

ORDINANCE NO. .
BOARD OF SUPERVISORS, COUNTY OF SAN MATEO,
STATE OF CALIFORNIA

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**EMERGENCY ORDINANCE TO ESTABLISH SUPPLEMENTAL PAID SICK LEAVE
FOR COVID-19 RELATED REASONS FOR EMPLOYEES OF EMPLOYERS WITH
500 OR MORE EMPLOYEES**

The Board of Supervisors of the County of San Mateo, State of California, ORDAINS as follows:

SECTION 1. Authority; Declaration of Emergency

The California Constitution, Article XI, Section 7 vests the County with authority to “make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.” Sections 25123(d) and 25131 of the California Government Code authorize the County to enact ordinances for the immediate preservation of the public peace, health, or safety. Moreover, pursuant to the authority set forth in Section 8634 of the Government Code, the Board of Supervisors may promulgate emergency orders and regulations necessary to provide for the protection of life and property.

On March 3, 2020, the San Mateo County Director of Emergency Services issued a proclamation of local emergency in San Mateo County, and the San Mateo County Health Officer declared a local health emergency, due to the introduction in the County of the novel coronavirus, “COVID-19.” Both the Director of Emergency Services and the Health Officer noted that the Centers for Disease Control and Prevention (“CDC”) had stated that COVID-19 is a serious public health threat.

On March 10, 2020, the Board of Supervisors (the “Board”) ratified and extended the Director of Emergency Services declaration of local emergency and the Health Officer’s declaration of local health emergency in response to the spread of the novel coronavirus COVID-19. On April 7, 2020, the Board further extended the declaration of local emergency and the declaration of local health emergency indefinitely until the County takes action to terminate the local emergency and local health emergency.

On March 4, 2020, Governor Newsom proclaimed a State of Emergency related to COVID-19 throughout the State of California. On March 13, 2020, the President issued a “Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak.”

To mitigate the spread of COVID-19, on March 16, 2020, the County’s Health Officer issued an Order directing all individuals living in the County to “shelter in place.” This

Order generally required individuals to remain in their homes through April 7, 2020, and was subsequently revised and extended on March 31, April 29, May 15, May 29, and June 4, 2020. As of March 15, 2020, immediately prior to the Health Officer's initial "shelter in place" order, 41 cases of COVID-19 had been identified in the County, and in the seven Bay Area jurisdictions jointly issuing "shelter in place" orders, there were at least 258 confirmed cases and three deaths resulting from COVID-19. As of June 30, 2020, there were 3,311 confirmed cases of COVID-19 and 108 deaths resulting from COVID-19 in San Mateo County alone.

Due to the public health emergency related to COVID-19 and the actions required to respond to the emergency, many workers across the County are unable to work (including telework) due to illness, exposure to others with the coronavirus, business closures, and family and household caregiving obligations related to closures of schools and care facilities, and an inability to secure caregiving assistance. Additionally, due to a downturn in economic conditions and in order not to experience a loss of wages, many workers may decide to come into work notwithstanding that they exhibit symptoms of COVID-19 or have contracted COVID-19. These conditions pose a significant threat to the health, safety, and economic well-being of those who live or work in the County.

SECTION 2. Findings and Purpose

On March 18, 2020, President Trump signed into law the Families First Coronavirus Response Act ("FFCRA"), H.R. 6201, which provides emergency paid sick leave to certain employees who are unable to work or telework due to the COVID-19 crisis. The FFCRA, however, exempts employers with 500 or more employees, leaving those employees without the FFCRA's critical protections. On April 16, 2020, Governor Gavin Newsom signed Executive Order N-51-20, which extends paid sick leave benefits for food sector workers impacted by COVID-19.

This Ordinance addresses the emergency paid leave coverage gap created by the FFCRA and Executive Order N-51-20, by extending emergency paid leave to employees working in the unincorporated areas of the County who are employed by businesses with 500 or more employees within the United States, which includes any State of the United States, the District of Columbia, or any Territory or possession of the United States.

