

San Jose Minimum Wage Ordinance

-- PRELIMINARY -- Frequently Asked Questions

The City of San Jose's Office of Equality Assurance is providing the following information as a public service. This information and related materials are presented to give the public access to information on the San Jose Minimum Wage Ordinance. Please be aware that while we attempt to keep the information timely and accurate, there may be a delay between official publications of the materials and modification of these pages. Additionally, the City of San Jose is in the preliminary stages of implementing the Minimum Wage Ordinance adopted as Measure D, so the City reserves the right to modify or supplement this document as the need arises and further information is developed. Therefore, we make no express or implied guarantees regarding the accuracy of the information. Although we make every effort to correct any errors brought to our attention, you are directed to http://www3.sanjoseca.gov/clerk/elections/2012Election/november/measure_forms/measure_dord.pdf for the full text of the San Jose Municipal Wage Ordinance.

Questions and answers are grouped in the following categories: General; Employer Related; Employee Related; Administrative and Enforcement Related; and San Jose Business Tax Related.

GENERAL QUESTIONS

Q: What is the San Jose Minimum Wage Ordinance?

A: The San Jose Minimum Wage Ordinance was passed by City of San Jose voters on November 6, 2012. The Ordinance requires employers covered by the Ordinance to pay a minimum wage of **\$10.00 per hour** beginning **March 11, 2013** to each employee who performs at least two (2) hours or more per week of work in San Jose.

Q: What is the effective date of the San Jose Minimum Wage Ordinance?

A: **March 11, 2013** is the effective date of the San Jose Minimum Wage Ordinance. Employers covered by the Ordinance must pay their workers a minimum of **\$10.00 per hour** beginning **March 11, 2013**.

Q: What is the San Jose minimum wage?

A: Effective **March 11, 2013**, the San Jose minimum wage is **\$10.00 per hour**.

Q: How is the San Jose minimum wage adjusted?

A: Beginning January 1, 2014, and on every January 1 thereafter, the minimum wage will increase by an amount corresponding to the prior year's Consumer Price Index (CPI) for urban wage earners and clerical workers for the San Francisco-Oakland-San Jose CA metropolitan statistical area as reported by the US Department of Labor, Bureau of Labor Statistics.

Q: What is included in the definition of "wages" under the San Jose minimum wage?

A: "Wages" include compensation that is received in the form of salary, hourly pay, piece rate, commissions and non-discretionary performance bonuses. Wages do **not** include tips. In addition, San Jose permits employers to offset a portion of the San Jose minimum wage for housing and meal costs. The City offsets for housing and meal costs are the same as those offsets available under the California minimum wage law. The offsets are only recognized if there is a prior voluntary agreement between the employer and employee.

Q: Does the San Jose Minimum Wage Ordinance protect undocumented workers?

A: Yes. All workers in San Jose, whether or not they are legally authorized to work in the United States, are protected. The City's Office of Equality Assurance will process and investigate a wage claim without regard to a worker's immigration status. Workers filing a claim with the City's Office of Equality Assurance will not be questioned about their immigration status.

Q: What is the difference between the Federal, State and San Jose minimum wage laws?

A: San Jose employers are subject to Federal, State and San Jose minimum wage laws. When there are conflicting requirements in the laws, the employer must follow the strictest standard; that is, the one that is most favorable to the employee. Since San Jose's current law requires a higher minimum wage rate than does the state and federal law, covered employers are required to pay the City's minimum wage of **\$10.00 per hour**.

Q: Where can I find more information about the San Jose Minimum Wage Ordinance?

A: Information regarding the San Jose Minimum Wage Ordinance is posted at <http://www.sanjoseca.gov/index.aspx?NID=3491>. You can also call the San Jose Office of Equality Assurance (OEA) at 408-535-8430 or e-mail OEA at SJMWO@sanjoseca.gov.

EMPLOYER RELATED QUESTIONS

Q: Does the minimum wage apply to all San Jose employers?

A: The San Jose Minimum Wage applies to most employers. Employers that maintain a facility in San Jose **or** employers that are subject to the San Jose Business Tax are required to comply with the San Jose Minimum Wage Ordinance. The San Jose Minimum Wage Ordinance does **not** apply to employers that do not maintain a facility in the City of San Jose **and** are exempt from the San Jose Business Tax.

Q: What are the Minimum Wage Ordinance administrative requirements for covered employers?

