



Memorandum

TO: HONORABLE MAYOR AND CITY COUNCIL

FROM: Richard Doyle
City Attorney

SUBJECT: COVID-19 Paid Sick Leave Ordinance

DATE: March 30, 2020

COUNCIL DISTRICT: CITYWIDE

Recommendation:

Consider the attached draft "COVID-19 Paid Sick Leave Ordinance" when discussing the elements of the urgency ordinance the Council wants to consider for adoption at the April 7, 2020 City Council meeting.

Background:

The Joint Meeting for the Rules and Open Government Committee and Committee of the Whole considered a paid sick leave urgency ordinance in Item G.2 of its March 25, 2020 meeting. The Committee voted to have a special meeting on Wednesday, April 1, 2020 in order to:

- Further consider and discuss the recommendations in the Mayor's March 24, 2020 memorandum ("Mayor's Memo"), and
- Provide direction for an urgency sick leave ordinance that it wants to consider for adoption at the April 7, 2020 City Council meeting.

Given the extraordinary urgency of this matter, the City Attorney's Office provides the attached draft ordinance ("Draft Ordinance") to help facilitate the discussion at the Special Meeting.

The Draft Ordinance is based on the Mayor's Memo, as well as the Emergency Paid Sick Leave Act that was adopted as part of the Families First Coronavirus Response Act ("Federal Act"). The City Attorney's Office will revise the Draft Ordinance in accordance with Council direction given at the Special Meeting.

Analysis:

The following are the material elements of the Draft Ordinance that the Council may want to consider.

1. **Sunset:** Section 4 proposes that the City’s paid sick leave ordinance “sunset” when the Santa Clara County Health Officer rescinds the “shelter-in-place” mandate of its March 16, 2020 order. The Mayor’s Memo recommends the ordinance expire when the City ends its state of emergency.

The Council may want to consider if having the City’s paid sick leave ordinance sunset when the “shelter-in-place” mandate is lifted more closely aligns with the reason for the ordinance.

2. **Employer/Employee Definitions:** The definitions of these terms in Section 5 tracks the definitions used in the City’s Minimum Wage Ordinance. The Mayor’s Memo does not address how to define these terms.

3. **Covered Employers:** Section 6 would make the paid sick leave ordinance applicable to employers not subject to the Federal Act. This is consistent with the direction in the Mayor’s Memo to “fill gaps” in the Federal Act.

- The Federal Act **allows** the United States Labor Department to provide a financial hardship exemption for businesses with less than 50 employees. The Draft Ordinance would apply to those employers obtaining such a hardship exemption. The practical result of the Draft Ordinance should be that such employers would not seek a hardship exemption under the Federal Act because under the Federal Act they would be eligible for tax credits not available under the City’s sick leave ordinance.
- Similarly, the Federal Act **allows** an employer not to provide paid sick leave to healthcare providers and first responders. The Draft Ordinance should have the same practical impact as it would have on employers of less than 50 employees, i.e. employers should provide the benefit to healthcare providers and first responders under the Federal Act because of the availability of the tax credit.

4. **Employees Receiving Benefit:** Consistent with the Mayor’s Memo, Section 7 would provide paid sick leave to employees performing “essential” work outside the home in accordance with the March 16, 2020 order of the Santa Clara County Health Officer.

In addition, Section 7 would also provide paid sick leave to employees working outside of the home in violation of the County Health Officer’s March 16, 2020 order *if they are doing so as a result of the employer making the performance of such work a condition of continued employment.* The Council may want to consider whether such employers should also be required to provide paid sick leave.

- 5. Sick Leave Hours:** Section 8 tracks the recommendation in the Mayor’s Memo as to full-time employees. The Mayor’s Memo does not address part-time employees.

For part-time employees, Section 8 suggests calculating the maximum number of sick leave hours in the same manner as under the Federal Act. The availability and accrual of hours is consistent with the approach taken in the Mayor’s Memo for full-time employees.

- 6. Use of Sick Leave:** Section 9 allows sick leave to be used just like under the Federal Act. This is consistent with the direction in the Mayor’s Memo to “fill gaps” in the Federal Act.

