# The Fair Workweek Ordinance

**Berkeley Municipal Code 13.102**

**November 2023**

**City of Berkeley**
**Labor Standards Enforcement**

erose@berkeleyca.gov

**510-981-7551**

# About Us

Labor Standards Enforcement is part of the Heath, Housing, and Community Services Department, which aims to promote the health of all Berkeley residents by ensuring that they have their basic needs met, including economic stability.


CITY OF BERKELEY
HEALTH, HOUSING AND COMMUNITY SERVICES

The Labor Standards team helps employers and employees understand relevant chapters of the Berkeley Municipal Code, does outreach when local ordinances change, and enforces the labor ordinances by investigating complaints.

We also administer the following City of Berkeley labor ordinances:

| | |
|---|---|
| 13.27 | Living Wage Ordinance |
| 13.99 | Minimum Wage Ordinance |
| 13.100 | Paid Sick Leave Ordinance |
| 13.101 | Berkeley Family Friendly and Environment Friendly Workplace Ordinance |

# The Fair Workweek Ordinance

## Background

The City Council adopted this ordinance to ensure that workers within Berkeley have some predictability in their lives and work schedules, can avoid shifts that cause exhaustion, and can balance their lives, which often involve multiple jobs, childcare, and other family responsibilities. Having a predictable schedule is an important component of a healthy life. It is a matter of public health and family well-being.

## Purpose

To enact fair scheduling practices within the City of Berkeley, including:

1. Two weeks' advance notice of work schedules
2. Predictability pay for last-minute scheduling changes
3. The option for employees to decline back-to-back shifts without adequate rest
4. The requirement that employers offer any additional hours that become available to existing part-time employees

## Start Date

The ordinance will become operational for all Covered Employers and Covered Employees on Friday, **January 12, 2024**.

# Who is Covered?
## Employers

The Fair Workweek Ordinance applies to every employer within the City of Berkeley who has **10 or more employees in Berkeley** and 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 100 or more employees globally; or
3. a franchisee primarily engaged in the retail or restaurant industries and is associated with a network of franchises employing in the aggregate 100 or more employees globally; or
4. a not-for-profit corporation organized under Section 501 of the United States Internal Revenue Code in the building services, healthcare, hotel, manufacturing, retail, restaurant or warehouse services industries and employs 100 or more employees globally.

# Who is Covered?
## Employers

**Example 1:** Company A is a non-franchise retail business with two locations total, both in the City of Berkeley and each with 25 employees. Company A **is not** a Covered Employer under the Fair Workweek Ordinance.

**Why?** Because Company A is an employer primarily engaged in the retail industry that does not have 56 or more employees globally.

**Example 2:** Company B owns one franchise restaurant in Berkeley with 15 employees and is associated with a network of franchises that employs more than 100 people globally. Company B **is** a Covered Employer.

**Why?** Because Company B is primarily engaged in the restaurant industry, has at least 10 employees in Berkeley, and is associated with a large global franchise.

**Example 3:** Company C owns three non-franchise restaurants: one in Berkeley with 20 employees and two in Oakland with 40 employees each. Company C **is** a Covered Employer.



**Why?** Because Company C is primarily engaged in the restaurant industry, has at least 10 employees within the City of Berkeley, and has exactly 100 employees globally.

# Who is Covered?
## Employers

**Example 4:** Company D owns four warehouses, one of which is located in the City of Berkeley. The Berkeley warehouse employs 12 workers, and the other three warehouses employ 10 workers each. At its headquarters, Company D has 10 salaried administrative employees and 5 temporary employees. Company D **is** a Covered Employer.

**Why?** Because Company D is primarily engaged in the warehouse services industry, has 10 or more employees in Berkeley, and has 57 employees globally. When determining the total number of employees your business has globally, count all individuals (not FTEs), including salaried, executive, and temporary employees.

**Example 5:** Company E is an affordable housing non-profit in the City of Berkeley that has 10 janitorial employees. Company E **is not** a Covered Employer.

**Why?** Because Company E is primarily engaged in affordable housing, which is not one of the covered industries under the ordinance. Company E is not a Covered Employer even though some of its employees provide building services.

