

# Local COVID-19 Related Emergency Sick Leave Ordinances in California: San Francisco and San Jose

April 21, 2020

Cities in California have been implementing local ordinances providing for emergency supplemental paid sick leave for local workers in the wake of the COVID-19 pandemic, which adds complexity for employers navigating the rapidly changing obligations resulting from the pandemic. Such local ordinances apply to businesses with 500 or more employees, as these employers are too large to be subject to the federal Family First Coronavirus Response Act (FFCRA), which obligates businesses with fewer than 500 employees to provide emergency paid sick leave to these businesses' employees. Indeed, the local ordinances are designed to protect employees not covered by the FFCRA. Buchalter's Client Alert on Los Angeles' local emergency order on supplemental paid sick leave can be found [here](#). Below are summaries of the San Francisco and San Jose emergency paid sick leave ordinances. A chart detailing the San Francisco, Los Angeles, and San Jose local emergency sick paid leave requirements can be found [here](#) and will be updated as additional cities and counties follow this trend.

## **SAN FRANCISCO PUBLIC HEALTH EMERGENCY LEAVE ORDINANCE**

On April 17, 2020, Mayor London Breed signed into law an amended Public Health Emergency Leave Ordinance (PHELO) requiring that covered employers provide two additional weeks of paid emergency supplemental sick leave to local employees for use during the COVID-19 public health emergency, beyond what the covered employer's vacation or sick leave policies provide (unless the employer had already independently provided the requisite amount of additional COVID-19-related leave), including the amount of paid sick leave required under San Francisco's existing Paid Sick Leave Ordinance.

### **What are the effective dates of the PHELO?**

The PHELO took effect on April 17, 2020 and will expire on June 17, 2020, unless the Board of Supervisors reenacts it or the Public Health Emergency is terminated, whichever occurs first.

### **Who is a covered employer under the PHELO?**

"Employer" means any person, as defined in Section 18 of the California Labor Code, including corporate officers or executives, who directly or indirectly or through an agent or any other person, including through the services of a temporary services or staffing agency or similar entity, employs or exercises control over the wages, hours, or working conditions of an employee.

Private employers with 500 or more employees worldwide must comply with the PHELO for covered San Francisco employees. For purposes of calculating employer size, all persons performing work for the employer are counted (not just those who work in San Francisco).

The PHELO does not cover employers required to comply with the FFCRA.

### **Who is a covered employee under the PHELO?**

“Employee” means any person providing labor or services for remuneration who is an employee under California Labor Code Section 2750.3(a), including a part-time or temporary employee who performs work as an employee within the geographic boundaries of the City, those considered employees under San Francisco’s existing Paid Sick Leave Ordinance, and certain participants in “Welfare-to-Work Programs.”

An employer of an employee who is a health care provider or emergency responder can choose to limit the use of Public Health Emergency Leave available to these employees, but must provide Public Health Emergency Leave when the employee is unable to work (at their customary place of work or telework) because either: (1) a health care provider has advised them to self-quarantine; or (2) they are experiencing COVID-19 symptoms, seeking a medical diagnosis, and do not meet the CDC guidance for criteria to return to work for health care personnel with confirmed or suspected COVID-19.

### **How much Public Health Emergency Leave must a covered employer provide?**

A covered employer must provide a full-time San Francisco employee (who works 40 hours a week) as of February 25, 2020 with 80 hours of Public Health Emergency Leave.

A covered employer must provide a part-time San Francisco employee as of February 25, 2020 the number of Public Health Emergency Leave hours equal to the average number of hours over 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.

Employers must compensate employees for Public Health Emergency Leave in the same manner as sick leave is calculated under San Francisco’s existing Paid Sick Leave Ordinance. There are two options for non-exempt employees: (1) employers may calculate Public Health Emergency Leave for non-exempt employees using the regular rate of pay for the workweek in which the employee uses Public Health Emergency Leave, whether or not the employee works overtime in that week; or (2) employers may calculate Public Health Emergency Leave 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. Public Health Emergency Leave for exempt employees must be calculated in the same manner as the employer calculates wages for other forms of paid leave time.

Public Health Emergency Leave is in addition to what the covered employer's vacation or sick leave policies provide, including paid sick leave under San Francisco's existing Paid Sick Leave Ordinance. However, the PHELO provides an **offset** reducing an employer's obligation for every hour of paid leave or paid time off the employer allowed an employee to take for purposes consistent with the ordinance above the employer's normal policies (other than previously accrued hours) on or after February 25, 2020.

Employees are not entitled to more than 80 hours of Public Health Emergency Leave.

Employers are not required to provide Public Health Emergency Leave in addition to any leave provided under the California Supplemental Paid Sick Leave Act. Employers that provide paid leave under the California Supplemental Paid Sick Leave Executive Order are permitted to offset that leave from the requirement.