In enacting this Ordinance, the Board makes the following findings:

- (1) Workers in San Mateo County are facing significant employment and economic insecurity. According to a May 22, 2020, report from the State of California's Employment Development Department, the unemployment rate in the County was 11.4 percent in April 2020, as compared with an estimated 1.9 percent in April 2019;
- (2) Between April 2019 and April 2020, the total number of jobs in the County decreased by 13.5 percent, with the most severe impacts felt in the industries of

leisure and hospitality, trade, transportation, and utilities, retail trade, private educational and health services, construction, and professional and business services;

- (3) On June 8, 2020, the National Bureau of Economic Research officially declared a recession, noting that the U.S. economy had fallen into a broad contraction not confined to one sector. According to the NBER Committee, the unprecedented magnitude of the decline in employment and production, and its broad reach across the entire economy, warrants the designation of this crisis as a recession. This marks the first U.S. recession since the Great Recession, which began in December 2007 and lasted until June 2009;
- (4) Dr. Anthony Fauci, Director of the National Institute of Allergy and Infectious Diseases, stated in a June 3, 2020, interview that several vaccine trials will begin in July 2020. While Dr. Fauci was “cautiously optimistic” that if an effective vaccine were produced, it might obtain FDA approval and be ready for the public in 2021, he warned that the timeline for such a vaccine remains “a big unknown.” On June 30, 2020, Dr. Fauci testified before Congress that the nationwide rate of new coronavirus infections could more than double to 100,000 a day if current outbreaks were not contained, and he warned that the virus’s march through the South and the West “puts the entire country at risk”;
- (5) The American College of Occupational and Environmental Medicine stated that paid sick leave is recommended to reduce the chances that a worker will come to work with COVID-19;
- (6) In the absence of paid sick leave, many workers facing employment and economic insecurity will make the difficult decision to work when they should be quarantining or isolating themselves at home, posing a significant public health risk;
- (7) Moreover, in the absence of paid sick leave, many workers will have no option other than to send their children to childcare providers or school when those children should be quarantining or isolating themselves at home, thereby posing a significant public health risk; and
- (8) The CDC’s May 2020 Interim Guidance for Businesses and Employers recommends that in order to maintain healthy business operations, employers should implement flexible sick leave policies that are consistent with public health guidance. The CDC further advises that sick leave policies should permit employees to stay home to care for a sick family member or take care of children due to school and childcare closures.

By requiring employers with more than 500 employees to provide emergency paid sick leave to their employees, this measure will address the County’s local health emergency in several regards:

- (1) The Local Health Officer's Orders were issued to ensure that the maximum number of people shelter in place at home to slow the spread of COVID-19 to the extent possible. This Ordinance is intended to assist employees working in the unincorporated areas of the County who are permitted to work under the Local Health Officer's Orders so that they will be financially better able to stay home and isolate if exposed to COVID-19, exhibiting symptoms related to COVID-19, or caring for an individual affected by COVID-19. By increasing employee access to paid leave during the current crisis, this Ordinance will reduce the likelihood that infected employees will report to work, or that any of their infected family members or household members will be out in the community during such period of infection, and will therefore decrease the spread of COVID-19 through interactions with fellow employees or members of the public;
- (2) The FFCRA provides emergency paid sick leave only to employees of businesses with fewer than 500 employees, and employees of public agencies. The FFCRA does not cover employees of businesses with 500 or more employees. This Ordinance is intended to address this gap in coverage, and provide necessary additional protection for employees working in the unincorporated areas of the County for businesses with 500 or more employees, and thereby help contain the spread of COVID-19;
- (3) With the closure of schools by school districts across the Bay Area, as well as limitations of other facilities providing education, childcare, elder care, or other family and household caregiving support, workers in the County are facing significant caregiving impacts. By extending supplemental paid sick leave to employees not protected by the FFCRA who are subject to self-quarantine or isolation orders (including "close contacts" of persons with COVID-19) or whose children are impacted by school or other childcare closures, this Ordinance makes it more likely that those employees will be able to care for their family and household members and ensure those family and household members stay home, rather than seeking caregiving placements that do not conform with the Local Health Officer's shelter-in-place orders, thereby minimizing the spread of COVID-19 in the community;
- (4) This Ordinance will also address the current financial crisis of those employees working in the unincorporated areas of the County not protected by the FFCRA who are struggling to make ends meet due to widespread closures, lack of access to childcare and elder care, and other workplace disruptions, which are likely to continue to affect employees after the expiration of the Local Health Officer's shelter-in-place orders; and
- (5) Due to the significant and extensive impact of COVID-19 on workers in the County, the likelihood of the economic downturn extending through the end of the year, and the current unknown timeframe for production of an effective vaccine, this Ordinance will provide protection to employees through December 31, 2020.

