



City of Emeryville

CALIFORNIA

MEMORANDUM

DATE: August 16, 2016

TO: Carolyn Lehr, City Manager

FROM: Charles S. Bryant, Community Development Director

SUBJECT: Study Session On Fair Workweek / Employee Scheduling Ordinance

RECOMMENDATION

Staff recommends that the City Council provide direction on the proposed Fair Workweek Ordinance as discussed in this report and presented by staff at the study session.

SUMMARY

On May 17, 2016 the City Council directed staff to prepare a draft “Fair Workweek” ordinance for review. The City Council requested that staff tailor the draft ordinance to Emeryville’s economy and administrative capacity, and conduct outreach with the business community.

Staff met with City Council members individually to confirm the policy objectives to be achieved. Three goals were raised consistently:

- Increase stability of schedules for retail and restaurant workers;
- Reduce employee turnover in retail and restaurant businesses; and
- Increase the number of hours worked by individual employees (i.e., decrease “underemployment”).

With this direction, staff conducted the research and outreach as described in further detail below. Problematic scheduling issues were found to occur, but relatively infrequently. Underemployment was found to be a more widespread issue. The business community was found to be generally unsupportive of the concept of City regulation of employee scheduling. The findings from this process led to the development of four high-level policy options designed to achieve the stated policy objectives, including:

- Advocacy
- Regulation
- Cooperative Incentive Program
- Regulation with Incentive

If the City Council chooses to proceed with a policy option that includes an ordinance (i.e., the “Regulation” or “Regulation with Incentive” options), staff requests additional direction on ordinance options including:

- The types of Employers covered by an ordinance
- How many days in advance to require advance posting of schedules
- Whether to require “Predictability Pay” to employees for changed schedules; and if so, how much Predictability Pay to require and the types of schedule changes that would be exempt from this requirement; alternatively, a “right to decline” provision could be included in lieu of Predictability Pay
- Whether to include requirements for an “offer of hours” to existing part-time employees before proceeding with hiring new employees
- Whether to include a “right to decline” back-to-back shifts separated by 11 hours or less (i.e. “clopenings”)
- Whether to establish a “right to request” a flexible work arrangement

Taking into account the policy objectives, the findings from existing research, the analysis of Emeryville retail and food service employee scheduling practices, and input from the business community, staff recommends that the City Council select the “Regulation with Incentive” policy option, to include the following:

- an ordinance requiring retailers with more than 55 Emeryville employees to:
 - provide two weeks’ advance notice of work schedules and changes
 - provide a right to decline work schedule changes on less than seven days’ notice
 - provide a right to decline work shifts separated by less than 11 hours (“clopenings”)
 - provide a right to request a flexible work arrangement
 - offer hours to existing part-time employees before hiring new employees
- a “Fair Workweek Certification Program” open to all retail and food service businesses that demonstrate best practices in employee scheduling

BACKGROUND

At its meeting on May 17, 2016, the City Council held a study session to review the San Francisco Formula Retail Employee Rights Ordinances (“FRERO”) and approved a motion directing staff to return with a draft “Fair Workweek” ordinance for a study session to be held on August 16, 2016.

During the study session, Councilmembers noted that the ordinance should be tailored specifically to Emeryville, with consideration of Emeryville’s unique position in the area’s economy and limited City resources for administration of regulations. In the interest of streamlining administration, it was suggested that an ordinance could be applicable to “Large Businesses” as that term is defined in the City’s Minimum Wage Ordinance

(Emeryville Municipal Code Title 5, Chapter 37), and potentially exclude restaurant businesses. Additionally, staff was urged to conduct outreach to the potentially affected businesses and to evaluate the potential for unintended negative consequences of a Fair Workweek Ordinance.

To provide the research expertise necessary in the timeframe desired by the City Council, staff was authorized to obtain professional assistance from qualified consulting firms, whose findings are found in Attachment 2, and which helped to inform policy options and staff recommendations.

DISCUSSION

Policy Context

In order to inform the discussion of policies relating to retail and food service employee scheduling, staff reviewed existing research on the topic, commissioned original research to assist with tailoring policy to Emeryville's unique characteristics, and conducted outreach to the business community, including an "Employers' Forum" held at Bay Street on July 14, 2016.

