

ORDINANCE NO. 7,861-N.S.

ADDING CHAPTER 13.107 TO THE BERKELEY MUNICIPAL CODE ESTABLISHING
HEALTHCARE AND APPRENTICESHIP STANDARDS FOR PRIVATE
DEVELOPMENT

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

Section 1. That Chapter 13.107 is hereby added to the Berkeley Municipal Code as follows:

**ESTABLISHING HEALTHCARE AND APPRENTICESHIP STANDARDS FOR
PRIVATE DEVELOPMENT****13.107.010 Title****13.107.020 Purpose****13.107.030 Definitions****13.107.040 Apprenticeship Requirements****13.107.050 Required Health Care Expenditures****13.107.060 Required Applicant and Contractor Statements****13.107.070 Notice and Publishing****13.107.080 Retaliation Prohibited****13.107.090 Retention of Records****13.107.110 City Access****13.107.111 Implementation and Enforcement****13.107.112 City Undertaking Limited Promotion of General Welfare****13.107.113 No Preemption of Higher Standards****13.107.114 City Manager Regulations****13.107.115 Severability****13.107.010 Title.**

This Ordinance shall be known as the Helping Achieve Responsible Development with Healthcare and Apprenticeship Training Standards (“HARD HATS”) Ordinance.

13.107.020 Purpose.

The purpose of this Chapter is to address the shortage of qualified construction workers, rising labor costs, and to refine labor standards in the local construction industry. These measures are intended to improve the recruitment, training, and retention of skilled construction workers.

The requirements of this Chapter ensure that larger projects within the City are awarded to contractors that participate in high quality, industry-proven apprenticeship programs, and that apprentices working under such contracts are competently trained.

The requirements of this Chapter also enhance the good health of construction workers working in the City, thereby increasing the pool of labor available to complete current and future projects, including City public works projects for which the City contracts on a regular basis.

Together, the requirements of this Chapter will help promote the retention and growth of a skilled labor pool in the construction industry that can live as well as work in the City.

13.107.030 Definitions.

"Applicant" shall mean any individual, person, firm, partnership, association, joint venture, corporation, entity, combination of entities or authorized representative thereof, who undertakes, proposes and/or applies to the City for, a Covered Project.

"Apprenticeable Craft or Trade" is defined in California Labor Code section 1777.5.

"Contractor" shall mean contractors or subcontractors of any tier that have contracted to perform work on the Covered Project in excess of ½ of one percent of the total Cost of the Covered Project.

"Cost of the Covered Project" shall mean the amount determined by the Chief Building Official for purposes of setting the building permit fee in accordance with the most recent building valuation date specified in the building permit fees section of the resolution establishing fees and charges as adopted by the City Council.

"Covered Project" shall mean a private development project within City limits consisting of construction, alteration, or demolition of 50,000 square feet or more of floor area which has not received its final permits, variances, approvals and/or other entitlements by the effective date of this Ordinance.

"Covered Construction Worker" shall mean any construction worker employed by the Contractor at any time over the duration of the Covered Project.

"City" shall mean the City of Berkeley and any implementing department or official.

“Health Care Expenditures” shall mean the amount calculated by multiplying the number of hours worked by a Covered Construction Worker on the Covered Project by the hourly Health Care Expenditure Rate.

“Health Care Expenditure Rate” shall mean the rate determined annually from the City of Berkeley Health and Dental Plan Monthly Premium Rates for the Kaiser HSA-Qualified Deductible HMO Plan, or a successor plan, for the applicable fiscal year. The Health Care Expenditure Rate shall be prorated on an hourly basis, and arrived at by dividing the total monthly premium for the Kaiser HSA-Qualified Deductible HMO Plan, or a successor plan, by one hundred and fifty (150), the typical number of hours worked in a month by a construction worker.

“Joint Labor-Management Apprenticeship Program” shall mean an apprenticeship program jointly managed and administered by both a union and contractor or contractor association, and (i) approved by the State of California’s Division of Apprenticeship Standards; (ii) registered with the U.S. Department of Labor; or (iii) registered with a State Apprenticeship Agency granted authority by the U.S. Department of Labor to register apprenticeship programs for federal purposes, pursuant to 29 CFR Part 29.

“Project Labor Agreement” shall mean a pre-hire collective bargaining agreement with one or more labor organizations that establishes the terms and conditions of employment for a specific construction project.

