



July 31, 2017

Michael Guinea  
City Attorney, City of Emeryville  
1333 Park Ave  
Emeryville, CA 94608

***RE: Draft Fair Workweek Regulations***

Dear Mr. Guinea,

The California Retailers Association (CRA) and the California Restaurant Association (CRA) and our members operating in the City of Emeryville appreciate the opportunity to comment on the proposed regulations. Implementing an ordinance that seeks to regulate a very complicated aspect of our industries certainly doesn't fall short of its challenges. From our experiences in San Francisco, it is imperative for the regulations to provide as much guidance to employers as possible. This will help ensure the highest level of compliance.

The final version of the ordinance was hastily adopted during the first reading without any meaningful opportunity for stakeholder input, especially from the businesses in Emeryville. During public comment, our organizations cited, within the minute of time allotted, the implementation challenges the new ordinance language posed. The City Council was not inclined to entertain statutory changes to address these issues, however, then-Mayor Martinez reassured that our challenges can be resolved through a robust rulemaking process. We strongly urge the City Council to keep their commitment and work in good faith with the business community in Emeryville to comply with this new law. Please find our comments below to the proposed regulations.

The California Retailers Association is the only statewide trade association representing all segments of the retail industry including general merchandise, department stores, mass merchandisers, restaurants, convenience stores, supermarkets and grocery stores, chain drug, and specialty retail such as auto, vision, jewelry, hardware and home stores. CRA works on behalf of California's retail industry, which currently operates over 418,840 retail establishments with a gross domestic product of \$330 billion annually and employs 3,211,805 people—one fourth of California's total employment.

The California Restaurant Association is the definitive voice of the food service industry in California and is the oldest restaurant trade association in the nation. The CRA strives to improve the business environment for restaurants, advocating on a slate of national, state and local issues. We are committed to keeping restaurateurs in Emeryville informed about the latest rules and regulations affecting their businesses. California is home to more than 90,000 eating and drinking places that employ 1.6 million workers, making restaurants an indisputable driving force in the state and local.

**1. Definitions (Section 5-39.01)**

**d. “Regular Rate of Pay” includes Commissions earned. “Commissions” (whether based on a percentage of total sales or of sales in excess of a specified amount, or some other formula) are payments for hours worked and must be included in the Regular Rate of Pay; and regardless of whether the Commission is the sole source of the Employee’s compensation or is paid in addition to a guaranteed salary or hourly rate, or on some other basis; and regardless of the method, frequency, or regularity of computing, allocating and paying the Commission. Commission earnings may be computed daily, weekly, biweekly, semimonthly, monthly, or at some other interval. The fact that the Commission is paid on a basis other than weekly, and that payment is delayed for a time past the Employee’s normal pay day or pay period, does not excuse the Covered Employer from including this payment in the Employee’s Regular Rate of Pay. (29 CFR 778.117)**

**Comments:** Should the proposed definition of “Regular Rate of Pay” be used to calculate predictability pay, then we strongly recommend that the definition be consistent with the California Department of Labor Standards Enforcement’s definition as it applies to overtime calculations and have regular rate of pay classified as the hourly compensation based on the Employee’s sales activity or work performance. In addition, we recommend that commissions should exclude discretionary bonuses and other incentive payments of any kind, as these are not appropriate to be reflected in predictability pay.

**2. Covered Employers (Section 5-39.02)**

**Comments:** Currently, these regulations do not differentiate between exempt and non-exempt employees and which category of employees this law applies to. We do not believe this was the intent of the ordinance and suggest the inclusion of language in the regulations that the ordinance does not apply to executive, administrative and professional employees who are exempted from overtime requirements and minimum wage coverage in the California IWC Wage Orders.

**3. Advance Notice of Work Schedules (Section 5-39.03)**

**b. Whether posting of Work Schedules is in hard copy, electronic format, or another permissible method, Employees shall be able to modify the Work Schedule to reflect any mutually agreed-upon Shift swaps or coverage among Employees. The Covered Employer may require that it pre-approve Shift swaps or coverage and may assist Employees in finding such arrangements so long as it is at the request of the Employee. Assistance shall be limited to helping an Employee identify other Employees who may be available to provide coverage or Shift swap and does not include the Covered Employer arranging the Shift swap or coverage.**

**Comments:** Both CRA’s appreciate the allowance for Employers to pre-approve shift swaps. We strongly believe shift swaps must be done in accordance with another employee’s skill set or job title. For some of our industries, not all shifts are interchangeable such as those for cooking staff vs. the host position. Pre-approval helps protect employees from assuming shifts they are not trained for and ensures the business can proceed with operations in an efficient and safe manner. Furthermore, the explicit allowance for Employers to assist Employees in finding shift swap arrangements is a very beneficial addition. Many times, managers are aware of their workforce’s

most recent schedule needs and are best positioned to assist employees in finding coverage for their shifts. We simply ask that the regulation also explicitly state that such activity will not trigger predictability pay.

**c. Covered Employers may post additional hours for which Employees may volunteer to work in addition to regularly scheduled Shifts. No Predictability Pay is required where a Covered Employer makes available additional Shifts that Employees may opt to work, where there is no other change to the Employee's schedule, and the Employee on his/her own initiative volunteers to report for that additional Shift.**

**Comments:** We support this clarification in the regulation because it promotes an employee's ability to manage their schedules and assume more hours if they choose to. By enforcing the inverse, Employers will not be incentivized to offer additional hours on the bi-weekly posting if those shifts would trigger predictability pay. Although we disagreed with the City Council's broad decision to exclude other employer-initiated schedule changes from predictability pay, we believe the scenario described above is consistent with the City Council's intent since the Employee initiates such schedule changes.

