

Commission on Labor

Agenda

North Berkeley Senior Center
1901 Hearst Avenue
Berkeley, CA

Wednesday
July 20, 2016
7:00 p.m.

Preliminary Matters

1. Roll Call
2. Public Comments
The public may comment about any item not on the agenda. Public comments regarding agenda items will be heard while the Commission is discussing the item.
3. Approval of May 18, 2016 Meeting minutes (Attachment 1)

Action Items

The Commission may take action related to any subject listed on the Agenda. Public comments regarding agenda items will be heard while the Commission is discussing the item.

4. Commission on the Status of Women presentation regarding status update on the Council referral to refer to the City Manager to amend the Berkeley Municipal Code to require city contractors and subcontractors with 20 or more employees to submit an Equal Pay Report.
5. Status Updates:
 - 1) Minimum Wage Ordinance/Living Wage Ordinance
 - 2) Fair Chance Ordinance Subcommittee report
 - 3) Family & Environment Friendly Worktime Ordinance (aka Flexible Worktime Ordinance)
 - 4) Public Transportation Subcommittee report
 - 5) City-wide security contracts draft council report discussion on action taken at May 18, 2016 to amend the March meeting motion to include outsourcing of other city services including but not limited to parking fine processing.
7. Agenda planning for next regular meeting on September 21, 2016

Information

8. Adding Berkeley Municipal Code Chapter 13.104, Wage Theft (attachment 2)

Announcements

Adjournment

Please refrain from wearing scented products to this meeting.

COMMUNICATION ACCESS INFORMATION

This meeting is being held in a wheelchair accessible location. To request a disability-related accommodation(s) to participate in the meeting, including auxiliary aids or services, please contact the Disability Services specialist at 981-6342 (V) or 981-6345 (TDD) at least three business days before the meeting date.

Communications to Berkeley boards, commissions or committees are public record and will become part of the City's electronic records, which are accessible through the City's website. **Please note: e-mail addresses, names, addresses, and other contact information are not required, but if included in any communication to a City board, commission or committee, will become part of the public record.** If you do not want your e-mail address or any other contact information to be made public, you may deliver communications via U.S. Postal Service or in person to the secretary of the relevant board, commission or committee. If you do not want your contact information included in the public record, please do not include that information in your communication. Please contact the commission secretary for further information.

Written material may be viewed in advance of the meeting at the Housing & Community Services Department, 2180 Milvia, 2nd Floor, during regular business hours or at the Berkeley Public Library, Shattuck/Kittredge Streets, during regular library hours at the Reference Desk. The Commission Agenda and Minutes may be viewed on the City of Berkeley website:
<http://www.cityofberkeley.info/commissions>.

Secretary:

Delfina M. Geiken
Health, Housing & Community Services
Department
(510) 981-7551
E-mail: DGeiken@CityofBerkeley.info

Mailing Address:

Commission on Labor
Delfina Geiken, Secretary
2180 Milvia, 2nd Floor
Berkeley, CA 94704



Minutes

North Berkeley Senior Center
1901 Hearst Avenue
Berkeley, CA

Wednesday
May 18, 2016
7:00 p.m.

Preliminary Matters

1. Roll Call
Meeting called to order @ 7:04pm
Present: S. Frankel; L. Sayre; W. Bloom; K. Gomez; J. Fillingim (arrived @ 7:15pm); Kessler (arrived @ 7:25pm)
Absent: None
Staff: D. Geiken
2. Public Comments
The public may comment about any item not on the agenda. Public comments regarding agenda items will be heard while the Commission is discussing the item.

None
3. Approval of March 16, 2015 Meeting minutes (Attachment 1)

M/S/C (Frankel/Sayre) to approve minutes as written
Ayes: Frankel; Bloom; Gomez; Sayre
Absent: Fillingim; Kessler (both not present during vote)

Action Items

The Commission may take action related to any subject listed on the Agenda. Public comments regarding agenda items will be heard while the Commission is discussing the item.

