


FILED  
OFFICE OF THE CITY CLERK  
OAKLAND

15 FEB 13 PM 2:51

Approved as to Form and Legality

  
Oakland City Attorney's Office

## OAKLAND CITY COUNCIL

Resolution No. 85 423 C.M.S.

---

### RESOLUTION ENACTING AND APPROVING REGULATIONS INTERPRETING THE OAKLAND MINIMUM WAGE LAW (NOVEMBER 2014 BALLOT INITIATIVE, MEASURE FF) WHICH TAKES EFFECT ON MARCH 2, 2015

**WHEREAS**, in November 2014 the Oakland voters passed Measure FF, a voter initiative ballot measure that among other things, establishes an Oakland minimum wage in the amount of \$12.25 effective March 2, 2015; and

**WHEREAS**, Measure FF also requires that covered employers provide paid sick leave for employees who perform at least two hours of work in a particular workweek in Oakland and contains provisions which require that covered employers distribute service charges to the employees who provide the services in question; and

**WHEREAS**, some of the provisions of the ordinance are vague and not crystal clear and the City of Oakland recognizes the importance of providing clear guidance to employers and employees regarding the measure to help them understand and follow the law; and

**WHEREAS**, the City administration, City Attorney, Mayor and City Councilmembers have received many calls from businesses, the community and civic organizations raising questions about the interpretation of the ordinance; and

**WHEREAS**, the City Council has the power to enact regulations interpreting the Measure FF, codified at Oakland Municipal Code section 5.92 et seq.; and

**WHEREAS**, regulations are necessary to provide clarity regarding the requirements and interpretation of the Oakland Minimum Wage Law; and

**WHEREAS**, the City of Oakland intends to adopt regulations in phases, the first phase will interpret some of the Minimum Wage Law's coverage and provisions pertaining to coverage, application of the minimum wage, sick leave and service charge and other provisions; subsequent phases will provide regulations regarding compliance and enforcement and may provide additional language interpreting additional provisions of the law; the instant regulations are phase one regulations; now therefore be it

**RESOLVED:** that the Council of the City of Oakland hereby adopts the regulations appended to this resolution, which hereby are incorporated by reference as if set forth in full herein.

IN COUNCIL, OAKLAND, CALIFORNIA, FEB 19 20152015

PASSED BY THE FOLLOWING VOTE:

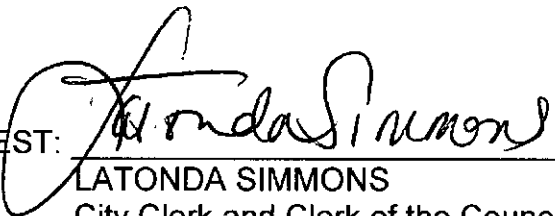
AYES – BROOKS, CAMPBELL WASHINGTON, GALLO, GUILLEN, ~~WILLIAMS~~, KAPLAN, REID AND PRESIDENT GIBSON-MCELHANEY - 7

NOES - Ø

ABSENT - Ø

ABSTENTION - Ø

Excused - Kalb - 1

ATTEST:   
LATONDA SIMMONS  
City Clerk and Clerk of the Council  
of the City of Oakland, California

15 FEB 13 PM 2: 51

# CITY OF OAKLAND

## REGULATIONS INTERPRETING THE OAKLAND MINIMUM WAGE LAW (Oakland Municipal Code Section 5.92, et seq.)

Effective February 19, 2015

---

### 1. Employee Eligibility under Oakland Municipal Code section 5.92 et seq.

A. An employee qualifies for Oakland's minimum wage as set forth in Oakland Municipal Code section 5.92 if he/she is entitled to payment of a minimum wage from any employer under the California minimum wage law, as provided under California Labor Code section 1197 and wage orders published by the California Industrial Welfare Commission ("IWC").

B. Employees who in a particular week perform at least two (2) hours of work within the geographic boundaries of the City of Oakland, *regardless of the location of the employer*, are eligible for the wages and benefits in Oakland Municipal Code section 5.92 et seq. (hereinafter referred to as "Eligible Employee").

