



City of Emeryville

INCORPORATED 1896
1333 Park Avenue
Emeryville, California 94608-3517
Tel: (510) 596-4300 | Fax: (510) 596-4389

Frequently Asked Questions (FAQs) Emeryville's Fair Workweek Ordinance Effective July 1, 2017 Last Updated: August 2019

INTRODUCTION

On November 1, 2017, the City Council of the City of Emeryville adopted the City's Fair Workweek Employment Standards (Ordinance) (Chapter 39 of Title 5 of the Emeryville Municipal Code), which establishes to provide standards for work hours for employees in the retail and fast food industries above and beyond the requirements of state law. This Ordinance was amended on October 17, 2017 and effective on November 17, 2017.

The Ordinance establishes standards for work hours for employees in the retail and fast food industries above and beyond the requirements of state law. The Ordinance also requires adequate notice of work schedules, compensation for employer initiated schedule changes, access to sufficient hours of work for part time employees, healthy rest between shifts, and a protected right to have input into schedules which protects the public health, safety and welfare by ensuring that employees within the City of Emeryville can care for their families, attend classes and medical appointments, budget their weekly income, and conduct other essential activities in a manner that enables and facilitates their individual self-reliance.

Note that federal, state and local laws pertaining to wages and paid sick leave also apply.

This memorandum answers frequently asked questions to help Employers, Employees, and others understand and comply with the law in Emeryville. It is divided into sections: General Information, followed by questions pertaining to each section of the Ordinance. **This is a general guide and resource, and does not constitute legal advice.** It may be updated from time to time, as deemed appropriate by the City. The full text of the existing Ordinance can be found here: <http://www.ci.emeryville.ca.us/1136/Fair-Workweek-Ordinance>

If you have questions about this guide or questions about the law that are not addressed here, please email: fairworkweek@emeryville.org



City of Emeryville

INCORPORATED 1896

1333 Park Avenue. Emeryville, CA 94608-3517
t (510) 596-4300 | f (510) 596-4389

GENERAL INFORMATION

1. When did Emeryville's new Fair Workweek Employment Standards Ordinance ("Ordinance") go into effect?

Answer: The Ordinance went into effect July 1, 2017. The Ordinance was later amended on October 17, 2017 and effective November 17, 2017.

2. What City department is implementing the Ordinance?

Answer: The City Manager's Office is responsible for implementing the Ordinance. The City Manager has designated the responsibilities for implementation to the Economic Development and Housing department as well as contracted out services to Mills College and The Labor Compliance Managers.

3. Where can I call with questions?

Answer: Employers, Employees, and others should call (510) 510-596-4351 or email fairworkweek@emeryville.org with questions.

4. Does the Ordinance protect undocumented workers?

Answer: Workers reporting violations of the Ordinance with the City of Emeryville will not be questioned about their immigration status.

5. Can Employees waive their rights under the Ordinance?

Answer: An Employee's rights under the Ordinance can only be waived through a bona fide collective bargaining agreement that contains clear and unambiguous terms setting forth in such waiver.

6. When should employees receive and sign the Ordinance Notice?

Answer: Each existing employee should receive and sign the notice immediately. New employees should sign the notice upon their hire with all other HR paperwork. Notices are available online for your convenience and can be signed electronically. A copy of the signed notice should be in each employee file.

7. **Does the ordinance apply to hours worked prior to the grand opening (pre-retail work: prep, general training, setup hours) of a Formula Retail Employer's store?**

Answer: Yes.

8. **If an Emeryville associate is borrowed to work in another location or vice versa, does the Fair Workweek Ordinance requirements apply even if that other location is not covered by the Ordinance?**

Answer: Anytime the associate is working within the Emeryville city limits for a covered employer the Ordinance applies.

COVERED EMPLOYERS (5-39.02)

9. **What employees are covered by the Ordinance?**

Answer: Nonexempt Full time and Part time employees, Temporary, On-Call, contract and seasonal employees who are employed by retail with 56 or more employees globally or fast food firms with 56 or more employees globally and 20 or more employees in Emeryville.

