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REVISED AGENDA MATERIAL for Supplemental Packet 2

Meeting Date: October 11, 2022

Item Number: 22a

Item Description: Fair Workweek Ordinance; Adding Berkeley Municipal Code Chapter 13.102

Submitted by: Vice Mayor Harrison

Revised ordinance chapter from 13.110 to 13.102. Chapter 13.110 is already taken by the COVID-19 Emergency Response Ordinance.

ORDINANCE NO. -N.S.

FAIR WORKWEEK EMPLOYMENT STANDARDS

BE IT ORDAINED by the Council of the City of Berkeley as follows:

Section 1. That Berkeley Municipal Code Chapter ~~13.110~~13.102 is added to read as follows:

**CHAPTER ~~13.110~~13.102
FAIR WORKWEEK EMPLOYMENT STANDARDS**

Sections:

- ~~13.110~~13.10 **Purpose and Intent**
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- ~~13.110~~13.10 **Definitions.**
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- ~~13.110~~13.10 **Applicability.**
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- ~~13.110~~13.10 **Advance Notice of Work Schedules.**
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- ~~13.110~~13.10 **Notice, Right to Decline, and Compensation for Schedule Changes.**
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- ~~13.110~~13.10 **Notice and Posting.**
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- ~~13.110~~13.10 **Implementation.**
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- ~~13.110~~13.10 **Enforcement.**
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~~13.110~~13.102.010 Purpose and Intent

This chapter shall be known and may be cited as the “Berkeley Fair Workweek Ordinance”. It is the purpose of this chapter and the policy of the City: (i) to enact and

enforce fair and equitable employment scheduling practices in the City of Berkeley; (ii) to provide the working people of Berkeley with protections that ensure employer scheduling practices do not unreasonably prevent workers from attending to their families, health, education, and other obligations; and (iii) to require Employers needing additional hours, whether temporary or permanent, to first offer those hours to current part-time Employees.

13.11013.102.020 Definitions

As used in this chapter, the following terms shall have the following meanings:

- (a) "Building services" means the care and maintenance of property, including, but not limited to, janitorial services, building and grounds maintenance services, and security services.
- (b) "Calendar week" shall mean a period of seven consecutive days starting on Sunday.
- (c) "City" shall mean the City of Berkeley.
- (d) "Covered employer" shall mean an employer subject to the provisions of this chapter, as specified in Section ~~13.110~~13.102.030.
- (e) "Department" shall mean the City Manager's Department, as specified in Chapter 2.36, or another department or agency as the City Manager shall designate.
- (f) "Employee" shall mean any person who:
 - (1) In a calendar week performs at least two hours of work within the geographic boundaries of the City of Berkeley for an employer;
 - (2) Qualifies as an employee entitled to payment of a minimum wage from any employer under the California minimum wage law, as provided under Labor Code Section 1197 and wage orders published by the California Industrial Welfare Commission. Employees shall include learners, as defined by the California Industrial Welfare Commission; and
 - (3) Is (i) not exempt from payment of an overtime rate of compensation pursuant to Labor Code Section 510; and (ii) is not paid a monthly salary equivalent to at least forty hours per week at a rate of pay of twice the minimum wage required by Berkeley Municipal Code Section 13.99.040.
- (g) "Employer" shall mean any person, as defined in Labor Code Section 18, who directly or indirectly through any other person or employer, , employs or exercises control over the wages, hours or working conditions of any Employee, or any person receiving or holding a business license through Title 9 of the Berkeley Municipal Code.
- (h) "Franchise" shall have the meaning in California Business and Professions Code Section 20001.
- (i) "Franchisee" shall have the meaning in California Business and Professions Code Section 20002.
- (j) "Franchisor" shall have the meaning in California Business and Professions Code Section 20003.
- (k) "Good faith" shall mean a sincere intention to deal fairly with others.
- (l) "Healthcare" shall mean either a Hospital, Medical Practitioner Office, Nursing Home,

or Supportive Housing as defined in BMC Section 23F.04.10, or a facility that provides outpatient maintenance dialysis.