SECTION 3. Definitions

For the purposes of this Ordinance, unless the context clearly requires a different meaning, the following words, terms, and phrases have the meanings given to them in this section:

1. An “Aviation Security Worker” is defined as any Employee performing work on behalf of the Transportation Security Administration.
2. “Emergency Responder” is given the same meaning as that set forth in the FFCRA, its rules, regulations and other guidance issued by the U.S. Department of Labor regarding the FFCRA.
3. “Employee” means an individual, regardless of immigration status, who is or has been required by their Employer to perform any work within the geographic boundaries of unincorporated San Mateo County since January 1, 2020. For purposes of this Ordinance, a worker is presumed to be an Employee, and an Employer has the burden to demonstrate that a worker is a bona fide independent contractor and not an Employee. A food sector worker, as defined in the California Governor’s Executive Order N-51-20, is excluded from the definition of “Employee.”
4. “Employer” means any Person, defined in Section 18 of the California Labor Code, as “any person, association, organization, partnership, business trust, limited liability company, or corporation,” who directly or indirectly or through an agent or any other person, including through the services of a temporary service or staffing agency or similar entity, employs or exercises control over the wages, hours, or working conditions of any Employees. This Ordinance applies only to Employers with 500 or more employees within the United States, which includes any State of the United States, the District of Columbia, or any Territory or possession of the United States. This Ordinance and the definition of Employer do not apply to federal, state, or local government agencies.
5. “Health Care Provider” is given the same meaning as that set forth in the FFCRA, its rules, regulations and other guidance issued by the U.S. Department of Labor regarding the FFCRA.
6. “Individual” or “Care for an individual,” for the purposes of Sections 5(1)(c) and (d), mean an Employee's immediate family member, a person who regularly resides in the Employee's home, or a similar person with whom the Employee has a relationship that creates an expectation that the Employee would care for the person if he or she were quarantined or self-quarantined, or whose senior care provider or whose school or childcare provider is closed or is unavailable in response to a public health or other

public official's recommendation. For this purpose, the term "Individual" does not include persons with whom the Employee has no personal relationship. The meaning of these terms is intended to be consistent with that set forth in the FFCRA, its rules, regulations, and other guidance issued by the U.S. Department of Labor regarding the FFCRA.

7. "Supplemental Paid Sick Leave" means time an Employee is compensated by an Employer for COVID-19 related leaves as described in this Ordinance.

SECTION 4. Supplemental Paid Sick Leave Entitlements.