10. **Are Exempt Employees covered by the Ordinance?**

Answer: No.

11. **What employers are covered by the Ordinance?**

Answer: Covered Employers include Retail Firms with 56 or more Employees globally and fast food firms with 56 or more employees globally and 20 or more Employees within the city limits of Emeryville. This includes franchisees associated with a franchisor or a network of franchisees with more than 12 locations globally.

12. **Does the Ordinance apply to Employers located outside the City but who employ Employees performing work in Emeryville?**

Answer: Yes.

13. **Who should be counted in determining Employer size?**

Answer: Calculations should include temporary, on-call and seasonal employees who work at a retail or fast food firm as long as they meet the definition set forth in Section 5-39.01(d). The basis is on the number of all individuals employed within the City of Emeryville and not based on numbers of employees at each location. In addition, it shall not be calculated using the number of FTEs (see Section 5-39.02).

14. **Does the Ordinance apply to full-time, part-time, and temporary Employees?**

Answer: Yes

15. What if the number of persons performing work changes from week to week or month to month?

Answer: For businesses employing a fluctuating number of persons performing work during a quarter (13 weeks), Employer size is based on the weekly average number of persons performing work for compensation during the quarter beginning January 1 of that year. (For example: A business that employs 50 persons during the first 6 weeks of the quarter and 65 persons during the last 7 weeks of the quarter would have a weekly average of 58 Employees per week, thus categorizing the Employer as a covered employer subject to the Ordinance.

$$\frac{(50 \text{ Employees/week} \times 6 \text{ weeks}) + (65 \text{ Employees/week} \times 7 \text{ weeks})}{13 \text{ weeks}} = 58$$

Scenario: *The Fiesta store sells party supplies and hires additional temporary workers during the holiday throughout the year. Last year it employed an average of 30 workers per week for 6 weeks, but half of them were temporary seasonal employees. Currently, the Fiesta Store has only 12 employees. Does the Fiesta store employ enough workers to count as a retail employer and the Fair Workweek Ordinance?*

Yes. *Although the Fiesta Store's worker count changes from week to week, the average number of weekly employees would be 20 therefore it employs enough employees to be covered although there are some temporary and seasonal employees during the course of the year.*

16. How does a new business determine its size?

Answer: In this situation, businesses should calculate business size for the current calendar quarter based upon the average number of persons per week who worked for compensation for the first ninety (90) days after the first Employee(s) began work.

17. What happens when a covered employer has employees from other stores come in and work for short periods of time? Is the Ordinance still applicable and are the employees included in the final count?

Answer: The Fair Workweek Ordinance, along with minimum wage and sick leave ordinances, applies if this situation causes a covered employer to have 20 or more employees and as long as the employee works a minimum of 2 hours per week in the Emeryville location.

18. Do covered employers always need to report/note their employee averages?

Answer: Employers should calculate averages anytime there is a change in staffing and it would be advisable to do it on a quarterly basis as a routine. This suggested practice informs any investigations that follow with the most current reports and numbers.

19. Does an Employer need to provide notice of an Employee’s rights under the Ordinance?

Answer: Yes

20. Does the Ordinance apply to Employees covered by an existing collective bargaining agreement?

Answer: Yes. The Ordinance is a law of general application that applies to all Employees who are eligible under the law, whether represented by a union or not. However, the requirements of the Ordinance may be waived by a bona fide collective bargaining agreement. The waiver must be expressed in clear, unambiguous language.

21. If Cosmetics, Beauty Supplies, and Perfume Store under NAICS code 446120 also has a full-service salon in the store, would the Ordinance apply to the salon associates who work by appointment as hair stylists, rather than retail associates, but still in the physical store?

Answer: Given the definition of the business as a “retail” rather than personal service under NAICS code, the business is classified as a retail establishment under Emeryville Code 9-2.353, the Ordinance would apply to this type of establishment to all hourly, nonexempt employees regardless of the nature of their work.

ADVANCE NOTICE OF WORK SCHEDULES

22. May a Covered Employer use a methodology for posting, such as texting, if that methodology causes the Employee to incur costs?