A review of a sample of existing research on retail and food service employee scheduling is attached (Attachment 1). In summary, much of the existing research on the incidence and impacts of schedule instability and flexibility addresses macro-level geographies, industries, and occupation types. Research specific to retail and food service employee scheduling practices at the local level is relatively sparse and most has been produced by policy advocacy groups or industry associations that have an interest in a specific policy outcome.

In an effort to respond to the City Council's request for a draft Fair Workweek Ordinance that is tailored to Emeryville's environment, staff engaged a professional consulting firm that specializes in data-driven evaluation of various economic issues faced by cities to prepare an objective analysis of retail and food service employee scheduling practices. This analysis used an employee survey designed to provide additional detail on scheduling issues while taking into consideration business type, size and "chain" status. The survey included 304 respondents, and is the first and only study of Emeryville employee schedules that has been conducted by a disinterested party. For these sectors overall, the Emeryville employee survey shows that:

General:

- 12% of the employees surveyed reside in the Emeryville zip code¹
- 55% work 30 hours per week or less, on average

¹ Note that the Emeryville zip code includes an area substantially larger than the City's jurisdictional limits. Consequently, this figure is likely overstated. According to U.S. Census Journey-to-Work data, about 6.2% of all Emeryville employees (all industries) are Emeryville residents.

- 63% report that their total hours worked are consistent from week to week

Schedule stability:

- 87% of employees say that they have influence in the development of their schedules, with about 30% reporting “I can decide what my schedule will be but within certain limits”.
- 70% report they receive their schedules more than one week in advance.
- 76% report that their schedule has never changed with less than 24 hours’ notice. Of the 24% who have experienced a short notice schedule change, 66% said it was not a problem for them. Overall, just 8% of respondents experienced a schedule change with less than 24 hours advance notice and characterized it as a problem for them. This suggests that only approximately 300 to 400 employees (or about 1% of the entire Emeryville workforce) would benefit from a regulation that curbs this scheduling practice.
- 58% report getting called in to cover a shift that they were not originally scheduled for. About 84% of those employees report it was not much of a problem for them. Overall, only 9% of respondents have been called in for a shift not on their original schedule and said it was somewhat of a problem.
- 33% report being sent home early from a shift, with 80% of those respondents saying it was not really a problem for them. Overall, just 6% of respondents experienced being sent home early from a shift and said this was a problem.

Employee turnover:

- 42% of surveyed employees had been working at their current job for less than one year. A similar share, 39%, had held the job for two or more years.

Underemployment:

- 39% of respondents indicate they would prefer to work more hours

For additional detail, including information about whether and how these responses vary across business types and sizes, see Attachment 2.

As noted above, the City Council directed staff to conduct outreach to the business community on this topic. The methods and results of the business outreach effort are summarized in Attachment 3. Overall, comments ranged between indifference and strong dislike of the concept of a Fair Workweek Ordinance, with the vast majority of respondents feeling these types of regulations would be intrusive and unnecessary. In particular, the concept of compensating employees for employer-initiated schedule changes (i.e. “predictability pay”) received strong resistance.

Policy Options

After establishing the policy objectives, reviewing existing research, conducting original research applicable to Emeryville, and soliciting input from the business community, staff developed policy options for the City Council's consideration.

Policy Option A: Advocacy

For this policy option, the City Council would postpone any legislative direction for now, but direct staff to continue to monitor local and national trends relating to scheduling practices for retail and restaurant employees, actively advocate for regional, state and/or federal legislation, and report back to the City Council periodically on any significant developments. In addition, the City Council could direct staff to replicate the employee survey and business outreach at some future date to determine whether indicators for schedule stability, worker turnover and underemployment are improving or deteriorating.

This option recognizes that schedule stability is an emerging concern, that empirical data regarding retail and restaurant scheduling at the local level is somewhat limited, and additional time is required to develop a more complete picture. For example, research by University of California Hastings and sponsored in part by a major retailer is currently underway. This research utilizes an experimental approach to introduce different schedule practices in similar retail outlets, and comparing outcomes. This study is expected to yield useful information specific to the retail sector; but it is not scheduled to be released until later this year.

