



## PORT OF OAKLAND

# MEMO

TO: Omar Benjamin, Executive Director

FROM: Diann Castleberry, Acting Director of Administration and  
Director of Social Responsibility

DATE: March 29, 2010

SUBJECT: **AMENDMENT OF PORT LIVING WAGE RULES AND REGULATIONS  
TO CLARIFY WHEN A NEW PORT ASSISTED BUSINESS IS DEEMED  
TO REPLACE A PRIOR PORT ASSISTED BUSINESS**

---

### I. Summary

Under the Charter of the City of Oakland ("Charter") and the Port of Oakland's Rules and Regulations for the Implementation and Enforcement of Port of Oakland Living Wage Requirements ("Regulations"), when a "new" Port Assisted Business ("PAB") "replaces" a "prior" PAB, it must retain certain workers from the prior PAB, under certain circumstances. Guidance on when precisely a new PAB is deemed to "replace" a prior PAB issues under the Charter and the Port's Regulations is limited. Several questions have arisen recently regarding these issues in the context of new subconcessionaires at Oakland International Airport.

The Social Responsibility Division ("SRD"), in coordination with the Port Attorney's Office and the Aviation Division, and after extensive meetings with stakeholders, proposes amending the Port's Regulations to clarify these issues.

The key issues to be clarified by the proposed amendment include:

1. **Q:** What geographic proximity must a new PAB have to a prior PAB to "replace" it?

**A:** The new PAB must be established at the same location or in the same structure as the prior PAB.
2. **Q:** On what date does a new PAB "replace" a prior PAB?

**A:** On the date it assumes or obtains its lease, sublease, contract, or subcontract, subject to some limited exceptions

3. **Q:** When does a PAB become a "prior PAB?"  
**A:** When it ceases to operate.
4. **Q:** Once a PAB ceases to operate, how much time must elapse before an incoming new PAB is no longer deemed to "replace" the prior PAB?  
**A:** 180 days.

The proposed amendment of the Regulations has been developed based upon significant input from HMS Host, the prime permittee for food concessions at the Airport, and with Unite Here! Local 2850, representing hospitality and food service workers at the Airport.

## **II. Regulatory Authority**

On October 16, 2001, the Board of Port Commissioners ("Board") adopted Port Ordinance 3666, requiring certain Port service contractors to pay "living wage" rates to their employees who work at the Port. On March 5, 2002, voters of Oakland adopted Measure I, which enacted Section 728 of the Oakland City Charter (the "Charter") to extend the living wage laws to tenants of the Port and setting forth other requirements. On October 22, 2002, the Board adopted Port Ordinance 3719 to amend Ordinance 3666 to incorporate the requirements of the Charter Provisions.

Section 10(a) of Ordinance 3666 authorizes the Executive Director to adopt and promulgate regulations to implement and enforce the Port Ordinance. On December 4, 2007, the Executive Director adopted the current Rules and Regulations for the Implementation and Enforcement of Port of Oakland Living Wage Requirements ("Regulations").

## **III. Legal and Factual Background**

Section 728(5) of the Charter specifies that "new" PABs that "replace" a "prior" PAB must retain certain workers of the prior PAB for at least 90 days under certain circumstances. The Charter specifies that a PAB "replaces" another if it "(1) assumes all or part of the lease, contract or subcontract of a prior employer or obtains a new lease, contract, or sublease, and (2) offers employment which Employees of prior PAB can perform." The Charter does not define "prior" and does not provide further detail regarding how and when a PAB replaces another. The current Regulations provide only limited guidance on these issues.

Given the lack of guidance on these issues in the Charter and the Regulations, several questions have arisen recently regarding these issues in the context of new subconcessionaires at Oakland International Airport (the "Airport"). Such questions include:

1. What geographic proximity must a new PAB have to a prior PAB to "replace" it?
2. On what date does a new PAB "replace" a prior PAB?

3. When does a PAB become a "prior PAB?"
4. Once a PAB ceases to operate, how much time must elapse before an incoming new PAB is no longer deemed to "replace" the prior PAB?

The clarifications included in the proposed amendment to the Regulations answer these questions.

The Social Responsibility Division ("SRD"), in coordination with the Port Attorney's Office and the Aviation Division, has conducted a series of meetings on these issues and has received significant input from HMS Host, the prime permittee for food concessions at the Airport, and from Unite Here! Local 2850, representing hospitality and food service workers at the Airport.

#### IV. Proposed Amendment of the Regulations

Section 13.1 of the Port of Oakland's Rules and Regulations for the Implementation and Enforcement of Port of Oakland Living Wage Requirements currently reads as follows:

##### 13.1. Replacing a prior PAB

A PAB "replaces" another if it (1) assumes all or part of the lease, contract or subcontract of a prior PAB employer or obtains a new lease, contract, or sublease, to replace PAB for the same contracted service or space and (2) offers employment which employees of the prior PAB can perform.

The following text amendments to Section 13.1 are proposed (where underlines indicate additions and ~~strikethroughs~~ indicate deletions):

##### 13.1. Replacing a prior PAB

A PAB "replaces" another if it :

(1) (a) assumes all or part of the lease, contract or subcontract of a prior PAB employer; or, (b) obtains a new lease, ~~contract,~~ or sublease, within the same structure as the prior PAB's leasehold within 180 days after the prior PAB ceases to operate within the same structure or at the same location being occupied by the new PAB; or, (c) obtains a new-to-replace PAB for the same contracted for the same service provided to the Port by the prior PAB; or space and

AND

(2) offers employment which employees of the prior PAB can perform.