(m) "Hotel" shall mean Tourist Hotel as defined in BMC Section 23F.04.10.

(n) "Manufacturing" shall mean a Manufacturing Use as defined in BMC Section 23F.04.10.

(o) "Predictability pay" shall mean wages paid to an employee, calculated on an hourly basis at the employee's regular rate of pay as that term is used in 29 U.S.C. Section 207 (e), as compensation for schedule changes made by a covered employer to an employee's schedule pursuant to Section ~~13.110~~13.102.060, in addition to any wages earned for work performed by that employee.

(p) "Restaurant" shall mean a Food Service Establishment as defined in BMC Section 23F.04.10.

(q) "Retail" shall mean a Retail Products Store as defined in BMC Section 23F.04.10.

(r) "Shift" shall mean the consecutive hours an employer requires an employee to work including employer-approved meal periods and rest periods.

(s) "Warehouse services" shall mean Warehouse Based Non-Store Retail as defined in BMC Section 23F.04.10.

(t) "Work schedule" shall mean all of an employee's shifts, including specific start and end times for each shift, during a calendar week.

~~13.110~~13.102.030 **Applicability**

(a) This chapter shall apply to: the City of Berkeley as an employer, and any employer in the City of Berkeley that is:

- (1) primarily engaged in the building services, healthcare, hotel, manufacturing, retail, or warehouse services industries, and employs 56 or more employees globally; or
- (2) primarily engaged in the restaurant industry, and employs 10 or more employees in the city of Berkeley and employs 100 or more globally; or
- (3) is a franchisee primarily engaged in the retail or restaurant industries employing 10 or more employees in the city of Berkeley and is associated with a network of franchises with franchisees employing in the aggregate 100 or more employees globally.

(b) This chapter does not apply to a not-for-profit corporation organized under Section 501 of the United States Internal Revenue Code unless it employs 100 or more employees globally.

(c) In determining the number of employees performing work for an covered employer during a given week, all employees performing work for the covered employer for compensation on a full-time, part-time, or temporary basis, at any location, shall be counted, including employees made available to work through the services of a temporary services or staffing agency or similar entity.

(d) For the purposes of determining whether a nonfranchisee entity is a covered employer as defined by this chapter, separate entities that form an integrated enterprise shall be considered a single employer. Within one year of the effective date of the ordinance, the City Manager shall promulgate rules pursuant to the authority provided in

Section ~~13.110~~13.102.110 to implement this subsection clarifying factors to be considered in determining what constitutes an integrated enterprise. .

(e) For the City of Berkeley as an employer, this chapter shall become operative with respect to non-represented employees one year after the effective date of the ordinance. Subject to a waiver under Section ~~13.110~~13.102.040, with respect to employees subject to a collective bargaining agreement, this chapter shall become operative upon the commencement of a bona fide successor collective bargaining agreement or one year after the effective date of the ordinance, whichever is earlier.

(f) For all other employers, with respect to employees subject to a collective bargaining agreement, this chapter shall become operative on the commencement of a bona fide successor collective bargaining agreement, subject to a waiver pursuant to Section ~~13.110~~13.102.040.

(g) For all other employers not subject to a collective bargaining agreement, this chapter shall become operative one year after the effective date of the ordinance.

~~13.110~~13.102.040 Waiver through Collective Bargaining

The requirements of all or of specific portions of this chapter may be waived in a bona fide collective bargaining agreement, but only if the waiver is set forth explicitly in such agreement in clear and unambiguous terms.

~~13.110~~13.102.050 Advance Notice of Work Schedules.

(a) Initial Estimate of Minimum Hours. An employer shall provide each employee with a good faith estimate in writing of the employee's work schedule. The employee may submit a written request to modify the estimated work schedule, and the covered employer in its sole discretion may accept or reject the request and shall notify the employee of covered employer's determination in writing prior to or on commencement of employment.

