



San Francisco And San Jose Provide Emergency Paid Sick Leave To Cover FFCRA Coverage Gaps (UPDATED)

Insights

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San Francisco and San Jose have joined the growing list of local California jurisdictions to adopt COVID-19-specific paid sick leave measures impacting employer and employees who operate in the local areas. In general, these ordinances do not amend existing law. Rather, they supplement paid leave already offered under federal law and other local ordinances.

As most know by now, the federal Families First Coronavirus Response Act (FFCRA) requires employers with fewer than 500 employees to provide emergency paid sick leave to certain employees. The San Francisco and San Jose ordinances aim to cover the gap in the coverage of the FFCRA by requiring employers not already covered by the FFCRA to provide emergency paid leave to certain employees. Both ordinances have been brought as urgent measures. They will go into effect immediately upon signature by their respective mayors.

SAN FRANCISCO'S PUBLIC HEALTH EMERGENCY LEAVE ORDINANCE

The new Public Health Emergency Leave Ordinance (SF PHELO) provides eligible employee with up to 80 hours of supplemental paid leave for COVID-19 related reasons who work within the City and County of San Francisco. Once signed by Mayor London Breed, the ordinance will remain in effect until the 61st day following enactment, unless it is reenacted, or the Public Health Emergency is terminated.

[Ed. Note: On April 14, 2020, San Francisco amended the SF PHELO, and now awaits Mayor Breed's Signature. The changes are detailed below.]

[Ed Note: SF PHELO was set to expire on August 15, 2020, San Francisco has again reenacted the ordinance and it will remain in effect for another 61 days.]

Who Is Covered?

- **Private Employers** who have 500 or more employees nationally **Employees** who have performed 56 or more hours of work as an employee within the City and County of San Francisco during the 365 days immediately preceding the effective date of this ordinance. **[Ed Note: SF PEHLO has been extended and now applies to employees providing labor or services for a fee in San Francisco, no longer requiring the 56-hour requirement. Whether an individual is an employee is determined using California's new AB 5 standard (ABC Test) and whether the individual is an employee under the rules governing San Francisco's new, existing Paid Sick**

individual is an employee under the rules governing San Francisco's pre-existing Paid Sick Leave Ordinance.] This includes part-time and temporary workers and participants in Welfare-to-Work programs.

- **Exceptions:** Employers of healthcare providers or first responders (as defined under the FFCRA) may elect to exclude these employees under this ordinance. **[Ed Note: Employers of healthcare providers or first responders cannot exclude but may limit the use of leave.]**

How Are Total Hours/Pay Calculated?

Eligible employees are entitled to receive up to **80 hours of supplemental paid leave**. **[Ed Note: Full-time employees, as of February 25, 2020, are entitled to the full 80 hours. Part-time employees, as of February 25, 2020, are entitled to receive the number of hours equal to the average number of hours over a two-week period that the employee was scheduled to work over the previous six months ending on February 25, 2020, including hours the employee took any leave.]** Employers should calculate the rate of pay the same way it does under San Francisco's Paid Sick Leave Ordinance. You can use one of the following calculations:

- Nonexempt employees can be paid at their regular rate of pay for the workweek in which the employee uses the leave
- Nonexempt employees can be paid by dividing the employee's total wages, not including overtime premium pay, by the employee's total hours worked in the full pay periods of the prior 90 days of employment.
- Exempt employees should be paid the same way the employer calculates wages for other forms of paid leave.

Additionally, employers cannot require employees to use other accrued paid time off (paid sick leave, PTO, vacation, etc.) before they can use SF PHELO. However, employees may voluntarily choose to use other accrued paid leave before using SF PHELO.

What Can SF PHELO Be Used For?

SF PHELO must be granted upon oral or written request of the eligible employee. No doctor's note or other documentation is required. Uses are limited to taking time off because the employee:

- Is subject to an individual or general Federal, State, or local quarantine or isolation order related to COVID-19. This includes Governor Newsom's Executive Order, local Shelter-in-Place Orders, and also recommendations and requirements for "vulnerable populations" employees from Governor Newsome or Bay Area jurisdictions orders;
- Has been advised by a health care provider to self-quarantine;
- Is experiencing symptoms associated with COVID-19 and seeking a medical diagnosis;
- Is caring for a Family Member who is subject to an order as described above, has been advised to self-quarantine, or is experiencing symptoms associated with COVID-19;

- Is caring for a Family Member if the school or care provider of Family Member is closed or unavailable to due to COVID-19; or
- Is experiencing any other substantially similar conditions specified by the Local Health Officer.

[Ed. Note: Health care providers and emergency responders may only use SF PHELO if these employees are unable to work or telework because they have been advised by a health care provider to self-quarantine or if they are experiencing symptoms associated with COVID-19, seeking a medical diagnosis, and do not meet CDC guidance criteria to return to work for healthcare personnel with confirmed or suspected COVID-19.]

“Family Member” means child; parent; legal guardian or ward; sibling; grandparent; grandchild; and spouse, registered domestic partner under any state or local law, or designated person. Child, parent, sibling, grandparent, and grandchild relationships include relationships resulting from adoption; step-relationships; and foster care relationships. “Child” also includes child of domestic partner.

“Vulnerable Population” includes people who are 60 years and older; people with certain health condition such as heart disease, lung disease, diabetes, kidney disease and weakened immune system; and people who are pregnant or were pregnant in the last two weeks.

Notice Requirements

The Office of Labor Standards Enforcement will post a Notice within seven days of the effective date of this ordinance. Employers will have three days after the Notice is published to provide it to employees in manner which will reach all employees. Employers should:

- Post the Notice in the employee’s workplace;
- Send the Notice in an electronic communication; and/or
- Post the Notice on the employer’s intranet or app-based platform.

