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SAN JOSE THINKS IT KNOWS THE WAY

By [Kathiana Aurelien](#)

The Economic Policy Institute has reported that, in 2016, as many as 4 million workers nationwide wanted but were unable to obtain full-time work. While some have debated these numbers, the City of San Jose, California, has attempted to tackle the issue with a voter-enacted ordinance that imposes new restrictions and obligations on when employers can hire additional workers to meet their needs.

While San Jose is currently one of the only cities in the nation with such a law, it is unlikely that this status will last for long. San Francisco passed a narrower ordinance in 2014, the Predictable Scheduling and Fair Treatment for Formula Retail Employees Ordinance, applicable to large retail chains that employ 20 or more individuals in the City of San Francisco and have 20 or more locations worldwide. A legislator in California has already followed San Jose's lead and introduced proposed legislation.

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SAN JOSE'S OPPORTUNITY TO WORK ORDINANCE

The Opportunity to Work Ordinance (the "Ordinance"), approved by voters on November 8, 2016, went into effect on March 13, 2017, and requires employers with more than 35 employees to offer additional work hours to current part-time employees before hiring new employees, either directly or through a temporary staffing agency.

For an employee to fall under the Ordinance, he or she must have worked two hours for an employer within the last calendar week or be entitled to California's minimum wage.

Employers are not obligated to simply offer work to all part-time workers, whether or not they are qualified. Under the Ordinance, employers are required to offer the work hours to those employees who, in the employer's good faith and reasonable judgment, have the skills and experience necessary to perform the work. Additionally, under the Ordinance, an employer does not need to offer an existing employee additional hours if doing so would require the employer to compensate the existing employee at time-and-a-half or any other premium rate under the law or a collective bargaining agreement. The Ordinance also states that employers must "use a transparent and nondiscriminatory process to distribute the hours of work among those existing employees" but gives little guidance on what that means in practice.

The Ordinance imposes new notice and recordkeeping obligations on covered employers. Employers must post a notice, available on the Office of Equality Assurance's website, informing employees of their rights under the Ordinance. This notice must be placed in a conspicuous place where employees can easily read it. Employers must retain employee work schedules and other documentation for at least four years.

Although the Ordinance exempts employers from their first violation, it authorizes the City of San Jose to issue administrative fines of up to \$50 per violation and to seek civil penalties for noncompliance. The Ordinance also provides covered employees with a private right of action. A successful plaintiff would be entitled to lost wages, penalties, and attorneys' fees.

The Ordinance prohibits retaliation by covered employers and provides a rebuttable presumption of retaliation where an employee experiences an adverse employment action within 90 days of complaining about a violation of the Ordinance.

The Ordinance includes two exceptions for employers. First, the San Jose ordinance includes a carve out where a collective bargaining agreement explicitly waives the Ordinance in clear and unambiguous terms. Second, the City of San Jose has the authority to exempt employers

from the Ordinance where the employer works in good faith to comply but compliance is impracticable, impossible, or futile.

ASSEMBLY BILL 5 – CALIFORNIA'S OPPORTUNITY TO WORK ACT

Assembly members Lorena Gonzalez Fletcher and Ash Kalra recently introduced some legislation modeled after the Ordinance. The Opportunity to Work Act (the "Act") tracks many of the requirements found in the San Jose ordinance. The Act is making its way through the California legislative process and was recently approved by the California Assembly Committee on Labor and Employment on April 19, 2017.

Compared to the Ordinance, the Act would set a lower threshold for covered employers. While the Ordinance applies to those employers with more than 35 employees, the Act would apply to employers with as few as 11 employees. The proposed Act requires California employers with more than 10 employees to offer additional hours of work to existing part-time employees before hiring additional employees or subcontractors. Additionally, unlike the Ordinance, the Act does not currently include an exemption for impracticability, impossibility, or futility.

Similar to the Ordinance, the Act, as proposed, also imposes new recordkeeping and notice obligations on employers. The Act requires employers to post a notice outlining employee rights, to be created by the Division of Labor Standards Enforcement (DLSE). The Act provides for enforcement by the DLSE on its own accord or via complaint by an employee. Like the Ordinance, the Act also provides employees with a private right of action.

The Assembly Committee on Labor and Employment, chaired by Tony Thurmond, has stated in its analysis of the Act that, "while some have suggested that the shared responsibility provision of the Affordable Care Act, which requires certain employers to pay a fee if they don't offer a minimum level of health insurance to employees working 30 or more weekly hours, is behind some of this shift toward part time work, that theory is not supported by the data."

CONCLUSION

Employers in San Jose that have not already taken these steps should be sure to get the required notices from the Office of Equality and Assurance and immediately post them. San Jose employers should also keep written records of all offers of additional work hours made to part-time employees.

As the statewide statute goes through the California legislative process, employers concerned about the possible effects may want to weigh in.

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