(b) Two Weeks' Advance Notice of Work Schedule. A covered employer shall provide its employees with at least two weeks' notice of their work schedules by doing one of the following:

(1) posting the work schedule in a conspicuous place at the workplace that is readily accessible and visible to all employees; or

(2) transmitting the work schedule by electronic means, so long as all employees are given access to the electronic schedule at the workplace. For new employees, a covered employer shall provide the new employee prior to or on their first day of employment with an initial work schedule. Thereafter, the covered employer shall include the new employee in an existing schedule with other employees.

(c) An Employee who is a victim of domestic violence or sexual violence may request that the Employee's Work Schedule not be posted or transmitted to other employees. An oral or written request shall be sufficient and implemented immediately and is

sufficient until the Employee gives written permission to post the Employee's schedule. An Employer may request a written statement from the Employee that states that the Employee is a victim of domestic violence or sexual violence. The written statement shall constitute the documentation needed for the Employer to implement the request. The Employer may not require a written statement more than once in a calendar year from any Covered Employee for this purpose.

~~13.110~~13.102.060 Schedule Changes.

- (a) Notice. A covered employer shall provide an employee written notice of any change to the employee's posted or transmitted work schedule within 24 hours of a schedule change. This notice requirement shall not apply to any schedule changes the employee initiates.
- (b) Right to Decline. Subject to the exceptions in subsections (d) and (e) of this section, an employee has the right to decline any previously unscheduled hours that the covered employer adds to the employee's schedule, and for which the employee has been provided advance notice of less than 14 days before the first day of any new schedule.
- (c) Predictability Pay for Schedule Changes. Subject to the exceptions in subsections (d) and (e) of this section, a covered employer shall provide an employee with the following compensation per shift 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:
- (1) with less than 14 days notice, but 24 hours or more notice to the employee: one hour of predictability pay;
 - (2) with less than 24 hours to the employee,
 - (i) When hours are cancelled or reduced, four hours or the number of cancelled or reduced hours in the employee's scheduled shift, whichever is less;
 - (ii) For additions and all other changes, one hour of predictability pay. The compensation required by this subsection shall be in addition to the employee's regular pay for working such shift.
- (c) Scheduling Exceptions. The requirements of this section shall not apply under any of the following circumstances:
- (1) Mutually agreed-upon work shift swaps or coverage arrangements among employees;
 - (2) Employee initiated voluntary shift modifications, such as voluntary requests to leave a scheduled shift prior to the end of the shift or to use sick leave, vacation leave, or other policies offered by the Employer. This paragraph shall apply only to the employee initiating the voluntary shift modification; or
 - (3) To accommodate the following transitions in shifts:

- (i) If an employee works no more than thirty minutes past the end of a scheduled shift to complete service to a customer, provided the employee is compensated at their regular rate of pay for the additional work performed by the employee.
 - (ii) An employee begins or ends their scheduled shift no more than ten minutes prior to or after the scheduled shift, provided the employee is compensated at their regular rate of pay for the additional work performed by the employee.
- (d) Operational Exceptions. The requirements of this section shall not apply under any of the following circumstances:
- (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), pandemic, war, civil unrest, strikes, or other cause not within the covered employer's control;
 - (4) When, in manufacturing, events outside of the control of the manufacturer result in a reduction in the need for Covered Employees, including, but not limited to, when a customer requests the manufacturer to delay production or there is a delay in the receipt of raw materials or component parts needed for production; or
 - (5) With regard to healthcare employers, in (i) any declared national, State, or municipal disaster or other catastrophic event, or any implementation of an Employer's disaster plan, or incident causing a hospital to activate its Emergency Operations Plan, that will substantially affect or increase the need for healthcare services; (ii) any circumstance in which patient care needs require specialized skills through the completion of a procedure; or (iii) any unexpected substantial increase in demand for healthcare due to large public events, severe weather, violence, or other circumstances beyond the Employer's control.
- (e) Nothing in this section shall be construed to prohibit a covered employer from providing greater advance notice of employee's work schedules and/or changes in schedules than that required by this section.

