

COMPLIANCE ALERT

San Jose Enacts COVID-19 Paid Sick Leave Ordinance

April 20, 2020

San Jose has enacted COVID-19-specific paid sick leave measures impacting employers and employees who operate within San Jose. The COVID-19 Paid Sick Leave Ordinance (CPSLO) 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 paid sick leave to certain employees. The CPSLO is effective April 7, 2020, through December 31, 2020.

What is the San José Paid Sick Leave Ordinance?

The San Jose City Council passed the San José Paid Sick Leave Ordinance on April 7, 2020, in response to the COVID-19 health crisis. The Ordinance requires certain employers to provide select employees with paid sick leave to be used for specified COVID-19 related reasons.

What are the effective dates of the San José Paid Sick Leave Ordinance?

Employers subject to the Ordinance must provide the required paid sick leave benefits starting April 8, 2020 through December 31, 2020.

Does the San José Paid Sick Leave Ordinance apply to all employers in San José?

No, the Ordinance applies only to employers that meet both of the following requirements:

- The employer is subject to the Business License Tax required by Chapter 4.76 of the Municipal Code, or maintains a facility within the boundaries of the City, and
- The employer is not required to provide paid sick leave benefits under the federal Emergency Paid Sick Leave Act. For example, the federal Emergency Paid Sick Leave Act does not apply to employers with over five hundred (500) employees, so the City's Ordinance applies to those employers.

COMPLIANCE ALERT

If the Ordinance applies to an employer, does the employer have to provide all its employees with the required paid sick leave benefit?

No, the Ordinance requires employers to provide the required paid sick leave benefit only to those employees meeting both of the following requirements:

- The employee has worked for the employer for at least two (2) hours within the geographic boundaries of the City of San José, and
- The employee leaves their own residence to perform “essential work” for the employer. “Essential work” means work that employees are lawfully allowed to leave their residences to perform under the “shelter in place” order of the Health Officer of the County of Santa Clara, dated March 16, 2020, as amended on March 31, 2020.

How will the City determine if someone is an employee or an independent contractor?

The City will determine employee status in accordance with Section 2750.3 of the California Labor Code. The determination of an employee in the construction industry will be made in accordance with Section 245.5 (a)(2) of the California Labor Code.

How many hours of paid sick leave are eligible employees entitled to?

A full-time employee is entitled to eighty (80) hours of paid sick leave.

A part-time employee is entitled to paid sick leave equivalent to the average number of hours worked over a two-week period. The weekly average is calculated by using the hours the employee worked during the 26-week period between October 8, 2019 and April 7, 2020.

Here’s an example of how the average weekly hours can be calculated:

Employee worked a total of 496 hours between 10/8/19 and 4/7/20. $496 \text{ hours} \div 26 \text{ weeks} = 19.1 \text{ hours}$ average per week. The employee is eligible for two weeks of the average hours per week, which is 38.20 hours.

If an eligible employee has worked for less than 6 months, then the average hours the employer expected at the time of hire will be used.

COMPLIANCE ALERT

When can an employee start using the paid sick leave?

The employer must make the paid sick leave to which an employee is entitled under the Ordinance available immediately on the Ordinance's effective date of April 7, 2020.

Are there limits on the use of paid sick leave under the Ordinance?

Yes, an employee can only use the paid sick leave provided under the Ordinance for at least one of the following reasons:

- Employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
- Employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- Employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis; or
- Employee is caring for an individual who either is subject to a quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.

An employee can take paid sick leave for one or more of the above qualifying reasons until the employee either (1) uses the full amount of paid sick leave or (2) no longer has a qualifying reason for taking paid sick leave.

What rate of pay applies when an employee uses Paid Sick Leave?

Like the federal Emergency Sick Leave Act, the rate of pay is based on the qualifying reason for usage of paid sick leave. If an employee uses paid sick leave for themselves, they must be paid at least their regular rate of pay up to \$511.00 per day, not to exceed an of \$5,110.00 for two weeks.

If an employee uses paid sick leave to care for another person, they must be paid at least two-thirds (2/3) of their regular pay up to \$200.00 per day, not to exceed an \$2,000.00 for two weeks.

Can an employer require an employee to find a replacement as a condition of taking paid sick leave?

No, an employer cannot require an employee to find a replacement as a condition of using sick leave.

COMPLIANCE ALERT

Can employees “carryover” Paid Sick Leave hours provided in San José’s Paid Sick Leave Ordinance?

No, employees are not entitled to carryover sick leave between years and are not entitled to be paid for unused sick leave. Unused sick leave will not be available after the effective period for the Ordinance ends.

What records do I need to keep when my employee takes paid sick leave or expanded family and medical leave?

The City is following Fair Labor Standards Act recordkeeping requirements. Compliance with the City’s COVID-19 Paid Sick Leave Ordinance requires businesses to maintain and provided the following documentation:

- The name of your 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 the reason.

Where can I find more information about the San José Paid Sick Leave Ordinance?

Information regarding the San José Paid Sick Leave Ordinance is posted [here](#). You can also call the San José Office of Equality Assurance (OEA) at 408-535-8430 or e-mail at MyWage@sanjoseca.gov.

Does the San José COVID-19 Paid Sick Leave Ordinance protect undocumented employees?

Yes, provided the employee meets all the other requirements of the Ordinance. The City’s Office of Equality Assurance will process and investigate a claim without regard to an employee’s immigration status. Employees filing a claim with the City’s Office of Equality Assurance will not be questioned about their immigration status.

May employers use other paid time off (i.e. Paid Time Off, Vacation, and Sick) as a credit toward its obligations to pay the San José Paid Sick Leave?

Yes, the Ordinance does not apply to any Employer that provides its Employees, on the effective date of this Ordinance, with some combination of paid personal leave at least equivalent to the paid sick time required by this Ordinance.

COMPLIANCE ALERT

An Employer that provides some combination of paid personal leave less than the paid sick time required by this Ordinance is required to comply with this Ordinance to the extent of such deficiency.

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.

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