

San Francisco Surpasses Other Jurisdictions and Enacts Expansive COVID-19 Related Paid Sick Leave

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On April 14, 2020, the San Francisco Board of Supervisors unanimously passed the [Public Health Emergency Leave Ordinance \(PHELO\)](#). Mayor London Breed signed the ordinance into law on April 17, 2020, making it effective immediately. The PHELO was created in an effort to fill the gap left by the federal Families First Coronavirus Response Act (FFCRA).

- **Applies to employees who work for companies with 500 or more employees.**
- **Provides up to 80 hours of paid sick leave for uses related to COVID-19.**
- **Available immediately.**
- **In addition to company-provided sick leave and other paid time off, unless that leave was independently provided for COVID-19 purposes.**

The PHELO's passage is part of a continuing trend of California cities enacting emergency paid sick leave ordinances related to COVID-19, including [Los Angeles](#) and [San Jose](#). The PHELO was also signed into law on the same day that Governor Newsom signed [Executive Order N-51-20](#), creating [COVID-19 Supplemental Paid Sick Leave](#), a statewide sick leave benefit for food industry employees.

Although the various COVID-19 sick leave ordinances all share the same purpose – providing employees with additional paid sick leave for uses related to COVID-19 – each of these laws is unique and so it is important that employers understand the nuances between the different laws to ensure compliance. Depending on the size of the employer, geography, and industry will impact what paid sick leave benefits must be provided to employees.

The following questions and answers are designed to help businesses determine if the new San Francisco PHELO applies to them and how to comply with the ordinance.

What Companies Are Required to Comply With the San Francisco PHELO?

The PHELO applies to businesses that:

1. Employ 500 or more employees;
2. Employ workers who perform work within the City and County of San Francisco; and
3. Are not required to comply with the FFCRA.

Which Employees Are Covered by the PHELO?

PHELO benefits must be provided to any worker providing services for payment, *whether or not those workers are currently scheduled to work*. The definition of employees eligible for PHELO benefits is *very broad* and includes full-time, part-time, temporary, and possibly furloughed employees – **regardless of how long the employee has been employed**.

The PHELO also includes covered employees as defined in Rule 6 of the San Francisco Paid Sick Leave Ordinance. These are employees who might otherwise be considered to have only minimal contact with San Francisco for work purposes. This means that a worker will also be considered an “employee” under the PHELO and entitled to its benefits, if the worker:

1. Lives in San Francisco and performs work from home for 56 or more hours within a calendar year; or
2. Performs work outside of San Francisco, but stops in San Francisco to perform work – such as to make pickups or deliveries – for a total of 56 or more hours within a calendar year.

If an Employer Lays Off Employees Will Those Employees Be Eligible for Paid Leave Under the PHELO?

No. If an employer fires or lays off employees, those employees will not be eligible for PHELO once their employment has terminated.

If an employer elects to furlough employees, rather than terminate their employment, those employees would be eligible to receive benefits under the PHELO.

How Much PHELO Leave Are Covered Employees Entitled To?

The amount of leave provided under the PHELO depends on whether employees worked full-time or part-time as of February 25, 2020. The PHELO does not define “full-time” or “part-time” for purposes of the ordinance.

- Employees who worked full-time as of February 25, 2020, are entitled to 80 hours paid leave.
- Employees who worked part-time as of February 25, 2020, are entitled to the average number of hours that the employee was scheduled to work over two (2) weeks during the six (6) month period prior to February 25, 2020.

However, the total number of hours of paid leave taken in a week may not exceed the average number of hours for which the employee is normally scheduled over a one-week period.

Are Employers Required to Provide PHELO Benefits in Addition to Other Paid Time Off Provided?

Yes. Covered employers must provide PHELO benefits in addition to any paid time off (i.e. accrued vacation, PTO, or sick leave) that was offered or provided to employees on or before the enactment of the ordinance.

However, an employer's obligation to provide PHELO leave benefits will be reduced for every hour of leave that an employer has allowed employees to take paid time off for purposes consistent with the ordinance, provided that the leave was in addition to previously accrued hours. This credit may be taken for such paid time off provided after February 25, 2020.

For What Purposes May Covered Employees Use PHELO Leave Benefits?

Similar to the San Jose and Los Angeles ordinances, covered employees may use PHELO leave benefits if the employee is unable to work or telework because the employee is:

1. Subject to quarantine or isolation by federal, state, or local order due to COVID-19, or is caring for a family member who is quarantined or isolated due to COVID-19;
 - a) This includes an employee who is a member of a vulnerable or high-risk population and who is therefore unable to work as recommended by San Francisco Public Health Orders, Executive Orders of the Governor, or orders of other Bay Area jurisdictions.
2. Advised by a health-care provider to self-quarantine due to COVID-19 or is caring for a family member who is so advised by a health care provider;
3. Experiencing symptoms of COVID-19 and is seeking medical diagnosis or is caring for a family member who is experiencing symptoms of COVID-19;
4. Caring for a minor child due to school or daycare closure related to COVID-19; or
5. Experiencing any other substantially similar condition specified by the Local Health Officer or under FFCRA section 5102(a)(6), by the United States Secretary of Health and Human Services.