- i. The term "particular week" is defined as any seven consecutive days, starting with the same calendar day each week beginning at any hour on any day, so long as it is fixed and regularly occurring.
- ii. An employer may establish the day of week when an employee's "particular week" starts, but once an employee's workweek is established, it remains fixed regardless of his /her working schedule.
- iii. An employer may change an employee's workweek only if the change is intended to be permanent and is not designed to evade an employer's obligations under Oakland Municipal Code section 5.92, et seq.

C. Employers shall pay Eligible Employees Oakland's minimum wage for every hour worked in the geographic boundaries of the City of Oakland.

D. Eligible Employees shall only accrue paid sick leave for hours worked in the geographic boundaries of the City of Oakland.

### 2. Calculation of Business Size.

A. A "Small Business" is an employer for which, on average, fewer than ten (10) persons, work for compensation per week. In calculating the total number of employees, the following shall be included:

- i. Full-time, part-time, and temporary employees;
- ii. Employees performing work in different locations operated by the same employer;
- iv. Employees who work outside the City of Oakland; and
- iii. Persons made available to work through the services of a temporary services or staffing agency.

B. The calculation for business size for the current calendar year is based upon the average number of persons who worked for compensation per week during the preceding calendar year.

C. For new employers, the calculation for business size for the *current calendar year* is based upon the average number of persons per week who worked for compensation for the first ninety days after its first employee(s) commenced work.

D. Employers shall calculate the size of their business(es) in accordance with Sections 2(A) – (B) above each calendar year to ensure compliance with Oakland Municipal Code section 5.92 et seq.

### **3. Minimum Wage Increases Pursuant to Consumer Price Index Data.**

Pursuant to Oakland Municipal Code section 5.92.020(B), Oakland's minimum wage shall increase by an amount corresponding to the prior calendar year's increase, if any in the Consumer Price Index ("CPI").

A. The City of Oakland and covered employers shall use the August-to-August change in the Consumer Price Index to calculate the annual increase, if any, in Oakland's minimum wage rate.

B. If there is a decrease in the CPI, the minimum wage will remain the same and shall not decrease.

C. Upon release of this CPI data, Employers shall provide notice to employees of the new minimum wage as soon as practicable but no later than December 15<sup>th</sup> of that year.

D. Minimum wage increases shall take effect on January 1<sup>st</sup> of each year.

**4. Accrual of Paid Sick Leave for All Employees.** All employees who perform work in the geographic boundaries, including on a part-time or temporary basis, shall accrue paid sick leave for those hours worked in the City of Oakland, regardless of where their employer is located.

A. Eligible Employees who live in Oakland and perform work for an employer from home, including for employers located outside of Oakland, shall accrue paid sick leave in accordance with Oakland Municipal Code section 5.92.030 for all hours that they work from home in Oakland.

B. Employees who work outside of Oakland and who travel through Oakland, but do not stop in the city as a purpose of their work, are exempted from coverage under Municipal Code section 5.92.030.

C. Eligible Employees who travel through Oakland and stop in Oakland as a purpose of their work shall accrue paid sick leave for all hours worked in the city, including travel within the city to and from the work site(s).

**5. Accrual Rate of Paid Sick Leave for Nonexempt Employees.** Nonexempt Eligible Employees accrue paid sick leave on all hours worked, including overtime hours worked in the City of Oakland.

**6. Accrual Rate of Paid Sick Leave for Exempt Employees.** In determining the accrual rate of paid sick leave for exempt employees, exempt employees shall accrue sick leave based on a forty (40) hour workweek absent clear and convincing evidence that the exempt employee regularly works less than forty (40) hours in a workweek; In such instances, paid sick leave will accrue based on the regular workweek for that exempt employee.

