

*City of San José, California*

**COUNCIL POLICY**

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| <b>TITLE</b> LIVING WAGE POLICY  | <b>PAGE</b><br>1 of 13               | <b>POLICY NUMBER</b><br>3-3 |
| <b>EFFECTIVE DATE</b> November 17, 1998  | <b>REVISED DATE</b> January 28, 2014 |                             |
| <b>APPROVED BY COUNCIL ACTION</b> 11/17/1998, Item 9c, Res. No. 68554;<br>6/8/1999, Item 9a, Res. No. 68900; 5/27/2003, Item 10.1(a), Res. No. 71584; 6/23/2009,<br>Item 2.28, Res. No. 75041; 06/04/2013, Item 3.9, Res. No. 76653, 01/28/2014, Item 3.3, Res.<br>No. 76911 |                                      |                             |

**BACKGROUND**

On November 17, 1998, the City Council adopted Resolution No. 68554. On June 8, 1999 Council adopted Resolution No.68900 revising the policy and making the following findings and promulgating the City of San José’s original Living Wage Policy:

1. It is beneficial to the health and welfare of all citizens of San José that all workers are paid a wage which enables them to not live in poverty;
2. The City awards many contracts to employers to provide services to the public and the City government;
3. The City provides direct financial assistance to employers for the purpose of economic development and job growth;
4. Many service employees in San José and their families live at or below the poverty line; and
5. The payment of such inadequate compensation tends to negatively affect the quality of services to the City and the public by fostering high turnover and instability in the workplace;
6. The use of City funds to promote the creation of a livable wage will increase the ability of these employees to attain sustenance, decrease the amount of poverty and reduce the amount of taxpayer funded social services in San José;
7. Many employers who provide contract services to the City or receive direct financial assistance do not provide health insurance to their employees which affects performance and absenteeism and has a negative impact to local and state health programs which can only be ameliorated by having employers providing reasonable health insurance to their employees; and
8. A City policy providing for a livable wage is consistent with other programs operated by the City to meet the employment and economic development needs of low wage workers.

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On May 27, 2003, City Council adopted Resolution No. 71584 further modifying the Living Wage Policy by adding additional enforcement provisions and audit rights.

Resolution No. 68900 originally exempted contracts awarded by the City on behalf of the San José/Santa Clara Water Pollution Control Plant from the Living Wage Policy. On June 23, 2009, the City Council adopted Resolution No. 75041 to (1) revise the Living Wage Policy to apply to contracts awarded by the City on behalf of the San José/Santa Clara Water Pollution Control Plant (now known as the San José-Santa Clara Regional Wastewater Facility) in light of the City Council's determination that the application of the Living Wage Policy to those contracts would benefit the City and the San José-Santa Clara Water Regional Wastewater Facility consistent with the Council's original findings; and (2) memorialize the Living Wage Policy as a formal City of San José Council Policy.

On June 4, 2013, City Council adopted Resolution No. 76653 modifying the Living Wage Policy to require contractors to provide a minimum number of days of compensated time off to workers providing labor or service to the City pursuant to procurements initiated on or after June 5, 2013, and to any amendment of existing agreements that require City Council approval.

On January 28, 2014, City Council adopted Resolution No. 76911 revising the Living Wage Policy to clarify that living wage and labor peace requirements do not apply to leases with tenants who do not have service contracts with the City or receive direct financial assistance from the City.

**PURPOSE**

The purpose of this Policy is to provide for a livable wage for workers employed by employers who are awarded service contracts for services that are provided directly to the City or for services otherwise provided by City employees or who receive direct financial assistance by the City, and thus enhance the welfare of workers of San José.

**POLICY**

**I. LIVING WAGE POLICY**

It is the policy of the City of San José that persons doing work on, for or on behalf of the City for services that are provided directly to the City or for services otherwise provided by City employees or who receive financial assistance from the City should be paid a living wage, be provided with or able to afford health insurance, have reasonable time off, not be subject to lay off merely because the City changes contractors and should work in an environment of labor peace.

