

## Publications

### **Labor and Employment Alert: San Jose Ensures Part-Time Employees an 'Opportunity to Work'**

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Beginning on March 8, 2017, employers in San Jose generally must offer their part-time employees additional work hours before hiring new or temporary employees. The Opportunity to Work Ordinance (available [here](#)) also imposes additional recordkeeping requirements and significant penalties for noncompliance.

### **Coverage**

The ordinance applies to any person that employs more than 35 employees and is subject to San Jose's business tax (or, if exempt from that tax, has a place of business within the city). A person that employs 35 or fewer employees is exempt from the ordinance with two exceptions. For a chain business not owned by a franchise, the total number of employees is determined by the combined number of employees at every location, whether or not located in San Jose. For a franchisee, the total number of employees is determined by the combined total number of employees at every location owned by the franchisee operating under the same franchise, whether or not located in San Jose. Note that "employer" is broadly defined to include anyone who exercises direct or *indirect* control over an employee's wages, hours, or working conditions.

An "employee" is any person who has performed at least two hours of work for an employer or who is entitled to the state minimum wage.

### **Access to additional hours of work**

Before hiring additional employees or subcontractors, including hiring through the use of temporary services or staffing agencies, an employer must offer additional hours of work to existing employees who, in its good faith and reasonable judgment, have the skills and experience to perform the work. The employer must use a "transparent and nondiscriminatory process" to distribute those work hours among existing employees. An employer is not required to offer work hours to an employee if doing so would require the employer to pay overtime or a premium rate.

The city's Office of Equality Assurance may grant a limited hardship exemption if the employer demonstrates it has taken all good faith, reasonable steps to comply and full and immediate compliance would be impracticable, impossible, or futile.

### Notice and recordkeeping

The Office of Equality Assurance will publish and employers must post a notice of employee rights.

Employers are required to retain: (1) for any new hire of employees or subcontractors, documentation of the offer of additional hours of work to existing employees before completing the hire; (2) employee work schedules (defined as regular and on-call shifts, with specific start and end times, during a consecutive seven-day period); and (3) any other records the Office of Equality Assurance requires be maintained to demonstrate compliance.

### Penalties

The city can issue \$50 fines per violation (except for the first violation) as well as seek civil penalties in court for noncompliance. Moreover, the ordinance authorizes a private right of action for the employee to seek lost wages, penalties, and attorney's fees (thereby ensuring the continued opportunity to work for plaintiffs' attorneys).

Finally, the ordinance prohibits retaliation, which is very broadly defined to include any threat, harassment, discrimination or adverse employment action, as well as reporting or threatening to report the actual or suspected citizenship or immigration status of the employee or employee's family member to a federal, state, or local agency. There is a rebuttable presumption of retaliation when an employee claims to have suffered an adverse action within 90 days of complaining about a violation of the ordinance.

### Conclusion

The ordinance's requirements are both complex and vague, so it's possible that the city will issue additional guidance as the ordinance is implemented. Given that employees have the right to sue over violations, employers should carefully review their hiring and scheduling practices to ensure that they comply with the ordinance. Contact your Vorys lawyer if you have questions on the impact the ordinance will have on your business.