The Draft Ordinance would **allow** an employer to prohibit health care providers and first responders from using sick leave to care for another. This was not mentioned in the Mayor’s Memo. The Council may want to consider whether an employer should be allowed to limit healthcare providers and first responders to using sick leave to when they show signs of COVID-19 or have been exposed to COVID-19.

- 7. Pay Rate:** Section 9 follows the Federal Act as to the applicable pay rate and limits. The issue of compensation rates and limits is not addressed directly in the Mayor’s Memo.

- 8. Exemption:** Section 10 provides an exemption from the complying with the City’s paid sick leave ordinance if the employer already provides a significant paid leave benefit to its employees. This is consistent with the direction in the Mayor’s Memo.

- 9. Enforcement:** Section 11 provides that the Office of Equality Assurance has the same enforcement powers it has under the City’s Minimum Wage Ordinance. Enforcement was not addressed directly in the Mayor’s Memo.

RICHARD DOYLE
City Attorney

By : /s/ Glenn Schwarzbach
Glenn Schwarzbach
Sr. Deputy City Attorney

cc: David Sykes

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ORDINANCE NO. _____

AN UNCODIFIED URGENCY ORDINANCE OF THE CITY OF SAN JOSÉ ENACTING TEMPORARY SICK-LEAVE REQUIREMENTS FOR CERTAIN PRIVATE EMPLOYERS FOR THE DURATION OF THE CURRENT COVID-19 HEALTH EMERGENCY

WHEREAS, on January 31, 2020, the United States Secretary of Health and Human Services declared a public health emergency based on the threat caused by COVID-19 (also known as the “Coronavirus Disease”), and the President of the United States issued a Proclamation Declaring a National Emergency Concerning COVID-19 beginning March 1, 2020;

WHEREAS, on March 4, 2020, the Governor of California proclaimed a State of Emergency (Executive Order N-25-20) to exist in California based on the threats to public health caused by COVID-19;

WHEREAS, on March 6, 2020, the City of San José issued a Proclamation of Local Emergency finding that the existence and threat of COVID-19 in the community gives rise to conditions of extreme peril to the safety and health of persons within the City;

WHEREAS, on March 16, 2020, the Santa Clara County Public Health Officer issued a COVID-19 related order doing the following:

- Requiring residents to shelter in place and businesses to close, and
- Establishing exceptions, including allowing individuals to leave their homes to engage in “essential activities,” “essential government functions” and “essential businesses,” as those terms are defined in the order;

WHEREAS, on March 19, 2020, the Governor of the State of California issued an Order (Executive Order N-33-20) that all individuals living in California stay home or at their place of residence, except as needed to maintain continuity of operations for certain critical infrastructure sectors, to protect the public health of Californians, to mitigate the impact of COVID-19, and to ensure the healthcare delivery system is capable of serving all;

WHEREAS, effective April 1, 2020, the Emergency Paid Sick Leave Act (enacted as part of the Families First Corona Virus Response Act) mandates that certain employers provide their employees with paid sick leave to be used for any of the following COVID-19 related reasons:

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- The employee is subject to quarantine or isolation by federal, state or local order, or is caring for someone who is quarantined or isolated,
- The employee is advised by a health-care provider to self-quarantine or is caring for someone who is so advised by a health-care provider,
- The employee experiences symptoms and is seeking medical diagnosis, or
- The employee is caring for a minor child because of a closed school or daycare;

WHEREAS, the federal Emergency Paid Sick Leave Act mandates 80 hours of sick leave for full-time employees and the average number of hours an employee works over a 2-week period as the sick leave hours for part-time employees;

WHEREAS, the federal Emergency Paid Sick Leave Act requires sick leave to be available immediately regardless of the length of employment;

WHEREAS, the federal Emergency Paid Sick Leave Act contains tax credits to help employers pay for the sick leave provided to employees;

WHEREAS, the sick leave requirements of the federal Emergency Paid Sick Leave Act contain the following limitations:

- The Act does not apply to employers with more than 500 employees,
- The Act authorizes the Department of Labor to provide exemptions for businesses with less than 50 employees if the providing the benefit would put them out of business, and
- The Act does not require employers to provide sick leave to employees who are health care providers or emergency first responders;

WHEREAS, the requirements relating to the Emergency Paid Sick Leave Act under the Families First Corona Virus Response Act expire on December 31, 2020;

WHEREAS, given the extraordinary health threat caused by COVID-19 and the need to take extraordinary measures to limit its spread, the City Council is compelled to enact this Ordinance, which sets forth sick-leave requirements for employees not covered by the federal Emergency Paid Sick Leave Act; and

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WHEREAS, Section 606 of the City Charter does not require codification of this Ordinance because the Ordinance is temporary and, therefore, not a general ordinance in force.

NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF SAN JOSE:

SECTION 1. Title

This Ordinance will be known as the "COVID-19 Paid Sick Leave Ordinance."

SECTION 2. Authority

This Ordinance is adopted based on the same powers pursuant to which the City adopted its Minimum Wage Ordinance in Chapter 4.100 of the San José Municipal Code, including Article XI, Section 7 of the California Constitution and Section 1205(b) of the California Labor Law. The enactment of this Ordinance is intended to be an exercise of the City's general police powers to protect the health, safety, and welfare as those powers are set forth in State and Federal law.

SECTION 3. Urgency

In accordance with Section 605 of the City Charter, this Ordinance is adopted as an urgency measure necessary for the immediate preservation of the public peace, health and safety. The facts constituting the urgency are as follows.

- A. COVID-19 is a pandemic threatening the health and safety of the City's residents, as reflected by the various emergencies declared at the local, state and national levels.
- B. **Immediate** efforts to limit the spread of COVID-19 are critical to protecting the health and safety of the City's residents.
- C. Among the most effective ways to limit the spread of COVID-19 is for people to "shelter in their places of residence" and to follow "Social Distancing Requirements" as mandated by the order issued by the Santa Clara County Public Health Officer on March 16, 2020, and as urged by other state and national declarations of emergency.
- D. Efforts to limit the spread of COVID-19 are undermined if individuals, based on not having paid sick leave benefits, feel compelled to leave their residences to continue to receive income and engage in "essential activities," "essential government functions," or "essential businesses" (as permitted by the order

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issued by the Santa Clara County Public Health Officer on March 16, 2020) even though they are advised to self-quarantine due to COVID-19 exposure or are experiencing symptoms of COVID-19.

- E. Any delay in making available the paid sick-leave benefits provided under this Ordinance could result in the unnecessary spread of COVID-19 resulting from individuals engaged in “essential activities,” “essential government functions,” or “essential businesses” who do so even though they have been advised to self-quarantine due to COVID-19 exposure or are experiencing symptoms of COVID-19.

SECTION 3. Effective Date

This urgency Ordinance is effective on the date of its adoption.

SECTION 4. Sunset Date

This Ordinance sunsets automatically when the “shelter-in-place” mandate in the order issued by the Santa Clara County Health Officer on March 16, 2020 is rescinded, even though other parts of the order may remain in effect.

SECTION 5. Definitions

For purposes of this Ordinance, the following words, whether used in the singular or plural, have the following meanings.

- A. “Employee” means a person who meets both of the following requirements:
 - 1. The person is an “employee” as defined in Subsection B of Section 4.100.030 of the San Jose Municipal Code, and
 - 2. On the effective date of this Ordinance, the person has worked at least one (1) hour in which the person’s Employer (as defined below) must pay the person at least the Minimum Wage in accordance with Chapter 4.100 of the San Jose Municipal Code.
- B. “Employer” means a person or entity that is an “employer” as defined in Subsection C of Section 4.100.030.
- C. “Essential Work” means work activities and services – as defined in the order issued by the Santa Clara County Public Health Officer on March 16, 2020 - for which an Employee may leave his/her residence to perform.
- D. “Federal Act” means the federal Emergency Paid Sick Leave Act that was enacted as part of the Families First Corona Virus Response Act.

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- E. "Office" means the City's Office of Equality Assurance or such other City department or office as the Council may designate by resolution to enforce the Minimum Wage Ordinance.
- F. "Other Outside Work" means work that is not Essential Work but is work an Employee leaves his/her residence to perform because the Employer has made doing so a condition of continued employment even though performing such work violates the order issued by the Santa Clara County Public Health Officer on March 16, 2020.