If adopted, the new Section 13.1 would read as follows:

### 13.1. Replacing a prior PAB

A PAB "replaces" another if it:

(1) (a) assumes all or part of the lease, contract or subcontract of a prior PAB employer; or, (b) obtains a new lease or sublease within the same structure as the prior PAB's leasehold within 180 days after the prior PAB ceases to operate within the same structure or at the same location being occupied by the new PAB; or, (c) obtains a new contract for the same service provided to the Port by the prior PAB;

AND

(2) offers employment which employees of the prior PAB can perform.

Many of the Sections include "examples" for guidance in interpreting the language of the Section. The following examples are proposed for inclusion into the Regulations after Section 13.1:

**Example 1. "same structure."** A new PAB in a structure unattached to the structure that contained a prior PAB does not "replace" the prior PAB. Structures attached to one another are deemed to be the "same structure." For example, Terminal One and Terminal Two at the Oakland International Airport are attached and, as such, are deemed to be the "same structure."

**Example 2. "ceases to operate."** A PAB does not qualify as a "prior" PAB unless and until it "ceases to operate."<sup>1</sup> A PAB "ceases to operate" when it permanently stops providing products or services in exchange for money within the subject structure or location.

**Example 3. "within 180 days after the prior PAB ceases to operate."** Where a lease or sublease is finally executed for an otherwise qualifying replacement PAB, that PAB would be deemed to "replace" a prior PAB if such execution occurs 180 days or less after the prior PAB ceases to operate.<sup>2</sup> Under certain circumstances, variances from the final lease

<sup>1</sup> The "ceases to operate" language is used here because a new PAB cannot reasonably be said to "replace" a "prior" PAB if it is operating concurrently and parallel with a still-operating PAB.

<sup>2</sup> The standard of "assuming" or "obtaining" a lease or contract is based on the plain language of the Charter. Charter Section 728(1)(B) includes in the definition of a "PAB" "any person involved in Port Aviation or Port Maritime Business" or "any person party to a Port Contract." Based on this definition, a business becomes a "PAB" on the date it becomes "involved" in Port business or becomes a party to a contract. Both of these standards suggest that it is the execution of the lease or contract that is determinative in the creation of a new PAB, not some subsequent event.

This reading of the Charter language is further supported by the plain language of Charter Section 728(5) which states that a PAB "replaces" another if it (1) assumes all or part of the lease, contract or subcontract of a prior employer or obtains a new lease, contract, or sublease." Under this language, the

execution date as the trigger for “replacement” timing is appropriate. For example, where no lease or sublease is ever executed or where an otherwise qualifying replacement PAB commences to operate before a lease or sublease is executed, that PAB would be deemed to “replace” a prior PAB if such commencement of operations occurs 180 days or less after the prior PAB ceases to operate. (A PAB “commences to operate” when it begins providing products or services in exchange for money within the subject structure or location. An otherwise qualified replacement PAB would not “replace” a prior PAB if it finally executed its lease or sublease (or, where no lease or sublease has been executed, commenced operating) 181 days or more after the prior PAB ceased to operate). Similarly, where the Port or an existing PAB announces that such existing PAB will cease operations (and become a “prior” PAB) in a matter of weeks or months, and an otherwise qualifying replacement PAB commences operations after the prior PAB ceases operations, the fact that the new PAB may have finally executed its lease before the prior PAB ceased operations, after having been notified that the prior PAB would cease operations, should not preclude the new PAB from being considered as a replacement for the prior PAB.

Example 4. “same location.” As discussed above, an otherwise qualified PAB may “replace” a prior PAB where the prior PAB ceases operations in the “same structure.” The “same location” language is designed to address those instances where the prior PAB may operate at multiple locations in the same structure, cease operations at one or more of those locations, but continue operating at one or more locations in the same structure. For example, Prior PAB A operates 4 kiosks in the same structure. Prior PAB A ceases operations at 1 of its kiosks but continues operating the other 3 kiosks in the same structure. Replacement PAB B assumes operations of the 1 closed kiosk. Assuming Replacement PAB B is an otherwise qualified replacement PAB, Replacement PAB B would “replace” Prior PAB A at that 1 kiosk because it is operating at the “same location” as Prior PAB A, even though Prior PAB A has not ceased to operate at all locations within the same structure.

Example 5. “contract for the same service.” This language is intended to cover PABs with contracts to provide services to the Port that do not have leases, subleases, or other agreements with the Port associated with the occupation of a specific space at the Port.

---

action of “replacement” is triggered upon “assumption” or “obtaining” the subject lease or contract, not some subsequent event.


**V. Options**

1. Approve the amendment to the Regulations, as proposed, authorizing the proposed clarifications, by signing below.
2. Direct Port Staff to address this issue to the Board for its consideration.
3. Direct Port Staff to evaluate different or additional issues.

**VI. Recommendation**

**Approve the amendment to the Regulations, as proposed, authorizing the proposed clarifications, by signing below.**

Approved: \_\_\_\_\_

  
Omar Benjamin, Executive Director

Date: \_\_\_\_\_

4.1.2010

**Attachments**

- cc: Deborah Ale Flint  
Marcel "Skip" Conrad  
Janet Deutsch  
Joshua Safran  
Bessie Papailias  
Connie Ng-Wong  
File