Moreover, anecdotal evidence suggests that scheduling practices are changing for some businesses toward improved stability and more full time workers. Market dynamics are improving the business case for some of these practices (see Wall Street Journal article in Attachment 4). By taking an active role in supporting policies that encourage schedule stability and reduce underemployment, the City could encourage uniform regulations that are consistent across jurisdictions. To support this effort, the City Council could form a subcommittee, or assign the Economic Development Advisory Committee (EDAC) to this topic.

As would be expected, the fiscal impacts associated with an advocacy approach are negligible as they are limited to the staff costs of monitoring research on this topic, periodically reporting to an assigned committee and replicating the employee survey at some future date.

This approach to supporting the policy objectives would not alter outcomes directly, and there is a chance that employment conditions could deteriorate in the interim, which would run counter to the City's goals.

On the other hand, the risk of negative economic impacts or other unintended consequences resulting from this policy option is very low to nonexistent, and the

employee survey findings indicate that schedule instability affects only a small proportion of the Emeryville retail and food service workforce.

Policy Option B: Regulation

This option includes adopting a Fair Workweek Ordinance that regulates retail and restaurant employee scheduling practices. Pursuit of this course requires several additional policy choices which are described in more detail in Attachment 5. Attachment 5 includes an annotated draft ordinance.

The regulatory approach is promoted by several advocacy groups and certain researchers who are active in the field of labor economics. It is predicated on the idea that negative conditions are pervasive and severe enough in some subset of business types to warrant regulatory intervention. As outlined above, the Emeryville employee survey suggests that negative experiences attributable to short-notice schedule changes is not pervasive, but rather is limited to a small portion of the restaurant and retail workforce. However, the survey finds regular scheduling commonly does occur two weeks or less in advance and does vary week to week for some workers.

There are some differences in schedule consistency across business type, size and status. The survey reveals more week-to-week variation in work days and times at retail businesses, as compared to restaurants, while restaurants change regular schedules by sending employees home early far more frequently than retailers. Responses also indicate that work days, times and total hours vary slightly more at large businesses, as compared to small businesses. While hours are similarly consistent across chains as compared to non-chains, non-chains offer employees slightly more consistency in work days and times.

An important consideration is that this policy option risks burdening many “good actor” establishments with the costs of documentation and other requirements of an ordinance. Additionally, according to input received from the business community, an ordinance would be viewed as “punitive” to employers, which could have negative implications for the general perception of the City’s business climate.

The fiscal impact of an ordinance depends on the number of covered employers and the complexity of the regulations; however, staff estimates ongoing implementation would be similar to that required for the Minimum Wage and Paid Sick Leave Ordinance. Ongoing management is anticipated to require 0.5 full time equivalent (FTE) of an Economic Development and Housing Division Management Analyst’s staff time (\$70,000), eight hours annually for City Attorney support (\$1,000), \$5,000 annually for printing and mailing of notices and other materials to inform businesses of the requirements, and \$30,000 biannually (\$15,000 annually) for evaluation of the ordinance’s effectiveness, resulting in a total \$91,000 estimated average annual implementation cost. Note that with regard to staff costs, these are “opportunity costs,” which means that the costs for staff time are expected to be incurred in any case, but would have been allocated to other City initiatives.

Notwithstanding these risks and costs, the regulatory approach may be effective in improving schedule stability for those employees experiencing instability, reducing employee turnover, and decreasing underemployment for employees of businesses covered by an ordinance.

However, because the employee survey found scheduling issues to be negatively impacting a small number of employees, and to the extent an ordinance is narrowly tailored to a specific subset of employers, the City cost per employee assisted would be high.

Policy Option C: Cooperative Incentive Program

This policy option consists of implementing a program that rewards businesses that provide the City with evidence that they operate with certain scheduling practices, employee benefits, and other best practices that support the policy objectives of schedule stability, employee retention, and full employment.