**A. Payment of Minimum Compensation to Employees**

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1. Wages

- a. If health insurance benefits are provided, during the applicable period of time a wage of no less than the amount set forth below:

|                                 |  |
|---------------------------------|--|
| Initial Rate: 11/17/98 – 7/1/00 | Nine Dollars and Fifty Cents (\$9.50) per hour |
| 7/1/00 – 6/30/01                | \$10.10 per hour                               |
| 7/1/01 – 6/30/02                | \$10.10 per hour                               |
| 7/1/02 – 6/30/03                | \$10.10 per hour                               |
| 7/1/03 – 6/30/04                | \$10.31 per hour                               |
| 7/1/04 – 6/30/05                | \$10.72 per hour                               |
| 7/1/05 – 6/30/06                | \$11.61 per hour                               |
| 7/1/06 – 6/30/07                | \$12.27 per hour                               |
| 7/1/07 – 6/30/08                | \$12.66 per hour                               |
| 7/1/08 – 6/30/09                | \$12.83 per hour                               |
| 7/1/09 – 6/30/10                | \$12.83 per hour                               |
| 7/1/10 – 6/30/11                | \$12.94 per hour                               |
| 7/1/11 – 6/30/12                | \$13.59 per hour                               |
| 7/1/12 – 6/30/13                | \$14.73 per hour                               |
| 7/1/13 – 6/30/14                | \$15.78 per hour                               |

- b. If health insurance benefits are not provided, a wage of no less than the amount set forth below:

|                                 |   |
|---------------------------------|---|
| Initial Rate: 11/17/98 – 7/1/00 | Ten Dollars and Seventy-Five Cents (\$10.75) per hour |
| 7/1/00 – 6/30/01                | \$11.35 per hour                                      |
| 7/1/01 – 6/30/02                | \$11.35 per hour                                      |
| 7/1/02 – 6/30/03                | \$11.35 per hour                                      |
| 7/1/03 – 6/30/04                | \$11.56 per hour                                      |
| 7/1/04 – 6/30/05                | \$11.97 per hour                                      |
| 7/1/05 – 6/30/06                | \$12.86 per hour                                      |

|                  |                  |
|------------------|------------------|
| 7/1/06 – 6/30/07 | \$13.52 per hour |
| 7/1/07 – 6/30/08 | \$13.91 per hour |
| 7/1/08 – 6/30/09 | \$14.08 per hour |
| 7/1/09 – 6/30/10 | \$14.08 per hour |
| 7/1/10 – 6/30/11 | \$14.19 per hour |
| 7/1/11 – 6/30/12 | \$14.84 per hour |
| 7/1/12 – 6/30/13 | \$15.98 per hour |
| 7/1/13 – 6/30/14 | \$17.03 per hour |

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- c. These initial rates will be reviewed each year, no later than the 10th of February, to determine if any adjustment should be made based on any change as of December 31 of the previous year in the federal poverty level standard or the geographic cost of living differential used by the City in determining the initial wage adjustment. If either standard has changed the City shall recalibrate the wages using the original methodology with the new values. If neither standard has changed, the Consumer Price Index for all Urban Consumers in the San Francisco-Oakland-San José area (U. S. Department of Labor, Bureau of Labor Statistics) shall be reviewed. If the CPI has increased by at least 1%, the wage rate shall be adjusted by the same percentage change in the CPI but not to exceed 3%.
- d. If the contract is subject to a prevailing wage requirement, the higher of the two wages shall apply.
- e. Proof of the provision of such benefits must be submitted to the City with the executed contract or receipt of the City financial assistance to qualify for employees with health benefits.

**B. Compensated Time Off to Employees**

Twelve (12) days of compensated time off per year for full time employees, and six (6) days of compensated time off for part time employees, who meet the criteria set forth in Section II.B of this Policy as a covered employee. Paid holidays, paid sick days, paid vacation and paid personal days shall count towards the required twelve (12) or six (6) days.

**C. Employee Retention Requirements**

1. Application

The Employee Retention Requirements under this Policy will apply to contracts subject to this Policy which are over the amount of \$50,000 and provides for the continuation of a service currently provided by another contractor, including the following contracts:

- a. Food Services
- b. Janitorial and Custodial Services
- c. Shuttle transportation
- d. Parking lot management
- e. Street sweeping (citywide)
- f. Operation, programming and maintenance of recreational facilities
- g. Any other service or labor determined by the Director of Equality Assurance to meet the intent of this Policy

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## 2. Retention Employee

Any person employed by the predecessor contractor or any subcontractor to the predecessor contractor who:

- a. Provides direct labor or service on the City contract;
- b. Is not an “exempt” employee under the Fair Labor Standards Act; and
- c. Has been employed for at least the six (6) month period prior to the date of the new contract by the predecessor service contractor or subcontractor.

