

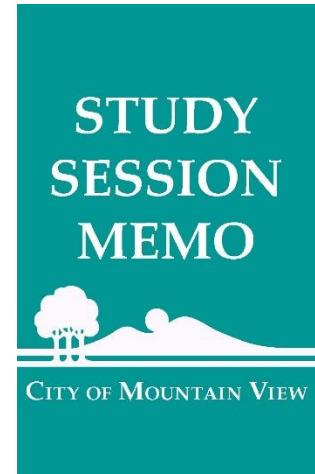
DATE: October 26, 2021

TO: Honorable Mayor and City Council

FROM: Christina Gilmore, Assistant to the City Manager
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VIA: Kimbra McCarthy, City Manager

TITLE: **Wage Theft and Responsible Construction Ordinances**



PURPOSE

The purpose of this Study Session is to receive City Council input on the development of a Wage Theft Ordinance and a Responsible Construction Ordinance to enhance wage protections for workers in the City of Mountain View.

BACKGROUND

In 2014, the City was a regional leader in adopting a local Minimum Wage Ordinance to provide a more livable wage for workers in Mountain View. During the Fiscal Year 2019-20 through Fiscal Year 2020-21 City Council Major Goal-Setting process, advocates from the Santa Clara County Wage Theft Coalition (Coalition) cited the impact of wage theft in the region and Mountain View. They requested that Council consider adding a project to develop and implement ordinances to address wage theft and responsible construction in Mountain View.

The Coalition was formed in 2013 and consists of 35 community organizations, grassroots groups, and nonprofits who are committed to responding to the ongoing crisis of wage theft, defending workers' rights, and ensuring enforcement of wage theft judgments through policy advocacy, community organizing, and outreach, education, and resource coordination.

At its May 21, 2019 meeting, the City Council adopted the Fiscal Year 2019-20 through Fiscal Year 2020-21 City Council Major Goals, which included a project to develop and consider ordinances to address wage theft and responsible construction as part of Council's Community for All Goal.

DISCUSSION

Overview of Timeline for Engagement, Research, and Ordinance Development

In summer 2019, staff met with representatives from the Coalition to learn more about wage theft and responsible construction and discuss their proposal. Staff conducted initial research regarding existing wage regulations and different ordinance models being considered and/or adopted by other Bay Area jurisdictions. Staff also met with representatives of the different City departments who would be involved in implementing wage theft and responsible construction ordinances to gather input on what might work best in Mountain View. The outbreak of the COVID-19 pandemic in March 2020 significantly affected the progress of this project as staff was redeployed to focus on programs and policies to provide relief to the community and address operational needs resulting from the pandemic.

In late 2020, staff resumed work on the project, meeting with representatives from the Fair Workplace Collaborative, a group of community-based organizations that advocate for workers' rights, continuing to conduct research, and engaging with various City staff to identify potential strategies and a timeline for the development and implementation of wage theft and responsible construction ordinances. Ultimately, this project was carried forward for inclusion in Council's current Fiscal Years 2021-22 and 2022-23 Strategic Roadmap Action Plan.

Definitions of Wage Theft and Responsible Construction

Wage theft occurs when an employee does not receive the full wages they are owed. Examples of wage theft outlined by the Department of Industrial Relations include paying less than minimum wage, not paying overtime, taking tips, unauthorized deductions from paychecks, not allowing required meal and rest breaks, bounced paychecks, not being paid promised vacations or bonuses, and not being allowed to use paid sick leave.

Workers in the following industries are at high risk for wage theft: retail, restaurants, caregiving, construction, massage and spa, and the service industry (e.g., security guards, janitors, hotel cleaning staff, and car wash workers). Existing wage and hour laws addressed later in this Study Session memorandum protect workers' rights and enable workers who have experienced wage theft to file a claim with the State to recover wages or other compensation and penalties.

Responsible construction refers to wage protection and other provisions specific to the construction industry. According to research conducted by Working Partnerships USA,

construction is the second-fastest growing industry in Silicon Valley after computer and mathematical occupations. The construction industry is large and can employ workers from many trades in a single construction project, often using a general contractor and several subcontractors. A 15,000 square foot project could employ up to a total of 2,000 people.

To learn more about ongoing wage theft claims in Mountain View, staff submitted a public records request to the Labor Commissioner's Division of Labor Standards Enforcement (DLSE) to obtain data for wage theft claims filed from 2011 through 2020. The report highlighted that 101 wage theft claims were filed beginning in 2017 through November 2020. In 51 instances, the claims were settled or final judgments had been issued. As of November 2020, 50 cases were open, of which 22 were filed in 2020. Most of the cases were from the retail, restaurant, corporate organization, and health-care sectors.