**7. Employer Policies Creating Caps.**

A. Employers may cap the accrual of paid sick leave. Small Businesses, as defined in Oakland Municipal Code section 5.92.010, may cap accrual at forty (40) hours while all other business may cap accrual at seventy-two (72) hours. If an employee reaches the accrual cap and then uses some of his/her paid sick leave, the employee shall commence accruing additional paid sick leave in accordance with Oakland Municipal Code section 5.92.030(A) until he/she again reaches the employer's cap.

B. If an employer implements or has implemented a paid time off (PTO) policy that is consistent with Oakland Municipal Code section 5.92.030 and allows employees to take paid time off for any reason, such policy will be presumptively lawful.

**8. Reasonable Notice for the Use of Paid Sick Leave.**

A. An employer may require employees to give *reasonable* notification of an absence from work for which paid sick leave is or will be used. An employer shall not impose unreasonable notification requirements on employees.

- i. Policies or practices that require advance notice of a pre-scheduled or foreseeable absence from work for which paid sick leave will be used, such as a doctor's appointment, are in principle

reasonable and thus presumptively lawful. However, an advance notification requirement may be unreasonable if it is excessive or the method required for providing advance notification is unnecessarily burdensome on the employee.

- ii. Policies or practices that require notification as soon as practicable for an unforeseeable absence from work for which paid sick will be used are, in principle, reasonable, and thus, presumptively lawful.
  - a. Employers may define “as soon as practicable” as two hours, or a time period less than two hours, prior to the start of an employee’s work shift, recognizing that there are instances such as accidents, emergencies, or sudden illnesses for which such a requirement is unreasonable.
  - b. An advance notification requirement of greater than two hours is presumptively unreasonable unless the employer can demonstrate that there is a compelling justification for the longer advance notification requirement.
- iii. If an employer requires advance notification of the use of paid sick leave, the employer shall establish a *reasonable* procedure for employees to communicate absences to the employer.

B. Employees need not expressly request the use of paid sick leave to have the absence covered under Oakland Municipal Code 5.92.030(B) and an employer may inquire further to determine whether the leave qualifies for paid sick leave, provided that such an inquiry does *not* violate federal, state, or local medical privacy laws, including the Family Medical Leave Act, California Family Rights Act, Pregnancy Disability Leave Act, the Americans with Disabilities Act, and/or other applicable laws.

C. Notification policies approved through a bona fide collective bargaining agreement shall be deemed reasonable. This rule applies whether the collective bargaining agreement was entered into before or after March 2, 2015, the effective date of the Minimum Wage Law.

**9. Employer Verification of Employee’s Use of Paid Sick Leave.**

A. Employers shall take only reasonable measures to verify or document that an Employee’s use of paid sick leave is for purposes allowable under Oakland Municipal Code 5.92.030.

- i. An employer may confirm that the employee’s use of paid sick leave was for a lawful reason and/or for a person specified in Oakland Municipal Code section 5.92.030.

- a. Policies or practices that require a physician's note or other medical documentation for the use of paid sick leave of fewer than three consecutive work days shall be deemed presumptively unreasonable.
  - b. Policies or practices that require a physician's note or other medical documentation for the use of paid sick leave of three or more consecutive work days (whether full or partial days) shall be deemed presumptively reasonable.
- ii. If an employer requires an employee, who has not otherwise sought medical care during his/her paid sick leave absence, to obtain medical documentation solely for verification of paid sick leave compliance, the employer shall pay all costs in excess of five dollars (\$5.00).
  - iii. If an employer requires documentation supporting an employee's use of paid sick leave, the employer shall ensure compliance with the Family Medical Leave Act, California Family Rights Act, Pregnancy Disability Leave Act, Americans with Disabilities Act and/or other applicable laws.

B. If an employer requires or comes into possession of a physician's note or other medical documentation regarding the use of paid sick leave, the employer shall treat that information as confidential in accordance with federal, state, and local medical privacy laws.

C. If an employer reasonably believes that an employee is or has engaged in a pattern of paid sick leave abuse, an employer may require a physician's note or other medical documentation to verify that an employee's *subsequent* use of paid sick leave is consistent with the Oakland Municipal Code section 5.92.030.

