

## San Jose + San Francisco Enact Temporary Emergency Paid Sick Leave Requirements for Employers Not Covered by FFCRA

April 23, 2020

As mentioned in previous Cooley alerts, the federal Families First Coronavirus Response Act (FFCRA) requires private employers with fewer than 500 employees to provide emergency paid sick leave to eligible employees. San Jose and San Francisco have each enacted temporary local ordinances intended to fill the gap in coverage under the FFCRA by providing emergency paid sick leave to certain employees who are not otherwise covered by the FFCRA. San Jose's law became effective on April 7, 2020, and San Francisco's law became effective on April 17, 2020.

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

#### **Am I a covered employee or employer under the new law? How much paid leave will a covered employee receive?**

San Jose's COVID-19 Paid Sick Leave Ordinance (PSLO) provides 80 hours of emergency paid sick leave to full-time employees (and lesser pro-rated amounts for part-time employees) who have worked at least two hours within the city of San Jose and leave their home to perform "Essential Work" as defined in the Santa Clara County Public Health Officer's shelter-in-place order (as amended). (Employees who are able to work from home are not eligible.)

Covered employers include those who are subject to San Jose's business license tax or maintain a facility in San Jose, and who are not required to provide FFCRA emergency paid sick leave because (1) the employer has 500 or more employees, (2) the employer has fewer than 50 employees and is covered by the FFCRA's small business exemption or (3) the employer employs healthcare providers or emergency responders and has opted to exclude such workers from application of the FFCRA.

#### **What if the employer has already provided paid leave to its employees?**

If, as of the PSLO's April 7, 2020, effective date (or, for hospital employers, as of April 21, 2020), a covered employer provides employees with some combination of paid personal leave that is equal to or greater than what the employee would have received under the PSLO, the employer is not required to provide additional leave. If the paid personal leave already provided by the employer is less than what is required under the PSLO, the employer must provide additional emergency paid sick leave to bridge the gap.

#### **What are the permitted uses of emergency paid sick leave?**

Covered employees can use emergency paid sick leave for the following reasons:

- 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

- The employee has been advised by a healthcare provider to self-quarantine due to COVID-19 or is caring for someone who is so advised by a healthcare provider
- The employee experiences symptoms of COVID-19 and is seeking medical diagnosis
- The employee is caring for a minor child because a school or daycare is closed due to COVID-19

Emergency paid sick leave is available to covered employees for immediate use. Employers may not require an employee to find a replacement worker to cover the employee's missed work time as a condition of the employee's use of these paid benefits.

### **How do you calculate payment for emergency paid sick leave?**

Payment under the PSLO is modeled after the FFCRA. Covered employees will receive emergency paid sick leave pay at their regular rate of pay, subject to a cap of \$511 per day and \$5,110 in the aggregate. If the employee takes emergency paid sick leave to care for another individual, the employee's rate of pay is reduced to 2/3 their regular rate, capped at \$200 per day and \$2,000 in the aggregate.

### **Does emergency paid sick leave expire?**

Yes, the PSLO prohibits employees from carrying over any unused emergency paid sick leave after December 31, 2020 (when the ordinance expires), and employers are not required to pay out unused emergency paid sick leave.

### **What notice and recordkeeping requirements apply to a covered employer?**

The San Jose Office of Equality Assurance (OEA) is authorized to implement and enforce the PSLO (including any notice requirements that may be forthcoming). Guidance published by the OEA provides that covered employers must maintain and provide documentation in line with federal Fair Labor Standards Act recordkeeping requirements, including the name of the employee requesting leave, the date(s) for which leave is requested, the reason for leave and a statement from the employee that he or she is unable to work because of such reason.

The full text of the PSLO can be found [here](#). The OEA has published [guidance](#) and an [opinion letter](#) to assist covered employers with complying with the new ordinance.

## **San Francisco's Emergency Ordinance**

### **Am I a covered employee or employer under the new law? How much paid leave will a covered employee receive?**

San Francisco's Public Health Emergency Leave Ordinance (PHELO), as amended by the San Francisco Board of Supervisors on April 14, 2020, provides up to 80 hours of Public Health Emergency Leave to full-time employees (and lesser pro-rated amounts for part-time employees). Covered employees include any person performing work in the city or county of San Francisco who is deemed an employee under California Labor Code Section 2750.3(a), including part-time and temporary employees, persons considered employees under the existing San Francisco Paid Sick Leave Ordinance, and employees who are participants in a welfare-to-work program.