1. An Employer's obligation to provide Supplemental Paid Sick Leave under this Ordinance begins on July 8, 2020.
2. An Employee who is employed by an Employer on the effective date of this Ordinance is entitled to Supplemental Paid Sick Leave hours as follows:
 - a. A full-time Employee who is normally scheduled to work forty (40) or more hours per week shall receive eighty (80) hours of Supplemental Paid Sick Leave.
 - b. A part-time Employee who is normally scheduled to work fewer than forty (40) hours per week shall receive Supplemental Paid Sick Leave in an amount no greater than the Employee's average number of work hours in a two-week period, calculated over the period of January 1, 2020 through July 7, 2020.
3. The Supplemental Paid Sick Leave hours shall be paid at not less than the employee's regular rate of pay as specified in the FFCRA, its rules, regulations and other guidance issued by the U.S. Department of Labor regarding the FFCRA, subject to the cap set forth below. However, unlike the FFCRA, there is no distinction in pay based on the reason for the leave and Employees shall receive their full regular rate regardless of the reason for leave.
4. In no event shall the Supplemental Paid Sick Leave amount paid to an Employee exceed \$511 per day and \$5,110 in the aggregate. Unlike the FFCRA, the \$511 per day maximum applies to all leaves under this Ordinance, regardless of the reason. There is no \$200 maximum applied to leaves under this Ordinance. Employees of joint Employers are only entitled to the total aggregate amount of leave specified for Employees of one Employer.

5. The total number of hours of Supplemental Paid Sick Leave to which an Employee is entitled pursuant to this Section shall be in addition to any paid sick leave that may be available to the Employee under Labor Code Section 246, as well as any preexisting paid time off provided to employees prior to March 16, 2020, subject to offsets set forth in Section 7.
6. An Employer may not require an Employee to use any other paid or unpaid leave, paid time off, or vacation time provided by the Employer to the Employee before the Employee uses Supplemental Paid Sick Leave, or in lieu of Supplemental Paid Sick Leave.

SECTION 5. Employee Request for Supplemental Paid Sick Leave.

1. An Employer shall provide Supplemental Paid Sick Leave upon the written (includes but is not limited to electronic mail and text) request of an Employee if the Employee cannot work, or telework, because:
 - a. The Employee has been advised by a health care provider to isolate or self-quarantine to prevent the spread of COVID-19;
 - b. The Employee is experiencing COVID-19 symptoms and is seeking a medical diagnosis;
 - c. The Employee needs to care for an Individual who is subject to a federal, state, or local quarantine or isolation order related to COVID-19, or has been advised by a health care provider to self-quarantine related to COVID-19 or is experiencing COVID 19 symptoms and is seeking a medical diagnosis; or
 - d. The Employee takes time off work because the Employee needs to provide care for an Individual whose senior care provider or whose school or childcare provider is closed or is unavailable in response to a public health or other public official's recommendation.
2. An Employer may request information supporting an Employee's request for Supplemental Paid Sick Leave, as provided in the FFCRA or in the applicable regulations or guidance issued by the United States Department of Labor.

SECTION 6. Exemptions.

An Employer of an Employee who is a: (a) Health Care Provider; (b) Aviation Security Worker in the case of an Employer's good faith determination that granting such leave pursuant to Sections 5(1)(c) or (d) would render it unable to meet staffing level

requirements required to ensure that airports operations are not adversely affected due to staffing shortages; or (c) Emergency Responder may elect to limit such an Employee's use of Supplemental Paid Sick Leave, but at a minimum such an Employee may use Supplemental Paid Sick Leave to the extent that the Employee is unable to work (either at the Employee's customary place of work or telework) due to any of the following:

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

SECTION 7. Employer Offset; Coexistence with Other Available Forms of Leave.

If an Employer provided additional paid leave specifically for COVID-19 related purposes ("Voluntary COVID-19 Leave") above and beyond an Employee's regular or previously accrued leaves (e.g., sick or personal leaves) between March 17 to June 30, 2020, or provided supplemental leave pursuant to the laws of another jurisdiction requiring the provision of additional paid leave specifically for COVID-19 related purposes at any time, the obligation to provide Supplemental Paid Sick Leave under this Ordinance shall be reduced for every hour an Employer allowed an Employee to take the Voluntary COVID-19 Leave in an amount equal to or greater than the requirements in Section 4. If an Employer provided Voluntary COVID-19 Leave to an Employee at a rate of pay or hourly accrual rate less than that provided in Section 4, then such amounts or hours shall be offset against such rates and hours as the Employee would have received as set forth in Section 4.

