

Locke Lord QuickStudy: San Jose and San Francisco Pass COVID-19 Supplemental Paid Sick Leave Ordinances

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The cities of San Jose and San Francisco join Los Angeles in passing supplemental paid sick leave ordinances. For an in depth discussion regarding the Los Angeles COVID-19 Supplemental Paid Sick Leave Ordinance, please click [here](#).

Similar to the Los Angeles ordinance, San Jose and San Francisco passed ordinances that provide eligible employees the opportunity to receive Supplemental Paid Sick Leave for qualifying reasons related to COVID-19.

SAN JOSE'S COVID-19 PAID SICK LEAVE ORDINANCE

On April 7, 2020, the San Jose City Council passed the [COVID-19 Paid Sick Leave Ordinance](#) (the "San Jose Ordinance") requiring employers who are not subject to the Families First Coronavirus Response Act ("FFCRA") to provide up to 80 hours of Supplemental Paid Sick Leave to full-time employees for qualifying reasons related to the COVID-19 pandemic. For an in depth discussion regarding the FFCRA, please click [here](#).

The San Jose Ordinance is adopted as an urgency measure and became effective immediately. It will remain effective until December 31, 2020. It does not permit an employee to carryover unused paid sick leave nor any right to be paid out any unused paid sick leave provided by the ordinance.

Unlike the FFCRA, employers covered by the San Jose Ordinance do not receive a tax credit covering the cost of the paid leave.

Covered Employers

The San Jose Ordinance applies to employers that are (1) not required, in whole or in part, to provide paid sick leave benefits under the FFCRA; and (2) are employers as defined in the City's Minimum Wage Ordinance, located in Subsection C of Section 4.100.030 of San Jose Municipal Code.

Specifically, the San Jose Ordinance applies to all persons, associations, organizations, partnerships, business trusts, limited liability companies or corporations, or corporate officers or executives, who

1. directly or indirectly through any other person, including through the services of a temporary employment agency, staffing agency or similar entity, employs or exercises control over the wages, hours or working

- conditions of any employee; and
2. are either subject to the Business License Tax Chapter 4.76 of the Municipal Code, or maintain a facility in the City.

Notably, if an employer is either exempt or partially exempt under the FFCRA (e.g., small employers, employers of health care providers and emergency responders), the San Jose Ordinance is intended to apply only to the extent the FFCRA does not provide benefits.

Eligible Employees ?

The San Jose Ordinance is immediately available to all employees who have worked at least two (2) hours within the geographic boundaries of the City of San Jose, and who leave their residences to perform “Essential Work” exempted from state and local shelter at home orders.

The San Jose Ordinance defines “Essential Work” as work activities and services per the Santa Clara County Public Health Order Issued on March 16, 2020, including, among other types of businesses, healthcare operations and essential infrastructure, food cultivation, businesses that provide mailing and shipping services. For a full list of what work constitutes “essential,” please see [Paragraph 10 of the March 16, 2020, Order](#).

Qualifying Reasons for Leave

A covered employer is required to provide Supplemental Paid Sick Leave to eligible employees who are unable to work or telework for any of the following reasons:?

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 a school or daycare is closed due to COVID-19.

Since the San Jose City Council chose to use wording in the Ordinance that ?differs from that in the FFCRA, it is unclear whether the qualifying reasons in the Ordinance will be ?interpreted consistent with federal regulations and guidance interpreting unidentical provisions under the ?FFCRA.?

An employer cannot require an employee to find a replacement worker as a condition to using sick leave. The San Jose Ordinance is silent as to requiring documentation to support a leave request. The Los Angeles Ordinance, by contrast, expressly stated documentation is not required.

Amount of Leave Available

Eligible employees who work at least 40 hours per work or who are classified as full-time by an ?employer are eligible for up to 80 hours of Supplemental Paid Sick Leave. Part-time employees are entitled to sick leave hours equal to the number of hours he or she worked on average over a two (2) week period.

Employees who work varying schedules from week to week are entitled to sick leave hours equal to the average number of hours the employee worked per day during the six (6) months preceding April 7, 2020. If, however, the employee has worked for the employer for less than six months, the employer may calculate the amount of sick leave available based on the average number of hours the employer expected the employee to work at the time of hire.