4. Status update on the efforts of the UC Workers coalition (Student Labor Committee & AFSCME 3299)
Sayre reported on the successful outcome.
5. Subcommittee Status Updates:
 - 1) Minimum Wage Ordinance/Living Wage Ordinance
Staff provided update on council action of February April 26, 2016, directing staff to develop a ballot initiative

M/S/C (Gomez/Bloom) to allow the MWO/LWO subcommittee to sunset now that their work is complete.
Passed unanimously

- 2) Fair Chance Ordinance
No report at this time.
- 3) Family & Environmental Friendly Worktime Ordinance (aka Flexible Worktime Ordinance)
Staff reported that the council item is tentatively scheduled for a July council meeting.
- 4) Public Transportation Subcommittee
Subcommittee continues to research & prepare to provide an update at a future full commission meeting.

6. City-wide security contracts draft council report discussion on action taken at March 18, 2015 meeting.

March 18, 2016 action: *M/S/C (Fillingim/Dixon) to recommend to City Council to direct City Manager to create security personnel in classified service to make security personnel city employees; also recommend that city should only contract with unionized companies.*

M/S/C (Sayre/Fillingim) to amend March 18, 2016 to include recommendations regarding outsourcing of other city services including but not limited to parking fine processing.

Passed Unanimously

7. Agenda planning for next regular meeting on July 20, 2016
 - Subcommittee reports: Fair Chance Ordinance and Public Transportation
 - Minimum Wage status update
 - Presentation by representatives of the Commission on the Status of Women regarding their efforts thus far on Equal Pay as referred by City Council
 - Family & Environment Friendly Workplace Ordinance status update
 - Discussion and possible action regarding contracting (outsourcing) by the City of Berkeley for city services

Communications

8. Letter requesting the Commission on Labor to look into the City of Berkeley's outsourcing of parking fines & fees to entities outside of Berkeley. (Attachment 2)

Announcements

None

Adjournment

Meeting adjourned @7:50pm.

Minutes Approved on _____

Delfina Geiken
Commission Secretary

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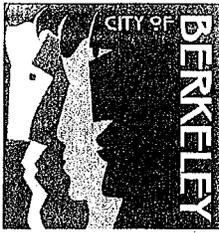
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Secretary:

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Commission on Labor
Delfina Geiken, Secretary
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Berkeley, CA 94704



Office of the City Manager

CONSENT CALENDAR

July 12, 2016

To: Honorable Mayor and Members of the City Council
 From: *DWR* Dee Williams-Ridley, City Manager
 Submitted by: Zach Cowan, City Attorney
 Subject: Adding Berkeley Municipal Code Chapter 13.104, Wage Theft

RECOMMENDATION

Adopt first reading of an Ordinance adding Berkeley Municipal Code Chapter 13.104, Wage Theft Prevention, to ensure that new construction projects greater than 30,000 square feet that are not subject to local, state or federal prevailing wage requirements or do not have a valid Project Labor or Community Workforce Agreement complies with Labor Code section 2815.5.

FISCAL IMPACTS OF RECOMMENDATION

Additional staff time to review reports submitted by project owners, contractors and/or subcontractors.

CURRENT SITUATION AND ITS EFFECTS

The City does not currently monitor compliance with Labor Code section 2815.5.

BACKGROUND

On January 26, 2016, the Council referred to the City Manager to prepare an ordinance requiring all new construction projects greater than 30,000 square feet that are not subject to local, state or federal prevailing wage requirements or do not have a valid Project Labor or Community Workforce Agreement to comply with Labor Code section 2815.5.

The Council referred the ordinance to the City Manager, as follows:

Action: Moved to Consent Calendar. Adopted revised recommendation as written below:

'Refer to the City Manager to generate an ordinance requiring all projects that include new construction of greater than 30,000 square feet and that are not subject to local, state or federal prevailing wage requirements or do not have a valid Project Labor or Community Workforce Agreement to adhere to the requirements as outlined below. The City Manager is requested to provide a

history of the wage theft problem in Berkeley.” (Attached as Attachment A is the Council referral from January 26, 2016.)

The draft ordinance conforms to this direction.

ENVIRONMENTAL SUSTAINABILITY

There are no identifiable environmental effects or opportunities associated with the subject of this report.

RATIONALE FOR RECOMMENDATION

This report is in response to Council’s direction to staff at its January 29, 2016 meeting.

