

DRAFT

ORDINANCE NO.

AN UNCODIFIED ORDINANCE OF THE CITY OF SAN JOSE ESTABLISHING LABOR STANDARDS REQUIREMENTS FOR HAZARD PAY FOR GROCERY STORE EMPLOYEES WORKING DURING THE COVID-19 HEALTH EMERGENCY IN SAN JOSE

WHEREAS, the new coronavirus 19 (“COVID-19”) disease is caused by a virus that spreads easily from person to person and may result in serious injury or death, and is classified by the World Health Organization (“WHO”) as a worldwide pandemic; and

WHEREAS, COVID-19 has spread broadly throughout California and remains a significant health risk to the community, especially members of our most vulnerable populations; and

WHEREAS, WHO has declared that COVID-19 is a global pandemic, which is particularly severe in high risk populations, such as people with underlying medical conditions and the elderly, and the WHO has raised the health emergency to the highest level, requiring extraordinary actions to disrupt and prevent the spread of the disease; and

WHEREAS, on March 4, 2020, California Governor Gavin Newsom proclaimed a state of emergency in response to COVID-19; and

WHEREAS, on March 19, 2020, California Governor Gavin Newsom issued a “Stay Home – Stay Healthy” proclamation closing all non-essential workplaces, requiring people to stay home except to participate in essential activities or to provide essential business services, and banning all gatherings for social, spiritual, and recreational purposes. In addition to healthcare, public health and emergency services, the “Stay

Home-Stay Healthy” proclamation specifically identified Grocery Stores as essential businesses critical to protecting the health and well-being of Californians and designated their workers as essential critical infrastructure workers; and

WHEREAS, on December 3, 2020, California Governor Gavin Newsom extended the “Stay Home-Stay Healthy” proclamation and imposed a Regional Stay at Home Order; and

WHEREAS, on January 25, 2021, the California Department of Health and the County of Santa Clara lifted the Regional Stay at Home Order and announced that businesses, entities and individuals in Santa Clara County are subject to the purple tier of the State’s Blueprint for a Safer Economy and a revised County Health Officer Order; and

WHEREAS, as of January 26, 2021, the World Health Organization Situation Report reported a global total of 98,925,221 cases of COVID-19, including 2,127,294 deaths; as of February 3, 2021, the State of California reported 3,294,447 cases of COVID-19 including 42,466 deaths; and as of February 3, 2021, the City of San José reported 68,097 cases of COVID-19; and

WHEREAS, Grocery Stores are essential businesses operating in the City of San José and serve as the main points of distribution of food and other daily necessities for residents during the COVID-19 emergency; and

WHEREAS, Grocery Store employees are essential workers who perform services that are fundamental to the economy and health of the community during the COVID-19 crisis. These employees interact with the public and have limited ability to engage in physical distancing; and continually expose themselves and the public to the spread of disease; and

WHEREAS, Grocery Store employees have been supporting grocery businesses' operations and facilitating community access to food during the pandemic, despite facing a clear and present danger of workplace exposure to COVID-19 and receiving limited or inconsistent additional pay in recognition of this hazard; and

WHEREAS, Grocery Store employees cannot choose to work from home and must come to work to perform their jobs, which can involve substantial interaction with customers and/or ventilation systems that could potentially spread the virus. They are wearing masks, trying as much as possible to social distance, performing safety protocols, and learning new skills to decrease transmission of the virus to protect themselves and the public; and

WHEREAS, hazard pay, paid in addition to regular wages, is an established type of compensation for employees performing hazardous duty or work involving physical hardship that can cause extreme discomfort and distress; and

WHEREAS, Grocery Store employees working during COVID-19 emergency merit additional compensation because they are performing hazardous duty due to the significant risk of exposure to COVID-19 while working. Grocery Store employees have been working under these hazardous conditions for months. They are working in these hazardous conditions now and will continue to face safety risks as the COVID-19 public health emergency presents an ongoing threat for an uncertain period, potentially resulting in subsequent waves of infection; and

WHEREAS, the continued availability of Grocery Stores is fundamental to the health and welfare of the community and is made possible during the COVID-19 emergency because Grocery Store employees are on the frontlines of this devastating pandemic supporting public health, safety and welfare by working in hazardous conditions; and

WHEREAS, the Occupational and Environmental Medicine Journal published a study of the association between COVID-19 infection, exposure risk and mental health among a cohort of essential retail workers in the USA. In that study, the researchers found a considerable asymptomatic COVID-19 infection rate among grocery workers: Employees with direct customer exposure were five times more likely to test positive for COVID-19; and

