

## Chapter 3.49 - UNCLASSIFIED MANAGEMENT DEFINED CONTRIBUTION 401(a) PLAN

### 3.49.010 - Name.

The name of this plan is the City of San José, California Defined Contribution Plan for Unit 99 Employees (hereinafter referred to as the plan).

(Ord. 29184.)

### 3.49.020 - Purpose.

The primary purpose of the plan is to attract and hold personnel by providing to them a defined contribution benefit plan to which mandatory employee contributions and contributions by the City of San José will be made, which will provide for a plan benefit upon death, retirement, separation from service, or other event as provided herein, in accordance with the applicable provisions of the Internal Revenue Code.

(Ord. 29184.)

### 3.49.025 - Establishment of trust.

- A. There is hereby established the City of San José defined contribution plan for Unit 99 employees trust. The plan and trust shall consist of this chapter and any plan document adopted by the city to supplement this chapter.
- B. Notwithstanding any contrary provision of the plan, in accordance with Section 401(a) of the Internal Revenue Code, all assets held in connection with the plan, including all contributions to the plan, all property and rights purchased with such amounts, and all income attributable to such amounts, property, or rights shall be held by the city in trust (or appropriate investment products) for the exclusive benefit of participants and beneficiaries under the plan.
- C. All contributions to the plan shall be transferred to the trust or investment product within a period that is not longer than is reasonable for the proper administration of the accounts of participants and beneficiaries.
- D. Prior to the satisfaction of all liabilities with respect to plan participants and their beneficiaries, no part of the assets or income of the plan shall be used for, or diverted to, purposes other than for the exclusive benefits of the plan participants and their beneficiaries and defraying reasonable expenses of the administration of the plan.

(Ord. 29184.)

### 3.49.030 - Definitions.

For the purposes of this plan, certain words or phrases used herein will have the following meanings:

- A. "414(h) pick-up contribution account" shall mean the account maintained for a participant under the plan to which participant contributions pursuant to Section 3.49.040 and the adoption agreement shall be credited.
- B. "Account" shall mean the account maintained for a participant under the plan, which may include the following accounts: the employer contribution account, the 414(h) pick-up contribution account, and the rollover contribution account.

- C. "Beneficiary" shall mean a beneficiary designated pursuant to the plan terms.
- D. "City" shall mean the City of San José, California.
- E. "Employer contribution account" shall mean the account maintained for a participant under the plan to which city contributions pursuant to Section 3.49.080 and the adoption agreement shall be credited.
- F. "Compensation" shall mean "participant's compensation," within the meaning of Internal Revenue Code Section 415(c)(3), required to be reported as actual wages in Box 1 of Form W-2 for a year for services to the city plus any compensation reduction election under Internal Revenue Code Sections 125, 132(f), 401(k), 403(b), or 457(b) (including an election to defer compensation under the city's deferred compensation plan) that is actually paid or includable in gross income during the calendar year. Compensation also includes certain additional amounts if paid no later than two and one-half months after severance from employment or the end of the calendar year that includes a participant's severance from employment that, absent a severance from employment, would have been paid to the participant while the participant continued in employment with the city. The compensation of each participant for any plan year shall not exceed two hundred fifty thousand dollars (for 2012), as adjusted for cost of living increases in accordance with Internal Revenue Code Section 401(a)(17)(B). The cost of living adjustment in effect for a calendar year applies to compensation for the determination period that begins with or within such calendar year. Amounts of compensation shall be determined without regard to any community property laws.
- G. "Employee" shall mean any officer or employee of the City of San José, California, who is an executive management or professional employee in Unit 99 who is first hired on or after January 20, 2013.
- H. "Normal retirement age" shall mean age sixty-five.
- I. "Participant" shall mean any eligible employee who fulfills the requirements of enrollment into the plan contained in Section 3.49.050, and has not yet received a distribution of his or her entire account under the plan.
- J. "Participation agreement" shall mean the agreement executed and filed by an employee with city, pursuant to Section 3.49.050, in which an employee elects to become a participant in the plan.
- K. "Payroll period" shall mean the normally scheduled payroll for Unit 99.
- L. "Plan document" shall mean any document, including a basic plan and adoption agreement, that is adopted by the city to set forth additional plan provisions.
- M. "Plan year" shall mean a calendar year.
- N. "Rollover contribution account" shall mean the account maintained for a participant under the plan to which rollovers pursuant to Section 3.49.058 and the adoption agreement shall be credited.
- O. "Separation from service" shall mean a severance of a participant's employment with the city for any reason, including retirement. A participant shall be deemed to have separated from service with the city for purposes of the plan when, in accordance with the established personnel practices of the city, the employment relationship is considered actually terminated. If a participant has not been terminated, but the participant has not performed services for the city for a period of six consecutive months and the participant is not on a paid leave of absence, the participant shall be deemed separated from service for purposes of this plan at the end of the six-month period.