Employers must also provide the Notice to employees in any language spoken by at least 5% of the employees. The Notice must also set forth the amount of leave available to the employees under the ordinance.

Are There Any Exemptions And/Or Offsets?

SF PHELO runs concurrently with emergency paid sick leave under the FFCRA. SF PHELO is **in addition** to California/San Francisco-mandated paid sick leave.

However, if an employer has already provided additional paid leave since February 25, 2020 for COVID-19 related purposes (not including already previously accrued hours), any hours will be offset against the 80-hour requirement. For example, if an employer has already provided an employee five hours of additional paid leave for COVID-19 purposes after February 25, 2020, the employer is only be obligated to provide 75 hours to the employee under this ordinance.

Upon the employee's separation from employment, the employer does not have to provide or pay-out unused SF PHELO.

What Are The Penalties For Noncompliance?

SF PHELO includes anti-retaliation protections that, among other provisions, prohibit interfering with any right protected under the emergency ordinance and taking any adverse action against an employee for exercising rights protected under the emergency ordinance. Generally, employees who are retaliated against for taking protected leave can be awarded:

- Reinstatement, if they were terminated;
- Backpay and supplemental paid leave that was unlawfully withheld (calculated at the employee's average rate of pay); and/or
- Other legal or equitable relief the court may deem appropriate.

Miscellaneous

The ordinance is silent as to the responsibilities of employers who have temporarily closed or laid off employees since February 25, 2020 (the end of the time period for calculating payment). Therefore, there is no express exemption for these employers.

SAN JOSE'S COVID-19 PAID SICK LEAVE ORDINANCE

On April 7, 2020 the San Jose City Council voted to enact the COVID-19 Paid Sick Leave Ordinance. It provides up to 80 hours of paid leave to employees providing essential services within the City. As an urgency measure, the ordinance will take effect immediately upon signature by the mayor.

[Ed Note: The City of San Jose has issued official guidance regarding the Ordinance.]

Who Is Covered?

- **Employers** who are subject to the San Jose Business License Tax or maintain a facility within the City and are not already required to provide sick leave under the FFCRA. This includes both employers with more than 500 *and* less than 50 employees.
- **Employees** who have worked at least two hours within the City's geographic boundaries and who leave their residence to perform Essential Work, as defined by the Sana Clara County Public Health Officer on March 16, 2020.

However, the ordinance does not require sick leave to be provided to employees that are able to work from home. Additionally, employers that provide employees with some form of paid personal leave, as of adoption of the ordinance, are exempt from the ordinance so long as the personal leave is at least equal to what the employee would have received under the ordinance. If the personal leave is less than what the employee would have received under the ordinance, the employer must provide paid sick leave to make up the difference.

How Are Total Hours And Pay Calculated?

Full-time employees are entitled to 80 hours of paid sick leave. The ordinance does not provide a definition for “fulltime employee.”

Part-time employees are entitled to sick leave hours equal to the number of hours the employee worked on average over a two-week period. Employers should calculate a part-time employee’s use of sick leave based on the average number of hours the employee worked per day during the six months preceding the ordinance. If the employee has worked less than six months, the employer should calculate sick leave usage based on the average number of hours the employee was expected to work at the time they were hired.

Employees should receive sick pay at their regular rate of pay. Sick leave pay is capped at \$511 a day and \$5,110 total. If the employee takes leave to care for another individual the sick leave rate of pay is reduced to 2/3 of the employee’s regular rate of pay, capping off at \$200 a day and \$2,000 total.

When Should Hours Be Provided To Covered Employees And Do They Expire?

Sick leave benefits became effective immediately upon adoption of the ordinance. The benefits will expire on December 31, 2020. Employers are not required to cash out the unused benefits to employees.

Employers cannot make sick leave benefits contingent upon employees finding coverage for shifts missed because of sick leave.

What Can The Sick Leave Be Used For?

Employees can use ordinance-provided sick leave for any of the following reasons:

1. The employee is subject to quarantine or isolation by federal, state or local order or is caring for someone who is quarantined or isolated;
2. A healthcare provider advised the employee to self-quarantine or the employee is caring for someone who has been advised to quarantine;
3. The employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis; or
4. The employee is caring for a child under the age of 18 because a school or daycare is closed due to COVID-19.

What Are the Penalties For Noncompliance?

The ordinance does not specify the penalty for noncompliance. Rather, it authorizes the San Jose Office of Equality Assurance to implement and enforce the ordinance. Generally, employees can bring actions against employers if they are retaliated against for taking protected leave. In such instances, employees can be awarded:

- Reinstatement, if they were terminated;
- Backpay and supplemental paid sick leave that was unlawfully withheld (calculated at the employee’s average rate of pay); or

employee's average rate of pay), or

- Other legal or equitable relief the court may deem appropriate.

What's Next?

[The City of Los Angeles](#) and Emeryville have already adopted similar measures, and more proposals are under consideration in Oakland and Los Angeles County, among other jurisdictions. We expect further local ordinances to be passed in the coming days and weeks.

We will continue to monitor the rapidly developing COVID-19 situation and provide updates as appropriate. Make sure you are subscribed to [Fisher Phillips' Alert System](#) to get the most up-to-date information. For further information, contact your Fisher Phillips attorney, any attorney in our [San Francisco office](#), or [any member of our COVID-19 Taskforce](#). You can also review our nationwide [Comprehensive and Updated FAQs for Employers on the COVID-19 Coronavirus](#) and our [FP Resource Center For Employers](#), maintained by our Taskforce.

This Legal Alert provides an overview of specific city laws. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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