WHEREAS, the Brookings Institute Report dated November 2020 reported the inequities between the windfall profits of retail businesses and their essential workers and found that while top retail companies' profits have soared during the pandemic, pay for their frontline essential workers, in most cases, has not; that the top retail companies in the analysis earned on average an extra \$16.7 billion in profit this year compared to last year; a 40% increase; that the 13 companies studied raised pay for their frontline essential workers by an average of just \$1.11 per hour since the pandemic began, a 10% increase on top of wages that are often too low to meet a family's basic needs; and

WHEREAS, establishing an immediate requirement for Grocery Stores to provide hazard pay to Grocery Store employees protects public health and welfare by insuring the stability of the food supply chain, supports stable incomes and promotes job retention by ensuring that Grocery Store employees are compensated for the substantial risks, efforts, and expenses they are undertaking to provide essential services in a safe and reliable manner during the COVID-19 emergency; and

WHEREAS, Section 606 of the City Charter does not require codification of this Grocery Store Employee Hazard Premium Pay Ordinance because it is temporary, and therefore, not a general ordinance in force; and

WHEREAS, pursuant to the provisions and requirements of the California Environmental Quality Act of 1970, together with related State CEQA Guidelines and

Title 21 of the San José Municipal Code (collectively, "CEQA"), the Director of Planning, Building and Code Enforcement has determined that the provisions of this Ordinance do not constitute a project, under File No. PP17-008 (General Procedure and Policy Making resulting in no changes to the physical environment); and

WHEREAS, the City Council of the City of San José is the decision-making body for this Ordinance; and

WHEREAS, this Council has reviewed and considered the "not a project" determination under CEQA prior to taking any approval actions on this Ordinance;

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

SECTION 1. Title

This ordinance will be known as the "Grocery Store Employee Hazard Premium Pay Ordinance".

SECTION 2. Authority

- A. 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 Code.
- B. The City intends the enactment of this Ordinance to be an exercise of the City's general police powers to protect the public health, safety and welfare as those powers are set forth in State and Federal Law.

SECTION 3. Intentionally Omitted.

SECTION 4. Effective Dates of the Ordinance

- A. This Grocery Store Employee Hazard Premium Pay Ordinance (“Ordinance”) is effective thirty (30) days following the date of its adoption.
- B. This Ordinance will expire one hundred twenty (120) days from the effective date of this Ordinance.

SECTION 5. Definitions

The following shall apply to this Ordinance:

- A. “Base Wage” shall mean the hourly wage paid to Covered Employees as of the effective date of this Ordinance not including Hazard Premium Pay owed under this Ordinance or any “Employer-Initiated Hazard Pay”.
- B. “City” shall mean the City of San José.
- C. “Covered Employer” shall mean:
 - 1. Grocery Store as defined herein, that employs three hundred (300) or more employees nationwide, regardless of where those employees are employed, including but not limited to chains, integrated enterprises, or franchises associated with a franchisor or network of franchises with Franchisees that employ more than three hundred (300) employees in the aggregate, regardless of where those employees are employed.

To determine the number of Grocery Store's employees, the calculation shall be based upon:

- a. The actual number of employees per calendar week who worked for compensation during the pay period preceding the effective date of this Ordinance.
- b. All employees who worked for compensation shall be counted, including but not limited to:
 - i. Employees who are not covered by this Ordinance;
 - ii. Employees who worked inside the City;
 - iii. Employees who worked outside the City; and
 - iv. Employees who worked in full-time employment, part-time employment, joint employment, temporary employment, or through the services of a temporary services or staffing agency or similar entity.

D. "Covered Employee" shall mean any person who:

1. In a calendar week, performs at least two (2) hours of work for a Covered Employer within the geographic boundaries of the City; and
2. Qualifies as an employee entitled to payment of a minimum wage from any Covered Employer under the California minimum wage law, as provided under Section 1197 of the California Labor Code and wage orders published by the California Industrial Welfare Commission.

- E. "Employer Initiated Hazard Pay" shall mean any other premium hourly rate already paid by a Covered Employer solely to compensate Covered Employees for working during the pandemic.
- F. "Franchise" means a written agreement by which:
1. A Person is granted the right to engage in the business of offering, selling, or distributing goods or services under a marketing plan prescribed or suggested in substantial part by a Franchisor or its affiliates; and
 2. The operation of the business is substantially associated with a trademark, service mark, tradename, advertising, or other commercial symbol; designating, owned by, or licensed by a Franchisor or its affiliates; and
 3. The Person pays, agrees to pay, or is required to pay, directly or indirectly, a fee for the rights granted to the Person under such written agreement.
- G. "Franchisee" means a Person to whom a Franchise is offered or granted.
- H. "Franchisor" means a Person who grants a franchise to another Person.
- I. "Holiday Premium" shall mean the hourly wage paid to Covered Employees for performing work during a holiday or holiday season.
- J. "Hazard Premium Pay" shall mean Covered Employer shall pay the amount of three dollars (\$3.00) per hour in hazard pay above and beyond any payments already owed to the Covered Employee.

