

# Labor and Employment Alert

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## New Bay Area COVID-19 Related Paid Sick Leave Ordinances

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### Key Points

- On April 7, 2020, San Jose and San Francisco (as amended April 14, 2020) passed emergency ordinances expanding on the paid sick leave provided under the Family First Coronavirus Response Act (FFCRA) and its Emergency Paid Sick Leave (EPSLA) provision to cover employers with over 500 employees.
- The San Jose ordinance covers employees who are required to leave their homes to perform essential work and services, whereas San Francisco's Public Health Emergency Leave Ordinance (PHELO) covers all employees, including those teleworking or furloughed.
- Paid PHELO leave is in addition to currently required and/or provided paid employer leave and San Francisco employers are prohibited from changing any paid time off policies on or after the ordinance's effective date, except to provide *additional* paid leave. The new sick leave under San Jose's ordinance is not addition to other leave, provided the employer already provides at least 80 hours of paid sick or personal leave.
- Other local governments are in the process of discussing or implementing measures to address the COVID-19 pandemic, and employers should consult counsel for the latest developments and updated guidance on complying with these requirements.

The San Francisco and San Jose ordinances, which come on the heels of the Los Angeles City Council's passage of Emergency Paid Sick Leave legislation (signed into law April 7, 2020), are generally meant to support local workers not covered by the FFCRA and its corresponding EPSLA. While both ordinances are based loosely on the FFCRA, they differ from the FFCRA in that they apply to employers with over 500 employees and employers will not receive tax credits or monetary relief for providing the additional benefits required under these ordinances. Additional key provisions specific to each ordinance are discussed below.

### San Jose COVID-19 Paid Sick Leave Ordinance

#### Which employers are covered?

### Contact Information

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The ordinance covers San Jose employers that “are not required—in whole or in part—to provide paid sick leave benefits under the federal Emergency Paid Sick Leave Act.” Thus, the ordinance’s intent is to cover San Jose employers not already subject to FFCRA requirements.

### **Which employees are covered?**

The ordinance only covers employees who are required “to leave their residence to perform Essential Work” and who have worked at least two hours in San Jose. Essential work includes the activities and services Santa Clara deemed essential in its shelter-in-place order (as amended March 31, 2020), including health care, essential infrastructure, essential government functions, grocery stores, food cultivation, banks, hardware stores, gas stations, laundromats, take-out restaurants, delivery services, and residential and shelter services, among others.

San Jose has provided guidance clarifying that the ordinance covers employees that are not San Jose residents, but it has not addressed when the employee must have worked at least two hours in San Jose, or whether the employee is covered if he or she previously worked in San Jose but now works outside the city limits.

The ordinance does not require employers to provide sick leave to employees who can work from home. Specifically, it aims to address the fact that efforts to limit the spread of COVID-19 are undermined if individuals without sick leave benefits feel compelled to continue to leave their residences to perform “essential” work, even if they have been advised to self-quarantine or are experiencing COVID-19 symptoms.

### **How much paid sick leave must be provided?**

Full time employees are entitled to 80 hours of paid sick leave.

Part-time employees are entitled to sick leave hours equal to the number of hours they work on average over a two-week period, calculated based on the average number of hours the employee worked per day during the six months immediately preceding the effective date of the ordinance. If employees have worked for less than six months, their sick leave entitlement is based on the average hours they were expected to work at their time of hire.

Like the FFCRA, the ordinance limits the amount of sick leave pay. Employers must pay sick leave at the employee’s regular hourly rate, up to \$511 per day, not to exceed an aggregate of \$5,110. The employer may pay an employee using sick time to care for another person at two-thirds of the employee’s regular rate, up to \$200 per day, not to exceed an aggregate of \$2,000.

### **What if the employer already provides paid sick or personal leave?**

This paid sick leave does **not** mandate additional paid sick or personal leave if the employer already provides at least 80 hours of paid leave. The ordinance expressly does not apply to employers that already provide employees a “combination of paid personal leave at least equivalent to the paid sick time required by this Ordinance.”

Employers who provide paid leave of less than 80 hours are required to increase paid leave to 80 hours.

### **What are the qualifying reasons for COVID-19 Paid Sick Leave?**

An employee can use paid sick leave under the ordinance if the employee is:

- I. Subject to quarantine or isolation by federal, state or local order due to COVID-19 or caring for someone who is quarantined or isolated due to COVID-19.
- II. 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.
- III. Experiences symptoms of COVID-19 and is seeking medical diagnosis.
- IV. Caring for a minor child because a school or daycare is closed due to COVID-19.

### **When is this effective?**

San Jose's COVID-19 Paid Sick Leave Ordinance is effective immediately through December 31, 2020.

## **San Francisco's Public Health Emergency Leave Ordinance**

### **Which employers are covered?**

The PHELO applies to private employers with 500 or more employees. Although the law does not say which employees to count when assessing the threshold, comments by Supervisor Gordon Mar, a PHELO co-sponsor, indicate that employers should count all employees, regardless of where they work, for purposes of determining if they are covered by the PHELO.