Answer: No.

23. When must a covered employer post work schedule in order to avoid penalties?

Answer: Covered employers must post work schedules 14 days in advance of employers first shift. Posting must be in a conspicuous place at the workplace, that is visible to the employees. In addition, communication may be by electronic means only if all employees are given access to the electronic scheduling system.

NOTICE, RIGHT TO DECLINE, AND COMPENSATION FOR SCHEDULE CHANGES

(5-39.04)

24. Is predictability pay owed when an employee calls in sick?

Answer: If an employee calls in sick, that employee is entitled to sick leave but not predictability pay.

25. If the shift is slow and a Covered Employer asks for volunteers to go home, will the Employer have to pay Predictability Pay?

Answer: Yes. The Employer will have to pay the lesser of (1) the number of remaining hours of the scheduled shift or (2) four hours predictability pay because this is a reduction

of work hours. Refer to Section 5-39.04 for further guidance.

26. Do Employees need to sign a form to indicate they are voluntarily initiating a change in their Work Schedule or Shift?

Answer: The Ordinance does not require Employees to sign a form to voluntarily initiate a change in their Work Schedule or Shift. However, the Covered Employer is required to maintain documentation for three years to show compliance with the Ordinance and its implementing regulations, and therefore, the Covered Employer may want to document using a signed form that the employee is voluntarily initiating a change in their work schedule or shift.

27. If an Employee who is scheduled to work a shift the next day, asks for the next shift off, will the Employee be penalized in any way?

Answer: Pursuant to Section 5-39.04 Notice, Right to Decline, an Employee should not be penalized. A covered employer may not retaliate against an Employee for declining a schedule change under section 5-39.04(b)

28. If an Employee works past the end of a scheduled shift to complete service to a customer, which would entitle the Employee to receive a commission, tip or other incentive pay based on the completion of that service, is the employee entitled to overtime pay? Predictability Pay?

Answer: Although we state that the regular rate of pay must be granted to the employee, it is also implied throughout the ordinance that state and federal law applies in all situations as appropriate, including the payment of overtime in certain instances. In this case, overtime should be paid if the shift was 8 hours (full time). Predictability pay is **not due** if the additional time worked resulted in a commission, tip or other incentive pay.

29. Do an Employee's voluntarily initiated shift modifications, such as voluntary requests to leave a scheduled shift prior to the end of the shift, trigger predictability pay?

Answer: Employee voluntarily initiated shift modifications, such as, voluntary requests to leave a scheduled shift PRIOR to the end of the shift does not warrant Predictability Pay Does changes that are not initiated by the employee such as, if their coworker had suggested a shift change instead of themselves qualify for Predictability Pay.

30. Does an Employee dying constitute an act of nature that would exempt an Employer from owing Predictability Pay to Employees who will cover the deceased Employee's shifts?

Answer: No. An Employee's death does not constitute an act of nature.

31. If an employee clocks-in 6 minutes before a shift and clocks-out 6 minutes after their shift, is the total 12-minute difference still within the grace period?

Answer: The grace period allows for an employee to clock in 10 minutes before and/or

after a shift provided the employee is compensated at his/her regular rate of pay for the additional work performed.

Scenario 1: *An associate is scheduled to work from 9:30am to 6:00pm. The associate clocks in early at 9:10am which is 20 minutes earlier than their scheduled shift start time. The associate clocks out at 4:40pm which is 1 hour and 20 minutes earlier than their scheduled shift end time. The associate was scheduled to work 8 1/2 hours and ended up working 7 1/2 hours. Therefore, the employee is still short 1 hour from what they were scheduled. **The employer owes predictability pay for reduction of total hours if the employee did not voluntarily leave early. If the employer asked the employee to leave, then the employer owes the employer for the number of hours of the shift or 4 hours (the lesser of the two).***

Scenario 2: *An Associate is scheduled to work for 12:30pm to 8:30pm. The associate clocks out at 8:52pm which is 22 minutes later than their scheduled shift end time. **Does the employer owe predictability pay? The employer owes predictability pay because the employee worked 22 minutes after the shift end time.***

32. **If an employee is asked to leave due to disciplinary action, is the employer required to pay the employee for the rest of their shift and predictability pay?**

Answer: Yes. There are no exemptions for involuntary separation of an employee. The employee is due predictability pay for the scheduled shifts within the 14-day window.