- K. "Hours Worked" means the time during which a Covered Employee is subject to the control of a Covered Employer, including all the time the Covered Employee is permitted to work, and on-call.
- L. "Person" shall mean any individual, corporation, partnership, limited partnership, limited liability partnership, limited liability company, business trust, estate, trust, association, joint venture, agency, instrumentality, or any other legal or commercial entity, whether domestic or foreign.
- M. "Grocery Store" shall mean a retail store in the City of San José that sells household foodstuffs for offsite consumption, ~~including the sale of fresh produce, meats, poultry, fish, deli products, dairy products, canned foods, dry foods, beverages, baked foods and/or prepared foods.~~
- ~~["Grocery Store" shall mean a retail store in the City of San José that is either:~~
- ~~1. Over fifteen thousand (15,000) square feet in size and that sells household foodstuffs for offsite consumption, including the sale of fresh produce, meats, poultry, fish, deli products, dairy products, canned foods, dry foods, beverages, baked foods and/or prepared foods; or~~
 2. At with at least ten percent (10%) of its sales floor area dedicated to sale of non-taxable merchandise including, but not limited to, the sale of fresh produce, meats, poultry, fish, deli products, dairy products, canned foods, dry foods, beverages, baked foods and/or prepared foods.]
- N. "Retaliatory Action" shall mean the failure to hire, or the discharge, suspension, demotion, penalization, lowering of the Base Wage or Holiday Premium wage, or discrimination or any other adverse action against a Covered Employee with

respect to the terms and conditions of the Covered Employee's employment, for opposing any practice proscribed by this Ordinance, for participating in proceedings related to this Ordinance, for seeking to enforce his or her rights under this Ordinance by any lawful means, or for otherwise asserting rights under this Ordinance.

SECTION 6. Payment of Hazard Premium Pay to Covered Employees

- A. Hazard Premium Pay. For all hours worked and in addition to the Covered Employee's Base Wage or Holiday Premium Wage, whichever applicable at the time of hours worked, Covered Employers shall pay Hazard Premium Pay to their Covered Employees. The Covered Employers providing Employer-Initiated Hazard Pay will be credited for doing so in accordance with Section 13.

- B. Duration of Hazard Premium Pay. Covered Employers shall pay Hazard Premium Pay to all workers for any pay period during one hundred twenty (120) days from the effective date of this Ordinance. Unless extended by the City Council, this Ordinance shall expire one hundred twenty (120) days from the effective date of the Ordinance.

SECTION 7. Protections

- A. No Covered Employer shall, as a result of this Ordinance going into effect, take any of the following actions:
 - 1. Reduce a Covered Employee's compensation;

 - 2. Limit a Covered Employee's earning capacity.

- B. It shall be a violation if this Ordinance is a motivating factor in a Covered Employer's decision to take any of the actions in paragraph A of this section unless the Covered Employer can prove that its decision to take the action(s) would have happened in the absence of this Ordinance going into effect.

SECTION 8. Notice and Posting

Every Covered Employer shall post in a conspicuous place at any workplace or job site where any Covered Employee works, a notice informing Covered Employees of their rights under this Ordinance. Every Covered Employer shall post notices in English, Spanish, and any other language spoken by at least five percent (5%) of the Covered Employees at the workplace or job site. Every Covered Employer also shall provide each Covered Employee at the time this Ordinance becomes effective or at the time of hire, whichever is later, the Covered Employer and owner or manager's name; address; telephone number; and whether it is part of a chain, integrated enterprise, or franchise associated with a franchisor or network of franchises. If the information the Covered Employer provided to the Covered Employee changes, the Covered Employer shall provide the updated information in writing within ten (10) days of the change.

SECTION 9. Retaliation Prohibited

It shall be unlawful for a Covered Employer or any other party to discriminate in any manner or take adverse action against any Covered Employee in retaliation for exercising rights protected under this Ordinance. Rights protected under this Ordinance include, but are not limited to: the right to file a complaint or inform any person about any party's alleged noncompliance with this Ordinance; and the right to inform any person of his or her potential rights under this Ordinance and to assist him or her in asserting such rights. Protections of this Ordinance shall apply to any Covered Employee who mistakenly, but in good faith, alleges noncompliance with this

Ordinance. Taking adverse action against a Covered Employee, including but not limited to lowering Covered Employees' Base Wage or Holiday Premium Wages or reduction of hours, within ninety (90) days of the Covered Employee's exercise of rights protected under this Ordinance shall raise a rebuttable presumption of having done so in retaliation for the exercise of such rights.