Leave hours are immediately available to all eligible employees.

The amount of Supplemental Paid Sick Leave is capped at \$511 per day and \$5,110 in the aggregate per employee. An employer also may pay an employee using sick time to care for another person at two-thirds of the employee's regular rate of pay up to \$200 a day not to exceed an aggregate of \$2,000.

Exemptions

The San Jose Ordinance enumerates three exemptions:

1. Employees who can work from home.
2. Employers that provide its employees with some combination of paid personal leave, as of April 7, 2020, at least equivalent to the Supplemental Paid Sick Leave under the San Jose Ordinance. An employer that provides some combination of paid personal leave less than the amount of paid sick time required by this new law must comply with the San Jose Ordinance by making up the difference.
3. Any employer that operates a hospital if such employer provides its employees, within two (2) weeks of April 7, 2020, with some combination of paid personal leave at least equivalent to the paid sick time required under the San Jose Ordinance.

SAN FRANCISCO'S EMERGENCY ORDER, PUBLIC HEALTH EMERGENCY LEAVE

On April 17, 2020, San Francisco Mayor, London N. Breed, signed into law the [Public Health Emergency Leave Ordinance](#) (the "PHELO") requiring large employers (500+ employees) to offer up to two (2) weeks (80 hours) of public health emergency ("PHE") leave during the public health emergency related to COVID-19.

The PHELO is effective immediately until the 61st day following enactment, unless a separate measure is enacted or the COVID-19 public health emergency ends— whichever comes first.

Covered Employer

An employer is broadly defined as all persons, associations, organizations, partnerships, business trusts, limited liability companies or corporations, or corporate officers or executives, who directly or indirectly through any other person, including through the services of a temporary employment agency, staffing agency or similar entity, employs or exercises control over the wages, hours or working conditions of an employee.

Notwithstanding this definition, the PHELO does not apply to any employers covered by the FFCRA. The PHELO was intended to address any coverage omitted from the FFCRA.

Eligible Employees

The PHELO provides leave to “employees” defined as “any person providing labor or services for remuneration who is an employee under California Labor Code Section 2750.3(a), as may be amended from time to time, including a part-time and temporary employee who performs work as an employee within the geographic boundaries of the City.” This definition includes an “employee who performs limited work within the geographic boundaries of the City if the employee would be considered an Employee under Rule of the rules implementing the Paid Sick Leave Ordinance.” Moreover, an employee includes a “participant in a Welfare-to-Work Program when the participants engaged in work activity that would be considered ‘employment’ under the federal Labor Standards Act.”

Qualifying Reasons for Public Health Emergency Leave

An employee may use Public Health Emergency Leave to the extent he or she is unable to work or telework due to any of the following:

1. The employee is subject to an individual or general Federal, State, or local quarantine or isolation order related to COVID-19. This list includes, but is not limited to, an employee who is unable to work due to Governor Newsom’s Executive Order N-33-20, the shelter-in-place Order No. C19-07b or any succeeding order requiring residents to stay in their homes during the emergency, or shelter-in-place orders issued in other Bay Area jurisdictions. Further, this list also includes an employee who is a member of a “vulnerable population” as defined in Order No. C19-05 who is unable to work due to recommendations in Order No. C19-05, C19-07b, or any order issued by Governor Newsom or Bay Area jurisdictions recommending or requiring additional restrictions for vulnerable or high-risk populations.
2. The employee has been advised by a health care provider to self-quarantine.
3. The employee is experiencing symptoms associated with COVID-19 and seeking a medical diagnosis.
4. The employee is caring for a Family Member who is subject to an order as described in subsection (1), has been advised as described in subsection (2), or is experiencing symptoms as described in subsection (3). A “Family Member” is any person for whom an employee may use paid sick leave to provide care pursuant to Administrative Code Section 12W.4(a).
5. The employee is caring for a Family Member if the school or place of care of the Family Member has been closed, or the care provider of such Family Member is unavailable, due to the Public Health Emergency.
6. The employee is experiencing any other substantially similar condition specified by the Local Health Officer, or under Section 5102(a)(6) of the FFCRA, by the United States Secretary of Health and Human Services.