### **What are the triggering conditions for Public Health Emergency Leave under the PHELO?**

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 is subject to a Federal, State, or local quarantine or isolation order related to COVID-19, including Governor Newsom's statewide shelter-in-place order, or other local shelter-in-place orders. This includes an employee who is a member of a "vulnerable population" unable to work due to official recommendations, as defined in Public Health Order No. C19-05 as including: (1) people who are 60 years old and older; (2) people with certain health conditions such as heart disease, lung disease, diabetes, kidney disease, and weakened immune systems; and (3) people who are pregnant or were pregnant in the last two weeks.
- (2) The employee has been advised to self-quarantine by a health care provider;
- (3) The employee has COVID-19 symptoms and is seeking a diagnosis;
- (4) The employee is caring for a family member<sup>1</sup> who is subject to a quarantine or isolation

---

<sup>1</sup> "Family member" means: child; parent; legal guardian or ward; sibling; grandparent; grandchild; spouse or registered domestic partner under any state or local law; and Designated Person. These relationships include not only biological relationships but also relationships resulting from adoption, step-relationships, and foster care relationships.

- order, is self-quarantining, or has COVID-19 symptoms;
- (5) The employee is caring for a family member whose school, place of care, or care provider is unavailable due to the public health emergency; or
  - (6) The employee is experiencing a substantially similar condition.

### **When can Public Health Emergency Leave be used?**

Public Health Emergency Leave is available for immediate use, regardless of how long the employee has been employed, and regardless of the employee's status as a full or part-time, permanent, temporary, seasonal, salaried or commissioned worker. Public Health Emergency 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 do 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.

### **What are the restrictions on employers under the PHELO?**

While an employer can ask an employee to identify the basis for requesting Public Health Emergency Leave, an employer cannot require the disclosure of health information or a doctor's note. An employer cannot require an employee to use other accrued paid time off before using Public Health Emergency Leave. An employer cannot require that an employee find a replacement worker to cover the employee's hours used during Public Health Emergency Leave as a condition of taking such leave. An employer cannot require that an employee take leave in increments of more than one hour. An employer cannot modify any paid time off policies on or after the enactment of the PHELO, except to provide additional paid leave.

### **What are the employer's notice requirements under the PHELO?**

Employers must provide [this Public Health Emergency Leave notice](#) to employees immediately, in a manner calculated to reach all employees: by posting in a conspicuous place at the workplace, via electronic communication, and/or by posting in a conspicuous place in an employer's web-based or app-based platform. Every employer shall provide the notice in English, Spanish, Chinese, and any language spoken by at least 5% of the employees who are, or prior to the Public Health Emergency were, at the workplace or job site.



**Is an employer required to provide Public Health Emergency Leave even if an employee has no work to perform due to a business shutdown and/or if an employee has been furloughed?**

**Yes.** [San Francisco's Office of Labor Standards Enforcement Implementation Guidance](#) expressly states that businesses that have "temporarily closed" or have "suspended operations" are subject to the PHELO. The PHELO itself states that "[d]ue to the public health emergency related to COVID-19 and the actions required to respond to the emergency, a growing number of workers across the City are unable to work (including telework) due to . . . **business closures** . . ." (emphasis added) and that "[t]his emergency ordinance will also address the current financial crisis of those employees in San Francisco not protected by the Act who are struggling to make ends meet due to **widespread closures** . . ." (emphasis added). Additionally, the Office of Labor Standards Enforcement Implementation Guidance makes clear that an employee is not "entitled to use Public Health Emergency Leave after separation from employment (e.g. a layoff, quitting, or retirement)" but also specifically states that a "furlough" is *not* considered separation from employment under the Ordinance.

**Note** that this is in contrast to the federal FFCRA. The U.S. Department of Labor's Wage and Hour Division has [expressly stated](#) that if an employer's worksite is closed due to lack of business or a Federal, State, or local directive, or an employee is furloughed due to a lack of work or business, the employee is *not* entitled to take paid sick leave under the FFCRA.

**Must an employer provide or pay out any unused Public Health Emergency Leave upon an employee's separation?**

**No.** Upon an employee's separation from employment, an employer is no longer obligated to provide or pay for any Public Health Emergency Leave not used prior to separation. However, if an employee separates from an employer for any reason and is rehired by the employer within one year from the date of separation, unused Public Health Emergency Leave shall be reinstated. The employee shall be entitled to use the unused Public Health Emergency Leave upon rehiring. According to San Francisco's Office of Labor Standards Enforcement Implementation Guidance, a "furlough" is not considered a separation from employment under the PHELO.

**SAN JOSE COVID-19 PAID SICK LEAVE ORDINANCE**

On April 7, 2020, San Jose Mayor Sam Liccardo signed into law the City Council's COVID-19 Paid Sick Leave Ordinance (the "Ordinance"), requiring that covered employers provide two additional weeks of paid emergency supplemental sick leave for local employees who leave their homes for essential work to use during the COVID-19 public health emergency.