Existing Wage and Hour Protections in California

New City ordinances addressing wage theft and responsible construction can be best considered in the context of existing State and local laws, which provide various wage protections for workers. Some apply only to public works projects, while others apply more generally.

Wage and Hour Laws

The State requires all employers to comply with various wage and hour laws. These include, for example, minimum wages per hour, allowance for required meal and rest breaks, overtime, paid sick leave, reimbursement for business expenses, payment for promised vacations or bonuses, and split shift premiums. As mentioned above, when an employee does not receive their required wages, this is referred to as wage theft.

In 2011, the State enacted the California Wage Theft Prevention Act of 2011 (the Act). The Act requires, with some exceptions, that private-sector employers provide their employees written notice upon hire of specified information, including the employee's wage, Workers' Compensation, and minimum paid sick leave requirements under State law. Existing law had already required specified information be posted by an employer in locations where employees could view it. The Act required individualized notice to each employee.

Under State law, workers who believe wage theft has occurred can file a claim with the DLSE to recover wages or other compensation and penalties. Prior to a hearing on the claim, the DLSE may schedule a conference to try to informally resolve the matter. If the

claim is not resolved, a hearing is scheduled. The hearing officer renders a decision after the hearing, and either party can appeal the decision in court.

Violations of wage and hour laws may result in criminal penalties, civil penalties, liquidated damages, and/or restitution of unpaid wages. In addition, the State investigates and enforces other labor law violations, including employers engaged in systemic violations of wage and hour laws.

City's Minimum Wage Ordinance

The City adopted a local Minimum Wage Ordinance in 2014. The ordinance establishes a higher minimum wage requirement than required under State law for employers either subject to the City's business license requirements or that maintain a business facility in the City. The minimum wage requirement applies to employees who work at least two hours per week in Mountain View. In addition, the Minimum Wage Ordinance requires an annual posting of the current minimum wage rate and rights under the Minimum Wage Ordinance in a conspicuous place at any workplace or job site.

The ordinance also provides for coordination with the City of San Jose Office of Equality Assurance (OEA) to conduct initial investigations of complaints of violations and informal resolution, with escalated cases administered by the City under enforcement provisions contained in the City Code. A report provided by OEA covering from July 20, 2020 through August 31, 2021 showed no complaints were received during this period.

Public Works Projects and Prevailing Wage

Prevailing wage is the minimum wage required to be paid to workers based on their classifications for work performed on a public works project that is paid for in whole or in part with public funds. Chapter 42 of the City Code applies prevailing wage law to public works construction projects of more than \$25,000 and projects for alteration, demolition, repair, and maintenance work of more than \$15,000. Prevailing wages generally apply to public works projects meeting these requirements, with exceptions set forth in State law.

State law requires contractors to maintain certified payroll records to demonstrate compliance with prevailing wage requirements. In addition, payment bonds are required for public projects in excess of \$25,000 to secure payment of labor and materials for the project.

A payment bond allows subcontractors providing work for the project to file claims for payment against the bond for unpaid amounts due. In addition to a claim for payment

against the bond, a subcontractor can issue a stop payment notice to the City that requires the City to withhold sufficient funds due under the stated claim from the project funds until the claim is resolved. Notice must also be issued to the City. These protections help ensure full compensation to subcontractors on the project.

Efforts to Curtail Wage Theft

Santa Clara County established the Office of Labor Standards Enforcement (OLSE) in 2018 to lead the County's data collection and research initiatives related to the advancement of labor standards. OLSE began Phase I of the Food Permit Enforcement Program in 2019 in Mountain View, Sunnyvale, and parts of San Jose. Under this program, OLSE partners with the Santa Clara County Department of Environmental Health—Consumer and Environmental Protection Agency (DEH) to conduct outreach to food facility permittees with existing judgments for violations to encourage payment of such judgments. If a retail food vendor continues to violate their judgment for nonpayment, the County of Santa Clara may elect to suspend or revoke the vendor's food health permit temporarily.

In addition, on January 26, 2020, the Santa Clara County Board of Supervisors unanimously passed a measure to: (1) task community outreach workers with conducting outreach and education to retail food businesses, in consultation with workers and advocates; (2) create a Food Retail Task Force with input from workers and advocates to carry out enhanced enforcement at retail food businesses that have been leading sources of complaints and violations; and (3) suspend and revoke retail food facility permits for businesses where failure to cooperate with authorities poses an imminent threat of harm.