## 3. Employment

Employment shall be offered to all qualified retention employees.

- a. The new service contractor or subcontractor may deem a retention employee not to be qualified only if:
  - (i) The employee has been convicted of a crime that is related to the job or to his or her job performance; or
  - (ii) The contractor can demonstrate to the City that the employee presents a significant danger to customers, co-workers, or City staff.
- b. The new service contractor or subcontractor may treat any of its current employees as retention employees for purposes of this Policy who, based on payroll records or other reliable evidence can be shown to the satisfaction of the Director of the Office of Equality Assurance:
  - (i) To have been employed for at least the six (6) month period prior to the date of the new contract by the contractor or subcontractor; and
  - (ii) Would otherwise need to be terminated as a result of this program.
- c. In the event that the service contractor or subcontractor does not have enough positions available for all qualified retention employees and its current eligible retention employees, the service contractor or subcontractor will hire the predecessor contractor’s qualified retention employees and retain its current employees who are eligible for retention under this Policy by seniority within each employment classification. For any positions that become available during the initial ninety (90) day period of the new contract, the service contractor or subcontractor will hire qualified retention employees and rehire its current employees who are eligible for retention under this Policy by seniority within each employment classification.

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4. Retention

- a. Qualified employees of the predecessor contractor may not be discharged without cause during the initial ninety (90) day period of their employment.
- b. Each such qualified retention employee who receives a satisfactory performance evaluation at the end of the initial ninety (90) day period of employment will be offered continued employment under terms and conditions established by the contractor or subcontractor for all of its employees.

5. Third Party Beneficiary

A retention employee shall have the right of a third party beneficiary under any service contract subject to this employee retention requirement.

**D. Third Tier Review**

All service or labor contracts subject to this Policy shall be required to undergo what is commonly referred to as “Third Tier Review”. This is the process under which the City considers the proposer’s history as an employer and working condition commitments in evaluating the proposals. All proposals will be required to address the following:

1. Compensated Days Off

The proposal shall describe the compensated days off per year, including holidays, sick leave, vacation, and personal leave.

2. Employee Retention Requirements

The proposer will be required to provide requested information and documentation with regard to staffing needs under the contract and how many, if any, of its current employees would need to be considered for retention purposes.

3. Service Disruption /Labor Peace Provision

- a. The Council hereby declares that, to the best of its ability, it intends to ensure that essential services and labor for which it contracts are provided efficiently and without interruption. Therefore, it is necessary to avoid the potential of disruption by labor disputes.
- b. Prior to the issuance of any request for proposals, including requests for qualifications, requests for quotes or requests for information (collectively referred to as, RFP), the Office of Equality Assurance shall determine the

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level of vulnerability of the proposed contract to service or labor disputes and the degree to which labor peace is essential to the proprietary interests of the City. The determination shall be based on considerations including but not limited to following factors:

- (i) Whether the service or labor is provided on a City site or a site which is important to the proprietary interests of the City; and
  - (ii) Whether the service provider relies on a significant amount of public patronage; and
  - (iii) The economic effect of any disruption on City expenditures or revenues; and
  - (iv) The effect of any disruption on the citizens, tourists and businesses in the community.
- c. The Office of Equality Assurance shall consider the relationship between the extent to which the City is vulnerable from the effects of labor unrest and the type of assurances of protection against labor discord that need to be provided by the proposer.
  - d. The request for proposals shall include a provision requiring adequate assurances in light of the level of vulnerability in each request for proposals.
  - e. The City department awarding the contract shall provide a copy of each RFP to any person or entity who files a request for notification with the Director of the Office of Equality Assurance.

## **II. Service and Labor Contracts**

The Living Wage Policy shall apply to service and labor contracts for services that are provided directly to the City or for services otherwise provided by City employees as follows:

### **A. Application**

#### **1. Service or Labor Contract**

This policy applies to those contracts which:

- a. Involve an expenditure in excess of Twenty Thousand Dollars (\$20,000);
- b. Provide for the furnishing of services or labor to the City (as opposed to the purchase of goods or other property) including the following services:

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- 1.) Automotive repair and maintenance
- 2.) Facility and building maintenance
- 3.) Food services
- 4.) Janitorial and Custodial
- 5.) Landscaping;
- 6.) Laundry Services
- 7.) Office and Clerical (copier maintenance, facsimile maintenance, courier mailing, photographic, printing, , collections)
- 8.) Parking lot management
- 9.) Pest Control
- 10.) Operation, programming and maintenance of recreational facilities
- 11.) Security
- 12.) Shuttle Transportation
- 13.) Street Sweeping
- 14.) Towing
- 15.) Moving Services
- 16.) Fabrication and installation of City signs
- 17.) Maintenance of City owned equipment
- 18.) Any other service or labor determined by the Director of Equality Assurance to meet the intent of this Policy.