“Repeat Offender” shall mean an Applicant, Contractor, or entity that has received three or more violations of this Chapter within the last 24 months.

13.107.040 Apprenticeship Requirements

a. During the duration of the Covered Project, each Contractor shall do at least one of the following:

i. participate in a Joint Labor-Management Apprenticeship Program;

ii. participate in an apprenticeship program approved by the State of California Division of Apprenticeship Standards that has a graduation rate of 50% or higher and has graduated an average of at least thirty (30) apprentices annually for the five (5) years immediately preceding the start of construction date on the Covered Project. The Contractor will also maintain at least the ratio of apprentices required by California Labor Code section 1777.5 for the duration of the Covered Project. Any change in program participation must be immediately provided to the City; or

iii. make hourly contributions on a monthly basis to the California Apprenticeship Council for every hour worked by any Covered Construction Worker in any Apprenticeable Craft or Trade on the Covered Project of at least the apprenticeship contribution rate for the classification of “plumber, pipefitter, steamfitter” in Alameda County.

b. A Contractor without Covered Construction Worker employees shall comply with this Section by showing a contractual obligation that its subcontractors comply with this Section.

c. Contributions to an apprenticeship program or the California Apprenticeship Council shall not be credited towards compliance with BMC Chapter 13.99 (Minimum Wage).

d. Applicant shall ensure that the Apprenticeship requirement in this Section is included in all construction contracts for the performance of the Covered Project.

13.107.050 Health Care Expenditures

a. *Prequalification*: In order to be prequalified, each Contractor will sign and submit to the City a statement stipulating to and providing documented proof that the Contractor and its subcontractors, have provided Health Care Expenditures to or on behalf of each Covered Construction Worker for the 180 consecutive day period prior to the submission of the prequalification documents ("Contractor Prequalification Questionnaire"). This requirement is in addition to the regular hourly wages paid to its employees.

In the case of a Contractor that has employed no Covered Construction Workers for the 180 consecutive day period prior to the submission of the prequalification documents, said Contractor shall show a contractual obligation that its subcontractors provide Health Care Expenditures to or on behalf of each Covered Construction Worker employee for the 180 consecutive day period.

b. *Covered Project Duration*: For purposes of the Covered Project, each Contractor shall make Health Care Expenditures to or on behalf of each Covered Construction Worker, in addition to their regular hourly wages, during periods of employment on the Covered Project (and sign a statement certifying that it will do so as part of the Contractor Prequalification Questionnaire).

In the case of a Contractor that will employ no Covered Construction Workers on the Covered Project, said Contractor shall show a contractual obligation that its subcontractors will provide Health Care Expenditures on behalf of each Covered Construction Worker for the duration of the Covered Project.

A Contractor shall make Health Care Expenditures on behalf of the Covered Construction Workers employed by its subcontractors in the event said subcontractors fail to make required Health Care Expenditures.

c. Health Care Expenditures may be made to: (1) a health plan in which the Covered Construction Worker is enrolled at the Health Care Expenditure Rate; (2) a Covered Construction Worker's health savings account at the Health Care Expenditure Rate; and/or (3) a Covered Construction Worker in the form of cash at one and a half (1.5) times the rate of the Health Care Expenditure Rate.

d. Health Care Expenditures shall not be credited towards compliance with BMC Chapter 13.99 (Minimum Wage).

e. The Applicant shall ensure that the Health Care Expenditures requirements in this Section are included in all construction contracts for the performance of the Covered Project.

13.107.060 Required Applicant and Contractor Statements

A declaration must be signed by the Applicant at the time of permit issuance for the Covered Project, attesting to compliance with this Chapter under penalty of perjury (“Applicant Declaration”). By signing the Applicant Declaration, the Applicant commits to ensuring that all Contractors on the Covered Project have and will comply with the Apprenticeship and Health Care Expenditures requirements of this Ordinance, including by ensuring that all contracts for the performance of the Covered Project so require, requiring all Contractors complete the statements established by this Section, and submitting all Contractor statements to the City within seven (7) days of receipt.

Prior to executing their contract for the Covered Project, but no later than seven (7) calendar days before their first day of work on the Covered Project, each Contractor will sign and submit to the Applicant a statement stipulating that on the Covered Project it will comply with the Apprenticeship and Health Care Expenditures as set forth in this Chapter during the duration of the Covered Project, and that it has met the Health Care Expenditures prequalification requirements (“Contractor Prequalification Questionnaire”).