SECTION 10. Enforcement

A person aggrieved by a violation of this Ordinance on or after the effective date of this Ordinance shall have the same rights to bring a civil action and the same private remedies as are set forth in the Minimum Wage Ordinance in Section 4.100.090 B, C and E of the San José Municipal Code, entitled "Enforcement."

SECTION 11. Covered Employee Remedies for Violations

- A. Damages and Restitution. Every Covered Employer who violates this Ordinance, or any portion thereof shall be liable to the Covered Employee whose rights were violated for any and all relief, including, but not limited to:
1. Legal and equitable relief including but not limited to reinstatement, rescission, the payment of Hazard Premium Pay unlawfully withheld, and the payment of all penalties and fines imposed pursuant to other provisions of this Ordinance or State law.
 2. Interest on all due and unpaid wages at the rate of interest specified in subdivision (b) of Section 3289 of the California Civil Code, which shall accrue from the date that the wages were due and payable as provided in Part 1 (commencing with Section 200) of Division 2 of the California Labor Code, to the date the wages are paid in full.

B. Civil Enforcement. Any Covered Employee aggrieved by a violation of this Ordinance, or any other person or entity acting on behalf of the public as provided for under applicable state law, may bring a civil action in a court of competent jurisdiction against the Covered Employer violating this Ordinance. A Covered Employee, upon prevailing, shall be entitled to such legal or equitable relief as may be appropriate to remedy the violation including but not limited to monies to be paid pursuant to this Ordinance, back pay, reinstatement, rescission, and reasonable attorneys' fees and costs. Any other person or entity enforcing this Ordinance on behalf of the public as provided for under applicable state law, upon prevailing, shall be entitled only to equitable, injunctive and/or restitutionary relief, and reasonable attorneys' fees and costs. Nothing in this Ordinance shall be interpreted as restricting, precluding, or otherwise limiting a separate or concurrent criminal prosecution under the Municipal Code or state law. Jeopardy shall not attach as a result of any administrative or civil enforcement action taken pursuant to this Ordinance.

SECTION 12. Additional Remedies

The remedies, penalties and procedures provided under this Ordinance are cumulative and are not intended to be exclusive of any other available remedies, penalties and procedures.

SECTION 13. Credit for Employer-Initiated Hazard Pay

Hazard Premium Pay otherwise required under this Ordinance shall be reduced by the hourly amount of any Employer-Initiated Hazard Pay (e.g. A Covered Employer offering a two dollar (\$2.00) per hour Employer-Initiated Hazard Pay pays an additional one dollar (\$1.00) per hour in Hazard Premium Pay per this Ordinance.) Such Covered

Employer must demonstrate that, as of the effective date of this Ordinance and in any subsequent covered pay periods, all Covered Employees are receiving such Employer-Initiated Hazard Pay. No Covered Employer shall be credited prospectively for any past payments. No Covered Employer shall be credited for any hourly premiums already owed to Covered Employees, such as but not limited to, Holiday Premiums. Nothing herein shall be interpreted to prohibit any Covered Employer from paying more than three dollars (\$3.00) per hour in Hazard Premium Pay.

SECTION 14. No Waiver of Rights

Any waiver by a Covered Employee of any or all of the provisions of this Ordinance shall be deemed contrary to public policy and shall be void and unenforceable except as allowed herein.

SECTION 15. Coexistence with Other Available Relief for Specific Deprivations of Protected Rights

The provisions of this Ordinance shall not be construed as limiting any Covered Employee's right to obtain relief to which he or she may be entitled at law or in equity.

SECTION 16. Conflicts

Nothing in this Ordinance shall be interpreted or applied so as to create any power or duty in conflict with any federal or state law.

SECTION 17. Severability

If any subsection, sentence, clause or phrase of this Ordinance is for any reason held to be invalid or unconstitutional by a court of competent jurisdiction, such decision shall not

affect the validity of the remaining portions of this ordinance. The City Council hereby declares that it would have adopted this section, and each and every subsection, sentence, clause and phrase thereof not declared invalid or unconstitutional, without regard to whether any portion of the ordinance would be subsequently declared invalid or unconstitutional.

PASSED FOR PUBLICATION of title this _____ day of _____, 2021, by the following vote:

AYES:

NOES:

ABSENT:

DISQUALIFIED:

SAM LICCARDO
Mayor

ATTEST:

TONI J. TABER, CMC
City Clerk