

Memorandum

San Francisco and San Jose Adopt COVID-19-Related Paid Sick Leave Covering Large Employers

April 22, 2020

The City and County of San Francisco and the City of San Jose have become the latest municipalities in California to adopt paid emergency leave-of-absence measures in response to the circumstances created by the coronavirus disease 2019 (“COVID-19”). Key elements of the San Francisco Public Health Emergency Leave Ordinance (the “San Francisco Ordinance”) and the San Jose COVID-19 Paid Sick Leave Ordinance (the “San Jose Ordinance”) are summarized below. While many of the requirements of the San Francisco Ordinance and the San Jose Ordinance are similar to those of the federal Families First Coronavirus Relief Act (“FFCRA”), there are significant differences of which employers should be aware. Notably, both ordinances are intended to apply to employers who are not covered by the FFCRA, which is mainly large employers with 500 or more employees. As with a similar emergency public order providing supplemental paid sick leave to employees of large employers in the City of Los Angeles, the San Francisco Ordinance and the San Jose Ordinance both depart from the FFCRA by not providing employers with any tax credits to offset payments to employees. For more information about the FFCRA, see our memorandum [here](#). For more information about the City of Los Angeles COVID-19 emergency sick leave public order, see our memorandum [here](#).

San Francisco COVID-19 Supplemental Paid Sick Leave

Effective immediately upon the San Francisco Ordinance’s enactment on April 17, 2020 and through the earlier of June 17, 2020 or the termination of the local public health emergency period, employers with 500 or more employees (counted worldwide) are required to provide full-time employees working in the City of San Francisco or in San Francisco County who were hired as of February 25, 2020 with up to 80 hours of supplemental paid sick leave. Part-time employees as of February 25, 2020 are entitled to paid sick leave up to their two-week average of scheduled hours over the previous six months ending on February 25, 2020. Employees (whether full-time or part-time) hired after February 25, 2020 are entitled to paid sick leave up to their two-week average of hours worked between the date of hire and the date upon which leave is taken. All employees who perform work in either the City of San Francisco or in San Francisco County are eligible for San Francisco Ordinance leave, regardless of how long the employee has been employed. The paid leave under the San Francisco Ordinance is at the employee’s full pay but, unlike the FFCRA, without any limits on pay for highly compensated employees.

Employees are entitled to San Francisco Ordinance leave if they are unable to work or telework for the following reasons (these reasons are similar to the permitted reasons for leave under the FFCRA, although the San Francisco Ordinance’s family care provisions are more expansive):

- The employee is subject to, or is caring for a family member who is subject to, an individual or general Federal, State, or local quarantine or isolation order related to COVID-19 (including if the employee takes time off work because the employee is at least 60 years old, has a health condition such as heart disease, lung disease, diabetes, kidney disease, or weakened immune system, or is or was pregnant in the last two weeks);
- The employee has been advised by a health care provider to self-quarantine due to COVID-19, or is caring for a family member who has been so advised;
- The employee is experiencing symptoms associated with COVID-19 and seeking a medical diagnosis, or is caring for a family member who is experiencing such symptoms;
- 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 COVID-19 public health emergency; or
- The employee is experiencing any other substantially similar condition specified by the San Francisco Department of Public Health or by the United States Secretary of Health and Human Services under the FFCRA.

Employees may take San Francisco Ordinance leave in increments of as small as one hour. Employers may offset their obligation to provide supplemental paid sick leave by every hour of other paid leave the employee takes, on or after February 25, 2020, for any of the reasons for leave permitted by the San Francisco Ordinance set forth in the bulleted list above. Employees may use San Francisco Ordinance leave before using other accrued paid time off, or may voluntarily choose (but cannot be required to) use other accrued paid time off first. The San Francisco Ordinance prohibits employers from making changes to their paid time off policies after April 17, 2020, except to provide additional paid time off. Upon separation from employment, employers are not obligated to provide or pay for any San Francisco Ordinance leave not used prior to separation. San Francisco Office of Labor Standards Enforcement (“SF OLSE”) guidance states that the San Francisco Ordinance applies to businesses that have temporarily closed or suspended operations, except with respect to any employees for whom there has been a “separation of employment” (which the SF OLSE does not define, except to say that a “furlough” is not necessarily considered a separation from employment because there is no standard definition as to what constitutes a “furlough” for private employers in California).

