

Insights: Publications

San Francisco Issues Emergency Sick Leave Ordinance for Employers of 500+ Employees

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Please note: The below information may require updating, including additional clarification, as the COVID-19 pandemic continues to develop. Please monitor our main [COVID-19 Task Force page](#) and/or your email for updates.

On April 17, 2020, San Francisco Mayor London Breed signed into law the San Francisco Public Health Emergency Leave Ordinance (PHELO or Ordinance), adding San Francisco to the growing list of local jurisdictions issuing their own emergency paid sick leave laws. The City's Office of Labor Standards Enforcement (OLSE) issued an Implementation Guidance one day later to help employers and employees understand their rights and responsibilities. The ordinance issued on April 17, 2020 is an amendment of an earlier version passed by the Board of Supervisors on April 7, 2020, and while many of the provisions are the same, the final version contains important changes of which employers must be aware.

The purpose of PHELO is to address the paid leave “coverage gap” under the federal Families First Coronavirus Response Act (FFCRA), which provides emergency sick leave benefits to employers with fewer than 500 employees. PHELO closes that gap by providing two weeks of paid leave to employees working in San Francisco who are employed by businesses with 500 or more employees, including businesses that have temporarily closed or suspended operations because of a local shelter-in-place order.

The Ordinance became effective on April 17, 2020 and expires on June 17, 2020, unless reenacted, or on the termination of the public health emergency, whichever occurs first. It is not retroactive.

Covered Employers

The Ordinance applies to private employers with 500 or more employees worldwide, regardless of the number of employees working in San Francisco. If the number of employees fluctuates above and below 500 over the course of a year, its size for the purposes of the Ordinance is calculated based on the average number of employees per pay period in calendar year 2019.

The business must be located within the geographic boundaries of San Francisco. However, the Ordinance excludes private employers in “federal enclaves,” such as the Presidio, Fort Mason, and the Golden Gate National Recreation Area, as well as private sector employers at SFO, which is not within the City's geographic boundaries. PHELO specifically excludes employers defined as “Covered Employers” under the FFCRA.

Covered Employees

Any person providing labor or services for remuneration who is an employee under California law, including part-time and temporary employees, and who works within the geographic boundaries of the City is covered by the Ordinance, regardless of how long the person has been employed. (This is a significant change from the earlier version of the Ordinance passed by the Board of Supervisors, which defined “employee” as a person who had performed 56 or more hours of work in San Francisco in the preceding 365 days.) The Ordinance applies to undocumented employees. It does not apply to independent contractors.

Employees of “essential businesses” as defined by the FFCRA are covered by PHELO, but an employer of an employee who is a health care provider or first responder may limit the employee's use of leave under the Ordinance.

PHELO permits waiver of some or all of its provisions through a bona fide collective bargaining agreement, including a side letter to such an agreement. The waiver must be set forth in “clear and unambiguous” terms. The OLSE will not interfere with or participate in negotiating such language, but the Guidance provides that it will recognize for the purposes of enforcement a waiver stating: “Waiver of San Francisco Public Health Emergency Leave Ordinance: To the fullest extent permitted, this agreement shall operate to waive any provisions of the San Francisco Public Health Emergency Leave Ordinance, and shall supersede and be considered to have fulfilled all requirements of said Ordinance as presently written, and or amended during the life of this agreement.”

Employees who have been furloughed may be entitled to leave under the Ordinance, but employees who have been laid off, or who have resigned or retired are not entitled to paid leave. Employers are not obligated to pay or provide any PHELO leave on termination of employment. Unused leave expires upon expiration of the Ordinance.

Covered Uses of Leave

An employee may use PHELO 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:

- The employee is subject to an individual or general Federal, State, or local quarantine or isolation order issued in response to COVID-19. This includes, but is not limited to, an employee who is unable to work or telework because of Governor Newsom's Executive Order N-33-20, the San Francisco Shelter-In-Place Order (C19-05 or C19-05b), or any succeeding order requiring residents to stay in their homes during the emergency, or shelter-in-place orders issued in other Bay Area jurisdictions. This includes employees who are members of a “vulnerable population” who are unable to work or telework due to recommendations contained in any of the foregoing orders recommending or requiring additional restrictions for vulnerable or high-risk populations. As defined in Public Health Order No. C19-05, vulnerable populations include people who are: (1) 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..
- 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 family member 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 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 the Public Health Emergency.