Health Care Providers and Emergency Responders

Employers may exclude health care providers and emergency responders, as [defined under the FFCRA](#). Health care providers and emergency responders may be eligible for leave to the extent that the employee is unable to work because:

1. The Employee has been advised by a health care provider to self-quarantine, or
2. The Employee is experiencing symptoms associated with COVID-19, seeking a medical diagnosis of COVID-19, and does not meet the Centers for Disease Control and Prevention guidance for criteria to return to work for healthcare personnel with confirmed or suspected COVID-19.

Request and Documentation Requirements

An employer may require an employee to follow reasonable notice procedures in order to use Public Health

Emergency Leave to the extent that the leave is “foreseeable.” Additionally, an employer may require an employee to identify the basis upon which to request Public Health Emergency Leave, but it may not require the disclosure of health information or other documentation, including but not limited to a doctor’s note.

Amount of Leave

Full-time employees retroactive to February 25, 2020 are entitled to receive up to 80 hours of paid Public Health Emergency Leave. Additionally, part-time employees as then are entitled to sick leave equal to the number of hours they work on “average in a two-week period that the Employee was scheduled over the previous six months ending on February 25, 2020, including hours for which the Employee took leave of any type.”

Public Health Emergency Leave under the PHELO is in addition to existing paid sick leave required by law and/or provided under company policies. Certain employers may be entitled to a limited offset, however. If since February 25, 2020, employers have already provided additional paid leave for the qualifying reasons articulated in the PHELO, any leave hours then provided can be offset against the leave required by the PHELO.

Furthermore, Supplemental Leave “may be taken regardless of whether and when the Employee is scheduled to work, provided that the total number of hours of leave taken in a week may not exceed the average number of hours over a one-week period that the Employee was scheduled over the previous six months ending on February 25, 2020, including hours for which the Employee took leave of any type.”

Calculating Payments

The PHELO incorporates standards in the [San Francisco Paid Sick Leave Ordinance](#). For non-exempt employees, employers must either calculate the rate of leave pay in the same manner as the regular rate of pay for the workweek in which the employee uses leave or calculate the rate by dividing the employee’s total wages – excluding overtime premium pay – by the employee’s total hours worked in the full pay periods of the prior 90 days of employment.

For exempt employees, employers calculate the rate of leave pay in the same manner they calculate wages for other forms of paid leave time. Moreover, an employer must provide Public Health Emergency Leave payments no later than the payday for next regular payroll period after leave has been taken.

The caps on paid sick leave compensation set forth in the FFCRA or other local ordinances do not apply to the PHELO.

Notice Requirements

The Office of Labor Standards will post a notice within seven (7) days of the effective date. At this point, employers have three days to provide notice to its employees. Employers should (1) post the notice in the employee’s workplace; (2) send the notice in an electronic communications to every employee; and/or (3) post the notice on the employer’s intranet or app-based platform.

Prohibited Conduct

Employers cannot "discharge, threaten to discharge, demote, suspend, reduce other Employee benefits, or in any manner discriminate or take action against any person in retaliation for exercising rights" under the PHELO. Rights under the PHELO include "the right to file a complaint or inform any person about any Employer's alleged violation of this emergency ordinance; the right to cooperate with the Agency in its investigations of alleged violations of this emergency ordinance; and the right to inform any person of that person's potential rights" under the PHELO. Additionally, employer policies cannot count Public Health Emergency Leave use as an absence that may lead to or result in discipline, discharge, demotion, suspension, or any other adverse employment action.

Exemptions

The PHELO does not apply to employers already covered under the FFCRA. Moreover, the PHELO does not apply to employees covered by a collective bargaining agreement if the CBA expressly waives the requirements of the PHELO.

NOTE: Because of the ever-changing COVID-19 legal environment, employers should consult with counsel for the latest developments and updated guidance on these topics.

Visit our [COVID-19 Resource Center](#) often for up-to-date information to help you stay informed of the legal issues related to COVID-19.

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