### **Which employees are covered?**

The PHELO covers all employees who have "provided labor or services for remuneration" within the City of San Francisco, including full-time, part-time, temporary and Welfare-to-Work Program participants, regardless of whether or when they are scheduled to work, including employees who are furloughed or teleworking. This includes employees who perform limited work in San Francisco, as defined in San Francisco's Paid Sick Leave Ordinance (employees who either live in San Francisco and perform work for an employer from home or work outside San Francisco, but stop in San Francisco to work (e.g., to make pickups or deliveries) AND perform 56 or more hours of work in San Francisco in a calendar year).

### **How much paid sick leave must be provided?**

Employees who have been full-time since February 25, 2020 are entitled to 80 hours of leave.

Employees who were part-time as of February 25, 2020 are entitled to sick leave equal to the average number of hours the employee was scheduled to work over a two-week period during the prior six months ended on February 25, 2020.

While PHELO leave is available "regardless of whether and when the employee is scheduled to work," the total hours taken in a week may not exceed the average number of hours over a one-week period that the employee was scheduled to work over the previous six-month period ended on February 25, 2020.

Employers cannot require employees to take leave in increments of more than one hour.

Employers subject to the paystub requirement of California's paid sick leave law must, "to the extent feasible," set forth the amount of PHELO leave available on the employee's wage statement. If an employer provides unlimited paid time off to an employee, it can satisfy this requirement by indicating on the notice or the itemized wage statement that the leave is "unlimited." The sick leave must be paid no later than the payday for the next regular payroll period after an employee takes the leave. Employers are also subject to recordkeeping requirements under the PHELO.

### **What if the employer already provides paid sick or personal leave?**

Paid PHELO leave must be provided *in addition* to any leave employers were required to provide under California and/or San Francisco law and any leave employers chose to provide before the date of enactment. However, employers that voluntarily provided additional paid leave in response to the COVID-19 outbreak may count that leave toward the required PHELO leave. The PHELO prohibits employers from changing any paid time off policies on or after the ordinance's effective date, except to provide *additional* paid leave.

The PHELO permits employees at their option to use leave under the ordinance prior to using other accrued paid time off, but the employer cannot require an employee to do so.

### **What are the qualifying reasons for COVID-19 Paid Sick Leave?**

Except as discussed below for health care providers or emergency responders, an employee unable to work—either at their customary place of work or by telework—can use PHELO paid leave if the employee is:

- I. Subject to an individual or general federal, state or local quarantine or isolation order related to COVID-19, including employees unable to work due to shelter-in-place orders and employees unable to work because they are members of vulnerable populations, or caring for someone who is quarantined or isolated for these reasons.
- II. Advised by a health care provider to self-quarantine or caring for someone who is so advised by a health care provider.
- III. Experiencing symptoms associated with COVID-19 and is seeking a medical diagnosis or caring for someone experiencing such symptoms.
- IV. Caring for a family member (not limited to minor child) if the school or place of care of family member has been closed or is unavailable.
- V. Experiencing other "substantially similar condition" specified by the local health officer or under the FFCRA.

It is possible that furloughed employees will automatically be entitled to paid leave because they are unable to work because the business was shut down pursuant to a shelter-in-place order. After Mayor Breed signs the legislation into law, San Francisco's Office of Labor Enforcement Standards is expected to issue guidance, which may clarify this issue.

Employers of health care providers or emergency responders, as defined in the FFCRA, may elect to limit such an employee's use of leave under this emergency ordinance. At a minimum, however, such employees can use this leave to the extent they are unable to work (either in their customary place of work or telework) because (1) they have been advised to self-quarantine or (2) are experiencing COVID-19 symptoms, seeking a medical diagnosis, and do not meet the CDC guidance for criteria to return to work for healthcare personnel with confirmed or suspected COVID-19.

Additionally, employers can require employees to follow reasonable notice procedures with regard to requesting leave, but only when the leave is foreseeable. Employers can request employees identify the basis for requesting leave, but cannot require the employee to disclose health information.

### **Are San Francisco employers required to provide notice of this new benefit to their employees?**

Yes. The Office of Labor Standards Enforcement will, within seven days of the effective date of the PHELO, publish and make available on its website and through email a notice suitable for employers to use to inform employees of their rights under the PHELO. Employers must provide such notice (in the workplace, via email or via the employer's website) within three days after it is published.

### **When is this effective?**

San Francisco's PHELO will go into effect when Mayor London Breed signs the legislation through either the 61st day after enactment or until the COVID-19 public health emergency ends, whichever occurs first.

### **Next Steps for Employers**

To the extent employers are subject to either ordinance, employers should consult counsel to determine what their obligations are under each ordinance, particularly as new guidance and subsequent orders may be issued.

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