(a) Subject to the limitations in this chapter, before hiring new employees, including hiring through the use of temporary services or staffing agencies, a covered employer shall first offer additional hours of work to existing part-time employee(s) who have worked on behalf of the employer for more than two weeks, if the part-time employee(s) are qualified to do the additional work, as reasonably and in good faith determined by the covered employer. This section shall not be construed to require any employer to offer employees work hours paid at a premium rate under Labor Code Section 510 nor to prohibit any employer from offering such work hours. .

(b) A covered employer has discretion to distribute the additional work hours among part-time employees consistent with this section; provided, that: (1) the employer's system for distribution of hours must not discriminate on the basis of race, color, creed, religion, ancestry, national origin, sex, sexual orientation, gender identity or expression, disability, age, marital or familial status, nor on the basis of family caregiving responsibilities; and (2) the employer may not distribute hours in a manner intended to avoid an increase in the number of employees working 30 or more hours per week, or with regard to the City of Berkeley, to avoid a granting of any benefits that an employee earns based on hours worked.

(c) A part-time employee may, but is not required to, accept the covered employer's offer of additional work under this section.

(1) A part-time employee shall have 24 hours to accept an offer of additional hours of work under this section, after which time the covered employer may hire new employees to work the additional hours.

(2) The 24 hour period referred to in this subsection begins either when the employee receives the written offer of additional hours, or when the covered employer posts the offer of additional hours as described in subsection (d) of this section, whichever is sooner. A part-time employee who wishes to accept the additional hours must do so in writing.

(d) When this section requires a covered employer to offer additional hours to existing part-time employees, the covered employer shall make the offer either in writing or by posting the offer in a conspicuous location in the workplace or electronically where notices to employees are customarily posted.

~~13.110~~13.102.080 Right to Rest.

(a) An employee has the right to decline work hours that occur:

(1) Less than 11 hours after the end of the previous day's shift; or

(2) During the 11 hours following the end of a shift that spanned two days.

(b) An employee who agrees in writing to work hours described in this section shall be compensated at one and one-half times the employee's regular rate of pay for any hours worked less than 11 hours following the end of a previous shift.

~~13.110~~13.102.090 Right to Request a Flexible Working Arrangement.

An employee has the right to request a modified work schedule, including but not limited to additional shifts or hours; changes in days of work or start and/or end times for the shift; permission to exchange shifts with other employees; limitations on availability; part-time employment; job sharing arrangements; reduction or change in work duties; or part-year employment. Notwithstanding any obligations under Section ~~13.110~~13.102.060, an employer may accept, modify, or decline the employee's request. A covered employer shall not retaliate against an employee for exercising their rights under this section or the rights outlined in the Berkeley Family Friendly and Environment Friendly Workplace Ordinance, Berkeley Municipal Code Chapter 13.101.

~~13.110~~13.102.100 Notice and Posting.

(a) The Department shall publish and make available to covered employers, in English and other languages as provided in any implementing regulations, a notice suitable for posting by covered employers in the workplace informing employees of their rights under this chapter.

(b) Each covered employer shall give written notification to each current employee and to each new employee at time of hire of their rights under this chapter. The notification shall be in English and other languages as provided in any implementing regulations, and shall also be posted prominently in areas at the work site where it will be seen by all employees. Every covered employer shall also provide each employee at the time of hire with the covered employer's name, address, and telephone number in writing. Failure to post such notice shall render the covered employer subject to administrative citation, pursuant to the provisions of this chapter. The Department is authorized to prepare sample notices and covered employer use of such notices shall constitute compliance with this subsection.

~~13.110~~13.102.110 Implementation.

(a) The Department shall be authorized to coordinate implementation and enforcement of this chapter and may promulgate appropriate guidelines or rules for such purposes. Any guidelines or rules promulgated by the City shall have the force and effect of law and may be relied on by covered employers, employees and other parties to determine their rights and responsibilities under this chapter. Any guidelines or rules may establish procedures for ensuring fair, efficient and cost-effective implementation of this chapter, including supplementary procedures for helping to inform employees of their rights under this chapter, for monitoring covered employer compliance with this chapter, and for providing administrative hearings to determine whether a covered employer has violated the requirements of this chapter.

