



# Memorandum

**TO:** HONORABLE MAYOR AND CITY COUNCIL

**FROM:** Nora Frimann  
City Attorney

**SUBJECT:** COVID Paid Sick Leave Ordinance Amendments

**DATE:** December 23, 2020

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**COUNCIL DISTRICT:** CITYWIDE

**Recommendation:**

A. Adopt an urgency ordinance that:

1. Continues, retroactive from January 1, 2021 through June 30, 2021, the paid sick leave benefits that had been provided under the expired federal Emergency Paid Sick Leave Act and the COVID-19 Paid Sick Leave Ordinance;
2. Adds a private right of action to enforce the benefits;
3. Makes technical changes to reflect the health orders of the State and County of Santa Clara; and
4. Sets forth the facts constituting the urgency.

B. Approve an ordinance that:

1. Continues, retroactive from January 1, 2021 through June 30, 2021, the paid sick leave benefits that had been provided under the expired federal Emergency Paid Sick Leave Act and the COVID-19 Paid Sick Leave Ordinance;
2. Adds a private right of action to enforce the benefits; and
3. Makes technical changes to reflect the health orders of the State and County of Santa Clara;

**Background:**

**A. Federal Emergency Paid Sick Leave Act.**

On March 18, 2020, the federal government enacted the Families First Coronavirus Response Act, which included the Emergency Paid Sick Leave Act. The Emergency Paid Sick Leave Act expires on December 31, 2020.

The Emergency Paid Sick Leave Act requires employers to provide employees with COVID-19 related paid sick leave benefits. It contains the following limitations:

1. It does not apply to employers with more than 500 employees,
2. It authorizes the Department of Labor to exempt businesses with less than 50 employees if providing the benefit would jeopardize the viability of the business as a going concern, and
3. It authorizes employers not to provide the benefit to employees who are health care providers or emergency first responders.

The Families First Coronavirus Response Act included tax credits for employers subject to the mandate of the Emergency Paid Sick Leave Act.

On December 21, 2020, the United States Congress passed legislation addressing certain parts of the Families First Coronavirus Response Act. The legislation does *not* extend the Emergency Paid Sick Leave Act. It does, however, extend the tax credits through March 31, 2021 for employers who provide such sick leave as if the Act were still in effect. As of the date of this memorandum, the President has not signed the legislation.

**B. City's COVID-19 Paid Sick Leave Ordinance.**

On April 7, 2020, the City Council adopted the COVID-19 Paid Sick Leave Ordinance. The COVID-19 Paid Sick Leave Ordinance is intended to "fill the gaps" in the federal Emergency Paid Sick Leave Act by mandating that employers *not* required under the Act to provide COVID-19 related paid sick leave must provide such benefits. The Ordinance expires on December 31, 2020.

**C. Council Direction of December 15, 2020.**

The City Council addressed the expiration of the COVID-19 Paid Sick Leave Ordinance at its meeting of December 15, 2020. At the time of the meeting, no one knew whether the federal government was going to extend the expiration date of the federal Emergency Paid Sick Leave Act.

Council directed staff to return on January 5, 2021 with an ordinance, retroactive to January 1, 2021, doing whichever one of the following is applicable:

1. If the federal government extends the Emergency Paid Sick Leave Act, extend the COVID-19 Paid Sick Leave Ordinance consistent with such extension of the Act, or
2. If the federal government does *not* extend the Emergency Paid Sick Leave Act, prepare a comprehensive emergency ordinance continuing the same levels of benefits as in the Act and the COVID-19 Paid Sick Leave Ordinance.

Council also directed that the ordinance include a private right of action.

### **Analysis:**

#### **A. Urgency and Non-Urgency Ordinances.**

The recommendation involves adoption of an urgency ordinance and approval of the same ordinance as a non-urgency ordinance. If adopted by a vote of eight (8) members of the City Council, the urgency ordinance would become effective immediately.

The simultaneous approval of a non-urgency ordinance protects the City in the unlikely event someone challenges the “urgency” findings made as part of the urgency ordinance. This non-urgency ordinance would become effective 38 to 45 days after approval, depending on when the second reading occurs.

Under both ordinances, the effective date of the benefits is retroactive to January 1, 2021.

#### **B. Proposed Amendments**

This memorandum assumes the federal government has not extended the Emergency Paid Sick Leave Act. Accordingly, in accordance with Council direction, the proposed ordinance is comprehensive, continuing the same levels of benefits (retroactive to January 1, 2021) as were provided in the expired federal Emergency Sick Leave Act and COVID-19 Paid Sick Leave Ordinance.

The following are the main elements of the proposed Ordinance.

1. The proposed Ordinance incorporates the definitions of “employer” and “employee” from the expired COVID-19 Paid Sick Leave Ordinance.

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2. The proposed Ordinance substantially incorporates the substantive provisions of the expired federal Emergency Sick Leave Act, omitting the limitations discussed above. The expired COVID-19 Paid Sick Leave Ordinance was based on these same substantive provisions.
3. The proposed ordinance maintains the exclusion for employees who can work from home. This exclusion was in the expired COVID-19 Paid Sick Leave Ordinance.
4. The proposed ordinance incorporates the enforcement provisions from the expired COVID-19 Paid Sick Leave Ordinance. It adds a provision providing for enforcement via a private civil 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, entitled "Enforcement."
5. The proposed ordinance eliminates references to "essential work" and "essential business" that were in the expired COVID-19 Paid Sick Leave Ordinance. These were terms used in early orders issued by the Health Officer of the County of Santa Clara. Recent orders issued by the Health Officer no longer use the rubric of "essential worker" and "essential business."

The proposed ordinance would be implemented and interpreted consistent with the way the federal Emergency Sick Leave Act was implemented and interpreted before it expired.

NORA FRIMANN  
City Attorney

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

cc: David Sykes