## 2. Exemptions

- a. Contracts under which federal or state regulations preclude its applicability;
- b. Contracts which involve programs where the City shares management authority with other jurisdictions unless all participating agencies have a Living Wage Policy, except that contracts involving the San José-Santa Clara Regional Wastewater Facility shall be subject to the Policy;
- c. Contracts which involve programs with special decision making procedures including but not limited to the City Retirement Boards and the Deferred Compensation Board;
- d. Contracts which are impacted by leases, bond covenants, grant restrictions, governmental regulations and the like shall be reviewed on a case by case basis and the policy included to the extent it is not constrained;
- e. Contracts which involve programs which do not primarily provide direct services to the City but have a franchise or contract to provide services to the residents or property owners of the City;
- f. Contracts for professional services for specialized skills including but not limited to experts, consultants, auditors, engineers, attorneys, banking; or

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- g. Leases with tenants who do not have service contracts with the City or receive direct financial assistance from the City.
- h. Contracts where imposition of the policy is found by the Director of Equality Assurance to be likely to cause a hardship to small businesses.

**B. Covered Employees**

Any person employed by the contractor or any subcontractor, notwithstanding the location of the person, who:

- 1. Is not a person who provides volunteer services, that are uncompensated except for reimbursement of expenses such as meals, parking or transportation;
- 2. Expends at least half of his or her time on work for the City;
- 3. Is at least eighteen (18) years of age; and
- 4. Is not in training for the period of training specified under training standards approved by the City.

**III. Financial Assistance**

The Policy shall apply to any City financial recipient, excluding any corporation organized under Sec. 501 (c) 3 and 6 of the United States Internal Revenue Code of 1954, who receives direct monetary financial assistance from the City in an amount of One Hundred Thousand Dollars (\$100,000) or more in any twelve (12) month period executed after the effective date of this policy. Conformance to this Policy shall be required throughout the term of the agreement.

This Policy does not apply to any person or entity who receives any indirect financial assistance including but not limited to tax credits, subsidies or rebates, bond financing, or loans.

**A. Covered Employees**

Any person employed by the City financial recipient or any sub recipient whose compensation is attributable to the City's financial assistance, who:

- 1. Is not a persons who provides volunteer services, that are uncompensated except for reimbursement of expenses such as meals, parking or transportation;
- 2. Expends at least half of his or her time on work for the City;
- 3. Is at least eighteen (18) years of age; and

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4. Is not in training for the period of training specified under training standards approved by the City.

#### **IV. SUPERSESSION BY COLLECTIVE BARGAINING AGREEMENT**

Parties subject to this Policy may by collective bargaining agreement provide that such agreement shall supersede the requirements of this Policy.

#### **V. ADMINISTRATION**

The City’s Department of Equality Assurance shall monitor compliance, including the investigation of claimed violations, and may promulgate additional regulations consistent with this Policy.

##### **A. Reports**

The Director of the Department of Equality Assurance shall file an annual report on compliance to the City Council.

##### **B. Proposal and Contract Language**

All City proposals, contracts and financial assistance agreements subject to this policy shall contain the following paragraph or substantially equivalent language:

“The contract is subject to the City of San José Living Wage Policy and any implementing regulations. The Policy requires among other things, that unless specific exemptions apply, all employers, as defined, under service contracts and recipients of City financial assistance, as defined, shall provide payment of a minimum level of compensation to employees, which include the cost of health benefits and a minimum number of days of compensated time off. Failure to provide the Living Wage compensation and compensated time off may result in termination of the contract or debarment from future contracts. The service or labor contract shall include the employee retention requirements set forth in the Policy, if applicable.”

##### **C. Retention Program**

1. To the extent the City is able to obtain the information, the City will provide the service contractor or subcontractor with a list of names, addresses, dates of hire, and employment classifications for all covered employees of the outgoing service contractor or subcontractor who are interested in continued employment.