(b) Reporting Violations. An aggrieved employee may report to the Department in writing any suspected violation of this chapter. The Department shall keep confidential, to the maximum extent permitted by applicable laws, the name and other identifying information of the employee reporting the violation; provided, however, that with the authorization of such employee, the Department may disclose their name and identifying information as necessary to enforce this chapter or other employee protection laws.

(c) Investigation. The Department may investigate any possible violations of this chapter by a covered employer. The Department shall have the authority to inspect workplaces, interview persons and subpoena records or other items relevant to the enforcement of this chapter.

(d) Informal Resolution. If the Department elects to investigate a complaint, the City shall make every effort to resolve complaints informally and in a timely manner. The City's investigation and pursuit of informal resolution does not limit or act as a prerequisite for an employee's right to bring a private action against a covered employer as provided in this chapter.

~~13.110~~13.102.120 Enforcement.

(a) Enforcement by City. Where prompt compliance with the provisions of this chapter is not forthcoming, the Department may take any appropriate enforcement action to ensure compliance, including but not limited to the following:

The Department may issue an administrative citation pursuant to Chapter 1.28 of the Berkeley Municipal Code. The amount of this fine shall vary based on the provision of this chapter violated, as specified below:

- (1) A fine may be assessed for retaliation by a covered employer against an employee for exercising rights protected under this chapter. The fine shall be \$1,000 for each employee retaliated against.
- (2) A fine of \$500 may be assessed for any of the following violations of this chapter:
 - (i) Failure to provide notice of employees' rights under this chapter.
 - (ii) Failure to timely provide an initial work schedule or to timely update work schedules following changes.
 - (iii) Failure to provide predictability pay for schedule changes with less than 24 hours advance notice.
 - (iv) Failure to offer work to existing employees before hiring new employees or temporary staff or to award work to a qualified employee.
 - (v) Failure to maintain payroll records for the minimum period of time as provided in this chapter.
 - (vi) Failure to allow the Department access to payroll records.
- (3) A fine equal to the total amount of appropriate remedies, pursuant to subsection (c) of this section. Any and all money collected in this way that is the rightful property of an employee, such as back wages, interest, and civil penalty payments, shall be disbursed by the Department in a prompt manner.

(f) City Access. Each covered employer shall permit access to work sites and relevant records for authorized City representatives for the purpose of monitoring compliance with this chapter and investigating employee complaints of noncompliance, including production for inspection and copying of its employment records, but without allowing Social Security numbers to become a matter of public record.

(g) Any person aggrieved by a violation of this Chapter, any entity a member of which is aggrieved by a violation of this Chapter, or any other person or entity acting on behalf of the public as provided for under applicable state law, may bring a civil action in a court of competent jurisdiction against the Employer or other person violating this Chapter and, upon prevailing, shall be awarded reasonable attorneys' fees and costs and shall be entitled to such legal or equitable relief as may be appropriate to remedy the violation including, without limitation, the payment of any back wages unlawfully withheld, the payment of an additional sum as a civil penalty in the amount of \$50 to each Employee or person whose rights under this Chapter were violated for each day that the violation occurred or continued, reinstatement in employment and/or injunctive relief. Provided, however, that any person or entity enforcing this Chapter on behalf of the public as provided for under applicable state law shall, upon prevailing, be entitled only to equitable, injunctive or restitutionary relief to Employees, and reasonable attorneys' fees and costs.

(i) This Section shall not be construed to limit an Employee's right to bring legal action for a violation of any other laws concerning wages, hours, or other standards or rights nor shall exhaustion of remedies under this Chapter be a prerequisite to the assertion of any right.

