by a clear and unambiguous reference in the CBA. (FAQ 18)
- *Family-run businesses* that are covered by California Labor Code section 3352(a) need not pay the San Jose minimum wage to parents, spouses, children, or domestic partners. All other employees of such a business must be paid the minimum wage if they qualify as employees. (FAQ 20)
- Personal attendants who care for disabled adults and are assigned to work at homes located within the City are subject to the MWO, even if the employer is located outside the City (FAQ 21). Likewise, employees of *residential care facilities* located in the City are subject to the MWO. (FAQ 22)
- Employees working for a temporary services agency that is located in the City are not subject to the MWO for work performed outside the City. (FAQ 24)
- Employees of *non-profit organizations* conducting business in the City are subject to the MWO, even if the non-profit is not located in the City. However, as addressed below, the non-profit organization can request and may be granted a Business Tax exemption as a non-profit organization. (FAQ 25)
- *"State and federal agencies, including school districts,* are not required to pay a minimum wage when the work performed is related to their governmental function. However, for work that is not related to their governmental function (for example, booster or gift shops, non-K-12 cafeterias, on-campus pubs, and the like), the minimum wage must be paid. The minimum wage is also required to be paid by lessees or renters of facilities or space from the governmental agency." (FAQ 26) (emphasis added)
- The MWO applies to undocumented workers. (FAQ 6)

Application of the Business License Tax Exemption

As addressed above, the MWO applies to employers who are subject to the San Jose Business Tax. With that in mind, the OEA has offered the following guidance on the application of the Business Tax and potential exemptions:

- *"All persons or companies* conducting business in the City of San Jose are required to pay the Business Tax. *Included* are: commercial landlords; residential landlords (renting three (3) or more units); retail outlets; wholesalers; manufacturers; service companies; self-employed professionals; independent contractors; and home-based businesses. The San Jose Business Tax applies to home-based businesses and part-time operations." (FAQ 34) (emphasis added)
- An employer whose business is not physically located in the City, but conducts business in the City, is subject to the Business Tax, but may be entitled to an *apportioned tax rate*. The rate may be pro-rated in accordance with the number of days that the employer or its employees conducts business activity in the City. (FAQ 35)
- Businesses excluded from the Business Tax include banks (including national banking associations) and insurance companies and associations. (FAQ 40)
- A person engaged in business in San Jose may claim *exemption* from payment of the Business Tax by completing the form available at www.sanjoseca.gov/DocumentCenter/View/2998. In addition, a *Business Tax Hardship Exemption* Program is available to sole proprietorships and corporations that are owned by one person, husband/wife or domestic partner ownership structures that

have no employees, and annual gross receipts at or below less than twice the poverty level. The exemption form is available at www.sanjoseca.gov/DocumentCenter/View/2999. (FAQ 41)

Additional Administrative Requirements

In addition to paying the requisite minimum wages, the MWO requires employer compliance with the following administrative requirements:

- Post a notice at the workplace of the current and prospective minimum wage and the employees' rights under the ordinance. Copies of this notice, in English, Spanish, Vietnamese, and Chinese, are available at the City's MWO website.
- Maintain payroll records for a period of four years.
- Provide in writing to each employee at the time of hire the employer's name, address, and telephone number. If the employer is already providing that notice required by California Labor Code section 2810.5, this requirement will not necessitate any additional notice. (FAQ 10)

Enforcement and Remedies for Violations of the MWO

If an employer does not pay an eligible employee the required minimum wage, the employee may either file a *wage claim* with the City's OEA, or file a *lawsuit* against the employee's employer. (FAQ 28)

The OEA may issue administrative citations and compliance orders, file a lawsuit in court, and seek reimbursement of the City's administrative costs of enforcement. (FAQ 31)

OEA representatives have stated that the MWO will be enforced only on a complaint basis. The representatives have also said that, when necessary, the OEA will draw on the experience of the City and County of San Francisco's Office of Labor Standards Enforcement in administering that city's own minimum wage ordinance, which was enacted in 2003.⁴

The remedies available to persons harmed by a violation of the MWO are the right to *sue in court* to enforce the wage requirement, *the award of back wages*, *civil penalties* in the amount of \$50.00 per day to each employee harmed, and *recovery of reasonable attorneys' fees and costs*. (FAQ 32)

It is unlawful for a covered employer to *retaliate* against a covered employee who asserts his or her rights under the MWO. "There is a rebuttable presumption of retaliation if any adverse action is taken against the person within ninety (90) days of the person exercising their rights protected under the law." (FAQ 29)

Recommended Action Items for Covered Employers

If your business and at least some of your employees are covered by San Jose's new MWO, prepare to be in compliance no later than March 11, 2013 by:

- Downloading and posting the required poster in any language spoken by more than five percent of your workforce;
- Ensuring that your personnel records will be retained for a period of at least four years starting on that date; and

Confirming 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.

[Christopher E. Cobey](#) is Special Counsel, and [Karin M. 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.

4 See generally City & County of San Francisco Labor Standards Enforcement, [Minimum Wage Ordinance](http://sfgsa.org/index.aspx?page=411), <http://sfgsa.org/index.aspx?page=411>.