



# Memorandum

**TO:** HONORABLE MAYOR  
AND CITY COUNCIL

**FROM:** Lee Wilcox  
Matt Cano

**SUBJECT:** COVID-19 PAID SICK LEAVE  
ORDINANCE

**DATE:** December 9, 2020

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Approved D. DSyl Date **12/11/2020**

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## **RECOMMENDATION**

- (a) Accept progress report on the City’s COVID-19 Paid Sick Leave Ordinance set to expire on December 31, 2020.
- (b) Direct staff to provide progress report in early 2021 on federal and state paid sick leave extensions and recommendations for updates to the City’s COVID-19 Paid Sick Leave Ordinance.

## **OUTCOME**

Approval of the recommended actions will direct staff to provide progress report in early 2021 on outcomes of the federal Families First Coronavirus Response Act and California Assembly Bill 1867, and recommendations for updates to the City’s COVID-19 Paid Sick Leave Ordinance.

## **BACKGROUND**

*Families First Coronavirus Response Act (FFCRA)* - Emergency Paid Sick Leave Act

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 expires December 31, 2020.

The Act required certain employers to provide certain employees with COVID-19 related paid sick leave benefits. Importantly, the Act contains the following limitations:

- It does **not** apply to employers with more than 500 employees,

- It authorizes the Department of Labor to exempt businesses with less than 50 employees if providing the paid sick leave benefit would jeopardize the viability of the business as a going concern, and
- It authorizes an employer to elect not to provide the paid sick leave benefit to employees who are health care providers or emergency first responders.

The Act requires covered employers to provide each employee up to 80 hours or the average hours of two weeks work for part-time employment for COVID-19 related reasons. Those reasons are subject to a Federal, State, or local quarantine or isolation order, advised by a health care provider, experiencing symptoms of COVID-19, employee is caring for an individual who is subject to or is experiencing COVID-19 related symptoms. Employees can use paid sick time immediately for the purposes described above, regardless of how long the employee has worked for an employer.

The Act limits the amount of sick leave payments dependent on situation, prohibits carry over from year to year, and includes penalties for employers who violate.

#### *City of San José Urgency COVID-19 Paid Sick Leave Ordinance*

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

The Ordinance was intended to “fill the gaps” in the paid sick leave benefit required by the Act. That is, the Ordinance applies to employers that are not required – in whole or in part - to provide paid sick leave benefits under the Act: businesses with 500 or more employees and businesses of 50 or fewer. Employers subject to the Ordinance must provide employees with paid sick leave benefits equivalent to those required under the Act.

#### *California Sick Leave Law*

California has two different sick leave laws. The first is a general sick leave law adopted in 2015 requiring that full-time employees, at a minimum, earn 24 hours (or 3 days) of paid sick leave per year. Employees earn a minimum of 1 hour of paid leave for every 30 hours worked and are entitled to begin using accrued paid sick time beginning on the 90<sup>th</sup> day of employment.

The second sick leave law is AB 1867, enacted in September 2020 to address COVID-19 specifically. AB 1867 is scheduled to sunset on December 31, 2020 or the end of the Act, whichever is later.

Like the City's ordinance, AB 1867 is intended to fill the gaps in the paid sick leave portion of the Act. AB 1867, like the Ordinance, expands paid leave requirements to private businesses of 500 or more employees in the U.S. and specifically include food sector workers. However, unlike the Act and the Ordinance, AB 1867 does not provide leave for those employees caring for a family member who is quarantined or sick or caring for a minor child whose school or childcare has closed due to COVID-19.

## **ANALYSIS**

The Ordinance was written based on, references and is intertwined with the Act. The Ordinance was not written to stand independent of the Act. *If Congress extends the Act beyond December 31, 2020*, the recommended revision to the Ordinance might be as simple as merely extending the expiration date.

There has been no indication to date that Congress will extend the Act's expiration date. Due to continued COVID-19 Stimulus discussion and transition periods for the legislative and executive branches, extensions and/or expansions of the Act may be delayed or may not be enacted. If Congress does not extend the Act, revising the San Jose Ordinance as a stand-alone ordinance not referencing federal law would be exponentially more complicated. Simply amending the Ordinance's expiration date in December, absent a federal extension, would lead to confusion, lack of clarity, and ultimately, non-compliance with requirements.

Currently, the Ordinance applies only to employers not covered by the Act (i.e. businesses with 500 or more employees, businesses of 50 or fewer employees obtaining a hardship exemption and employers electing not to provide paid sick leave benefits to employees who are health care providers or emergency first responders). Additionally, the Ordinance applies to "essential" workers leaving home to perform "essential" work. The definition of "essential worker" has changed over time as State and County health restrictions have changed. Lastly, the number of paid sick leave hours mandated by the Ordinance (80 hours for full time employees) is only from the period of April 7, 2020 through December 31, 2020.

Revising the Ordinance to be independent of the Act requires complicated policy issues regarding:

1. Which employers beyond those currently covered by the Ordinance, if any, should be required to provide paid sick leave benefits,
2. Whether the application of the Ordinance should be expanded beyond "essential workers" leaving home to perform "essential" work, and
3. What number of mandated sick leave hours should be provided after December 31, 2020 (e.g. would an "essential worker" who used all his/her sick leave hours in 2020 get additional sick leave hours).

Not only would such revisions require additional time to draft, but they likely would result in establishing a new City program that would significantly increase the enforcement resources needed to ensure compliance. Moreover, effective implementation of any such new program necessitates having clear requirements for both businesses and employees.

### **CONCLUSION**

It is recommended that the City Council approve this progress report on the City's COVID-19 Paid Sick Leave Ordinance set to expire on December 31, 2020. The federal Families First Coronavirus Response Act expires on December 31, 2020, without indication of extension. The City's COVID-19 Paid Sick Leave Ordinance was supplemental to and fills the gaps left by the federal and state legislation. Extending and expanding the City's COVID-19 Paid Sick Leave Ordinance independent of federal and state legislation is a significant undertaking that requires staff time and resources. Staff will continue to monitor state and federal legislation and provide a progress report in early 2021 on federal and state paid sick leave extensions and recommendations for updates to the City's COVID-19 Paid Sick Leave Ordinance.

### **EVALUATION AND FOLLOW-UP**

Based on Council direction, staff will return to Council on March 2, 2020, with updates and recommendations.

### **CLIMATE SMART SAN JOSE**

The recommendation in this memo has no effect on Climate Smart San José energy, water, or mobility goals.

### **PUBLIC OUTREACH**

This memorandum will be posted on the City's website for the December 15, 2020, City Council Agenda.

### **COORDINATION**

This memorandum was coordinated with the City Manager's Office, City Attorney Office, Office of Economic Development, Department of Public Works, Office of Employee Relations, and Human Resources.

**COMMISSION RECOMMENDATION/INPUT**

No commission recommendation or input is associated with this action.

**CEQA**

Not a Project, File No. PP17-008, General Procedure and Policy Making resulting in no changes to the physical environment.



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/s/

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