(j) The remedies for violation of this chapter include but are not limited to:

1. Reinstatement, the payment of predictability pay unlawfully withheld, and the payment of an additional sum as a civil penalty in the amount of \$50 to each employee whose rights under this chapter were violated for each day or portion thereof that the violation occurred or continued, and fines imposed pursuant to other provisions of this chapter or State law.

2. Interest on all due and unpaid wages at the rate of interest specified in subdivision (b) of Section 3289 of the California Civil Code, which shall accrue from the date that the wages were due and payable as provided in Part 1 (commencing with Section 200) of Division 2 of the California Labor Code, to the date the wages are paid in full.

3. Reimbursement of the City's administrative costs of enforcement and reasonable attorney's fees.

4. If a repeated violation of this chapter has been finally determined in a period from July 1 to June 30 of the following year, the Department may require the employer to pay an additional sum as a civil penalty in the amount of \$50 to the City for each employee or person whose rights under this chapter were violated for each day or portion thereof that the violation occurred or continued, and fines imposed pursuant to other provisions of this Code or State law.

(k) The remedies, penalties and procedures provided under this chapter are cumulative and are not intended to be exclusive of any other available remedies, penalties and procedures established by law which may be pursued to address violations of this chapter. Actions taken pursuant to this chapter shall not prejudice or adversely affect

any other action, administrative or judicial, that may be brought to abate a violation or to seek compensation for damages suffered.

(l) No criminal penalties shall attach for any violation of this chapter, nor shall this chapter give rise to any cause of action for damages against the City.

~~13.110~~13.102.130 Retaliation Prohibited.

An employer shall not discharge, reduce the compensation of, discriminate against, or take any adverse employment action against an employee, including discipline, suspension, transfer or assignment to a lesser position in terms of job classification, job security, or other condition of employment, reduction of hours or denial of additional hours, informing another employer that the person has engaged in activities protected by this chapter, or reporting or threatening to report the actual or suspected citizenship or immigration status of an employee, former employee or family member of an employee to a Federal, State or local agency, for making a complaint to the Department, participating in any of the Department's proceedings, using any civil remedies to enforce their rights, or otherwise asserting their rights under this chapter. Within 120 days of an employer being notified of such activity, it shall be unlawful for the employer to discharge any employee who engaged in such activity unless the employer has clear and convincing evidence of just cause for such discharge.

~~13.110~~13.102.140 Retention of Records.

Each employer shall maintain for at least three years for each employee a record of their name, hours worked, pay rate, initial posted schedule and all subsequent changes to that schedule, consent to work hours where such consent is required by this chapter, and documentation of the time and method of offering additional hours of work to existing staff. Each employer shall provide each employee a copy of the records relating to such employee upon the employee's reasonable request.

~~13.110~~13.102.150 City Access.

Each employer shall permit access to work sites and relevant records for authorized Department representatives for the purpose of monitoring compliance with this chapter and investigating employee complaints of noncompliance, including production for inspection and copying of its employment records, but without allowing Social Security numbers to become a matter of public record.

~~13.110~~13.102.160 No Preemption of Higher Standards.

The purpose of this chapter is to ensure minimum labor standards. This chapter does not preempt or prevent the establishment of superior employment standards (including higher wages) or the expansion of coverage by ordinance, resolution, contract, or any other action of the City. This chapter shall not be construed to limit a discharged employee's right to bring a common law cause of action for wrongful termination.

~~13.110~~13.102.170 Severability.

If any part or provision of this Chapter, or the application of this Chapter to any person or circumstance, is held invalid, the remainder of this Chapter, including the application of such part or provision to other persons or circumstances, shall not be affected by such a holding and shall continue in full force and effect. To this end, the provisions of this Chapter are severable.

Section 2. Copies of this Ordinance shall be posted for two days prior to adoption in the display case located near the walkway in front of the Maudelle Shirek Building, 2134 Martin Luther King Jr. Way. Within 15 days of adoption, copies of this Ordinance shall be filed at each branch of the Berkeley Public Library and the title shall be published in a newspaper of general circulation.

DRAFT