- i. When an employer reasonably suspects an abuse of paid sick leave, an employer may require a physician's note or medical documentation for subsequent use of paid sick leave: a) even if the use of paid sick leave was for fewer than three (3) consecutive workdays and b) even if the cost of obtaining such documentation exceeds five dollars (\$5.00).
  - a. If an employer's reasonable suspicions of paid sick leave abuse are refuted, the employer shall comply going forward with Section 8(A).
  - b. If an employer's reasonable suspicions of paid sick leave abuse are confirmed, the employer may discipline in accordance with state and federal law and its disciplinary policies.

- ii. Employers who unreasonably or unlawfully accuse an employee of sick leave abuse violate Oakland Municipal Code sections 5.92.030 and 5.92.050.

**10. Use of Paid Sick Leave.**

A. Employees may use sick leave in one hour increments. However, an employer may choose to permit its employees to use paid sick leave in less than one hour increments.

B. If an employee is exempt under the Fair Labor Standards Act ("FLSA") and/or California law and takes an entire day off for paid sick leave purposes, employers shall deduct eight (8) hours of accrued paid sick leave from the employee's sick leave bank unless there is evidence that the employee's regular workweek is less than forty (40) hours. In such instances, the hours worked by the employee during a regular workweek should be divided by the number of days worked during a regular workweek to calculate the number of hours that shall be deducted from the employee's sick leave bank.

**11. Employee Use of Paid Sick Leave Outside of the City of Oakland.**

Employers must allow employees to use accrued, unused paid sick leave when they are working or scheduled to work in the geographic limits of the City of Oakland.

A. An employer may choose to allow employees to use accrued, paid sick leave when the employees are working, scheduled to work, or transferred to work outside of Oakland.

B. If an employer does not allow the use of accrued, paid sick leave hours when an employee works outside of Oakland, those hours remain "in the bank" for four years from the employee's last day of work in Oakland. The accrued, unused paid sick leave hours shall be available for use if the employee works or is scheduled to work in Oakland during those four years.

**12. Payment for Use of Paid Sick Leave.**

A. The sick leave pay rate for employees who are paid an hourly wage is the employee's hourly wage at the time he/she use accrued, paid sick leave.

B. The sick leave rate of pay for employees who earn an annual salary is determined as follows:

- i. Divide the annual salary by fifty-two (52) to obtain the employee's weekly salary; and
- ii. Divide that weekly salary by the number of hours the employee is regularly scheduled to work.



- a. For employees who are not exempt from the overtime provisions of the FLSA and California law, the weekly salary must be divided by forty (40) or fewer hours, even if the nonexempt employee regularly works more than forty (40) hours per week;
- b. For employees who are exempt from the overtime provisions of the FLSA and California law, the weekly salary should be divided by forty (40) hours, unless there is evidence that the employee's regular workweek is less than forty (40) hours. In such instances, the weekly salary should be divided by the number of hours worked during a regular workweek.

C. If an employee holds two positions or jobs for the same employer with different pay rates, the employer shall reimburse the employee at a rate of pay equal to the scheduled rate(s) of pay for the job during which sick leave is taken by the employee.

D. Employers shall pay employees for use of accrued, paid sick leave no later than the payday for the next regular payroll period after the sick leave was taken by the employee. However, if the employer has a lawful, reasonable verification requirement, the employer is not obligated to pay sick leave until the employee has complied with the verification requirement.

**13. Cash Out of Accrued, Unused Paid Sick Leave.**

A. Employers are not required to pay employees for accrued, unused paid sick leave at the time of separation of employment.

B. Employers may not require that employees "cash out" accrued, unused paid sick leave hours and employees are not entitled to "cash out" accrued, unused paid sick leave hours. However, employers and employees subject to a bona fide collective bargaining agreement are exempt to the extent that such exemption is expressly waived in the collective bargaining agreement in clear and unambiguous terms.