OLSE has also launched a Labor Standards Outreach and Education Initiative. The goal of this initiative is to inform businesses and workers of their rights and responsibilities and deliver support and individualized services to those seeking assistance to resolve potential claims or existing judgments. OLSE contracts with the member organizations of the Fair Workplace Collaborative, including Working Partnerships USA, Day Worker Center of Mountain View, Step Forward Foundation, Pilipino Association of Workers and Immigrants, Vietnamese American Roundtable, Enterprise Foundation/Silicon Valley Small Business Development Center, and Silicon Valley Latinx Chamber of Commerce.

In recent years, other cities in Santa Clara County have also adopted ordinances or established Council policies to address wage theft and promote responsible construction. San Jose, Morgan Hill, Sunnyvale, and Santa Clara County established council policies that require all parties contracting with the jurisdiction for the purchase of materials,

supplies, goods, and/or services to comply with wage and hour laws. The policies include provisions to disqualify a potential contractor for unpaid wage judgments and/or violations of applicable wage and hour laws within the five years preceding submission of a bid or proposal to contract with the jurisdiction. Failure to disclose or violations of wage and hour laws during the term of the contract can lead to contract termination. In addition, San Jose, Sunnyvale, and Milpitas have enacted ordinances to authorize denial, suspension, and/or revocation of certain city permits and/or licenses to businesses with unpaid wage theft judgments.

The City of Milpitas recently adopted a Responsible Construction Ordinance, which went into effect in April 2021. The ordinance requires acknowledgment and certification of compliance with State wage theft prevention laws for new construction projects not subject to prevailing wage requirements and greater than 15,000 square feet. A completed and signed form is required by permit applicants acknowledging the requirement to comply with all applicable wage and hour laws prior to issuance of a building permit. An additional completed and signed form is required of the project owner, contractor, and subcontractors that certifies compliance with wage theft protection laws and that there are no unpaid wage theft judgments prior to issuance of the Certificate of Occupancy.

RECOMMENDATION

Staff recommends developing a Wage Theft Ordinance and a Responsible Construction Ordinance to help ensure accountability and compliance with existing wage and hour laws, enhance protection to workers' rights, and build upon and support the City's Minimum Wage Ordinance. The proposed strategies below for wage theft and responsible construction were developed based on input from advocates and research of models in other jurisdictions as well as staff assessment of impacts on permit streamlining and support of local business vitality and the resources required to administer the ordinances.

Stakeholder Outreach

Staff conducted stakeholder outreach to the Chamber of Commerce, the Wage Theft Coalition, and the Day Worker Center, a member of the Fair Workplace Coalition, to gain initial input and feedback on the recommended wage theft and responsible construction strategies. The Chamber shared that both strategies align with the existing Minimum Wage Ordinance and that the Chamber does not anticipate that either strategy would present a significant challenge for businesses to comply with, given the proposed extended timeline for stakeholder outreach, engagement, and education recommended in this Study Session memorandum. The Chamber also shared that clear requirements

for, and communication and engagement with, developers would be key for smooth implementation of a Responsible Construction Ordinance.

The Wage Theft Coalition provided feedback that the Coalition appreciates the City's recommendation that the Wage Theft Ordinance require that all businesses subject to applying for a business license be required to submit an Attestation Form and that the Responsible Construction Ordinance require submittal of both a Pay Transparency and Pay Attestation form at the beginning and end of the permit application process, respectively. The Coalition also appreciated the City's effort to incorporate enforcement into both strategies through administrative citations and the levying of fines for noncompliance.

During these stakeholder meetings, staff noted the proposed timeline for the ordinance to be further developed and adopted and to become effective. Staff also shared the plan for extensive, ongoing outreach to gather additional feedback, raise awareness, and encourage and support compliance.

Recommended Wage Theft Ordinance Strategy

Staff has identified the business license application and renewal process as an efficient and effective way to connect with Mountain View employers to communicate and seek compliance with wage laws. Staff recommends all businesses subject to the City's business license requirements be required to submit an affidavit as part of the business license application process attesting that the business does not have any unsatisfied labor law judgments or orders (refusal to pay per final court order or administrative action when found by a local or State agency in violation of wage or hour laws).

Failure to submit the affidavit would result in administrative compliance orders and citations imposing administrative penalties, as shown in Figure 1 below. Submittal of a false attestation may be subject to administrative, civil, or criminal penalties dependent upon the circumstances. Due to limited resources, the affidavits for the estimated 4,600 business license forms submitted each year would not be individually verified by staff. Rather, the City would investigate complaints received alleging an attestation contained false information.