With the exception of any Voluntary COVID-19 Leave, as defined above, and any supplemental COVID-19 related sick leave pursuant to the laws of another jurisdiction, the Supplemental Paid Sick Leave provided by this Ordinance is in addition to and independent of any form of leave (e.g., vacation, sick, or personal leaves) to which an Employee may be entitled to utilize pursuant to the Employer's policies and the inability of an Employee to utilize the Supplemental Paid Sick Leave provided by this Ordinance shall not be construed to disqualify an Employee from utilizing such other forms of leave in accordance with the Employer's policies.

SECTION 8. Enforcement.

1. An Employee claiming a violation of this Ordinance may bring an action in Superior Court of the State of California against an Employer and may be awarded:

- a. Reinstatement to the position the Employee was discharged in violation of this Ordinance;
 - b. Back pay and Supplemental Paid Sick Leave unlawfully withheld, calculated at the Employee's average rate of pay; and/or
 - c. Other legal or equitable relief the Court may deem appropriate.
2. If an Employee is the prevailing party in any legal action taken pursuant to this Ordinance, the Court may award reasonable attorney's fees and costs as part of the Employee's recovery.

SECTION 9. Retaliatory Action Prohibited.

No Employer shall discharge, reduce in compensation or otherwise discriminate against any Employee for opposing any practice proscribed by this Ordinance, for requesting to use or actually using Supplemental Paid Sick Leave under 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 10. No Waiver of Rights.

Any prospective waiver by an Employee of any or all of the provisions of this Ordinance shall be deemed contrary to public policy and shall be void and unenforceable.

SECTION 11. Coexistence with Other Available Relief for Specific Deprivations of Protected Rights.

With the exception of rights and remedies provided to employees pursuant to the Families First Coronavirus Response Act (H.R. 6201) and the California Governor's Executive Order N-51-20, as well as any offsets provided in Section 7 for supplemental paid leave provided under these laws, the provisions of this Ordinance are in addition to or independent of any other rights, remedies, or procedures available under any other law and do not diminish, alter, or negate any other legal rights, remedies, or procedures available to an Employee.

SECTION 12. Conflicts.

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

SECTION 13. Severability.

If any section, subsection, sentence or clause of this Ordinance is for any reason declared unconstitutional or invalid or unenforceable by any court of competent jurisdiction, such decision shall not affect the constitutionality, validity or enforceability of the remaining portions of this Ordinance or any part thereof. The Board of Supervisors hereby declares that it would have adopted this Ordinance notwithstanding the unconstitutionality, invalidity or unenforceability of any one or more of its sections, subsections, sentences or clauses.

SECTION 14. Expiration of Ordinance.

This Ordinance shall be in effect until December 31, 2020, unless the Board of Supervisors takes an action to extend this Ordinance.

SECTION 15. Exemption for Collective Bargaining Agreement; Express Waiver.

All of the provisions of this Ordinance, or any part thereof, may be expressly waived in a collective bargaining agreement, but only if the waiver is explicitly set forth in the agreement in clear and unambiguous terms.

SECTION 16. Authority.

This Ordinance is approved pursuant to Sections 25123(d) and 25131 of the California Government Code, allowing for ordinances for the immediate preservation of the public peace, health, or safety, as well as Section 8634 of the Government Code, which authorizes ordinances necessary during a local emergency to provide for the protection of life and property.

SECTION 17. This Ordinance, as an ordinance enacted for the immediate preservation of the public peace, health, or safety, is an urgency ordinance pursuant to Sections 25123(d) and 25131 of the California Government Code and shall be effective immediately upon its introduction and passage.

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