### **What are the effective dates of the Ordinance?**

The Ordinance is effective as of April 7, 2020 and expires December 31, 2020.

### **Who is a covered employer under the Ordinance?**

For purposes of the Ordinance, an “employer” meets both of the following requirements: (1) is any person, including corporate officers or executives, as defined in Section 18 of the California Labor Code, 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 any employee and who is either subject to the Business License Tax Chapter 4.76 of the Municipal Code or maintains a facility in the City; and (2) is not required to provide paid sick leave benefits under the federal Emergency Paid Sick Leave Act in the FFCRA. For example, the federal Emergency Paid Sick Leave Act in the FFCRA does not apply to employers with over 500 employees, so the Ordinance applies to employers employing 500 or more employees. The Ordinance also applies to small businesses of 50 employees or fewer.

The Ordinance does not apply to any employer that operates a hospital if such employer provides its employees, within two weeks of April 7, 2020, with some combination of paid personal leave at least equivalent to the paid sick time required by this Ordinance. If such employer provides some combination of paid personal leave less than the paid sick time required by the Ordinance, the employer must comply with the Ordinance to the extent of the deficiency.

### **Who is a covered employee under the Ordinance?**

For purposes of the Ordinance, “employee” means: (1) a person employed by a covered employer who has worked at least two hours within the geographic boundaries of the City of San Jose for such employer, based on the California Labor Code definition of “employee”; and (2) provides “essential work” as defined in Santa Clara County’s Public Health Order dated March 16, 2020, as amended on March 31, 2020, for which an employee must leave his or her residence to perform. The Ordinance does not cover employees who can work from home.

### **How much COVID-19 Paid Sick Leave must a covered employer provide?**

A covered employer must provide a full-time San Jose employee with 80 hours of paid sick leave. A covered employer must provide a part-time San Jose employee sick leave hours equal to the number of hours the employee works on average over a two-week period.

A covered employer will pay the employee for properly used sick leave at the employee's regular rate of pay up to \$511 a day, not to exceed the aggregate of \$5,110. Notwithstanding the foregoing, a covered employer 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.

For a part-time employee, a covered employer will calculate the amount of paid sick leave used based on the average number of hours the employee worked per day during the six months directly preceding April 7, 2020. If an employee has worked for the covered employer for less than six months, the employer will calculate the amount of sick leave used based on the average hours the employer expected to have the employee work at the time of the employee's hire.

The Ordinance does not apply to any employer that provides its employees, on the effective date of the Ordinance, with some combination of paid personal leave equal to the paid sick leave time required by the Ordinance. An employer that provides some combination of paid personal leave less than the paid sick time required by the Ordinance is only required to comply with the Ordinance to the extent of the deficiency.

### **What are the triggering conditions for COVID-19 Paid Sick Leave under the Ordinance?**

An employee can use paid sick leave for any of the following purposes:

- (1) The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19, or is caring for someone who is quarantined or isolated due to COVID-19;
- (2) The employee has been advised to self-quarantine by a health care provider, or is caring for someone who is so advised by a health-care provider;
- (3) The employee has COVID-19 symptoms and is seeking a diagnosis; or
- (4) The employee is caring for a minor child because a school or daycare is closed due to COVID-19.

### **When can COVID-19 Paid Sick Leave be used?**

COVID-19 Paid Sick Leave is available for immediate use as of April 7, 2020.

### **What are the restrictions on employers under the Ordinance?**

An employer cannot require that an employee find a replacement as a condition of using sick leave.

**What are the employer's notice requirements under the Ordinance?**

The Ordinance does not set out particular notice requirements, but asks that employers comply with any notice requirements established by the City's Office of Equality Assurance.

**Must an employer provide or pay out any unused COVID-19 Paid Sick Leave upon an employee's separation?**

No. An employee cannot carryover unused sick leave between years and will not be paid for unused sick leave. Unused sick leave will not be available after expiration of the Ordinance.

Buchalter is committed to helping clients navigate through these challenging and rapidly changing times. We have attorneys experienced in adapting and navigating clients through these trying environments and are here to help however you need. If we can be of assistance, please feel free to contact any of the Buchalter Attorneys below.

**Dawn M. Knepper**

Labor & Employment  
(949) 224-6258  
dknepper@buchalter.com

**Jessica Hawk**

Labor & Employment  
619) 219-5335  
jhawk@buchalter.com

This communication is not intended to create or constitute, nor does it create or constitute, an attorney-client or any other legal relationship. No statement in this communication constitutes legal advice nor should any communication herein be construed, relied upon, or interpreted as legal advice. This communication is for general information purposes only regarding recent legal developments of interest, and is not a substitute for legal counsel on any subject matter. No reader should act or refrain from acting on the basis of any information included herein without seeking appropriate legal advice on the particular facts and circumstances affecting that reader. For more information, visit [www.buchalter.com](http://www.buchalter.com).