Employers of health care providers and emergency responders are not required to provide San Francisco Ordinance leave to such employees, except to the extent that an employee is unable to work or telework because the employee has been advised by a healthcare provider to self-quarantine or the employee is experiencing symptoms associated with COVID-19, seeking a medical diagnosis and does not meet the Centers for Disease

Control and Prevention guidance for criteria to return to work for healthcare personnel with confirmed or suspected COVID-19.

Employers had until April 20, 2020 to provide the San Francisco Ordinance leave notice to its employees in a manner that will reach all employees. As with the FFCRA, employers may satisfy the SF OLSE's posting requirement by emailing or direct mailing the notice to employees, or posting the notice on an employee information website (whether internal or external). Employers must also provide the notice to employees in English, Spanish, Chinese and any language spoken by at least 5% of the employees.

San Jose COVID-19 Supplemental Paid Sick Leave

The City of San Jose unanimously passed the San Jose Ordinance on April 7, 2020, effective from April 7, 2020 through December 31, 2020. The purpose of the San Jose Ordinance is to provide paid sick leave benefits to eligible employees who perform essential work (as defined by the Santa Clara County Public Health Officer on March 16, 2020) outside of the home and who are not covered by the paid sick leave provisions of the FFCRA. The San Jose Ordinance does not apply to employees who are able to telework, whether or not their employer is an "essential business" and whether or not the employee is performing essential work. This includes employees of large employers with 500 or more employees, employees of small employers with less than 50 employees (only to the extent they are exempt from certain provisions of the FFCRA under the small business exemption), and excludes health care providers and first responders. To be eligible for San Jose Ordinance leave, employees must have worked for an employer for at least two hours within the geographic boundaries of the City of San Jose (the San Jose Ordinance does not specify any temporal restrictions for having worked those two hours).

The amount of San Jose Ordinance leave and permitted uses are consistent with the requirements of the FFCRA. *To wit*, each full-time employee is entitled to up to 80 hours of paid leave, and each part-time employee is entitled to paid leave equal to the employee's two-week average, which is paid at full pay (up to \$511 per day and \$5,110 in the aggregate), if taken for personal reasons or two-thirds pay (up to \$200 per day or \$2,000 in the aggregate), if taken to care for another, and which may be used for any of the following reasons:

- The employee is subject to, or is caring for someone who is subject to, Federal, State or local quarantine or isolation order related 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 is experiencing symptoms associated with COVID-19 and is seeking a medical diagnosis; or
- The employee is caring for a minor child because the school or daycare of the minor child is closed due to the COVID-19 public health emergency.

The San Jose Ordinance does not apply to employers who provide some combination of paid leave which meets or exceeds the requirements of the San Jose Ordinance, as of the effective date of the San Jose Ordinance (or, for hospital employers, within two weeks of the effective date of the San Jose Ordinance). Employers who provide

some combination of paid leave less than the paid sick leave required by the San Jose Ordinance are required to comply only to the extent of such deficiency. As a practical matter, these provisions provide an offset for other paid leave. For example, if an employer's paid sick leave, vacation and/or other paid time off policies (or some combination thereof) provide two weeks or more of paid leave that can be used for COVID-19-related reasons, the employer is not obligated to provide any more paid sick leave under the San Jose Ordinance. However, if the employer's paid sick leave, vacation and/or other paid time off policies would allow an employee to take off one week because of COVID-19-related reasons, the employer's obligation under the San Jose Ordinance would be to make up the difference and allow the employee to take a second week of paid leave.

For further information regarding this memorandum, please contact one of the following:

PALO ALTO

Tristan Brown
+1-650-251-5140
tbrown@stblaw.com

NEW YORK CITY

Gregory T. Grogan
+1-212-455-2477
ggrogan@stblaw.com

Jeannine McSweeney
+1-212-455-3349
jeannine.mcsweeney@stblaw.com

Andrew M. Kofsky
+1-212-455-7437
andrew.kofsky@stblaw.com

Daniel J. Venditti
+1-212-455-7387
daniel.venditti@stblaw.com

The contents of this publication are for informational purposes only. Neither this publication nor the lawyers who authored it are rendering legal or other professional advice or opinions on specific facts or matters, nor does the distribution of this publication to any person constitute the establishment of an attorney-client relationship. Simpson Thacher & Bartlett LLP assumes no liability in connection with the use of this publication. Please contact your relationship partner if we can be of assistance regarding these important developments. The names and office locations of all of our partners, as well as our recent memoranda, can be obtained from our website, www.simpsonthacher.com.