Within 30 calendar days of completing their work on the Project each Contractor must sign and submit to the Applicant a statement certifying that it complied with the Apprenticeship and Health Care Expenditures requirements of this Chapter (“Contractor Satisfaction Statement”).

Prior to issuance of a certificate of occupancy for the Covered Project, the Applicant shall sign and submit to the City a certification that all Contractors on the Covered Project satisfied the Apprenticeship and Health Care Expenditures requirements of this Ordinance (“Applicant Certification of Compliance”).

13.107.070 Notice and Posting

a. The City shall publish and make available to Contractors a notice in English, Spanish, and any other primary languages as determined by City staff, for posting by Contractors in the workplace informing Covered Construction Workers of their rights under this Chapter (“Sample Notice”).

b. A Contractor shall give written notification to each current Covered Construction Worker and to each new Covered Construction Worker at time of hire of their rights under this Chapter. The notification shall be in English and Spanish, and any other primary languages as determined by City staff, and shall also be posted prominently in areas at

the work site where it will be seen by all Covered Construction Workers. Failure to post such notice shall render the Contractor subject to administrative citation, pursuant to the provisions of this Chapter. A Contractor's use of the City's Sample Notices shall constitute compliance with this Section.

13.107.080 Retaliation Prohibited

A Contractor shall not discharge, reduce the compensation of, discriminate against, or take any adverse employment action against a worker, 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 worker or family member to a federal, state or local agency, for making a complaint to the City, participating in any of the City's proceedings, using any civil remedies to enforce their rights, or otherwise asserting their rights under this Chapter. Within one hundred twenty (120) days of a Contractor being notified of such activity, it shall be unlawful for the Contractor to discharge any workers who engaged in such activity unless the Contractor has clear and convincing evidence of just cause for such discharge.

13.107.090 Retention of Records

Applicants and Contractors shall maintain the following records for the Covered Project at least three (3) years after receiving approved final inspection:

- 1) Applicant Declaration;
- 2) Contractor Prequalification Questionnaires;
- 3) Contractor Satisfaction Statements certifying compliance with the Health Care Expenditures and Apprenticeship requirements (Sections 13.107.040 and .050) of this Chapter;
- 4) Records reflecting Contractors' compliance with the Health Care Expenditures and Apprenticeship requirements (Sections 13.107.040 and .050) of this Chapter, including records of names of all Covered Construction Workers, dates those workers worked for the Contractor, and Health Care Expenditures the Contractor made to or on behalf of those workers; and
- 5) Applicant Certification of Compliance.

13.107.110 City Access

Applicant and Contractors shall permit access to Covered Project work sites and relevant records for authorized City representatives for the purpose of monitoring compliance with this Chapter and investigating worker complaints of noncompliance. Access to records will be provided within a reasonable amount of time of the City's request, but no longer than 30 days. Failure to provide access to records may be subject to City enforcement as permitted in Section 13.107.111.

13.107.111 Implementation and Enforcement

a. Issuance and Revocation of Permits

The City shall issue permits for the Covered Project only where an Applicant meets the requirements of this Ordinance and submits the Applicant Declaration. The City shall include conditions of approval requiring compliance with this Chapter for all permits issued for Covered Projects. The City may revoke or modify the applicable permits for the Covered Project pursuant to Section 23.404.080 where an Applicant or Contractor is out of compliance with this Ordinance.

b. Community Benefits Agreement Exception

If a Covered Project is covered by a Project Labor Agreement (or community workforce agreement or similar labor agreement) with the local Building and Construction Trades Council, Contractors will be deemed in compliance with this Chapter.

c. Collective Bargaining Agreement Exception

A Contractor that is signatory to a valid collective bargaining agreement with a labor union that requires participation in a state-approved apprenticeship program and the provision of health care expenditures to all construction craft employees shall be deemed in compliance with this Chapter.

d. City Enforcement.