**14. What Constitutes a Service Charge.**

A. A "Service Charge" is defined as "all separately designated amounts collected by a Hospitality Employer from customers that are for service by Hospitality Workers, or are described in such a way that customers might reasonably believe that the amounts are for those services."

B. Hospitality Employers may reasonably define the term "service" in Oakland Municipal Code section 5.92.040; the purpose of a Service Charge at their

establishment; what the Service Charge includes; and which type of Hospitality Workers may share in the Service Charge (referred to hereinafter as "Chain of Service").

- i. Hospitality Employers may not further define a Service Charge or implement a Chain of Service policy in the following instances:
  - a. Service Charges collected for banquets or catered meetings. These charges shall be paid to the Hospitality Workers who actually work the banquet or catered meeting.
  - b. Service Charges collected for room service. These charges shall be paid to the Hospitality Workers who actually deliver food and beverages associated with the charge; and
  - c. Service Charges collected for portage services. These charges shall be paid to the Hospitality Workers who actually carry the baggage associated with the charge.

C. If a Hospitality Employer implements a Chain of Service policy, it shall be in writing and must include the following:

- i. A complete definition of "service," including a reasonable and thorough description of why and for what the Hospitality Employer is charging the Service Charge. Subject to the limitations set forth in 12(B)(i) above, Hospitality Employers may define "service" to include food preparation;
- ii. Each Hospitality Worker position that is included in the Chain of Service;
- iii. The percentage that each Hospitality Worker shall receive from the Service Charge. The distribution of the Service Charge shall be paid to the Hospitality Worker(s) equitably and based on their contribution in the Chain of Service;
- iv. Written notice that supervisors shall not receive a portion of the Service Charge unless they perform nonsupervisory work in the Chain of Service.
- v. A statement that Service Charges will be paid to Hospitality Workers no later than the next payroll following the work or collection of the Service Charge from the customer, whichever is later.
- vi. Written notice, including the identity of an individual or employment position, to whom employees may direct questions or complaints regarding the payment (or nonpayment) of Service Charges.

D. If a Hospitality Employer implements a Chain of Service policy, it shall provide at least fifteen (15) calendar days advance, written notice of such policy to all employees.

- i. The Chain of Service policy shall be in writing and provided to new hires within five (5) calendar days of hiring and shall be posted prominently in areas at the worksite where it will be seen by all employees.
- ii. Hospitality Employers also must give written notice to customers of its Chain of Service policy in order to provide adequate notice to customers regarding the nature and purpose of the Service Charge.
  - a. Notice shall include the amount of the service charge, what the Service Charge is for and who shares in the Service Charge.
  - b. A Hospitality Employer's notice to its customers shall not mislead the customer as to the nature, purpose or who is sharing in the Service Charge.
  - c. To satisfy this notice obligation, Hospitality Employers need not provide customers with its entire written Chain of Service policy that is provided to employees.
  - d. If a Hospitality Employer modifies, amends, or discontinues its Chain of Service policy, it must provide written notice to its customers concurrently with the implementation of the new policy.
- iii. Hospitality Employers may modify, amend or discontinue a Chain of Service policy as long as it provides at least fifteen (15) calendar days' advance, written notice to Hospitality Employees. Hospitality Employers shall lawfully pay all owed Service Charges to Hospitality Employees under the preexisting Chain of Service Policy.

E. Supervisors shall not share in the distribution of the Service Charge unless they perform nonsupervisory work that comes within Hospitality Employer's Chain of Service policy.

F. A Service Charge is not a gratuity and/or tip.

- i. Employers shall follow California law (or federal law if applicable) regarding the distribution of tips and gratuities to their employees.

- ii. Employers cannot use a Service Charge to meet their obligations under Oakland's minimum wage, Oakland Municipal Code section 5.92.020.

G. The provisions of Oakland Municipal Code section 5.92.040 may be waived in a bona fide collective bargaining agreement but only if the waiver is explicitly set forth in the agreement in clear and unambiguous terms.