Covered employers include businesses with 500 or more employees.

## **What if the employer has already provided paid leave to its employees?**

Public Health Emergency Leave must be made available to covered employees in addition to any paid time off that the employer offered or provided to employees on or before April 17, 2020, *provided that* the amount of Public Health Emergency Leave that an employer must provide is reduced for every hour of paid leave or paid time off consistent with the PHELO that the employer allowed an employee to take, not including previously accrued hours or hours accrued under the San Francisco Paid Sick Leave Ordinance, on or after February 25, 2020.

## **What are the permitted uses of Public Health Emergency Leave?**

Covered employees can use Public Health Emergency Leave if the employee is unable to work (either at the employee's customary place of work or telework) for the following reasons:

- The employee is subject to an individual or general federal, state or local quarantine or isolation order related to COVID-19
- The employee has been advised by a health care provider to self-quarantine
- The employee is experiencing symptoms associated with COVID-19 and seeking a medical diagnosis
- The employee is caring for a covered family member (including a child, parent, legal guardian or ward, sibling, grandparent, grandchild, spouse, registered domestic partner under any state or local law or designated person) who is subject to an order as described in (1) above, has been advised as described in (2) above, or is experiencing symptoms as described in (3) above
- The employee is caring for a covered 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 Mayor London Breed's public health emergency proclamation on February 25, 2020
- The employee is experiencing any other substantially similar condition specified by the health officer of the city and county of San Francisco, or under Section 5102(a)(6) of the FFCRA, by the US secretary of health and human services

An employee may voluntarily choose to use other accrued paid time off provided by the employer before the employee uses Public Health Emergency Leave (but the employer may not require it).

Public Health Emergency Leave is available to covered employees for immediate use in increments of at least one hour.

Employers may not require an employee to find a replacement worker to cover the employee's missed work time as a condition of the employee's use of these paid benefits.

## **How do you calculate payment for Public Health Emergency Leave?**

Employers should compensate covered employees for Public Health Emergency Leave in the same manner set forth for calculating paid sick leave under the San Francisco Paid Sick Leave Ordinance.

## **Does Public Health Emergency Leave expire?**

Yes, Public Health Emergency Leave will expire upon the expiration of the PHELO (unless an employer extends an employee's access to such leave), and employers are not required to pay out unused Public Health Emergency Leave. The PHELO expires upon the earlier of June 17, 2020 (unless reenacted by the San Francisco Board of Supervisors) or the expiration of San Francisco's public health emergency.

## **What notice and recordkeeping requirements apply to a covered employer?**

The San Francisco Office of Labor Standards Enforcement (OLSE) has released an approved notice for employers to provide to employees to notify them of their rights under the PHELO. The notice must be provided to employees in a manner calculated to reach all covered employees, including by posting in a conspicuous place at the workplace, via electronic communication and/or via web-based or app-based platform. Employers can access the notice [here](#).

Employers must retain records documenting work schedules, hours worked (for nonexempt employees), days worked (for exempt employees) and Public Health Emergency Leave taken by employees. Employers must retain employee records for a period of four years.

The full text of the PHELO can be found [here](#). The OLSE has published [guidance](#) to assist covered employers with complying with the new ordinance.

## What does this mean for employers?

Due to the immediate applicability of these new laws, covered employers must get up to speed quickly on each ordinance's requirements, without having lead time to establish detailed policies or procedures for implementation. San Jose and San Francisco employers should keep an eye out for any updated guidance that may be provided by the San Jose OEA or San Francisco OLSE. As with other forms of protected paid sick leave, employers should ensure that employees are not discriminated or retaliated against for taking emergency paid sick leave as provided by these new laws. Employers with questions about whether and how these new laws will apply to their business should consult counsel to ensure compliance.

For additional information and guidance, please refer to Cooley's [coronavirus resource hub](#). Cooley continues to monitor developments and trends regarding local jurisdictions adopting COVID-19-related paid sick leave measures and other employment issues stemming from COVID-19 and will issue updates as necessary.

### [Coronavirus resource hub](#)

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