ALTERNATIVE ACTIONS CONSIDERED

None.

CONTACT PERSON

Zach Cowan, City Attorney, 981-6950
Michael Woo, Deputy City Attorney, 981-6990

Attachments:

- 1: Ordinance
- 2: January 26, 2016 Council Report

ORDINANCE NO. – N.S.

ADDING A NEW CHAPTER 13.104 TO THE BERKELEY MUNICIPAL CODE TO
PREVENT WAGE THEFT

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

Section 1. That a new Chapter 13.104 is added to the Berkeley Municipal Code to read as follows:

Chapter 13.104
WAGE THEFT PREVENTION

Sections:

- 13.104.010 Findings.**
- 13.104.020 Definitions.**
- 13.104.030 Third Party Pay Transparency Attestation.**
- 13.104.040 Construction Pay Transparency Report.**
- 13.104.050 Determination of Construction Pay Transparency Compliance.**
- 13.104.060 Issuance of a Certificate of Occupancy.**
- 13.104.070 Private Rights of Action.**
- 13.104.080 City Manager Regulations.**
- 13.104.090 Severability.**

13.104.010 Findings.

A. The City of Berkeley is committed to protecting the public health, safety and welfare. The construction industry involves unique labor standards compliance challenges. Construction workers who do not receive all of their wages and mandatory benefits are likely to discover that despite the best efforts of State enforcement officials, many employees continue to be victims of wage theft because they are unaware of their rights or the State lacks adequate resources to advocate on their behalf. General contractors and Developer/Owners who receive City-issued permits and licenses and who benefit from the construction workers' labor may disclaim responsibility for making underpaid workers whole.

B. Testimony presented to the State of California's "Little Hoover" Commission stated that existing studies suggest that "the underground economy" is at least a \$10 billion problem in California. Statewide, the construction industry is the industry with the second highest level of labor standards violations (as measured by State Labor Commissioner penalty assessments), surpassed only by the restaurant industry. Deputy Labor Commissioners conducted 985 inspections in the private construction industry in 2012-13, yielding 595 citations that assessed \$5.3 million in penalties. Enforcement actions, however, are dwarfed by the number of contractors and projects in California, including projects in Berkeley. Over 300,000 state-licensed contractors performed

about \$48 billion worth of private construction work in the State in 2014. The mismatch between the resources of the State and the scope of the issue of fundamental wage projections through disclosure and transparency requires the involvement of local government police powers.

C. Assembly Bill 469, also known as the Wage Theft Protection Act of 2011, went into effect on January 1, 2012, adding section 2810.5 to the Labor Code. The act requires that all employers provide each employee with a written notice containing specified information at the time of hire.

D. This Chapter will ensure compliance with the Wage Theft Protection Act of 2011 by requiring confirmation by owners, contractors and subcontractors of the rate of pay and other legally required information regarding mandatory and voluntary fringe benefits pursuant to Labor Code section 2810.5.

13.104.020 Definitions.

Whenever used in this chapter, the following terms shall have the meanings set forth below.

A. "City" shall mean the City of Berkeley.

B. "Completion of the project" means that construction is complete and the project is eligible for a Certificate of Occupancy or Temporary Certificate of Occupancy.

C. "Contractor" shall mean the prime contractor.

D. "Owner" shall mean the person or persons, firm, corporation or partnership exercising ownership of the Project.

E. "Project" shall mean new construction of greater than 30,000 square feet that are not subject to local, state or federal prevailing wage requirements or do not have a valid Project Labor or Community Workforce Agreement..

F. "Project construction employees" shall mean employees of the contractor or subcontractor.

G. "Subcontractor" shall mean a subcontractor of any tier.

13.104.030 Third Party Pay Transparency Attestation.

A. Within 30 days of the issuance of a building permit, for each construction contractor or subcontractor whose portion of the work exceeds \$100,000 or one percent (1%) of the value of the construction cost of the Project, whichever is greater, Owner shall provide to the City an attestation by an authorized representative of the Owner, contractor and/or subcontractor that either: (i) employees of the contractor or subcontractor(s) received Labor Code Section 2810.5 compliant notices and Labor Code Section 226(a) compliant itemized wage statements; or (ii) employees of contractor or subcontractor(s) meet one or more of the criteria of Labor Code section 2810.5(c).