While the Finance and Administrative Services Department can incorporate the affidavit requirement into the business license application and renewal process, there is not sufficient staff capacity currently to administer the compliance process. Consequently, staff will explore resource needs and options as part of the next steps following the Study Session. As appropriate, a recommendation about additional resources will be included when the ordinance returns to Council for adoption.

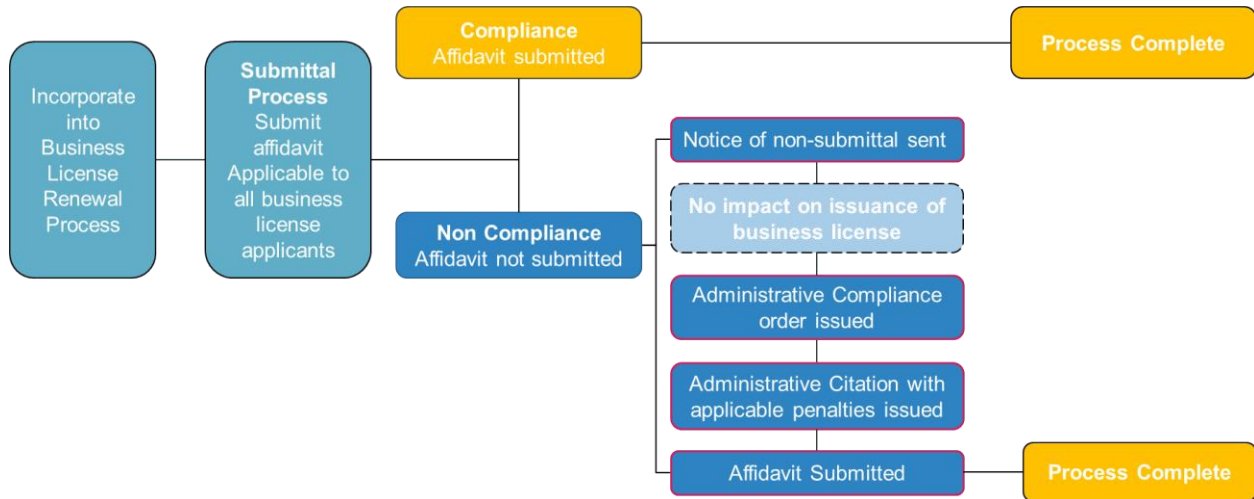


Figure 1: Process Flow for Wage Theft Strategy

Question No. 1: Does Council support staff's recommended strategy for the development of a Wage Theft Ordinance?

Recommended Responsible Construction Ordinance Strategy

Staff has identified the building permit process as an appropriate vehicle for communicating and seeking compliance with responsible construction wage protections. Staff recommends all commercial and multi-family housing construction projects above 15,000 square feet per structure, including new construction and renovation projects, be subject to requirements that confirm wage and hour laws were complied with for the project.

The permit applicant for the project would be required at the beginning of the permit application process to submit a Pay Transparency Acknowledgement form (Acknowledgement) certifying that all applicable labor laws will be adhered to and that a notice outlining workers' rights will be posted at visible locations on the job site.

After the construction project has been completed, the permittee would be required to submit to the City a Pay Attestation form (Pay Attestation) for the general contractor and qualifying subcontractors certifying they comply with applicable laws and that notices of workers' rights were posted at visible locations at the job site, as shown in Figure 2 below.

Like the proposed Wage Theft Ordinance strategy, failure to submit the Acknowledgment and Pay Attestations would result in administrative compliance orders and citations imposing administrative penalties. Submittal of a false pay attestation

would also be subject to penalties, which may include administrative, civil, or criminal remedies dependent upon the circumstances. Due to limited resources and the anticipated high volume of Pay Attestations for any project subject to the ordinance, the Pay Attestations submitted would not be individually verified by staff. Rather, the City would investigate complaints received that allege a Pay Attestation contained false information.

The proposed Responsible Construction Ordinance encourages compliance with existing wage and hour laws and enhances workers' rights protections through broad coverage of all applicable construction projects. Staff does not recommend that the Responsible Construction Ordinance be applied to public works projects subject to prevailing wage due to the additional protections already in place for public works projects. While the Acknowledgment and Pay Attestations would be submitted in conjunction with the building permit process, the ordinance would not affect the issuance of building permits.