(Ord. 29184.)

#### 3.49.040 - Participant contributions.

- A. During each payroll period in which an employee is a participant in the plan, the city shall deduct the percentage of the employee's compensation specified in the adoption agreement and contribute such amount to the plan. Although designated as employee contributions, the contributions made under this Subsection A. are picked up and paid by the city via salary reductions in accordance with Internal Revenue Code Section 414(h)(2). A participant may not receive any amounts paid under this section directly instead of having the amounts paid to the plan.
- B. Participant contributions will be subject to the applicable limit under Internal Revenue Code Section 415, as provided by Section 3.049.045 and the plan.

(Ord. 29184.)

#### 3.49.045 - Contribution limits.

Notwithstanding any provision of the plan to the contrary, contributions to the plan and additions to accounts of participants shall be limited as provided in Internal Revenue Code Section 415, as detailed in the plan document.

(Ord. 29184.)

#### 3.49.046 - Military service.

- A. Notwithstanding any provisions of this plan to the contrary, contributions, benefits, and service credit with respect to qualified military service shall be provided in accordance with the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA") [as codified at 38 U.S.C. Chapter 43]; Internal Revenue Code Section 414(u); and, effective January 1, 2007, Internal Revenue Code Section 401(a)(37), as amended from time to time.

For purposes of this section, "qualified military service" means any service in the uniformed services as defined in USERRA by any individual if such individual is entitled to reemployment rights under USERRA with respect to such service. A participant whose employment is interrupted by qualified military service under Internal Revenue Code Section 414(u) or who is on a leave of absence for qualified military service under Internal Revenue Code Section 414(u) may elect to make up contributions upon timely resumption of employment with the city in accordance with USERRA, subject to the following:

1. The make-up contributions shall not exceed the maximum contributions the participant would have made during the period of qualified military service if the participant's employment with the city had continued at the same level of compensation without the interruption or leave of absence, reduced by the contributions, if any, actually made during the taxable year(s) in which the qualified military service occurred.
2. The right to make-up contributions is limited to the five-year period immediately following the resumption of employment with the city or, if sooner, the period immediately following the resumption of employment that is equal to three times the length of the interruption or leave of absence.
3. If the participant makes-up contributions, then the city shall make-up the related city contributions which would have been required had such contributions actually been made during the period of qualified military service. The make-up contributions by the city shall be made as soon as practicable after the participant makes such make-up contributions.
4. If participant timely resumes employment in accordance with USERRA after a qualified military leave, the city shall make any other city contribution that would have been made if the

participant had remained employed during the participant's qualified military service. Such contributions must be made no later than ninety days after the date of such reemployment or when contributions are normally due for the year in which the qualified military service was performed, if later.

5. In determining the amount of employer contribution, a participant shall be treated as receiving compensation from the participating employer during such period of qualified military service equal to: (i) the compensation the participant would have received during such period if the participant was not in qualified military service, determined based on the rate of pay the participant would have received from the participating employer but for the absence during the period of qualified military service; or (ii) if the compensation the participant would have received during such period is not reasonably certain, the participant's average compensation from the participating employer during the twelve- month period immediately preceding the qualified military service (or, if shorter, the period of employment immediately preceding the qualified military service).
- B. Effective January 1, 2007, to the extent provided under Internal Revenue Code Section 401(a)(37), in the case of a participant whose employment is interrupted by qualified military service and who dies while performing qualified military service, the survivor of such participant shall be entitled to any additional benefit (other than benefit accruals) provided under the plan as if the participant timely resumed employment in accordance with USERRA and then, on the next day, terminated employment on account of death.
- C. A participant whose employment is interrupted by qualified military service or who is on a leave of absence for qualified military service and who receives a differential wage payment within the meaning of Internal Revenue Code Section 414(u)(12)(D) from the city, shall be treated as a participant who is making employee contributions and the differential wage payment shall be treated as compensation under Section 3.49.030F. This provision shall be applied to all similarly situated individuals in a reasonably equivalent manner.