A paper entitled “Flexible Workplace Solutions for Low-Wage Hourly Workers: A Framework for a National Conversation” produced by the Workplace Flexibility 2010 policy initiative of Georgetown Law and the University of Kentucky examines the interplay of flexibility, predictability, and stability, and recommends a public policy platform to promote business practices that support low-wage workers. Establishment of an award program for companies that engage in best practices is included among the recommendations, with Singapore’s Work-Life Excellence Award and Australia’s National Work-Life Balance Awards presented as possible model programs.

The goal of these types of award or certification programs is to encourage desired behavior by clearly differentiating the “good actors” from other businesses, which raises awareness for both consumers and employees. This in turn results in market pressure for positive change. Certification programs such as the California Green Business Program are used by businesses to communicate information about the business’s policies to consumers in an effort to influence their purchasing decisions. Similarly, an “employee friendly” certification program could provide useful information to both consumers and employees. Arguably, the information communicated to employees through a certification program would be more powerful than consumer-focused programs in prompting positive changes as businesses compete for employees.

The flexibility offered by the cooperative approach could provide varying types of businesses the opportunity to utilize scheduling solutions that perform best for their unique business models, which could allow for broad applicability. This flexibility also could be expanded to cover other workplace practices that are supportive of the policy objectives, such as “family-friendly” workplace benefits that enhance access to childcare and family leave.

Moreover, the cooperative approach could provide a novel avenue for marketing retail sites to prospective businesses, because an award or certification program would be an

opportunity for the City to promote its retail and restaurant sectors in a way that highlights its values. Staff could use the program in recruiting socially responsible retailers with a message that the City's policies are uniquely supportive of their businesses.

In terms of fiscal impact, staff estimates the costs could be similar to the amount required to implement the regulatory approach (around \$90,000 annually). Opportunity costs related to staff time are lower than the regulatory approach due to reduced involvement of City Attorney staff, but these would be offset by increased direct costs of marketing the program to businesses to encourage participation. If the cooperative approach is widely applied and is successful, the cost per employee assisted may be lower than that of the regulatory approach.

Despite the potential advantages of this policy option, its success is largely dependent on participation by the business community since this approach is, by definition, cooperative. The downside risks associated with the cooperative approach principally relate to potential lackluster business participation and program visibility.

Policy Option D: Regulation with Incentive

In addition to the three broad policy options outlined above, a hybrid approach could be considered that would combine elements of the regulatory and cooperative incentive options. For example, an ordinance that includes one or more provisions could be adopted and staff directed to proceed with an employee friendly certification program. Another option could include exempting certified businesses from regulatory requirements.

Due to the variety of combinations possible, it is difficult to estimate the relative fiscal impact of this approach, but in general costs are estimated to be slightly higher than that associated with the regulatory approach, between \$90,000 and \$95,000.

Measuring Effectiveness and Impacts

Regardless of the policy option selected, staff will develop a "baseline profile" just prior to adoption of a program or ordinance in order to provide a basis for evaluating the policy's effectiveness and impacts.

The employee survey collected data on scheduling practices and the experience of employees. This relates to the objective of increasing schedule stability. The survey also measured the tenure (amount of time with the employer) of employees, to provide a measure of employee turnover. Finally, the survey also asked respondents how many hours they typically work and how many hours they would like to work, which captures a measure of underemployment. Therefore, effectiveness in achieving the policy objectives can be measured by replicating this same survey using the same methods at a future date after a policy has been implemented,

To measure the potential for broader economic impacts, intentional or otherwise, the baseline profile will include measurements of employment in the restaurant and retail sector, retail vacancy rates, retail asking lease rates, and the number of restaurant and retail establishments in the City of Emeryville. Additionally, this would include an estimate of the sales by sector for retail and restaurant, separately. The baseline profile will be developed prior to policy implementation.

FISCAL IMPACT

Policy Development

The outreach, research and development of the policy options and ordinance described in this report have thus far required one FTE of Economic Development and Housing Division staff for a period of three months (\$43,000), and 25 hours of City Attorney staff (\$3,125). This totals \$46,125 in opportunity costs, which means this cost to the City would have been incurred in any case, but for different City activities and initiatives. In terms of direct costs, development and administration of the employee survey was \$28,000. Therefore, approximately \$74,125 total has been spent thus far to develop the Fair Workweek policy. Depending on the policy option selected by the City Council, additional opportunity costs are expected to be required to further develop an ordinance and/or program.