Note, the uses for which PHELO is available are broader than the uses outlined in Governor Newsom's Executive Order N-51-20. That means that if a company potentially falls under both the PHELO and the Executive Order, the company will need to ensure compliance with both.

Can an Employer Require Employees to First Exhaust Other Accrued Paid Time Off Prior to Taking Leave Under PHELO?

No. Employers cannot require an employee to use previously accrued paid time off before taking leave under the PHELO if leave is being taken for a purpose consistent with the ordinance. However, employees may choose to use other forms of paid time off prior to using leave under PHELO.

Can a Covered Employer Modify Existing Paid Time Off Policies to Offset the Additional Leave Required by PHELO?

No. The PHELO prohibits employers from modifying paid time off policies after the PHELO's enactment in order to reduce paid leave provided. Employers may only modify such policies to provide employees with additional paid time off.

Are Health Care Providers and Emergency Responders Covered Under the PHELO?

Yes, to an extent. An employer of a health care provider or an emergency responder, as defined by the Code of Federal Regulations section 826.30(c), may limit the use of PHELO leave benefits except in circumstances where the employee is unable to work if the employee:

- Has been advised by a health care provider to self-quarantine; or
- Is experiencing symptoms associated with COVID-19, seeking a medical diagnosis, and does not meet the Center for Disease Control criteria requirements to return to work.

At What Rate Are PHELO Leave Benefits Paid?

Employees who take leave under the PHELO must be paid in the same manner as other paid sick leave under the San Francisco Paid Sick Leave Ordinance – at the employee's regular rate of pay (i.e. the employee's overtime rate) for the workweek in which the leave is taken or by using a 90-day lookback period.

When Must Employers Pay Employees for Leave Under the PHELO?

Employees must be paid for PHELO leave by no later than the next regular payday after PHELO leave is taken.

Can I Require an Employee Who Requests Leave Under the PHELO to Find a Replacement?

No. Covered employers cannot require an employee to find a replacement as a condition of using PHELO leave benefits.

Can Employers Require Employees to Take PHELO Leave in Specific Increments?

Yes. PHELO may be taken in increments of one hour. Employers cannot require employees to take PHELO leave in increments greater than one hour.

Can Employers Require Employees to Provide Notice of the Need for PHELO Leave?

Yes, however, only to the extent that leave under the PHELO is reasonably foreseeable.

Can Employers Require Documentation to Substantiate Leave Under PHELO?

No. An employer can request the basis for PHELO leave, but may not require a doctor's note, the disclosure of health information, or other documentation to substantiate the PHELO leave.

Are Employers Required to Notify Employees of Their Right to Leave Under the Ordinance?

Yes. By April 24, 2020, the San Francisco Office of Labor Standards Enforcement (OLSE) will publish a notice for employers to provide to employees. Within three days of that publication, employers must provide the notice to employees either by: posting the notice in a conspicuous place; emailing the notice; and/or posting the notice on an intranet or employee website.

Notices to employees must be provided in English, Spanish, Chinese and any other language spoken by at least 5% of the employees who are or were at the workplace or job site.

Are Employers Required to Include the Amount of Available PHELO Leave on Employee Wage Statements?

Yes, to the extent “feasible.” The ordinance requires employers to provide written notice to employees of their available PHELO balance similar to the notice required under California Labor Code Section 246(i) for California sick leave.

If an employer provides unlimited paid time off to employees for use that would include the uses required by the PHELO, the employer may satisfy the PHELO notice requirement by indicating “unlimited” on the employee’s wage statement. However, employers with an “unlimited” sick leave or PTO policy should consult their employment lawyer for compliance with this new ordinance.

How Long Will Covered Businesses Be Required to Comply With the PHELO?

The PHELO will expire either 61 days following its enactment, unless reenacted, or when the San Francisco Public Health Emergency is terminated, whichever occurs first.

Who Will Enforce the PHELO’s Requirements?

The ordinance will be enforced by San Francisco’s OLSE. The PHELO also empowers the OLSE to establish requirements related to the ordinance.

Conclusion

The PHELO is unlikely to be the last municipal ordinance passed by a California city to address the need for additional paid sick leave in light of the COVID-19 pandemic. Other cities, including Oakland and Emeryville, are currently considering similar ordinances. Employers with a presence in multiple California jurisdictions (or with employees working from home in different cities) will need to closely monitor the ongoing developments at the federal, state and local levels to ensure compliance.

As you are aware, things are changing quickly and there is no clear-cut authority or bright line rules. This is not an unequivocal statement of the law, but instead represents our best interpretation of where things currently stand. This article does not address the potential impacts of the numerous other local, state and federal orders that have been issued in response to the COVID-19 pandemic, including, without limitation, potential liability should an employee become ill, requirements regarding family leave, sick pay and other issues.

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National Law Review, Volume X, Number 113

Source URL: <https://natlawreview.com/article/san-francisco-surpasses-other-jurisdictions-and-enacts-expansive-covid-19-related>