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San Francisco Enacts Emergency Paid Sick Leave Law

April 20, 2020

San Francisco has enacted COVID-19-specific paid sick leave measures impacting employers and employees who operate in the City and County of San Francisco. The Public Health Emergency Leave Ordinance (PHELO) aims to cover the gap in the coverage of the Families First Coronavirus Response Act (FFCRA) by requiring employers not already covered by the FFCRA to provide emergency paid leave to certain employees.

Mayor Breed signed the ordinance into law effective starting April 17, 2020, and ending June 17, 2020. The effective period could be shortened if the current state of emergency ends before that date; it could be extended if reenacted by the San Francisco Board of Supervisors.

Who Is Covered?

Private Employers who have 500 or more employees nationally and who employ any individuals who have provided labor or services for a fee within the City and County of San Francisco during the 365 days immediately preceding the effective date of the ordinance. The San Francisco International Airport, as well as private employers within Presidio, Fort Mason, and the Golden Gate National Recreation Area are exempt from the new law.

According to [FAQs](#) provided by the Office of Labor Standards Enforcement (OLSE), the law also applies to businesses that have temporarily closed or halted their operations. Therefore, there is no express exemption for these employers.

Whether an individual is an employee is determined using California's new AB 5 standard (ABC Test) and whether the individual is an employee under the rules governing San Francisco's pre-existing Paid Sick Leave Ordinance. This includes part-time and temporary workers and participants in Welfare-to-Work programs.

Exceptions: Employers of healthcare providers or first responders (as defined under FFCRA) may elect to limit use of leave by these employees under this ordinance. The OLSE clarifies that healthcare providers and first responders include, respectively:

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- A “health care provider” is anyone employed at any doctor’s office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, Employer, or entity. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions.

This definition includes any individual employed by an entity that contracts with any of these institutions described above to provide services or to maintain the operation of the facility where that individual's services support the operation of the facility. This includes anyone employed by an entity that provides medical services, produces medical products, or otherwise involved in making COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments.

- An “emergency responder” is anyone necessary for the provision of transport, care, healthcare, comfort and nutrition of such patients, or others needed for the response to COVID-19. This includes but is not limited to military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, child welfare workers and service providers, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency, as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility

How Are Total Hours/Pay Calculated?

Full-time employees (40hours/week), as of February 25, 2020, are entitled to up to 80 hours of paid leave. Part-time employees, as of February 25, 2020, are entitled to receive up to the number of hours equal to the average number of hours over a two-week period that the employee was scheduled to work over the previous six months ending on February 25, 2020, including hours the employee took any leave. For employees hired after February 25, 2020, employers may limit an employee’s use of PHELO hours in a given work week to the average number of hours that the employee was scheduled, on average, over a one-week period between the date of hire and the date upon which the leave is taken, including hours for which the employee took leave of any type.

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Employers should calculate the rate of pay as it does under San Francisco's Paid Sick Leave Ordinance, using one of the following calculations:

- Nonexempt employees can be paid at their regular rate of pay for the workweek in which the employee uses the leave.
- Nonexempt employees can be paid by dividing their total wages, not including overtime premium pay, by their total hours worked in the full pay periods of the prior 90 days' employment.

Exempt employees should be paid the same way the employer calculates wages for other paid leaves.

Additionally, employers cannot require employees to use other accrued paid time off (paid sick leave, PTO, vacation, etc.) before they can use PHELO. However, employees may voluntarily choose to use other accrued paid leave before using PHELO.

What Can PHELO Be Used For?

PHELO must be granted upon oral or written request of the eligible employee. No doctor's note or other documentation is required. Uses are limited to taking time off because the employee:

- Is subject to an individual or general Federal, State, or local quarantine or isolation order related to COVID-19. This includes Governor Newsom's Executive Order, local Shelter-in-Place Orders, and also recommendations and requirements for "vulnerable populations" employees from Governor Newsome or Bay Area jurisdictions orders;
- Has been advised by a health care provider to self-quarantine;
- Is experiencing symptoms associated with COVID-19 and seeking a medical diagnosis;
- Is caring for a Family Member who is subject to an order as described above, has been advised to self-quarantine, or is experiencing symptoms associated with COVID-19;
- Is caring for a Family Member if the school or care provider of Family Member is closed or unavailable to due to COVID-19; or
- Is experiencing any other substantially similar conditions specified by the Local Health Officer.

Health care providers and emergency responders may only use PHELO if these employees are unable to work

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or telework because they have been advised by a health care provider to self-quarantine or if they are experiencing symptoms associated with COVID-19, seeking a medical diagnosis, and do not meet CDC guidance criteria to return to work for healthcare personnel with confirmed or suspected COVID-19.

“Family Member” means child; parent; legal guardian or ward; sibling; grandparent; grandchild; and spouse, registered domestic partner under any state or local law, or designated person. Child, parent, sibling, grandparent, and grandchild relationships include relationships resulting from adoption; step-relationships; and foster care relationships. “Child” also includes child of domestic partner.

“Vulnerable Population” includes people who are 60 years and older; people with certain health condition such as heart disease, lung disease, diabetes, kidney disease and weakened immune system; and people who are pregnant or were pregnant in the last two weeks.

Notice Requirements

The OLSE has issued a notice (available [here](#)) which employers must post immediately in manner which will reach all employees. Employers should:

- Post the Notice in the employee’s workplace;
- Send the Notice in an electronic communication; and/or
- Post the Notice on the employer’s intranet or app-based platform.

Employers must also provide the Notice to employees in any language spoken by at least 5% of the employees. The Notice must set forth the amount of leave available to the employees under the ordinance.

Are There Any Exemptions And/or Offsets?

PHELO runs concurrently with emergency paid sick leave under the FFCRA. PHELO is in addition to California/San Francisco-mandated paid sick leave.

However, if an employer has already provided additional paid leave since February 25, 2020, for COVID-19-related purposes (not including already previously accrued hours), any hours will be offset against the 80-hour requirement. For example, if an employer has already provided an employee five hours of additional paid

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leave for COVID-19 purposes after February 25, 2020, the employer is only be obligated to provide 75 hours to the employee under this ordinance.

Upon the employee's separation from employment, the employer does not have to provide or pay-out unused PHELO. Depending on facts and circumstances, a furlough might not be considered a separation of employment under the ordinance.

What Are The Penalties For Noncompliance?

PHELO includes protections that, among other provisions, prohibit interfering with any right protected under the emergency ordinance and taking any adverse action against an employee for exercising rights protected under the emergency ordinance. Generally, employees who are retaliated against for taking protected leave can be awarded:

- Reinstatement, if they were terminated;
- Backpay and supplemental paid leave that was unlawfully withheld (calculated at the employee's average rate of pay); and/or
- Other legal or equitable relief the court may deem appropriate.

Conclusion

We will continue to monitor developments, including expected departmental and agency guidance and possibly a fourth round of COVID-19 relief legislation, and will provide the latest updates as we receive them.

We express to all of our clients and friends our deep appreciation for our ongoing relationships, and we look forward to strengthening those ties as we all work through this shared adversity. Stay safe and be well.

EPIC Employee Benefits Compliance Services

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