**d. Where Shifts may run over to accommodate completion of service to a client for which the Employee will receive a Commission or tip, and must complete the service in order to be entitled to the Commission or tip, the Covered Employer is not required to include that period of time in the posted Work Schedule and the Employee is not entitled to Predictability Pay for that additional work. However, the Employee shall be compensated at the Regular Rate of Pay for any additional time he or she is performing work.**

**Comments:** In our dynamic and highly competitive industries, both constantly responding to consumer demand, we find these scenarios common and employees are always compensated for their time. The intent and goal of the ordinance was to ensure that the Employer grants Employees as much advance notice as seemingly possible through posting schedules 2 weeks ahead. There is no way for Employers to predict customer service scenarios that may not end in accordance to an Employees scheduled shift. By allowing Employees to complete their services, they benefit through tips or commissions received. If such scenarios would be subject to predictability pay, employers would immediately relieve employees at the end of their shifts to avoid such penalties, which under the ordinance would be 4 hours. Such restrictive scheduling practices will not only disadvantage the business from a customer service perspective, but also the employee who may have spent the latter portion of their shift providing exemplary customer service but forced to leave the job unfinished, potentially resulting in lost commissions or tips. For these reasons, we strongly support this clarification in the regulations.

#### **4. Notice, Right to Decline, and Compensation for Schedule Changes (Section 5-39.04)**

##### **e. Particular Cases of Schedule Changes:**

**ii. No Predictability Pay shall be due where a Covered Employer requires an Employee to leave work early, where the Employee receives regular compensation for the entire scheduled Shift. However, Predictability Pay may be required for the Employee who covers that Shift.**

**Comments:** We support this clarification, as it is a similar rule in San Francisco's Formula Retail Employee Rights Final Rules. There are instances where Employee's may have to leave work early or if business operations are slow. Employees are made whole by being compensated for the remainder of their scheduled shift. To apply predictability pay to this scenario would be an overreach which is why we support this language.

**iii. Discipline-related schedule changes may give rise to Predictability Pay. No Predictability Pay is required where a Covered Employer requires an Employee to leave work early because the Covered Employer disciplines the Employee for good cause and documents the incident leading to the disciplinary action. However, should the Covered Employer then require another Employee to cover that Shift, or a portion thereof, that covering Employee is entitled to Predictability Pay.**

**Comments:** Disciplinary actions should never be considered an employer-initiated schedule change since Employers are simply complying with their policies and procedures, which is why we support this language. Such actions are never pleasant for either party involved, but many times, business operations must continue. We ask that the regulations not penalize employers for these scenarios when recruiting coverage for such shifts, but that predictability pay is not owed if an employee voluntarily provides coverage.

**f. A Covered Employer's requirement that an Employee work previously unscheduled overtime hours shall give rise to Predictability Pay in addition to the payment of overtime rates.**

**Comments:** We believe this provision is ambiguous and essentially penalizes employers twice. An employer is already paying a premium for overtime (1.5x) and shouldn't have to pay predictability pay in addition to overtime pay. San Francisco's Formula Retail Employee Rights Final Rules offered an exemption for predictability pay where overtime was required. We request the same rule apply here.

#### **5. Offer of Work to Existing Employees (Section 5-39.05)**

**c. Employee need not accept full portion of additional hours offered. When a Covered Employer offers additional work to an existing Part-time Employee, if no single Part-time Employee is available to work for the entire portion of additional hours, the Covered Employer must allow the existing Part time Employee to work a portion of the additional hours so long as: 1) the total number of additional hours for which the part time Employee is scheduled is more than four (4) consecutive hours; and (2) the remainder of the additional hours that the Part-time Employee cannot work is not less than four (4) consecutive hours.**

**Comment:** Splitting shifts in this manner is not an efficient scheduling practice and interferes with the employer's ability to manage its workforce and business needs. The intent of the ordinance was to provide employees predictability in respect to scheduling, and additional hours if desired so employees may attain full-time status. The process prescribed in this rule is contrary to the legislative intent and could result in the creation of more part-time jobs, to the detriment of full time employment opportunities. Furthermore, it is in direct contradiction to the ordinance which states that an employer has the discretion to divide additional work hours among part time employees.

To avoid creating tremendous administrative burdens, we recommend the following principle be established: If the entire available shift cannot be fulfilled by utilizing only one part-time employee, then the employer has fulfilled their obligation for satisfying Section 539.05.

We urge your serious consideration of our comments and suggestions to make implementation of this complicated ordinance smoother. Given the incredibly expeditious path to adoption of the final ordinance, we hope the City will take more time to consider our recommendations. Please consider the administrative burden this law places on businesses in Emeryville if such clarification is not provided in the regulations.

Sincerely,



Angie Manetti  
Director, Government Affairs  
California Retailers Association



Matt Sutton  
Senior Vice President, Government Affairs + Public Policy  
California Restaurant Association

cc: The Honorable Mayor Scott Donahue  
The Honorable Vice Mayor John J. Bauters  
The Honorable Dianne Martinez  
The Honorable Ally Medina  
The honorable Christian R. Patz  
Sheri Hartz, City Clerk  
Carolyn Lehr, City Manager  
Chadrick Smalley, Economic and Housing Development Manager, Emeryville