Michael Guina
City Attorney
1333 Park Ave.
Emeryville, CA 94608

July 11, 2017

Comments from ACCE, EBASE and CPD on Emeryville's Draft Fair Workweek Regulations

Dear Mr. Guina,

The Center for Popular Democracy (CPD), East Bay Alliance for a Sustainable Economy (EBASE), and Alliance of Californians for Community Empowerment (ACCE) have been central to the development and implementation of Emeryville's Fair Workweek Ordinance ("the Ordinance"). Our organizations collaborated to release a report in March 2016 on the impacts of scheduling practices on Emeryville's retail workforce that galvanized the City Council to take action. We bring deep knowledge of the problems the Council sought to address and the intent to provide stable, predictable work hours and good jobs in Emeryville. We write to suggest modifications to the Draft Fair Workweek Regulations ("draft regulations" or "rules") to clarify the Ordinance's requirements. **We also wish to call your attention to instances in which the rules appear to be inconsistent with the Ordinance's language and legislative intent.**

CPD's Fair Workweek Initiative supports efforts across the country to restore a workweek that enables working families to thrive. We are nationally recognized for our policy, research and employer-engagement expertise on issues relating to hours and wages. CPD played a central role in the implementation of the San Francisco Retail Workers Bill of Rights and the enactment of Fair Workweek ordinances in Emeryville, Seattle, New York City and the first state-level Fair Workweek law in Oregon, and assisted initiative proponents in drafting San Jose's Opportunity to Work Ordinance. Our staff has deep expertise in the industries where work-hours issues are most prevalent and understand both the business models that have generated these practices and the negative impact on workers and their families.

ACCE is a grassroots, member-led community organization, working with more than 10,000 members across California to create transformative community change. ACCE has been supporting workers in Emeryville since May 2015. Because of ACCE's commitment to member leadership, retail and fast food workers actively participated in the development of Emeryville's Fair Work Week Ordinance. To date, ACCE has had one-on-one conversations with over 1,000 retail and fast food workers, collected contact information of nearly 500 workers, and activated more than 50 workers to take leadership and address challenges in their workplaces. ACCE's Emeryville staff team have deep experience in the retail and fast food industries.

EBASE is nonprofit, community-based organization dedicated to building a just economy based on good jobs and healthy communities. EBASE has had a long-term commitment to workers' rights and labor standards in Emeryville, working to pass Measure C, the hotel living wage ballot measure in 2005, the

Emeryville minimum wage and paid sick day policy in 2015, and the Fair Workweek ordinance in 2016. EBASE builds coalitions among workers, residents, and people of faith to address economic inequality in the East Bay, and along with ACCE and CPD, garnered endorsements for the Fair Workweek ordinance from organizations like Residents United for a Livable Emeryville, the Alameda Labor Council AFL-CIO, Parent Voices, and UNITE HERE 2850.

CPD, EBASE and ACCE are eager to support the smooth implementation of Emeryville's Fair Workweek Ordinance (Emeryville Municipal Code Tit. 5, Ch. 39 ("the Ordinance")). The City has a duty to implement the Ordinance in a manner consistent with its plain language and purpose. (See Gov't Code § 11342.2.) Our organizations hope to assist in making this process as simple as possible for both the City and affected employers while effectuating the will of the Council to provide robust protections for workers. Our analysis and suggested revisions to the draft regulations are based on our understanding of the Ordinance and CPD's experience implementing this policy in other cities.

1. Exceptions to Predictability Pay

The draft rules contain several exceptions to the ordinance's predictability pay requirement that have no statutory basis:

- "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." (Draft Rule 3(c).)
- "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." (Draft Rule 3(d).)
- "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." (Draft Rule 4(e)(iii).)
- "A Covered Employer is not required to award Predictability Pay for additional work performed under Section 5-39.05, where the Employee's acceptance of the additional work was within fourteen (14) days of the Shift." (Draft Rule 5(d).)