The City may take appropriate enforcement action to ensure compliance with this Chapter, including issuing an administrative citation pursuant to Chapter 1.28 of the Berkeley Municipal Code. The City may issue a citation to any Contractor or Applicant that has not complied with the requirements of this Chapter, including but not limited to, the following violations:

- (1) failing to post the required notice (Section 13.107.070);
- (2) refusing to or not providing timely access to records or work sites (Section 13.107.110);
- (3) failing to submit or submitting a false or misleading Applicant Declarations, Contractor Prequalification Questionnaires, Contractor Satisfaction Statements, and/or Applicant Certificates of Compliance (Section 13.107.060) ; and/or
- (4) failing to comply with the Apprenticeship and/or Health Care Expenditures requirements of this Chapter (Sections 13.107.040 and 13.107.050).

The fine shall vary based on the provisions of this Chapter violated, but may be up to a maximum of \$5,000/month per Covered Construction Worker during the period of the violation.

In the event that any person identifies a Contractor or Applicant on a Covered Project not complying with this Ordinance as required, the person may file a complaint with the City. Complaints shall be made on a form prepared by the City and made available through the City's website. Upon receipt of such a complaint, the City shall investigate the complaint and, if a violation is found, issue a citation to the Applicant and/or the Contractor. The citation will give the Applicant and/or Contractor ten (10) days to correct the violation.

If a Contractor or Applicant subject to a citation does not correct the violation within ten (10) days, the City shall issue a penalty of \$1,000 per calendar day for the first calendar week, increasing to \$2,500 per calendar day for successive calendar weeks.

If the Contractor or Applicant has received a citation or has otherwise been penalized under this Ordinance, within the prior twelve (12) months, the penalty shall be \$2,000 per calendar day for the first calendar week, increasing to \$3,500 per calendar day for successive calendar weeks. If a subcontractor receives a citation under this Ordinance, the prime contractor shall be jointly and severally liable for the penalty.

d. Private Right of Action.

A Covered Construction Worker, or a joint labor-management committee established pursuant to the federal Labor Management Cooperation Act of 1978 (29 U.S.C. sec. 175a) on a Covered Construction Worker's behalf, may bring a civil action in a court of competent jurisdiction against the Contractor (and in the case of a Repeat Offender, the Applicant or Contractor who contracted with the Repeat Offender) 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 Health Care Expenditures that may have been unlawfully withheld and/or injunctive relief. Nothing in this Chapter creates a private right of action or otherwise authorizes legal action against the City, its officers, agents, or employees, for failure to enforce these provisions.

e. Repeat Offender List.

The City shall review the complaints filed under this Ordinance on a monthly basis to determine if any person or entity has received three or more violations of the Ordinance within the last 24 months. Any such person or entity shall be designated a Repeat Offender and be placed on a public list available on the City of Berkeley's website and shall be prohibited from working on future Covered Projects for a period of 24 months from their most recent violation. The City shall provide a notice of Repeat Offender designation through personal service, or by registered mail, postage prepaid, addressed to the person or entity's address on file with the City.

If, after being designated a Repeat Offender, the Repeat Offender again violates the Ordinance as determined by the City or the Superior Court, then the Applicant or Contractor who contracted with the Repeat Offender shall be jointly and severally liable

for any and all penalties, damages, or other financial obligations incurred by the Repeat Offender.

Any person or entity shall be entitled to appeal the City's decision to place it on the Repeat Offender List by filing a written notice of appeal with the City Manager within ten days from the date the notice of Repeat Offender designation is mailed. The appeal shall clearly and concisely set forth the grounds upon which it is based. If the permittee files a timely request for appeal, a hearing shall be held before the City Manager or their designee. The decision of the City Manager or their designee shall be final.

13.107.112 City Undertaking Limited Promotion of General Welfare

In undertaking the adoption and enforcement of this Chapter, the City is undertaking only to promote the general welfare. The City is not assuming, nor is it imposing on its officers and workers, an obligation for breach of which it is liable in money damages to any person who claims that such breach proximately caused injury. This Chapter does not create a legally enforceable right by any member of the public against the City.

13.107.113 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 or the expansion of coverage by ordinance, resolution, contract, or any other action of the City.

13.107.114 City Manager Regulations

The City Manager may promulgate regulations for the administration and enforcement of this Chapter.

13.107.115 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. Effective Date

The effective date of this Ordinance shall be January 1, 2024.

Section 3. 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.

At a special meeting of the Council of the City of Berkeley held on May 2, 2023, this Ordinance was passed to print and ordered published by posting by the following vote:

Ayes: Bartlett, Hahn, Harrison, Humbert, Robinson, Taplin, and Arreguin.

Noes: None.

Abstain: Kesarwani.

Absent: Wengraf.