# Who is Covered?
## Employees

1. A Covered Employee must perform **at least two hours of work** in a calendar week within the geographic boundaries of Berkeley **for a Covered Employer**;

2. A Covered Employee must qualify as **an employee entitled to payment of a minimum wage** under the California minimum wage law (Labor Code Section 1197 and wage orders published by the California Industrial Welfare Commission); and

3. A Covered Employee is an employee who is:

    i. **not exempt from payment of an overtime rate** of compensation pursuant to Labor Code Section 510; and

    ii. **not paid a monthly salary** equivalent to at least forty hours per week **at a rate of pay of twice the Berkeley minimum wage,** which is $18.07 per hour in Fiscal Year 2024.

# Who is Covered?
## Employees

**Example 1:** Employee A works two 6-hour shifts per week for a Covered Employer within the Berkeley City limits. Employee A is a non-exempt hourly employee who is subject to the minimum wage laws. Employee A **is** a Covered Employee under the Fair Workweek Ordinance.

**Why?** Because Employee A works at least two hours per calendar week for a Covered Employer and is not subject to any of the exceptions in the ordinance's definition of an employee.

**Example 2:** Employee B works for a Covered Employer as a full-time administrative employee who earns a salary and is exempt from the minimum wage laws. Employee B **is not** a Covered Employee under the ordinance.

**Why?** Because some of the exceptions in the ordinance's definition of an employee *do* apply to Employee B. Employee B is a salaried employee who is exempt from the overtime rate of compensation as defined in Labor Code Section 510.

# Who is Covered?
## Employees

**Example 3:** Employee C works at least 40 hours every week for a Covered Employer primarily engaged in the healthcare industry. Employee C is a non-exempt hourly employee who can earn overtime rates of compensation, and their hourly rate is $50. Employee C **is not** a Covered Employee under the ordinance.

**Why?** Because some of the exceptions in the ordinance's definition of an employee apply to Employee C. Employee C earns the full-time salary equivalent of twice the current Berkeley minimum wage, which is $18.07. **If Employee C worked fewer than 40 hours per week**, Employee C **would be** a Covered Employee under the ordinance.

# Key Employer Responsibilities

1. Notify Employees of FWW Ordinance
2. Advance Notice of Work Schedule
3. Offer of Work to Existing Employees
4. Right to Rest
5. Flexible Work Arrangements
6. Predictability Pay
7. Exceptions

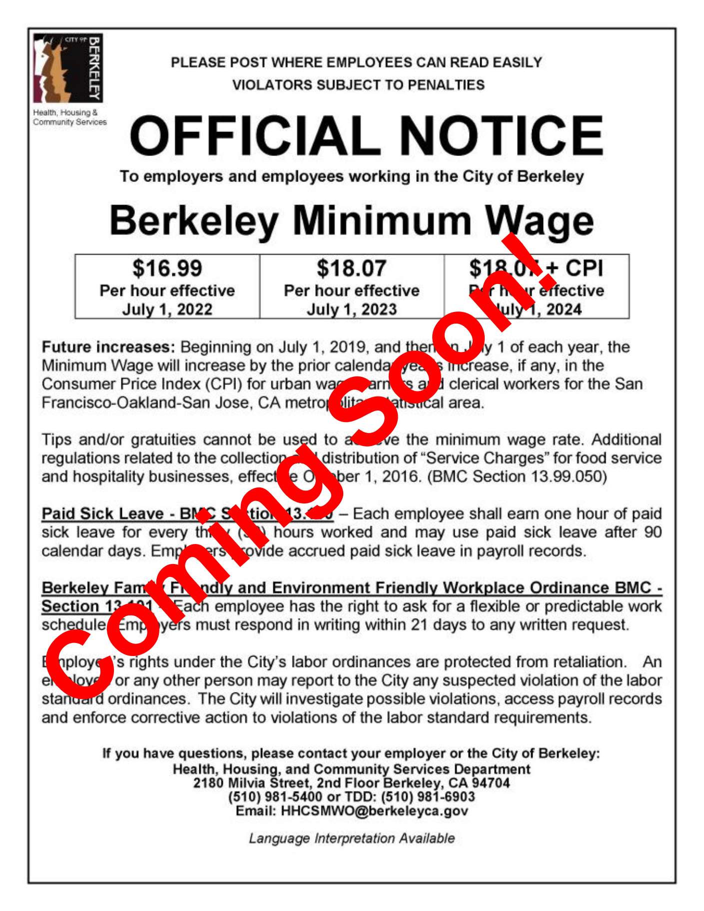
# Employer Responsibility #1: Notify Employees of FWW Ordinance

## Poster

- Employers must **post a public notice** regarding The Fair Workweek Ordinance at worksites in areas where it will be seen by all employees.