B. The attestation referenced in section A shall be updated every 30 days and provided to the City until the completion of the Project. A final Third Party Pay Transparency Attestation shall be provided to the City within 10 days from the completion of the Project by an authorized representative from the Owner, contractor and/or subcontractor, which shows the extent to which : (a) Project construction employees received complete and accurate information pursuant to Labor Code Sections 226 and

2810.5; or (b) Project construction employees meet one or more of the criteria of Labor Code section 2810.5(c).

13.104.040 Construction Pay Transparency Report.

Upon completion of the Project, the Owner shall submit a Construction Pay Transparency Report on a form approved by the City for this purpose. The completed Construction Pay Transparency Report shall be attested by an authorized representative of the Owner and contain a Contractor & Subcontractor List with:

- (i) an updated list of the portions of construction and demolition work broken down by subcontracts and organized by CSI Division; and
- (ii) an updated and final list of the complete names and Contractors State License Board license number of entities that worked on the Project. For each subcontract, the List shall provide an updated percentage of the total Project construction cost performed by each subcontractor.

13.104.050 Determination of Construction Pay Transparency Compliance.

Prior to approval of a certificate of occupancy for the Project, the City shall make a finding of compliance with the provisions of this Chapter. Such finding shall be issued if: (i) the City determines after review of the information provided pursuant to section 13.104.030 and 13.104.040 that the Owner, contractor and/or subcontractor(s) have complied with the provisions of this Chapter; and (ii) the City has not received any information that the Labor Commissioner's Office of the State of California has found violations of Labor Code Sections 226 or 2810.5 regarding construction work performed at the Project.

13.104.060 Issuance of a Certificate of Occupancy.

A. The City shall issue a Certificate of Occupancy to the Owner if it makes a finding of Construction Pay Transparency Compliance pursuant to 13.104.050 and all requirements of the building code are met.

B. If the City determines that section 13.104.030 and 13.104.040 have not been satisfied, the City may approve a Certificate of Occupancy upon being presented with evidence of the existence of a Labor Payment or a Lien Release Bond(s) for the Project. The bond shall be in an amount equal to 20 percent of the value of the subcontract(s) for the contractor(s) that did not receive an attestation, or 125 percent of the amount of any Project-related, Labor Commissioner-issued Civil Wage and Penalty Assessment(s) or mechanics lien(s), whichever is greater.

13.104.070 Private Right of Action.

Nothing in this chapter shall be interpreted to authorize a right of action against the City.

13.104.080 City Manager Regulations.

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

13.104.090 Severability.

If any word, phrase, sentence, part, section, subsection, or other portion of this chapter, or any application thereof to any person or circumstance is declared void, unconstitutional, or invalid for any reason, then such word, phrase, sentence, part, section, subsection, or other portion, or the proscribed application thereof, shall be severable, and the remaining provisions of this chapter, and all applications thereof, not having been declared void, unconstitutional or invalid, shall remain in full force and effect. The City Council hereby declares that it would have passed this title, and each section, subsection, sentence, clause and phrase thereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses or phrases had been declared invalid or unconstitutional.

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 Old City Hall, 2134 Martin Luther King Jr. Way. Within fifteen 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.

JAN 26 2016

OFFICE OF THE CITY CLERK
CITY OF BERKELEY



Berkeley City Council

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ACTION CALENDAR

January 26, 2016

(Continued from December 15, 2015)

To: Honorable Mayor and Members of the City Council
From: Councilmembers Laurie Capitelli, and Darryl Moore, Linda Maio and Kriss Worthington
Subject: Wage theft prevention Condition of Approval for Major Development Projects

RECOMMENDATION:

~~After review by staff Refer to the City Manager to~~, include as a standard condition of approval ~~in~~ generate an ordinance requiring all projects that include new construction of greater than 30,000 square feet and that are not subject to local, state, or federal prevailing wage requirements or do not have a valid Project Labor or Community Workforce Agreement that adhere to the requirements as outlined below following:

A. The applicant shall complete and submit a project Construction Pay Transparency Plan (the 'Plan'), on a form approved by the City for this purpose. The completed Plan shall indicate all of the following:

1. Contractor & Subcontractor List: List portions of construction work broken down by anticipated subcontracts and organized by CSI Division. Provide the complete name and Contractors State License Board license number of entities already under contract to perform the Project or portions of the Project. For each subcontract, provide the estimated percentage of the total Project construction cost to be performed.
2. Notice at the Time of Hire: Any contract(s) with Project prime construction contractor(s) shall require that the prime contractor(s), subcontractors and subsubcontractors of all tiers provide all employees whose labor is used in connection with the Project with a written notice containing specified information at the time of hire, pursuant to California Labor Code Section 2810.5, insofar as applicable to the performance of Project work and insofar as Project employees are not exempt per Labor Code section 2810.5(c).¹¹ The contract(s), subcontracts and sub-subcontracts shall attach as Exhibits the templates for such written notice - in various languages - that have been prepared by the state Labor Commissioner ([link](#)).
3. Itemized Wage Statements (Pay Stubs): Any contract(s) with Project construction prime contractor(s) shall require that the prime contractor(s), subcontractors and subsubcontractors of all tiers provide all employees whose labor is used in connection with the Project with

Itemized wage statements ("pay stubs") that are compliant with California Labor Code Section 226. The contract, subcontracts and sub-subcontracts shall include Exhibits that provide the current statutory language of Labor Code Section 226(a) and model itemized wage statements (pay stubs) provided by the Labor Commissioner (here for employees paid an hourly wage; here for employees paid on a piece rate basis).

4. Third Party Pay Transparency Attestation: For each construction contractor, subcontractor, or sub-subcontractor whose portion of the work exceeds \$2400,000 or ~~two~~ two percent (24%) of the value of Project construction, whichever is greater, Applicant shall provide the name, address and telephone number of a firm retained by the Applicant, the Project contractor or subcontractors that shall - prior to issuance of a certificate of occupancy - provide a Certified Public Accountant's attestation that one of the ~~two~~ two following conditions has been met:

a. Project construction employees receive Labor Code Section 2810.5-compliant notices and Labor Code Section 226(a)-compliant itemized wage statements; or

a-b. All Project construction employees meet one or more of the criteria of Labor Code section 2810.5(c)

b. ~~All Project construction employees meet one or more of the criteria of Labor Code section 2810.5(c).~~

B. Prior to the issuance of a building permit, an applicant shall submit and obtain approval for the Plan by the Zoning Official or designee.

C. Upon completion of the Project, the applicant shall submit a Construction Pay Transparency Report on a form approved by the City for this purpose. The completed Pay Transparency Report, signed by an authorized representative of the Applicant/Owner, shall indicate the following:

1. Contractor & Subcontractor List: An updated list of the portions of construction and demolition work broken down by subcontracts and organized by CSI Division. Provide the updated & final list of the complete names and Contractors State License Board license number of entities that performed the Project or portions of the Project, including subcontractors of any tier. For each subcontract, provide an updated percentage of the total Project construction cost performed.

2. Updated List of Third Party Pay Transparency Auditor(s): For each construction contractor or subcontractor who meet the criteria of subsection A(4), Applicant shall provide an updated & final list of the name, address and telephone number of the firm(s) retained by the Applicant and/or the Project contractor and/or subcontractors that shall provide a Certified Public Accountant's attestation regarding the Labor Code sections enumerated in A(4) of this section.

3. Certified Public Accountant's Attestation: Applicant shall provide copies of all reports that contain a Certified Public Accountant's attestation that one of the two following conditions has been met:

a. Project construction employees received complete & accurate information per Labor Code Sections 226 and 2810.5; or

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b. All Project construction employees meet one or more of the criteria of Labor Code section 2810.5(c).

D. Determination of Construction Pay Transparency Compliance: Prior to approval of a certificate of occupancy for the Project, the Official shall make a finding of compliance and will provide a written determination regarding compliance to the owner. To make a finding of compliance:

1. The Official reviews the information submitted under subsections A and C of this section and determines that the applicant has adequately complied; And

2. The Official has received no information that the Labor Commissioner's Office of the State of California has found violations of Labor Code Sections 226 or 2810.5 regarding construction work performed at the Project, the Official shall not make a finding of compliance.