A: In addition to payment of the minimum wage, covered employers are required to:

- (1) Post a notice at the workplace of the current and prospective minimum wage rates and the employees' rights under the Ordinance;
- (2) Maintain payroll records for a period of four (4) years; and
- (3) Provide in writing to each employee at time of hire with employer's name, address and telephone number.

The Minimum Wage Ordinance prohibits retaliation or discrimination against any person seeking to enforce the rights provided by the Ordinance.

Q: Does the San Jose minimum wage apply to all employers that have employees who perform work in San Jose?

A: Employers that maintain a facility in the City of San Jose **or** employers that are subject to the San Jose Business Tax must pay a minimum wage of **\$10.00 per hour** to each employee who performs work in San Jose for two (2) or more hours per week.

Q: Does the San Jose minimum wage apply to full-time and part-time employees?

A: Yes. Any person who performs at least two (2) hours of work in a particular week for an employer who is covered by the Ordinance must pay a minimum wage of **\$10.00 per hour**.

Q: Is the San Jose minimum wage the same for adult and minor employees?

A: Yes. The minimum wage is the same for adult and minor employees.

Q: Does the San Jose minimum wage cover employees who work in San Jose but are not San Jose residents?

A: Yes. Any person who performs at least two (2) hours of work in a particular week for an employer who maintains a facility in City of San Jose **or** is required to pay the San Jose Business Tax is entitled to be paid the San Jose minimum wage.

Q: May employers use tips as a credit toward its obligations to pay the San Jose minimum wage?

A: No. An employer may not use an employee's tips as a credit toward its obligation to pay the San Jose minimum wage.

Q: May employers use fringe benefits (health insurance, vacation, sick leave) as a credit toward its obligations to pay the San Jose minimum wage?

A: No. An employer may not use an employee's fringe benefits as a credit towards its obligation to pay the San Jose minimum wage.

Q: Are employers required to pay the San Jose minimum wage to workers who are exempted from the California minimum wage requirements?

A: No. The San Jose Minimum Wage Ordinance requires that employers pay the San Jose minimum wage to employees who are entitled to receive the California minimum wage. Certain categories of workers including independent contractors, learners and certain disabled workers are not entitled to the California minimum wage. For further information on these categories of exempted workers, please consult the Industrial Welfare Commission wage orders at <http://www.dir.ca.gov/iwc/wageorderindustries.htm>.

Q: Does the San Jose Minimum Wage Ordinance apply to employees covered by an existing collective bargaining agreement?

A: Yes. The San Jose Minimum Wage Ordinance is a minimum labor standard and a law of general application that applies to all employees covered by the Ordinance whether or not represented by a bargaining unit or union. However, under Ordinance Section 4.100.050, the provisions of the Minimum Wage Ordinance may be waived by a collective bargaining agreement. The Ordinance requires that the waiver must be in a bona fide collective bargaining agreement and must be in clear and unambiguous terms.

The parties to a collective bargaining agreement are free to negotiate any language they desire and the City of San Jose will not interfere with or participate in the negotiation of such language.

There may be many different ways to accomplish an effective waiver in a

collective bargaining agreement. An example of an effective waiver the City of San Jose's Office of Equality Assurance would recognize for purposes of enforcement is as follows: "Waiver of San Jose Minimum Wage Ordinance: To the fullest extent permitted, this agreement shall operate to waive any provisions of the San Jose Minimum Wage Ordinance and shall supersede and be considered to have fulfilled all requirements of said Ordinance as presently written, and or amended during the life of this agreement."

Q: May commissions be counted toward payment of the San Jose minimum wage?

A: Yes. Commissions may be counted toward payment of the San Jose minimum wage when the commissions are earned and paid together with other compensation paid to an employee and are equal to or greater than the current San Jose minimum wage. For each pay period, employers must pay the employee an amount that equals or exceeds the hours that the employee worked multiplied by the current San Jose minimum wage. If the employee's commissions for the pay period together with other compensation earned are less than that amount, the employer must pay the difference. Whether the employer may thereafter recover any amounts based on commissions that the employee earns in a later pay period or which are paid at a later date depends on whether the employer and employee have an enforceable written agreement.

Q: My business is a family run business. Do I need to pay my parent, spouse or child the San Jose minimum wage?

A: No. Consistent with California Labor Code Section 3352(a), individuals who are the parents, spouses or children of the employers are not covered by the San Jose minimum wage. Domestic partners are also excluded under the San Jose Minimum Wage Ordinance. However, an employer must pay the required San Jose minimum wage rate to any other person who performs more than two (2) hours of work in a week and qualifies as an employee entitled to payment of the minimum wage from any employer under the California Minimum Wage law as provided under Section 1197 of the California Labor Code and wage orders published by the California Industrial Welfare Commission.