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2. Contracts entered into after the adoption of this Policy shall obligate the contractor or subcontractor to provide names of all qualified retention employees at end of contract.

**D. Enforcement**

The service contract or financial assistance agreement shall provide that if a violation of any provision of this Policy occurs and is not corrected after written notice, the City may, at its option, do any or all of the following:

1. Suspend and/or terminate the contract or financial assistance agreement for cause;
2. Require the employer to pay any amounts underpaid in violation of the required payments and City’s administrative costs and liquidated damages. And in the case of financial assistance, to refund any sums disbursed by the City; and/or
3. Debar the contractor or subcontractor from future City contracts and/or deem the recipient ineligible for future financial assistance.

In addition, City contracts containing the Living Wage Requirement shall include a contractual provision substantially in the form of Attachment “A.”

**E. Coexistence with Any Other Employee Rights**

This Policy shall not be construed to limit an employee’s ability to bring any legal action for violation of any rights of the employee.

**F. No effect on Airport Living Wage Ordinance**

Nothing in this Policy is intended to affect the provisions of Chapter 25.11 of the San José Municipal Code, Airport Living Wage and Labor Standards.

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**Attachment "A"**

**MODEL CONTRACT PROVISION**

**I. Remedies For Contractor's Breach Of Prevailing Wage/Living Wage Provisions.**

**A. General:** Contractor acknowledges that it has read and understands that, pursuant to the terms and conditions of this Contract, it is required to pay workers either a prevailing or living wage ("Wage Provision") and to submit certain documentation to the City establishing its compliance with such requirement. ("Documentation Provision.") Contractor further acknowledges the City has determined that the Wage Provision promotes each of the following (collectively "Goals"):

1. It protects City job opportunities and stimulates the City's economy by reducing the incentive to recruit and pay a substandard wage to labor from distant, cheap-labor areas.
2. It benefits the public through the superior efficiency of well-paid employees, whereas the payment of inadequate compensation tends to negatively affect the quality of services to the City by fostering high turnover and instability in the workplace.
3. Paying workers a wage that enables them not to live in poverty is beneficial to the health and welfare of all citizens of San José because it increases the ability of such workers to attain sustenance, decreases the amount of poverty and reduces the amount of taxpayer funded social services in San José .
4. It increases competition by promoting a more level playing field among contractors with regard to the wages paid to workers.

**B. Withholding of Payment.** Contractor agrees that the Documentation Provision is critical to the City's ability to monitor Contractor's compliance with the Wage Provision and to ultimately achieve the Goals. Contractor further agrees its breach of the Documentation Provision results in the need for additional enforcement action to verify compliance with the Wage Provision.

In light of the critical importance of the Documentation Provision, the City and Contractor agree that Contractor's compliance with this Provision, as well as the Wage Provision, is an express condition of City's obligation to make each payment due to the Contractor pursuant to this Contract. The City is **not** obligated to make any payment due the Contractor until Contractor has performed all of its obligations under these provisions.

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Any payment by the City despite Contractor’s failure to fully perform its obligations under these provisions shall not be deemed to be a waiver of any other term or condition contained in this Contractor or a waiver of the right to withhold payment for any subsequent breach of the Wage Provision or the Documentation Provision.

- C. **Liquidated Damages for Breach of Wage Provision:** Contractor agrees its breach of the Wage Provision would cause the City damage by undermining the Goals, and City’s damage would not be remedied by Contractor’s payment of restitution to the workers who were paid a substandard wage. Contractor further agrees that such damage would increase the greater the number of employees not paid the applicable prevailing wage and the longer the amount of time over which such wages were not paid.

The City and Contractor mutually agree that making a precise determination of the amount of City’s damages as a result of Contractor’s breach of the Wage Provision would be impracticable and/or extremely difficult. Therefore, the parties agree that, in the event of such a breach, Contractor shall pay to the City as liquidated damages the sum of three (3) times the difference between the actual amount of wages paid and the amount of wages that should have been paid.

- D. **Audit Rights.** All records or documents required to be kept pursuant to this Contract to verify compliance with the Wage Provision shall be made available for audit at no cost to the City, at any time during regular business hours, upon written request by the City Attorney, City Auditor, City Manager, or a designated representative of any of these officers. Copies of such records or documents shall be provided to City for audit at City Hall when it is practical to do so. Otherwise, unless an alternative is mutually agreed upon, the records or documents shall be available at Contractor’s address indicated for receipt of notices in this Contract.