SECTION 6. Covered Employers

This Ordinance applies to the following Employers only:

- A. Employers with 500 or more Employees on the effective date of this Ordinance,
- B. Employers with 50 or fewer Employees that have obtained from the United States Department of Labor a financial hardship exemption from the Federal Act, and
- C. Employers that decide to accept the option of not complying with the Federal Act with regard to Employees who are health care providers or emergency first responders.

SECTION 7. Sick Leave Requirement

Employers subject to this Ordinance under Section 6 must provide the sick-leave benefit described in this Ordinance to each Employee who leaves his/her residence to perform either Essential Work or Other Outside Work.

SECTION 8. Sick Leave Hours

- A. A fulltime Employee is entitled to a maximum of eighty (80) hours of sick leave.
 - 1. The Employer must make the first forty (40) hours of sick leave available on the date this Ordinance is effective.
 - 2. The Employee will accrue an additional one (1) hour of sick leave, up to the maximum number of hours, for every two (2) hours of Essential Work or Other Outside Work.

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- B. A part-time Employee is entitled to a maximum number of sick leave hours equal to the number of hours he/she works on average over a 2-week period.
1. The Employer must make the first half of the maximum number of hours available on the date this Ordinance is effective.
 2. The Employee will accrue an additional one (1) hour of sick leave, up to the maximum number of hours, for every two (2) hours of Essential Work or Other Outside Work.

SECTION 9. Scope of Benefit

Sick leave hours are subject to the requirements set forth in this Section 9.

- A. An Employee can use the sick leave benefit for any of the following purposes:
1. The Employee is subject to quarantine or isolation by federal, state or local order due to COVID-19, or is caring for someone who is quarantined or isolated due to COVID-19,
 2. The Employee is advised by a health-care provider to self-quarantine due to COVID-19 or is caring for someone who is so advised by a health-care provider,
 3. The Employee experiences symptoms of COVID-19 and is seeking medical diagnosis, or
 4. The Employee is caring for a minor child because of a school or daycare is closed due to COVID-19.
- B. Notwithstanding Subsection A of this Section 9, an Employer does not have to allow an Employee who is a health care provider or a first responder to use sick leave to care for someone who is quarantined or isolated due to COVID-19, or to care for a minor child because a school or daycare is closed due to COVID-19.
- C. The Employer will pay the Employee for properly used sick leave at the Employee's regular rate of pay up to \$511 a day not to exceed an aggregate of \$5,110. Notwithstanding the foregoing, the Employer may pay an Employee using sick time to care for another person at two-thirds of the Employees regular rate of pay up to \$200 a day not to exceed an aggregate of \$2,000.

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- D. For a part-time Employee, the Employer will calculate the amount of sick leave used based on the average number of hours the Employee worked per day over the last six (6) months. If an Employee has worked for the Employer less than six (6) months, then the Employer will calculate the amount of sick leave used based on the average hours the Employer expected at time of hire to have the Employee work.
- E. An Employer cannot require an Employee to find a replacement as a condition of using sick leave.
- F. An Employee is not entitled to carryover sick leave between years and is not entitled, under any circumstances, to be paid for unused sick leave. Unused sick leave will not be available after the sunset of this Ordinance and ceases to exist.

SECTION 10. Exemptions

- A. Nothing in this Ordinance is intended to require the provision of sick leave to Employees who are working from home.
- B. Nothing in this Ordinance is intended to require the provision of sick leave to Employees not performing Essential Work or Other Outside Work.
- C. This Ordinance does not apply to any Employer that provides its employees with paid personal leave in excess of one hundred sixty (160) hours, provided at least the same number of hours required by Section 8 can be used for the purposes set forth in Subsection A of Section 9.

SECTION 11. Enforcement

- A. The Office is authorized to establish reasonable requirements related to informing Employees of their rights under this Ordinance, including requiring Employers to post notices.
- B. The Office is authorized to implement and enforce this Ordinance in the same manner as, and consistent with, the authority granted to it to enforce the Minimum Wage Ordinance in Chapter 4.100 of the San Jose Municipal Code.

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PASSED FOR PUBLICATION OF TITLE this _____ day of _____, 2020, by the following vote:

AYES:

NOES:

ABSENT:

DISQUALIFIED:

SAM LICCARDO
Mayor

ATTEST:

TONI TABER, CMC
City Clerk