(Ord. 29184.)

#### 3.49.050 - Participation in the plan.

- A. Each employee hired on or after January 20, 2013 has a one-time irrevocable election to either: (1) become a participant in this plan and make mandatory employee contributions to this plan; or (2) become a participant as a Tier 2 member in the federated employees retirement plan under Chapter 3.28, by executing a written election form on or before his or her first day of employment with the city. If the employee fails to timely file a written election form with the city on or before that date, the employee will be deemed to have elected to participate as a Tier 2 member in the federated employees' retirement plan under Chapter 3.28.
- B. Each employee shall have only one election (including a default election) to participate in the plan, and that election cannot be changed for any reason. If an employee who has made an election (including a default election) under this section leaves employment with the city and later returns to city employment in a capacity/position that would be covered by the plan, the employee's prior election will determine whether or not the employee participates in this plan.
- C. An employee who becomes a participant in this plan (and any survivors of such a participant) shall not eligible for retiree medical, dental, or other health and welfare benefits under Part 16 and Part 17 of Chapter 3.28.

(Ord. 29184.)

#### 3.49.058 - Eligible rollover distributions.

- A. Incoming rollovers shall be accepted pursuant to the plan document.
- B. Outgoing rollovers shall be permitted pursuant to the plan document.
- C. The city may require such documentation regarding any plan from which a rollover distribution may be accepted or to which a rollover distribution may be made as it deems necessary to effectuate the distribution; to confirm that such plan is an eligible retirement plan; or to assure that rollover distributions are permitted under such plan.

(Ord. 29184.)

#### 3.49.060 - Administration of the plan.

- A. The plan and the trust established by this chapter shall be administered by the city as outlined under the basic plan and adoption agreement, which shall be the sole authority to enforce the plan and the trust.
- B. The city shall be responsible for the operation of the plan in accordance with its terms, and shall determine all the questions arising out of the administration, interpretation, and application of the plan and the trust, including making decisions on behalf of the city as to the choice and nature of investments to be available under the plan. All such determinations shall be conclusive and binding on all persons.
- C. The city shall have the authority to enter into agreements on behalf of the city for the administration of the plan, for custodial agreements for funds, and for investments under the plan where the fees to be paid under such an agreement are to be paid by the participants or where there is no amount to be paid by the city under the agreement.
- D. The city may appoint the city manager to perform the administrative duties on behalf of the city. In such a case, the city manager may appoint a designee. The city may also appoint any person or body to act as trustee for the sole purpose of ensuring that all investments, amounts, properties and rights held under the plan are held for the exclusive benefit of participants and their beneficiaries. Except for this purpose, the plan trustee shall be a directed trustee and shall be completely subject to the direction of the administrator, plan coordinator, participant, beneficiary or alternate payee.

(Ord. 29184.)

#### 3.49.065 - Erroneous payments and contributions.

- A. If a payment from the trust fund is made that according to the terms of the plan and the benefits provided hereunder should not have been made, the city may recover that incorrect payment, by whatever means necessary, whether or not it was made due to the error of the city, from the person to whom it was made or from any other appropriate party. For example, if any such incorrect payment is made directly to a participant or beneficiary, the city may deduct it when making any future payments directly to that participant or beneficiary.
- B. If any contribution (or any portion of a contribution) is made to the plan by a good faith mistake of fact, then within one year after the payment of the contribution, and upon receipt in good order of a proper request approved by the city, the amount of the mistaken contribution (adjusted for any income or loss in value, if any, allocable thereto) shall be returned directly to the participant or, to the extent required or permitted by the city, to the city.

(Ord. 29184.)