## Written Notice of Rights

- Employers must give current employees **written notification of their rights** under this chapter.
- **At the time of hire**, employers must give new employees written notification of their rights under this chapter *and* a copy of employer's name, address, and telephone number.
- **"Written" can mean printed or electronic** format, including email, text message or a calendar program.




CITY OF BERKELEY
Health, Housing & Community Services

PLEASE POST WHERE EMPLOYEES CAN READ EASILY
VIOLATORS SUBJECT TO PENALTIES

**OFFICIAL NOTICE**

**To employers and employees working in the City of Berkeley**

**Berkeley Minimum Wage**

| | | |
|---|---|---|
| **$16.99** Per hour effective July 1, 2022 | **$18.07** Per hour effective July 1, 2023 | **$18.0[illegible] + CPI** [illegible] effective [illegible]uly 1, 2024 |

**Future increases:** Beginning on July 1, 2019, and then [illegible] July 1 of each year, the Minimum Wage will increase by the prior calenda[illegible] increase, if any, in the Consumer Price Index (CPI) for urban wa[illegible] and clerical workers for the San Francisco-Oakland-San Jose, CA metrop[illegible]atistical area.

Tips and/or gratuities cannot be used to a[illegible]ve the minimum wage rate. Additional regulations related to the collection [illegible] distribution of "Service Charges" for food service and hospitality businesses, effect[illegible] O[illegible]ber 1, 2016. (BMC Section 13.99.050)

<u>**Paid Sick Leave - BM[illegible] S[illegible]tion 13.[illegible]**</u> – Each employee shall earn one hour of paid sick leave for every th[illegible] ([illegible]) hours worked and may use paid sick leave after 90 calendar days. Empl[illegible]ers [illegible]ovide accrued paid sick leave in payroll records.

<u>**Berkeley Fam[illegible] F[illegible]ndly and Environment Friendly Workplace Ordinance BMC - Section 13.[illegible]**</u> – Each employee has the right to ask for a flexible or predictable work schedule. Emp[illegible]yers must respond in writing within 21 days to any written request.

[illegible]mploye[illegible]'s rights under the City's labor ordinances are protected from retaliation. An e[illegible]loye[illegible] or any other person may report to the City any suspected violation of the labor stan[illegible]d ordinances. The City will investigate possible violations, access payroll records and enforce corrective action to violations of the labor standard requirements.

**If you have questions, please contact your employer or the City of Berkeley:**
**Health, Housing, and Community Services Department**
**2180 Milvia Street, 2nd Floor Berkeley, CA 94704**
**(510) 981-5400 or TDD: (510) 981-6903**
**Email: HHCSMWO@berkeleyca.gov**

*Language Interpretation Available*

The City of Berkeley will supply employers with an electronic copy of the notice before January 12, 2024.

# Employer Responsibility # 2: Advance Notice of Work Schedules

## Initial Estimate of Minimum Hours

- Employers must provide each employee **with a good faith estimate** in writing of the employee’s work schedule.
- Employers must provide new employees with an initial work schedule **prior to or on their first day of employment**.
- The estimates must be **in writing**.
- The employee may submit a written request to modify the estimated work schedule. The covered employer may accept or reject the request and **must notify the employee of the determination in writing**.

# Employer Responsibility # 2: Advance Notice of Work Schedules

## Two Weeks' Advance Notice of Work Schedules

Employers must provide employees with at least two weeks' (14 days') notice of their work schedules by:

1. **posting the work schedule in a conspicuous place at the worksite** 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 schedule at the worksite as well.

An employee who is the victim or domestic or sexual violence may request that their schedule not be posted or transmitted to other employees.

# Employer Responsibility # 3: Offer of Work to Existing Employees

## Offer of Additional Hours

Before hiring new employees, including temps, employers must first offer additional hours to existing part-time employees if:

- they have worked for the employer for **more than 2 weeks**; and
- they are **qualified** to do the additional work; and
- the additional **hours do not conflict** with their work schedule.

Employers have discretion to distribute the additional work hours among employees as long as they:

- **do not discriminate**; and
- **do not avoid giving an employee 30 hours** in order to avoid the obligation to provide medical benefits.