These exceptions not only lack any basis in the ordinance, but contravene the City Council's explicit intent, and therefore must be removed from the final rules.

a. The Ordinance Includes Exceptions to Predictability Pay and the Rules Cannot Supply Additional Exceptions

Section 5-39.04 require Covered Employers to compensate employees "for each previously scheduled shift that the covered employer adds or subtracts hours, moves to another date or time, cancels, or each previously unscheduled shift that the covered employer adds to the employee's schedule." (§ 5-49.04(c).) The purpose of predictability pay is twofold: to create an incentive for employers to avoid unnecessary changes to employee work schedules, and to compensate employees fairly when necessary changes to work schedules disrupt their lives and reduce expected income.

The Ordinance specifies four limited exceptions to the general requirement to compensate employees for schedule changes:

> "(1) Operations cannot begin or continue due to threats to Covered Employers, Employees or property, or when civil authorities recommend that work not begin or continue;
> (2) Operations cannot begin or continue because public utilities fail to supply electricity, water, or gas, or there is a failure in the public utilities or sewer system;
> (3) Operations cannot begin or continue due to: acts of nature (including but not limited to flood, fire, explosion, earthquake, tidal wave, drought), war, civil unrest, strikes, or other cause not within the Covered Employer's control;
> (4) Mutually agreed-upon work Shift swaps or coverage among Employees." (§ 5-39.04(d).)

Basic principles of statutory construction prohibit adding exceptions to those listed in the Ordinance. It is a well-known rule of statutory interpretation that if a legislative body enumerates specific items, it is assumed that other items not included were purposely excluded. (See, e.g., *Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 195 "Under the familiar rule of construction, *expressio unius est exclusio alterius*, where exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed."]; *Mutual Life Insurance Company v. City of Los Angeles*, 50 Cal.3d 402, 410 (Cal. 1990) ["The electorate, in excepting from the 'in lieu' provision taxes on real property and motor vehicles, could have made a further exception for taxes incidental to the operation of a commercial real estate business, but they did not."].) **The exceptions listed in section 5-39.04(d) demonstrate that the Council knew that predictability pay might not be warranted in certain circumstances, and carefully designated those circumstances in the Ordinance.**

It is undeniably beyond the discretion of city staff to amend the Ordinance by adding exceptions that the Council chose not to include. The Regulations are intended to implement and clarify the Ordinance; rules that conflicts with the Ordinance's purpose are invalid. (Cal. Gov't Code § 11342.2.) City staff "do not have discretion to promulgate regulations that are inconsistent with the governing statute, or that alter or amend the statute or enlarge its scope." (*Slocum v. State Bd. Of Equalization* (2005) 134 Cal.App.4th 969, 974 (citations omitted). Whatever public policy considerations may have animated these draft rules are immaterial: courts consider "not the wisdom of the agency's rule or policy, but whether it would alter or amend the statute." (*In re Stanley* (1976) 54 Cal.App.3d 1030, 1036.) **In this case, the draft regulations would substantively change the legal rights and obligations under the Ordinance by depriving employees of compensation that they would otherwise be owed.** Therefore, even had the legislative record been silent on the council's intent regarding the scope of predictability pay exceptions, the Draft Regulations' proposed additional exceptions would be contrary to law.

b. The Council Expressly Intended to Limit Predictability Pay Exceptions

Even if it were arguably within the purview of the rulemaking process to expand on the exceptions listed in the ordinance, the legislative history makes abundantly clear that these exceptions subvert express legislative intent. The Council weighed competing policy considerations presented by city staff and stakeholders, and chose to include only limited, narrow exceptions to the predictability pay requirements.

The August 16 Study Session. At a study session on the Fair Workweek policy on August 16, 2016, Economic Development and Housing Manager Chadrick Smalley presented policy options to the Council and elicited feedback. Mr. Smalley presented three options with respect to predictability pay: "Omit Predictability Pay Provisions," "Predictability Pay With Exceptions For Certain Employer-Initiated Changes," or "Predictability Pay For All Employer-Initiated Changes." (August 16, 2016, Fair Workweek Study Session Staff Report, Attachment 5 ("Fair Workweek Ordinance Options"), pp. 5-6.) In support of the first option, Mr. Smalley observed: "Outreach to the business community revealed that predictability pay was universally the most poorly received aspect of a Fair Workweek Ordinance. Businesses characterized the concept as unfair, and said it would be difficult for them to implement." (*Id.*, p. 5.) Under the second option, Mr. Smalley referenced a survey of Emeryville employees that found "that the most frequent type of schedule change, experienced by 58% of employees, is 'getting called in to work a shift you weren't originally scheduled for,'" and suggested that predictability pay could be exempted when the employer seeks coverage for the unplanned absence of a scheduled employee. (*Id.*, p. 6.) Mr. Smalley described the third option, "Predictability Pay For All Employer-Initiated Changes," as follows:

> "This option would remove the exceptions described in the preceding option and require predictability pay for any employer initiated change. Some exceptions, however, are necessary. For example, exceptions should be provided in the event business operations cannot begin or continue due to threats to employees or property, because public utilities fail, or due to a natural disaster. Predictability pay would not be required for employee-initiated changes (taking a sick day, using leave time, mutually agreed shift swaps, employee requests to work different hours than scheduled)." (*Id.* p. 6.)

The draft ordinance attached to the staff report recommended that the ordinance "include 'right to decline' provisions in lieu of Predictability Pay," and that if the Council elected to include predictability pay, recommended an exception when "Another Employee previously scheduled to work that Shift is unable to work due to illness, vacation, or Covered Employer-provided paid or unpaid time off where the Covered Employer did not receive at least seven days' advance notice." (*Id.*, Attachment 5-a pp. 9-10.)

During public comment at the August 16 study session, a spokesperson for Home Depot specifically urged an exception from predictability pay for additional shifts that employees may opt to work:

> "Schedule changes are necessary in retail to ensure out callouts are covered and provide additional hours for our part time associates . . . Unfortunately, we can't foresee some of those schedule changes and we feel that passing this will pretty much inhibit us or penalize us for allowing [part-time] associates to take those additional hours." (August 16, 2016, study session Video/Audio record, at min. 56.)

Having heard these arguments, the Emeryville City Council nevertheless decided upon the third option – predictability pay for all employer-initiated changes, with limited exceptions for clearly specified unusual circumstances: threats, utility failures, acts of God, and employee-initiated shift swaps. Councilmember Jac Asher stated: "I can see, for the purposes of administration, having no exceptions, or

the Acts of God, 1 to 3. But the idea that you don't have to pay predictability pay… People go on vacation, people get ill, people take unpaid time off." Mayor Dianne Martinez interjected, "Yeah, that's the point of predictability pay." After further discussion, Mayor Martinez summarized the direction to staff: "So that is including acts of God, acts of nature, and eliminating number 4," the exception proposed by staff for additional shifts needed to cover unexpected absences. (August 16, 2016, study session Video/Audio record, at min. 3:13.)

The October 18, 2016 first reading. Following the study session, city staff responded to Council direction by preparing a bill for discussion and first reading. The staff report that accompanied the first reading recounted the direction provided by Council: "Predictability pay is not due for schedule changes due to natural disasters, power failures, etc." (October 18, 2016, Staff Report for Item 8.2, p. 2.) CPD, ACCE and EBASE also registered appreciation for the Council's decision to limit predictability pay exceptions, noting that "The exceptions in 5-39.04(c)1)-(3) will be included, but exception (c)(4) (unplanned absences) will not." (*Id.*, Attachment 4, p. 1.) The California Retail Association protested this decision:

> "[T]he ordinance only includes 3 exceptions from predictability pay covering only small portion of circumstances that are out of the employer's control. In San Francisco, several more were included in acknowledgement of the multitudinous scenarios that trigger non-employer initiated schedule changes. These exceptions include employee call outs/time requests off where the employer did not receive advanced notice, changes as a result of disciplinary actions, employee initiated shift exchanges, and for employers who require overtime. The majority of schedule changes made typically come from employees but can also be caused by unforeseen circumstances. It is unreasonable to penalize employers for schedule changes out of their control especially when business operations must still continue." (Public Comment: California Retail Assoc. Opposition Ltr. 101416, p. 2.)

The California Retail Association also predicted that employers would seek "to avoid situations that could trigger predictability pay penalties. As a result, both the employer and employees must cope with last minute unfilled work hours resulting in existing staff to picking up the burden of the workload." (*Id.*, p. 1.) CPD, EBASE and ACCE refuted this claim, noting: "Complaints about challenges forecasting labor needs or adapting to changes in demand run contrary to well-documented industry practice in the retail and food industries. . . . scheduling software can predict sales based on staffing, and retailers would be disincentivized to let shifts go empty instead of paying just one hour of predictability pay" to fill a shift. Public Comment: EBASE ACCE CPD Response To CRA Letter.101716, p. 1.)