The employee is experiencing any other substantially similar condition specified by the Local Health Officer, or under Section 5102(a)(6) of the FFCRA, by the United States Secretary of Health and Human Services.

Amount of PHELO Leave

Employees working full-time (40 hours per week) as of February 25, 2020, the date Mayor Breed declared a state of emergency, are entitled to 80 hours of PHELO leave. Part-time employees as of February 25, 2020 are entitled to the number of leave hours equal to the average number of hours over a two-week period that the employee worked in the six months prior to February 25, 2020, including any hours of leave the employee took. For employees hired after February 25, 2020, the leave entitlement is equal to the average hours worked over a two-week period between the date of hire and the date the leave is taken, including hours for which the employee took leave of any type.

Leave under the Ordinance is in addition to any paid time off that the employee was entitled to prior to April 17, 2020. However, employers that have provided additional leave in response to the COVID-19 crisis are allowed to offset that leave from the required amount of PHELO leave. In other words, every hour an employer must provide under PHELO is reduced by every hour of additional hour of COVID-19-related paid leave previously provided by the employer.

Likewise, employers providing paid leave under the California Governor Newsom's Supplemental Paid Sick Leave Executive Order (N-51-20), which went into effect on April 16, 2020, are entitled to offset each such hour against the leave requirements of the San Francisco Ordinance. Executive Order N-51-20 provides supplemental paid leave to food-sector workers. Workers covered under the Executive Order range from farmworkers to those working in the retail food supply chain, including pick-up, delivery, supply, packaging, retail, or preparation. Eligible workers include grocery workers, restaurant or fast food workers, workers at warehouses where food is stored, and workers who pick-up or deliver any food items.

Employers may not change any paid time off policies on or after April 17, 2020, except to provide additional paid leave. Nor may employers offer bonuses or raises to employees in lieu of PHELO leave.

Use of Leave Time

Employees may use paid sick leave under the Ordinance regardless of whether and when the employee is scheduled to work, as long as the total hours of leave taken in a week do not exceed the average hours per week that the employee was scheduled to work in the six months ending on February 25, 2020. For example, a full-time (40 hours per week) employee, unable to work (or telework) for a qualifying reason, who is scheduled to work this week but is not on the schedule for the following week, is entitled to use 80 hours of PHELO leave, up to 40 hours per week.

Employees are not entitled to use PHELO leave if they are working or are scheduled to work outside of San Francisco.

Employers cannot require employees to use leave in increments larger than one hour, and they cannot require employees to work a different shift instead of taking leave under the Ordinance. Similarly, while an employee can choose to use an alternative school or place of care for a family member in lieu of using PHELO leave, the employer cannot require the employee to do so.

Employers can require employees to provide reasonable advance notification of a foreseeable absence, but an advance notification requirement may be deemed unreasonable if the time required by the employer is excessive or the method of providing notice is unduly burdensome.

Rate of Pay

If an employee works two jobs at different rates of pay for the same employer, or the employee's rate fluctuates for the same job, the employee must be reimbursed at the employee's average hourly rate for the six months preceding the leave. This is basically twice as long as the usual method of calculating the rate of pay for non-exempt employees under San Francisco's regular Paid Sick Leave Ordinance. That rate is either the regular rate for the workweek in which paid sick leave is taken, or the employee's average rate for the preceding 90 days calculated by dividing the employees total pay by all non-overtime hours.

The pay rate for PHELO leave is based solely on the amount paid by the employer, meaning that tips are not included when calculating the rate of pay.

An employee can use PHELO leave for all hours the employee is scheduled to work, including scheduled overtime, but all hours would be paid at the employee's regular sick leave rate of pay.

Benefits

If an employer provides benefits on an hourly basis, it must provide the same benefits when employees are using PHELO leave hours.

Notice, Posting, and Recordkeeping

Within three days of publication of the PHELO notice on the OLSE's website, employers must provide the notice to employees in a manner calculated to reach all employees. This includes by posting the notice in a conspicuous place at the workplace, providing it via electronic communication, and/or by posting in a conspicuous place in an Employer's web-based or app-based platform. Notice must be provided in English, Spanish, Chinese, and any language spoken by at least 5% of its employees. The notice is available at <https://sfgov.org/olse/>.

Employers must keep records of work schedules, leave taken, and hours worked (except for exempt employees) for four years.

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