Employers are not obligated to offer additional hours on the basis of seniority.

# Employer Responsibility # 3: Offer of Work to Existing Employees

## 24 Hours to Accept

- Employees have **24 hours to accept** an offer of additional hours.
- Employees are **not obligated to accept** the offer of additional hours.
- Employees who wish to accept additional hours **must do so in writing**.
- Employers **may offer additional hours to individual employees or may post the offer** where notices to employees are customarily posted, allowing part-time employees to accept additional hours on a first come, first served basis.
- **The 24-hour period begins** either when the employee receives the written offer of additional hours, or when the employer posts the offer of additional hours, whichever is sooner.

# Employer Responsibility # 5: Flexible Work Arrangements

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.

Employers **may accept, modify, or decline** the employee's request.

Employer **may not retaliate** against an employee for exercising their rights under this Ordinance or the under the Berkeley Family Friendly and Environment Friendly Workplace Ordinance.

# Employer Responsibility # 4: Right to Rest

Employees have the **right to decline** work hours that occur less than 11 hours after the end of the previous shift.

Employees who agree in writing to work hours with less that 11 hours' rest **must be paid one and one-half times their regular rate of pay** for any hours worked less than 11 hours following the end of a previous shift.

**Example:** An employee has agreed to close at 10 pm on Saturday and open at 7 am on Sunday. The employee had the right to decline to work before 9 am on Sunday. Since the employee has agreed to work starting at 7 am for the Sunday shift, the employee must be paid time and a half (1.5 times their regular rate of pay) for the hours between 7 am and 9 am because those are hours worked without 11 hours' rest.

Starting at 9 am on Sunday, the employee will earn their regular rate of pay until the end of the shift.

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# Employer Responsibility # 6: Predictability Pay

| When a Covered Employer makes a schedule change<br>With less than 14 days' notice but 24 hours' or more notice to the employee | |
|---|---|
| Subtracts hours or cancels shifts | One hour of predictability pay |
| Adds hours or shifts | |
| Moves shifts to another date or time | |

| When a Covered Employer makes a schedule change<br>With less than 24 hours' notice to the employee | |
|---|---|
| Subtracts hours or cancels shifts | Four (4) hours or the number of cancelled or reduced hours in the employee's scheduled shift, whichever is less |
| Adds hours or shifts | One hour of predictability pay |
| Moves shifts to another date or time | |

An employee has the **right to decline any previously unscheduled hours with less than 14 days' notice** before the first day of any new schedule.

# Employer Responsibility # 6: Predictability Pay

**Example 1:** On January 14, an employer posts a work schedule that begins on February 4. The employer needs to modify the work schedule and on January 19 posts a new work schedule that begins February 4. The employer makes no further changes. **The employer does not owe predictability pay** to employees because the changes were made more than 14 days before the beginning of the work schedule.

**Example 2**: An employer cancels an employee's shift and notifies the employee in writing 3 days before the shift was set to begin. **The employer owes the employee 1 hour of predictability pay**.

**Example 3:** An employer cancels an employee's 8-hour shift with only 10 hours' notice. **The employer owes the employee 4 hours of predictability pay**.

**Example 4:** An employer reduces the hours in an employee's shift from 8 hours to 5 hours and informs the employee 9 hours before the beginning of the shift. **The employer owes the employee 3 hours of predictability pay** because the number of hours reduced on short notice is 3.

# Employer Responsibility # 7: Exceptions

## Scheduling Exceptions

Employers are **not** required to pay predictability pay under the following circumstances:

1. Mutually agreed-upon work **shift swaps** or coverage arrangements among employees;
2. Shift changes **initiated by the employee**, such as 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 only applies when the employee initiates the voluntary shift change; or
3. To accommodate the following **transitions in shifts,** provided the employee is compensated at their regular rate for the additional work.

   i. An employee begins or ends their scheduled shift **no more than ten minutes prior to or after** the scheduled shift

   ii. If an employee works **no more than thirty minutes past** the end of a scheduled shift **to complete service** to a customer.

# Employer Responsibility # 7: Exceptions

## Operational Exceptions

Employers are not required to pay predictability pay under 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.

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# Employer Responsibility # 7: Exceptions

## Industry-Specific Operational Exceptions

Employers are **not** required to pay predictability pay under the following circumstances:

- 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;

- 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 is reasonably expected to 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 healthcare employer's control.