33. **Is the manager of the store location a covered employee under the Ordinance? If yes, can the manager do a shift swap with another hourly employee without paying predictability pay?**

Answer: If the manager is hourly non-exempt employee for purposes of overtime requirements and minimum wage as set forth under federal and state law and California Industrial Welfare Commission Wage Orders, he/she is a covered employee under the Ordinance.

[OFFER OF HOURS \(5-39.05\)](#)

34. **Do I have to offer additional work to both full time and part time employees?**

Answer: A covered employer is not obligated to offer overtime but if it does, the covered employer must offer work hours to qualified part-time employees. In addition, the employer must have a written policy and documented procedure for offering additional work hours.

35. **When a Covered Employer notifies qualified Part-Time Employees of additional hours, and a Part-Time Employee volunteers for the additional hours, does the Covered Employer owe Predictability Pay?**

Answer: Yes, only if the acceptance is in less than (14) days in advance of the shift. See Section 5-39.05 (d) for further guidance.

- 36. May a Covered Employer use a methodology for posting, such as texting, if that methodology causes the Employee to incur costs?**

Answer: No.

- 37. Should extra hours be made available to all employees or only to employees in specific departments or with the specific experience aligned with the need and vacancy?**

Answer: Employers may offer work hours to qualified Part Time employees pursuant to the Employers written policy and procedures regarding offering additional work hours (Section 5-39.05).

- 38. Can a fast food or retail employer transfer workers between stores to cover shifts?**

Answer: Yes, in most cases. The employer must ensure all necessary offer of hours requirements have been met where available shifts are offered to those employees at the location where shifts are available first. If shifts remain open, the employer may offer those shifts to employees from other locations who responded in the timeframe allowed.

In the event that the relocation to another store occurs after the 14 days' notice of schedule posting, predictability pay would still be due to the employee.

[RIGHT TO REQUEST FLEXIBLE WORKING ARRANGEMENT \(5-39.07\)](#)

- 39. Does the Employee have a right to a flexible working arrangement?**

Answer: Pursuant to Section 5-39.07 of the Ordinance, employee has the right to request a flexible working arrangement. The request may be a combination of adjustments and is not limited to enumerated options in the Ordinance. Employer is not required to fulfill all requests and may suggest a variation or portion of the request. Federal or state law may require the Covered Employer to accommodate certain Employee(s) requests. Please contact your human resources department or lawyer for further information.

- 40. Can an Employer take any adverse action against an Employee for requesting a Flexible Workweek Schedule and/or filing a complaint for any non-compliance with the Ordinance?**

Answer: No, retaliation is barred. An Employer may not retaliate against an Employee and it is unlawful to take adverse action against Employees who assert their rights provided by the Ordinance. Retaliation may include, but is not limited to, discouraging complaints regarding noncompliance with the Ordinance, reducing hours including vacation or additional hours, suspension or transfer to an assignment to a lesser position or, increasing expenses for non-exempt Employees for items such as parking, meals, and/or uniforms. A "non-exempt Employee" means an Employee who is non-exempt under federal or state laws. This applies regardless of whether the City ultimately finds the Employer to be out of compliance.

- 41. If you request a flexible working arrangement, are you guaranteed full time hours or part time hours and pay?**

Answer: No.

- 42. What constitutes an employee initiated or requested sick leave when the schedule change is related to a Workers Compensation event?**

Examples: Not finishing the scheduled shift the day of the event, full or partial absences after the WC event, schedule changes to obtain treatment, or scheduling accommodations requested by the employee and medical provider.

Answer: In the case of Workers Compensation, Predictability Pay would be due to the employee covering the shift(s) but Predictability Pay is not due to the employee entitled to Workers Compensation.