Following this exchange, the only change to the predictability pay exceptions in the enacted ordinance was to add section 5-39.04(d)(4), "Mutually agreed-upon work Shift swaps or coverage among Employees." As this extensive record demonstrates, **the Council considered – and rejected – carving out additional exceptions to predictability pay.** To add these exceptions via regulation would contravene explicit legislative intent and exceed the city staff's rulemaking authority.

2. Additional clarifications needed

The rules leave several areas of ambiguity that should be clarified in order to maximize compliance.

a. Good faith estimate of work schedule

The ordinance defines good faith as "a sincere intention to deal fairly with others." (§ 5-39.01(*l*).) The rules should provide guidance on how that definition will be interpreted with respect to particular requirements. We recommend that the rules specify that the good faith estimate required by section 5-39.03(a)(1) must be both reasonable and based on some identifiable facts, rather than conjecture. The regulations should also indicate circumstances that may indicate a lack of good faith – for example, a pattern of significant divergence from the estimate (e.g., median hours over the first year of employment differ by more than 30% from the good faith estimate).

b. Notice of schedule changes.

Draft Rule 4(a) currently provides: "Where a Covered Employer changes the Employee's Work Schedule, that modification shall be made in such a manner as to guarantee the Employee is made aware of the schedule change, and the Covered Employer shall document that the information was transmitted to the Employee." The rule should also specify that Covered Employers must update the written work schedule when changes are made.

c. Right to decline additional shifts

Draft Rule 4(b)-(d) address the employee right to decline additional shifts, but fail to specify how the city will evaluate allegations that this right was infringed. We recommend that the rules require written consent to added shifts (which may include communication transmitted through email, text message or a workforce scheduling system), as already provided in Draft Rule 6(a).

d. Offer of hours to part-time employees

The draft regulations state, "So long as the Covered Employer otherwise complies with the Ordinance, the Covered Employer may offer additional work hours to the Part-time Employees of its own discretion, or may seek out interested Part-time Employees by another method, such as by group posting to its existing Part-time Employees." (Draft Rule 5(a).) This proposed rule is at odds with section 5-39.05(d) of the Ordinance, which specifies a posting process that employers must follow when offering additional hours.

The draft rules do not include guidance on employer determinations of which employees are qualified for additional hours under section 5-39.05(a). The rules should clarify that covered employers must exercise their judgment regarding qualifications in good faith and in a reasonable manner. The rules should also provide examples of circumstances in which the decision to hire from an external applicant pool or subcontractors rather than allocating the work to existing employees violates the ordinance because the circumstances indicate bad faith or an unreasonable exercise of judgment. Examples might

include when the missing qualifications are not germane to the job or when the new employee has substantially similar qualifications as the existing employee.

3. **Investigation and enforcement**

The draft rules reference anonymous complaints, but contain no parameters for the city of Emeryville's investigation of complaints alleging noncompliance with the Ordinance. Clear procedures and timelines for investigating and resolving complaints will promote greater collaboration between worker advocates and the city in addressing potential noncompliance, as well as giving Covered Employers notice of investigative practices. **The City's decision to contract enforcement duties to an outside company makes it especially critical to specify transparent, effective enforcement procedures.** Without them, workers lack confidence that their complaints will be taken seriously by the city and its contractors. Workers take large risks in coming forward to identify noncompliance, and they need to know that their complaint will be investigated and dealt with in a timely manner and that retaliation will not be tolerated.

In particular, the Rules should include provisions governing:

a. Access to work sites and records by employees and authorized City representatives for the purpose of monitoring compliance, including a presumption of noncompliance when an Employer fails to timely furnish requested records or denies access.
b. Procedures for the City and its contractors to respond to complaints, including issuing a demand letter to employers within a specified time period of receiving a complaint, and setting a time for the employer to respond.
c. Prioritization of employee complaints regarding retaliation and particularly retaliatory discharge.

Thank you for the opportunity to comment. We look forward to working with you to ensure the successful implementation of this important ordinance.

Sincerely,

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East Bay Alliance for a Sustainable Economy

Anthony Panarese
Alliance of Californians for Community Empowerment