#### 3.49.070 - Defined contribution fund.

- A. The city shall establish a defined contribution fund to which all contributions to the plan shall be credited, and to which all direct rollover amounts accepted by the plan shall be credited as received. Separate accounts will be established for each employee participating, which will show all amounts of contributions, direct rollover amounts, investments made, shares acquired and earnings and gains on investments. Each account will be valued at least semiannually.
- B. On executing the participation agreement, the employee shall designate his or her investment objective prospectively only. The city may select for investment of accounts the types of investments set forth in Sections 53601 and 53602 of the Government Code of the State of California and in corporate stocks, bonds, and securities, mutual funds, savings and loan accounts, credit union accounts, life insurance policies, variable and fixed annuities, mortgages, deeds of trust, or other security interests in real or personal property. Nothing in this section shall be construed to permit any type of investment prohibited by the Constitution of the State of California.
- C. From time to time, the city manager (or his or her designee) shall determine the available investment funds for participants (or beneficiaries upon the death of the participant). The participants may direct the investment of their accounts among the investment funds so selected. Unless otherwise directed by the participant (or beneficiary), in accordance with procedures established by the city manager (or his or her designee), a participant's (or beneficiary's) employer contribution account, and rollover contribution account, shall be invested in the same manner as the participant's (or beneficiary's) 414(h) pick-up contribution account. The city manager (or his or her designee) shall follow the participants' (or beneficiaries') directions with respect to the investment of the accounts, except that the city manager (or his or her designee) shall direct the investment of a participant's (or beneficiary's) account to a default investment when there is no valid investment direction on file.
- D. In the event that a participant does not have a valid investment direction on file for any portion of the amount in that participant's account, that portion of the account shall be invested in any default option or options as determined by the city manager (or his or her designee). In such event, the participant shall be deemed to have directed that option (or options) for investment of such portion of their account. The city manager (or his or her designee) intends to establish one or more default options based upon various factors, including but not limited to, market risk, stability and rate of return. If the city manager (or his or her designee) has appropriately exercised their fiduciary duty in selecting a default option(s), they have no liability for any loss sustained by a participant or beneficiary whose account in whole or in part is invested in the default option(s).
- E. All amounts of compensation deferred pursuant to the plan, all property and rights acquired or purchased with such amounts and all income attributable to such amounts, property or rights held as part of the plan, shall be transferred to the city to be held, managed, invested and distributed as part of the fund in accordance with the provisions of the plan. All contributions to the plan must be transferred by the city to the fund. All benefits under the plan shall be distributed solely from the fund pursuant to the plan.

(Ord. 29184.)

#### 3.49.080 - City contributions.

- A. For each participant making contributions to the plan under Section 3.49.040, the city shall contribute the percentage of the participant's compensation for each payroll period set forth in the adoption agreement (not to exceed nine percent) to the participant's employer contribution account in the defined contribution fund. In no event shall a participant receive any city contributions for any payroll period for which the participant does not make an employee contribution to the plan. The participant will at all times be one hundred percent vested in the contributions paid by the city to the plan.
- B. All contributions will be subject to the applicable limit under Internal Revenue Code Section 415, as provided by Section 3.49.045 and the plan.

(Ord. 29184.)

#### 3.49.100 - Status of participants.

Neither the establishment of the plan nor any modification thereof, nor the establishment of any book account, nor the payment of any benefits, shall be construed as giving to any participant or other person any legal or equitable right against city, except as herein provided; and in no event shall the terms of employment of any employee or participant be modified or in any way affected hereby.

(Ord. 29184.)

#### 3.49.120 - Governing law.

This plan shall be construed, administered, and enforced according to the laws of the state of California.

(Ord. 29184.)

#### 3.49.130 - Distribution of benefits; election.

- A. A participant may elect the method of payment and the settlement options for distribution in the event of separation from service, no later than thirty days before the commencement of such benefits.
- B. A participant may elect the method of payment and the settlement options for distribution in the event of the participant's death at any time before his or her death.
- C. If the participant fails to make an election of the method of payment before his or her death while still in employment status, the participant's beneficiary may elect the method of payment at any time before payments are due.
- D. If no election of the method of payment has been made by the participant or the participant's beneficiary within the times provided for in this chapter, the benefits payable to the participant or the participant's beneficiary, less any federal or state income taxes required to be withheld, shall be payable in a lump sum, subject to applicable eligible rollover distribution provisions under the plan.