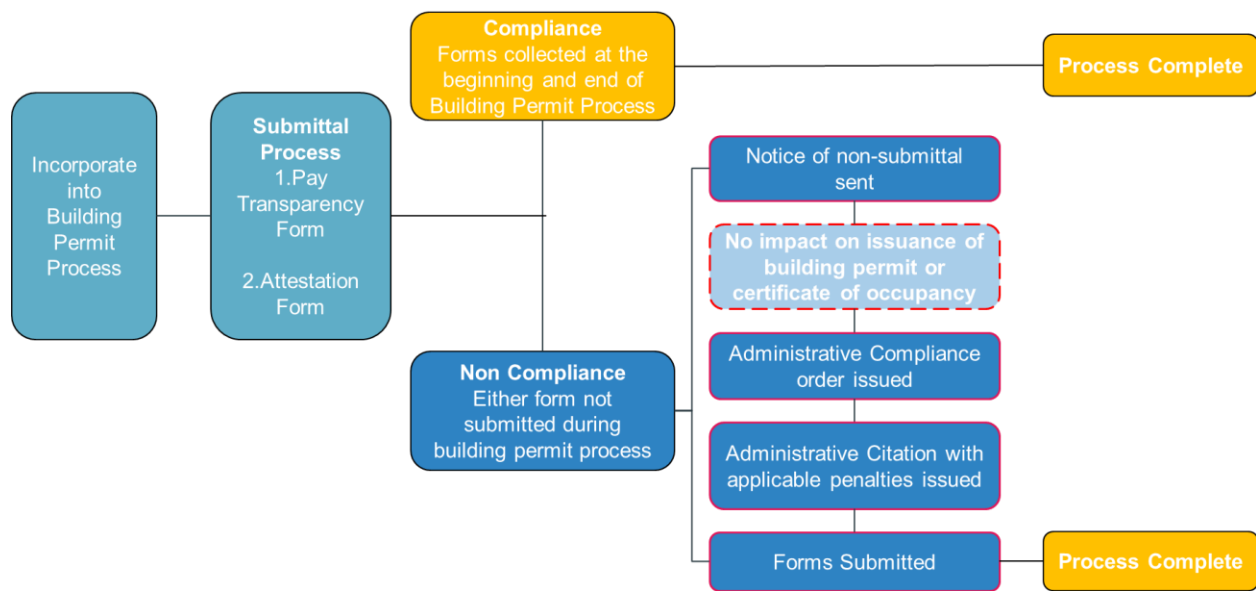


Figure 2: Process Flow for Responsible Construction Strategy

The Building Inspection Division is able to incorporate the Pay Transparency and Attestation Forms into the building permit process. However, there is not sufficient staff capacity to administer the compliance process. As noted above regarding the wage theft compliance process, staff will explore resource options and return with a recommendation to Council, as appropriate, as part of the ordinance adoption process.

Question No. 2: Does Council support staff's recommended strategy for the development of a Responsible Construction Ordinance?

NEXT STEPS

Following feedback from the City Council at this Study Session, staff proposes the following timeline of next steps for the development of Wage Theft and Responsible Construction Ordinances:

- Conduct stakeholder outreach and engagement with worker advocate organizations, local businesses and business organizations, and developers to seek input regarding the proposed ordinances and build awareness. (Q4 2021 to Q2 2022)
- Assess resource needs to administer the compliance process for both ordinances, explore staff and contract options to augment current capacity, and develop an appropriation recommendation to Council as appropriate. (Q4 2021 to Q2 2022)
- Refine policy elements as appropriate, draft ordinances, and return to Council for introduction and adoption. (Q2 to Q3 2022)
- Conduct outreach to communicate ordinance requirements and encourage compliance. Strategies would include: partnering with local community-based organizations to educate workers and business owners; creating a City webpage with an FAQ and resource links; and partnering with the County and DLSE to create and distribute collateral to work sites. (Q3 to Q4 2022)
- Develop the process to incorporate a Wage Theft Compliance Affidavit into the business license process in time for the November 2022 Business License renewal cycle. (Q2 to Q3 2022)
- Develop the process to incorporate Pay Transparency and Attestation Forms into the building permit process. (Q2 to Q3 2022)
- Proposed ordinances take effect. (January 2023)
- Periodic meetings with community advocates to discuss progress, issues, and opportunities. (Ongoing)

PUBLIC NOTICING

This City Council agenda is advertised on Channel 26, and the agenda and this Study Session memorandum were posted on the City's website and distributed to the Chamber of Commerce, the Wage Theft Coalition, and members of the Fair Work Place Collaborative.

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