Q: A company located outside of the San Jose City limits provides personal attendants to care for disabled adults in their homes and some of these adults reside in San Jose. Would the City of San Jose Minimum Wage Ordinance apply?

A: Yes. Even though the company does not maintain a facility in San Jose, it is conducting business in San Jose and is required to pay San Jose business tax. The Ordinance requires employers who maintain a facility in San Jose **or** employers that are subject to the San Jose Business Tax to comply with the San Jose Minimum Wage Ordinance.

Q: Are residential care facilities located in San Jose required to pay the San Jose minimum wage?

A: Yes. Although state law exempts residential care facilities for six or fewer elderly persons from the City's business license tax, all residential care facilities, regardless of number or type of occupant, are required to pay local minimum wage to employees when located in San Jose.

Q: A company moves its headquarters to a neighboring city but still performs work in San Jose. Would the City of San Jose Minimum Wage Ordinance apply?

A: Yes. Even though the company does not maintain a facility in San Jose, it is conducting business in San Jose and is required to pay San Jose business tax. The Ordinance requires employers who maintain a facility in San Jose **or** employers that are subject to the San Jose Business Tax to comply with the San Jose Minimum Wage Ordinance.

Q: A worker hired by a temp agency located in the City of San Jose is working outside of San Jose. Is the worker required to be paid a minimum of \$10.00 per hour?

A: No. Because the work is performed outside of San Jose, the agency is not required to pay the San Jose minimum wage.

Q: Are non-San Jose based non-profit organizations conducting business in San Jose subject to the San Jose Minimum Wage Ordinance?

A: Yes. The non-San Jose based non-profit is conducting business in San Jose and is subject to the San Jose Minimum Wage Ordinance. The non-profit can request and be granted a business tax exemption because it is a non-profit organization.

Q: Are government agencies with sites in San Jose subject to the San Jose Minimum Wage Ordinance?

A: State and federal agencies, including school districts, are not required to pay minimum wage when the work performed is related to their governmental function. However, for work that is not related to their governmental function (for example, booster or gift shops, non-K-12 cafeterias, on-campus pubs, and the like), minimum wage is required to be paid. Minimum wage is also required to be paid by lessees or renters of facilities or space from the government agency.

EMPLOYEE RELATED QUESTIONS

Q: May an employee agree to work for less than the City's minimum wage?

A: No. The minimum wage is an obligation of the employer and cannot be waived by agreement except collective bargaining agreements. To the extent required by federal law, all or any portion of the applicable requirements of the City of San Jose Minimum Wage Ordinance may be waived in a bona fide collective bargaining agreement provided that such waiver is explicitly set forth in such agreement in clear and unambiguous terms.

Q: **What can I do if my employer does not pay me at least the San Jose minimum wage?**

A: You may either file a wage claim with the City of San Jose's Office of Equality Assurance or file a lawsuit in court against your employer. If an employee chooses to file a claim alleging the non-payment of the San Jose minimum wage by her/his employer, the employee must file the claim either by mail or in person.

Q: **What can I do if my employer retaliates against me because I question her/him about not being paid the San Jose minimum wage?**

A: Under the San Jose Minimum Wage Ordinance, it is unlawful for an employer to retaliate against employees who assert their right to receive the San Jose minimum wage. There is a rebuttable presumption of retaliation if any adverse action is taken against a person within ninety (90) days of the person exercising their rights protected under the law. If you are subjected to retaliation, you may either file a claim with the City of San Jose's Office of Equality Assurance or file a lawsuit in court against your employer.

ADMINISTRATIVE AND ENFORCEMENT RELATED QUESTIONS

Q: **Who in the City is responsible for implementation and enforcement of the San Jose Minimum Wage Ordinance?**

A: The City's Office of Equality Assurance is responsible for implementation and enforcement of the Minimum Wage Ordinance. Their phone number is 408-535-8430. Their minimum wage e-mail address is: SJMWO@sanjoseca.gov.

Q: **What are the Minimum Wage Ordinance administrative and enforcement responsibilities of the City?**

A: The City's Office of Equality Assurance is responsible for administration and enforcement of the Minimum Wage Ordinance. The Office of Equality Assurance

will accept reports of suspected violations and investigate suspected violations where there appears to be a reasonable basis for the complaint.

