



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Matt Cano

SUBJECT: COVID-19 PAID SICK
LEAVE ORDINANCE

DATE: January 4, 2021

Approved

Date

1/4/2021

REASON FOR SUPPLEMENTAL

To provide additional information regarding administration, enforcement, and compliance of the City's COVID-19 Paid Sick Leave Ordinance to be heard at the January 5, 2021 City Council meeting.

BACKGROUND

In response to the COVID-19 pandemic the federal government enacted the Emergency Paid Sick Leave Act as part of the Families First Coronavirus Response Act ("the Act"). The Act was effective April 1, 2020 and expired on December 31, 2020.

On April 7, 2020, the City Council adopted the COVID-19 Paid Sick Leave Ordinance, an uncodified, urgency ordinance ("Ordinance"). The Ordinance sunset on December 31, 2020, the same date as the end of the Act.

On December 15, 2020, the City Council directed staff to perform the following:

1. Prepare to extend the City's Paid Sick Leave Ordinance through an urgency ordinance should the federal government extend the Act past the current December 31, 2020 deadline. Such protections should extend for the term of the extended federal protections; and/or
2. In the event the federal government fail to extend the paid sick leave protections, the City Attorney and City Manager shall prepare a comprehensive emergency COVID-19 Paid Sick Leave Ordinance that provided the same level of protection currently being given to San Jose workers for consideration by the Council on January 5, 2021. As part of this work the Administration should locate additional resources necessary for enforcement of this ordinance.

ANALYSIS

On December 18, 2020, the City of San José was notified that Paid Sick Leave and extension of the protections were not part of the pending stimulus bill Congress was negotiating. In response to this information and direction from the City Council, the City Attorney’s Office has drafted a comprehensive emergency COVID-19 Paid Sick Leave Ordinance that provides the same level of protection given under the Act. Public Works staff has identified the expanded body of work and the potential resources needed for enforcement of the ordinance.

The original Ordinance (that expired December 31, 2020) was intended to expand the protection provided in the Act by requiring exempt employers to provide certain employees with COVID-19 related paid sick benefits. The Act has the following exemptions:

- It did ***not*** apply to employers with more than 500 employees,
- Authorized the Department of Labor (DOL) to exempt businesses with less than 50 employees, and
- Authorized an employer to elect not to provide the paid sick leave benefit to employees who are health care providers or emergency first responders.

In coordination with the Finance Department, Public Works Office of Equality Assurance used the Business License Tax Certificates to determine the increase in covered businesses with the potential expansion of coverage provided by the proposed new Ordinance:

	# of Employees	# of Businesses
Business Tax Certificate	1	40,953*
	2-49	22,270**
	50-499	814
	500+	50
Original Ordinance (expired 12-31-2020)	500+ and <50 (w/DOL exemption)	22,320
<u>Proposed Expanded Ordinance</u>	<u>1-500+</u>	<u>64,087</u>

* Businesses with 1 employee are still covered under the federal Families First Coronavirus Response Act (FFCRA).
 **The federal FFCRA authorizes the Department of Labor to issue “small business” (<50 employees) exemptions. OEA staff does not have current data on the number of businesses who have received an exemption.

The Office of Equality Assurance (OEA) within the Department of Public Works implements, administers, and enforces multiple City policies, including but not limited to, Prevailing, Living, and Minimum Wage Policies, Disadvantage Business Enterprises, Local Hire and Wage Theft Council Priorities, and Project Labor Agreements. OEA was designated under the Ordinance as

the enforcement division of the City. No additional staffing or resources have been provided to OEA for enforcement of the proposed Ordinance.

Since April 7, 2020, OEA has received over 100 inquires, questions, complaints, and requests regarding the City's original Ordinance, with a majority of the work associated conducted by the OEA Division Manager. Of significant importance, the current Ordinance covered only a small subsection of businesses and a majority of the inquires, questions, and complaints were outside the Ordinance coverage.

Active enforcement of the current and proposed Ordinance would require immense staffing resources. In order to meet compliance and similar to the City's Minimum Wage and Opportunity to Work ordinance enforced by OEA, the Ordinance is a complaint-based enforcement process. Complaint-based enforcement requires employees to submit complaints to the City, that will be enforced as they are received and as staffing allows. Additionally, staff anticipates significant staffing resources would be needed in order to adequately respond to questions and inquiries regarding the ordinance. While staff is investigating whether additional resources can assist with responses to inquiries and enforcement, it should be acknowledged that a significant backlog of inquiries and enforcements will likely occur. Additionally, depending on the volume of requests, it is likely that other priorities that OEA is focused on such as local hire and wage enforcement, could be impacted.

Due to the potential backlog of valid complaints and limited City resources, the amended Ordinance incorporates "private right of action" by incorporating the rights and remedies set forth in the Minimum Wage Ordinance in Section 4.100.090 of the San José Municipal Code. Private right of actions allows employees to file civil action to enforce the benefits of the Ordinance. OEA has only been notified of one private right of action under the Minimum Wage Ordinance since its adoption in March 2013, which may be due to the financial hardships incurred by the employee. All services provided by OEA are free of cost and confidential.

Due to the increase in covered businesses under the proposed Ordinance, the Department of Public Works is looking at alternatives to identify at least three full time staff that can focus on this work to ensure enforcement and compliance is timely, accurate, and effective. As enforcement is complaint-based and the number of valid complaints is unknown, the need for additional resources may fluctuate over the term of the Ordinance.

/s/
MATT CANO
Director of Public Works

For questions please contact Christopher Hickey, Division Manager, Public Works Department, at Christopher.Hickey@sanjoseca.gov.