

# Part-Time Employees Get First Chance at Extra Hours under New San José Ordinance

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Employers in San José, California, must offer additional work hours to existing qualified part-time employees before hiring new employees beginning *March 13, 2017*, under the [Opportunity to Work Ordinance](#).

## Covered Employers and Employees

The Ordinance, or Measure E, passed by voters in 2016, applies to San José employers (including private and non-profit employers) who employ at least 36 employees *and* who are subject to the San José Business License Tax or maintain a facility in the city. Covered employers must offer existing part-time employees additional work hours before hiring new employees. “New employees” under the Ordinance include the use of subcontractors and temporary staffing services.

The city’s January 27, 2017, “preliminary” [Frequently Asked Questions](#) document on the Ordinance explains that a qualified employee is one who performs at least *two hours of work in a calendar week* for an employer within the geographic boundaries of San José and is entitled to payment of minimum wage under the California minimum wage law.

An employer must count both part-time and full-time qualified employees to determine whether it meets the 36-employee threshold. The FAQs explain that executive, administrative, and professional employees are *not covered* by the Ordinance and these employees *do not count* toward the 36-employee threshold.

If an employer is a “Chain” business (as defined by the Ordinance) not owned by a franchisee, the number of employees is determined by the total number of employees at every location of that Chain business, regardless of whether or not it is located within the city.

## Collective Bargaining Agreement

Under the San José Minimum Wage Ordinance, the provisions of the new Opportunity to Work Ordinance may be waived by a collective bargaining agreement. The waiver must be in a bona fide CBA and must be in clear and unambiguous terms.

## Recordkeeping and Poster

The Ordinance requires covered employers to retain the following records for at least four years:

- Work schedules and employment and payroll records on current and former covered employees;
- Copies of written offers to current and former covered part-time employees for additional work hours; and

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- Any other records the city's Office of Equality Assurance may require of employers to demonstrate compliance.

The city has published a [required poster](#) (expected to be available in four languages) that covered employers must posted in a location where employees can read it easily.

### Retaliation

It is unlawful for an employer to retaliate against employees who assert their right to be offered additional work hours under the Ordinance. There is a *rebuttable presumption of retaliation* if any adverse employment action is taken within 90 days of the employee exercising a right protected under the Ordinance.

### Enforcement and Remedies

The city's Office of Equality Assurance is responsible for administration and enforcement of the Ordinance. It will accept complaints of suspected violations and investigate where there appears to be a reasonable basis for the complaint. It may issue administrative citations and compliance orders, file a lawsuit, and seek reimbursement of the city's administrative costs of enforcement.

The Office of Equality Assurance also may grant a *hardship exemption* of up to 12 months to an employer who demonstrates that:

- It has undertaken, in good faith, all reasonable steps to comply with the Ordinance; and
- Full and immediate compliance would be impracticable, impossible, or futile.

An aggrieved individual also may file a lawsuit to enforce the right to be offered additional hours. The aggrieved individual who prevails may recover back pay and reasonable attorneys' fees and costs, among other remedies.

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Employers should regularly review their policies and practices with employment counsel to ensure they address specific organizational needs effectively and comply with applicable law. Jackson Lewis attorneys are available to answer inquiries regarding the Ordinance and assist employers to achieve compliance. Please contact a Jackson Lewis attorney with any questions.

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