As appropriate, the Office of Equality Assurance may:

- (1) Issue administrative citations and compliance orders;
- (2) File a lawsuit in court; and
- (3) Seek reimbursement of City's administrative costs of enforcement.

Q: What remedies are available to persons harmed by a violation of the Minimum Wage Ordinance?

A: Remedies available to persons harmed by a violation of the Minimum Wage Ordinance include:

- (1) Right to sue in court to enforce the wage requirement;
- (2) Award of back wages;
- (3) Civil penalties in the amount of \$50.00 per day to each employee harmed; and
- (4) Recovery of reasonable attorneys' fees and costs.

SAN JOSE BUSINESS TAX RELATED QUESTIONS

Q: What is the San Jose Business Tax?

A: The San Jose Business License Tax, Business Tax or License Tax is an annual obligation of businesses engaging in business in San Jose.

Q: Which employers are subject to the San Jose Business Tax?

A: All persons or companies conducting business in the City of San Jose are required to pay the Business Tax. Included are: commercial landlords; residential landlords (renting three (3) or more units); retail outlets; wholesalers; manufacturers; service companies; self-employed professionals; independent contractors; and home-based businesses. The San Jose Business Tax applies to home-based businesses and part-time operations.

Q: Does an employer whose business is not physically located in San Jose but conducts business in San Jose subject to the San Jose Business Tax?

A: Yes, but an employer may be entitled to an apportioned tax rate. The rate is pro-rated in accordance to the number of days you or your employees conduct business activities in San Jose. Any employer who is required to pay the San

Jose business license tax is required to pay the minimum wage under the ordinance.

Q: What is considered a business?

A: Under San Jose Municipal Code Section 4.76.050, a business includes all activities engaged in or caused to be engaged in within the City including any commercial or industrial enterprise, trade, profession, occupation, vocation, calling or livelihood including rental or lease of residential or nonresidential real estate and mobilehome parks or independent contractors whether or not carried on for gain or profit but shall not include the services rendered by an employee to his employer.

Q: What is an employee?

A: Under San Jose Municipal Code Section 4.76.060, an employee includes each and every person engaged in the operation or conduct of any business whether as owner, member of owner's family, partner, associate, agent, manager or solicitor, and each and every person employed or working in such business for a wage, salary, commission, or room and board.

Q: What does "engaged in business" mean?

A: Under San Jose Municipal Code Section 4.76.070, engaged in business means the commencing, conducting, operating, managing or carrying on of a business and the exercise of corporate or franchise powers whether done as an owner or be means of an officer, agent, manager, employee, servant or otherwise whether operating from a fixed location in the City or coming into the City from an outside location to engage in such activities.

Q: What does "evidence of doing business" mean?

A: Under San Jose Municipal Code Section 4.76.075, whenever any person shall by use of signs, circulars, cards or any other advertising media including the use of telephone solicitation, hold herself/himself out as or represent that she/he is doing business in the City then these facts may be used as evidence that such person in doing business in the City.

Q: Are any businesses excluded from the San Jose Business Tax?

A: Yes. Pursuant to federal law, banks including national banking associations and insurance companies and associations are excluded from the San Jose Business Tax.

Q: Can a person engaged in business in San Jose claim exemption from the payment of the San Jose Business Tax?

A: Yes.

A person can claim exemption from the payment of the San Jose Business Tax for the following common exemptions: honorable discharged disabled veteran; non-profit/charitable organization; farmers/poultry/horticulturist; interstate commerce (motor carrier permit); minor (16 years of age or younger); sale of hand-produced goods; senior citizen (65+ years of age); teachers; transient marketers at the Flea Market; family day care and family caregiver. For a complete listing of exemptions, please refer to Title 4, Revenue, Finance and Business Taxes of San Jose Municipal Code. To apply for an exemption, complete the Business Tax Exemption Request form. The form can be downloaded at: <http://www.sanjoseca.gov/DocumentCenter/View/2998>.

Additionally, a Business Tax Hardship Exemption Program is available to sole proprietorships and corporations that are owned by one person, husband/wife or domestic partner ownership structures that have: no employees and annual gross receipts at or below less than twice the poverty level which changes year to year. The term "poverty level" means the income amount established by the US Department of Health and Human Services as the poverty guideline for a single person multiplied by two (2) for the calendar year in the business tax is due. To apply for a Business Tax Hardship Exemption, complete the Business Tax Exemption Request form which can be downloaded at: <http://www.sanjoseca.gov/DocumentCenter/View/2999>.