(Ord. 29184.)

#### 3.49.131 - Method of payment of benefits upon occurrence of severance event.

- A. In the event of termination of employment because of retirement, disability, separation from service or other severance event, except death, the full benefits credited to the participant's account plus or minus subsequent investment gains or losses, but less any federal or state income taxes required to be withheld, shall be distributed to the participant in any one or more of the following ways:
  - 1. In a lump sum;
  - 2. In monthly, quarterly, semiannual, or annual installments, or, for a participant eligible for an annuity payout option, installments during the lifetime of the participant with or without a provision for a period certain, but in no case less frequently than annual payments. Life expectancy shall be actuarially determined by the city based on the date the distribution shall begin. Each installment payment shall not be less than fifty dollars, unless such payment is the entire balance remaining in the participant's account.
- B. The amount payable with respect to the participant shall be paid at such times specified by the Secretary of the United States Treasury pursuant to regulations promulgated by said Secretary.
- C. No payment option may be selected by a participant unless it satisfies a good faith interpretation of the requirements of Internal Revenue Code Section 401(a)(9).

(Ord. 29184.)

3.49.133 - Date of payment of benefits.

- A. A participant's account balances may continue to be invested until withdrawn for the payment of benefits.
- B. Payment of benefits under Section 3.49.131 may commence thirty-one days following the occurrence of a severance event, but in no event shall commence later than the required beginning date under Code Section 401(a)(9), as specified in the plan.
- C. Payment of benefits in the event of the death of the participant prior to commencement of benefits may commence sixty days after satisfactory proof of death, and shall commence no later than sixty days after the close of the plan year in which death occurred, subject to satisfactory proof of the death of the participant. However, if the beneficiary is the spouse of the participant, then the spouse may elect, within sixty days of the participant's death, to defer distribution to a date not later than the participant's required beginning date. In the event of the participant's death after commencement of benefits, benefits shall be paid as provided by Internal Revenue Code Section 401(a)(9), as specified in the plan.

(Ord. 29184.)

3.49.134 - Payment of benefits after death.

- A. After the death of a participant, the remaining balance credited to the participant's account, less any federal or state income taxes required to be withheld by law, shall be distributed to participant's beneficiaries in the manner designated by the participant pursuant to the plan document.
- B. Notwithstanding any provision of this plan to the contrary, all payments under the plan shall comply with a good faith interpretation of the requirements of Internal Revenue Code Section 401(a)(9), including the incidental benefit rule set forth in Internal Revenue Code Section 401(a)(9)(G) and Treasury Regulation Section 1.401-1(b)(1)(i) or any successor regulation thereto, as specified in the plan.

(Ord. 29184.)

3.49.137 - De minimis accounts.

Notwithstanding any other provision of this chapter, if the value of a participant's account upon the occurrence of a severance event is less than one thousand dollars, the participant's account shall be paid to the participant in a lump sum.

(Ord. 29184.)

3.49.150 - Nonassignability.

To the fullest extent permitted by law, the interest of a participant in the contractual obligation of the city, established by the plan, shall not be assignable in whole or in part, directly or by operation of law or otherwise, in any manner, and no right or interest of a participant in the city's contractual obligation shall be liable for, or subject to, any obligation or liability of such participant.

(Ord. 29184.)



3.49.160 - Amendment or termination of plan.

- A. The city may, at any time, terminate this plan for all participants. Upon such termination, each participant in the plan will be deemed to have terminated his service as of the date of such termination, and the value of each participant's account, less any taxes required to be withheld, shall be distributed to the participants or their beneficiaries no later than sixty days after the termination of the plan.
- B. The city may also amend the provisions of this plan at any time; provided, however, that no amendment shall affect the rights of the participants or their beneficiaries to the receipt of payment of benefits, to the extent of any contributed amounts at the time of the amendment as adjusted for income attributable to such deferred compensation prior to and subsequent to the amendment.
- C. This plan is intended to qualify as a governmental defined contribution money purchase plan under Internal Revenue Code Section 401(a), and shall be interpreted and administered in a manner consistent with such qualification. The city reserves the right to amend the plan to the extent that may be necessary to conform the plan to the requirements of Internal Revenue Code Section 401(a) and any other applicable law, regulation or ruling, including amendments that are retroactive to the effective date of the plan. In the event that the plan is deemed by the Internal Revenue Service to be administered in a manner inconsistent with Internal Revenue Code Section 401(a), the city shall correct such administration within the period provided in Internal Revenue Code Section 401(a). The city reserves the right to take such action and do such things as required to make the plan as administered consistent with Internal Revenue Code Section 401(a).