Policy Implementation

As described above, the precise fiscal impact of policy implementation depends upon the policy options selected by the City Council. A range of \$14,000 to \$71,000 in opportunity (i.e. staff) costs and up to \$21,000 in direct costs is anticipated, for a total average annual cost range of \$14,000 to \$95,000.

The following table summarizes the estimated development and implementation costs of the various policy options.

Policy Option	Development Costs Opportunity + Direct=Total (one-time expense)	Implementation Costs Opportunity + Direct=Total (average annual expense)
Advocacy	46,125 + 28,000 = 74,125	14,000 + 0 = 14,000
Regulation	50,000 + 28,000 = 78,000	71,000 + 20,000 = 91,000
Cooperative Incentive Program	50,000 + 50,000 = 100,000	70,000 + 21,000 = 91,000
Regulation with Incentive	50,000 + 50,000 = 100,000	71,000 + 24,000 = 95,000

ADVISORY BODY RECOMMENDATIONS

At its regular meeting on July 20, 2016 the Economic Development Advisory Committee (EDAC) was presented with the EBASE study, and its proposed ordinance, and a staff report describing staff's approach to business outreach and policy development.

One public commenter raised themes similar to those expressed at the Employer Forum, focusing on the negative implications of a Fair Workweek Ordinance for small businesses. Some EDAC members expressed concern that the material thus far presented was developed by a policy advocacy group and reiterated the call for the business perspective to be included in materials on this topic going forward. EDAC members also expressed a desire for additional time for review of the matter and to engage the business community.

In order to provide an opportunity for a more complete review of a Fair Workweek policy prior to an anticipated first reading of an ordinance, the EDAC scheduled a special meeting for September 21, 2016.

DISCUSSION QUESTIONS

Based on the above discussion, staff seeks the Council's direction on the following questions:

1. Does the City Council want staff to conduct additional outreach with the business community?
2. With which of the Policy Options (Advocacy, Regulation, Cooperative Incentive Program, Regulation with Incentive) does the City Council want to proceed?
3. If "Advocacy", on what frequency and in what format would the City Council like to receive updates from staff?
4. If "Cooperative Incentive Program", what kind of features, incentives and benefits would the City like to see included in a voluntary program?
5. If "Regulation with Incentive" which components of an ordinance should be combined with a voluntary program, and in what way?
6. If "Regulation":
 - a. How should "Covered Employer" be defined? Should this include Fast Food establishments and/or security and janitorial contractors?
 - b. How much advance notice of work schedules should be required?
 - c. Should predictability pay be included? If so, what kinds of exceptions?
 - d. Should an "Offer of Hours" provision be included? If so, what should the notice requirements be?
 - e. Should a "Right to Refuse Clopening" provision be included?
 - f. Should a "Right to Request Flexible Work Arrangement" provision be included?

(Please see Attachment 5 for a more detailed discussion of "Regulation" options.)

7. Are there other factors that should be included in a baseline study?

CONCLUSION

After receiving direction from the City Council, staff will prepare further materials based on the direction received.

PREPARED BY: Chadrick Smalley, Economic Development and Housing Manager

APPROVED AND FORWARDED TO THE CITY COUNCIL OF THE CITY OF EMERYVILLE:



Carolyn Lehr, City Manager

Attachments:

1. Review of Existing Research
 - 1-a. EBASE Wages and Hours Report
 - 1-b. EBASE Study Methodology and Survey Instrument
 - 1-c. Letter from East Bay Economic Development Alliance, June 30, 2016
2. Employee Survey Analysis
 - 2-a. EPS Memorandum Dated July 27, 2016
 - 2-b. Henne Group Memorandum Dated July 26, 2016
3. Business Outreach Summary
 - 3-a. Employer Forum Sign-In Sheet
 - 3-b. Employer Forum Summary Notes
4. Article – Wall Street Journal April 26, 2016
5. Fair Workweek Ordinance Options
 - 5-a. Annotated Draft Fair Workweek Ordinance
 - 5-b. Covered Employer Scenario Lists