E. Issuance of a Certificate of Occupancy: The Official or designee may issue a Certificate of Occupancy to the applicant if:

1. The Official has made a finding of Construction Pay Transparency Compliance per subsection D; or

2. The Official has determined that either subsection D(1) or D(2) have not been satisfied, the Official may approve a Certificate of Occupancy upon being presented with evidence of the existence of a Labor Payment or a Lien Release Bond(s) for the Project. The bond shall be in an amount equal to 125 percent of 340 percent of the value of the subcontract(s) for the contractor(s) that did not receive a CPA's attestation or 125 percent of the amount of any Project-related, Labor Commissioner-issued Civil Wage and Penalty Assessment(s) or mechanics lien(s), whichever is greater.

BACKGROUND:

The recommended additional Condition of Approval ordinance takes a modest step towards incentivizing lead Development and Construction companies to ensure that workers on a major project are not deprived of a fundamental right: disclosure and transparency regarding who their employer is, what their rate of pay is and other legally required information regarding mandatory and voluntary fringe benefits. It merely requires compliance with existing State Labor Code and confirmation of such compliance. Additionally, it attaches assurances that, if such compliance has not been confirmed, applicants will be liable.

Testimony presented to State of California's "Little Hoover" Commission recently stated that existing studies suggest that "the underground economy" is at least a \$10 billion problem in California. Statewide, the construction industry is the industry with the second highest level of labor standards violations (as measured by State Labor Commissioner penalty assessments), surpassed only by the restaurant industry. Deputy Labor Commissioners conducted 985 inspections in the private construction industry in 2012-13, yielding 595 citations that assessed \$5.3 million in penalties. Enforcement actions, however, are dwarfed by the number of contractors and projects in California: Over 300,000 state-licensed contractors performed about \$48 billion worth of private construction work in 2014. The mismatch between the resources of the State and the scope of the issue of

fundamental wage projections through disclosure and transparency requires the involvement of local government police powers.

The construction industry involves unique labor standards compliance challenges. Construction workers who do not receive all of their wages and mandatory benefits are likely to discover that despite the best efforts of State enforcement officials, subcontractors are "judgment proof": State Labor Commissioner penalty assessments are collected at the rate of about \$0.20 on the dollar. General contractors and Developer/Owners, who do receive City-issued permits and licenses and who benefitted from the construction workers' labor, disclaim responsibility for making underpaid workers whole. While the City of Berkeley has attempted to strengthen local minimum wage enforcement by exerting the right to suspend or revoke city-issued permits and licenses (BMC 13.99.090), this power exerts little influence over highly mobile construction subcontractors as compared to immobile businesses such as restaurants.

The principal current recourse of construction workers who have been victims of wage theft while working in Berkeley is to file "mechanics liens" on the real property where they worked. Seeing a mechanics lien claim through to completion requires an accumulation of project-specific information (e.g. property parcel number, legal knowledge and financial resources that is scarce amongst unorganized construction workers). It is not surprising that an examination of Mechanics Lien filings in Alameda County reveals that nearly all liens are filed by *contractors or material suppliers*; not workers, despite the reported prevalence of wage theft in the construction industry.

ENVIRONMENTAL SUSTAINABILITY

Not applicable.

FINANCIAL IMPLICATIONS:

Staff Time.

CONTACT PERSON:

Councilmember Laurie Capitelli 510-981-7150
Councilmember Darryl Moore 510-981-7120

- 1 Labor Code section 2810.5(c): For purposes of this section, "employee" does not include any of the following:
- (1) An employee directly employed by the state or any political subdivision thereof, including any city, county, city and county, or special district.
 - (2) An employee who is exempt from the payment of overtime wages by statute or the wage orders of the Industrial Welfare Commission.
 - (3) An employee who is covered by a valid collective bargaining agreement if the agreement expressly provides for the wages, hours of work, and working conditions of the employee, and if the agreement provides premium wage rates for all overtime hours worked and a regular hourly rate of pay for those employees of not less than 30 percent more than the state minimum wage.