ENFORCEMENT (5-39.10)

- 43. What can Employees do if an Employer does not pay them Predictability Pay or retaliates against them?**

Answer: Employees can seek advice from an attorney and/or file a lawsuit against their Employer. They may also submit a complaint to the City of Emeryville. Employees are entitled to all remedies available to correct a violation of this law, including back pay, reinstatement, injunctive relief, and/or attorneys' fees and witness fees and costs. Additionally, any Employer who violates this law and/or retaliates against an Employee may be liable for civil penalties in the amount of \$500.00 per violation and \$1,000 for each Employee retaliated against, the amount to be determined by a Hearing Officer.

- 44. How does an Employee file a complaint with the City of Emeryville?**

Answer: Complaints must be initiated by submitting a completed Claim Declaration on the form provided by the City. Copies of the Claim Declaration form are available from the City via email or U.S. mail request; by download from the <http://www.ci.emeryville.ca.us/1136/Fair-Workweek-Ordinance> webpage; or from City Hall at 1333 Park Avenue, Emeryville, CA 94608, during regular business hours. Email requests for a Claim Declaration form should be directed to: Labor Standards staff at complaints.laborstandards@emeryville.org. Claim Declaration forms may be mailed or submitted in person to the City Hall address above or submitted via email to: complaints.laborstandards@emeryville.org. The Claim Declaration form can also be filled out and submitted directly from the website on the Minimum Wage Ordinance webpage, found at the following link: <http://www.ci.emeryville.ca.us/1136/Fair-Workweek-Ordinance>

Supporting documents related to the complaint should accompany the Claim Declaration form. (For example: claims regarding Predictability Pay issues should provide pay stubs, and written schedules, claims regarding failure of Employer to post notice of rights may include photos, claims regarding retaliation may include emails from Employers and/or contacts of those who may be witnesses).

45. What are the Ordinance administrative requirements for Employers?

Answer: Employers are required to retain records to document compliance with the ordinance and regulations for no less than 3 years including but not limited to:

- a. spreadsheets or databases used for calculation of number of employees;
- b. calculations of employee rates of pay including commission analysis;
- c. work schedules transmitted to employees, including correspondence with employees regarding schedule changes regardless of timing
- d. postings and correspondence of additional hours available
- e. correspondence with employees regarding flexible working arrangements; and
- f. any other records referenced in the regulations or Ordinance.

The Ordinance prohibits retaliation or discrimination against any person seeking to exercise their rights provided by the Ordinance.

46. What role does the City of Emeryville have in ensuring compliance with the Ordinance?

Answer: The City may investigate complaints of possible violations of the Ordinance. The Ordinance requires Employers to permit authorized City representatives access to worksites and relevant records, which may include the production of records, to monitor compliance with this law, and investigate Employee complaints or non-compliance. The City may attempt to remedy any case through informal resolution. The City may also pursue administrative compliance orders and impose administrative fines for non-compliance. In addition, the City may initiate a civil judicial action for injunctive relief, damages, and penalties for non-compliance.

47. Can an Employer dispute a compliance order issued by the City?

Answer: Yes. A compliance order shall become final unless a complete written request for an administrative hearing before the City is received fourteen (14) days of service of the compliance order. The date of service of the compliance order shall be the date of mailing. The request for a hearing shall be submitted on a form provided by the City. If an Employer does not submit a complete written request within the above timeframe, the Employer shall waive any right to an administrative hearing.

48. If an Employer submits a written request for a hearing, when will it be scheduled?

Answer: If a written request for an administrative hearing is filed with the City within the timeframe described in Question 19, the City Clerk shall set a hearing date before a Hearing Officer that is 15 to 45 days from the date of filing. A notice of the scheduled hearing shall be mailed to the Employer and the affected Employee(s) at least ten (10) days before the date of the hearing. If multiple citations are being appealed, these appeals may be consolidated into one hearing. The decision of the

Hearing Officer shall be final and may uphold or dismiss the compliance order in its entirety or in part, including the assessment of fines.

49. What part of an employee's file do investigators look at in the complaint process?

Answer: The City has the right to access any and all employment records upon request and/or during an unscheduled site visit.