(Ord. 29184.)

3.49.170 - Limitation on city responsibility.

- A. The city will invest funds held pursuant to agreements between participants and city in accordance with the requests made by each participant at the time of enrollment or change in enrollment, prospectively only.
- B. Any action by the city or the city manager, or his or her designee, in selecting investment funds, or approving of any such investment of funds, shall not be considered to be either an endorsement or guarantee of any investment, nor shall it be considered to attest to the financial soundness or the suitability of any investment for the purpose of the plan. Neither city nor the city manager, or his or her designee, shall be liable to any participant, or to any participant's beneficiaries or heirs, or to any other person for any losses resulting from investments or funding made under the plan.
- C. The city hereby establishes this defined contribution plan on the terms and conditions set forth herein and in the basic plan and adoption agreement.

(Ord. 29184.)

3.49.181 - Conforming domestic relations orders.

- A. A "domestic relations order" means any judgment, decree or order, including approval of a property settlement agreement or separation agreement issued by a court of competent jurisdiction which relates to the provision of marital property rights of a participant, and is made pursuant to the state domestic relations law of the state where the marital dissolution or separation occurred.
- B. The plan shall only recognize domestic relations orders that the city, in accordance with its authority under Section 3.49.060 and the plan, determines are conforming domestic relations orders.
- C. A conforming domestic relations order is a domestic relations order that the city determines conforms with the following guidelines:

1. The order may provide for the establishment of a separate account for the nonparticipant spouse under the plan. For purposes of this section, "nonparticipant spouse" equally refers to current or former spouse of a plan participant.
2. The order may provide, with respect to any separate account established for the nonparticipant spouse, that the nonparticipant spouse shall have the right:
  - a. To direct the investment of the account in accordance with the provisions of the plan;
  - b. To elect the time and form of distribution from the options available under the plan, provided that distributions shall not commence earlier than provided in paragraph C.3. below;
  - c. To designate beneficiaries of the separate account in the event of the nonparticipant spouse's death, in accordance with the procedures provided under the plan;
  - d. To have all distributions from the account of the nonparticipant spouse made directly to the nonparticipant spouse or his or her beneficiary.
3. To conform, the order:
  - a. May not accelerate or increase any benefit provided under the plan or create any rights greater than the participant's rights under the plan and under Section 401(a) of the Internal Revenue Code of 1986, and may not conflict in any other way with the plan's distribution provisions or the requirements and limitations of Section 401(a)(9) of the Internal Revenue Code of 1986 as amended; provided that after December 31, 2001, the nonparticipant spouse who has been awarded a separate account may elect to commence distribution of the nonparticipant spouse's separate account prior to the occurrence of a severance event for the participant;
  - b. May not allow the nonparticipant spouse to make contributions to the plan except to the extent the nonparticipant spouse is an employee otherwise authorized to become a participant under the plan; and
  - c. May provide that all distributions made to the nonparticipant spouse shall be made directly to the nonparticipant spouse or beneficiary, as applicable, subject to any direct rollover rights;
4. The order shall also conform with such additional guidelines as the city shall establish from time to time including, with regard to the following:
  - a. Provision for the withholding of taxes required by applicable law;
  - b. Provision that the participant and/or the nonparticipant spouse be required to pay any expenses incurred by the city in connection with the order, including, without limitation, the costs of any legal action taken by the city relating to the order;
  - c. Any requirement that the nonparticipant spouse provide the city with such written requests, consents or instructions as the city may require in accordance with the provisions of the plan; and
  - d. Provision expressly acknowledging that the city's obligation to the participant is reduced to the extent that payments are to be made to the nonparticipant spouse.

(Ord. 29184.)