

San Francisco Enacts COVID-19 Public Health Emergency Leave Ordinance

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Late on April 17, 2020, Mayor Breed signed the Public Health Emergency Leave Ordinance (Ordinance) that was passed by the San Francisco Board of Supervisors earlier in the week. The Ordinance requires employers to provide paid Public Health Emergency Leave (PHE leave) to employees when they are absent from work for reasons related to the COVID-19 pandemic. The Ordinance became effective on April 17, 2020 and remains in effect until June 17, 2020 (unless extended) or the end of the public health emergency, whichever is earlier.

Shortly thereafter, the San Francisco Office of Labor Standards Enforcement (OLSE) published guidance in the form of FAQs on employers' and employees' rights and obligations under the Ordinance. The following summary incorporates the requirements of both the Ordinance and the OLSE guidance.

■ Covered Employers

Employers are required to provide PHE leave if they have 500 or more employees worldwide and have any employee who performs work in San Francisco. If the number of employees fluctuates, the population size of the employer is based upon the average number of employees per pay period during the preceding calendar year.

The Ordinance is intended to fill the gap left by the federal Families First Coronavirus Response Act (FFCRA), which generally requires employers with fewer than 500 employees to provide certain employees with paid sick leave and paid family and medical leave when they are unable to work or telework for reasons related to COVID-19. The Ordinance specifically does not apply to employers required to provide paid sick leave and paid family and medical leave under the FFCRA.

■ Eligible Employees

PHE leave is available under the Ordinance to any current employee who performs work within the geographic boundaries of San Francisco (even on a limited basis), including full-time, part-time, temporary, seasonal, salaried, and paid-by-commission employees. Eligibility for PHE leave is not affected by the employee's immigration or documented status, length of employment, or whether currently scheduled to work (as long as there has not been a formal separation of employment such as a layoff). This means that furloughed employees, and employees of businesses that have temporarily closed or suspended operations, are eligible for PHE leave under the Ordinance. However, independent contractors are not eligible for PHE leave.



Employers are not required by the Ordinance to permit eligible employees to take PHE leave when they are working-- or scheduled to work--outside of San Francisco.

■ Amount of PHE Leave

The amount of PHE leave payable to an eligible employee is calculated as follows:

Eligible Employee	Entitlement to Paid PHE Leave
An employee scheduled to work full-time (40 hours per week) as of February 25, 2020	80 hours
An employee scheduled to work part-time as of February 25, 2020	The average number of hours the employee was scheduled to work over two weeks during the six months ending on February 25, 2020 (including hours for which the employee took leave of any type), but not more than 80 hours
An employee who commenced work after February 25, 2020	The average number of hours the employee worked over two weeks between the date of hire and the date paid leave is taken (including hours for which the employee took leave of any type), but not more than 80 hours

In general, PHE leave must be provided in addition to any other paid time off available to the employee, including paid sick leave under the San Francisco Paid Sick Leave Ordinance.

An employer may not change any non-mandated paid time off policy on or after April 17, 2020 except to provide additional paid leave. For example, an employer may not reduce the amount of PTO under its internal non-mandated policy to offset PHE leave required to be paid under the Ordinance.

However, the amount of PHE leave an employer must provide to an employee is reduced by:

- every hour of paid time off that the employer allowed an employee to take in addition to previously accrued hours, on or after February 25, 2020, for any of the six reasons for taking PHE leave (as explained below), provided that the paid time off was consistent with the PHE leave requirements

- every hour of paid leave the employee takes pursuant to the April 16, 2020 California Supplemental Paid Sick Leave Executive Order applicable to food sector workers.

■ Reasons for Taking PHE Leave

Eligible employees may take PHE leave on or after Friday, April 17, 2020 (but not after the Ordinance expires, which is currently scheduled to occur on June 17, 2020), if the employee is unable to work or telework because of any the following reasons:

1. The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19, including shelter-in-place orders. This includes employees who are members of a “vulnerable population” or “high-risk population” who are unable to work due to recommendations in a state or local order, including people who are at least 60 years old; people with certain health conditions such as heart disease, lung disease, diabetes, kidney disease, and weakened immune systems; and people who are pregnant or were pregnant in the last two weeks.
2. The employee has been advised by a health care provider to self-quarantine.
3. The employee is experiencing symptoms associated with COVID-19 and seeking a medical diagnosis.
4. The employee is caring for a family member who is subject to an order as described in (1) above, has been advised to self-quarantine as described in (2) above, or is experiencing symptoms as described in (3) above.
5. The employee is caring for a family member, if the family member’s school or place of care has been closed, or the family member’s care provider is unavailable, due to the public health emergency.
6. The employee is experiencing any other substantially similar condition specified by a local health officer or under federal law.

Special Exception: If an employee is a health care provider or emergency responder, the employer may limit that employee’s use of PHE leave to the following situations:

- The employee is unable to work or telework because the employee has been advised to self-quarantine; or
- The employee is unable to work or telework because the employee is experiencing symptoms associated with COVID-19, is 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.

Note that the Ordinance and OLSE guidance (linked below) contain detailed rules on the individuals who qualify as family members, health care providers, and emergency responders for purposes of PHE leave.

For any PHE leave, the employer may require the employee to identify the basis for requesting the leave, but the employer may not require disclosure of health information or other documentation (such as a doctor's note or letter from a childcare facility) for absences related to any of the above reasons.

■ Payment of PHE Leave

PHE leave must be paid in the same manner as paid sick leave under the San Francisco Paid Sick Leave Ordinance:

Employee Classification	Payment
Non-exempt employees	At the employee's "regular rate of pay" for the workweek in which the leave is taken, or at a rate calculated by dividing total wages paid (not including overtime premium pay) by total hours worked over a 90-day lookback period
Exempt employees	In the same manner as the employer calculates wages for other forms of paid leave time

Tips are not included in calculating the rate of pay for PHE leave. PHE leave may never be provided at less than the San Francisco minimum wage. Refer to the OLSE guidance for additional rules on calculating an employee's rate of pay during PHE leave.

Additional rules that apply to taking PHE leave:

- Employers can require employees to take PHE leave in increments of up to one hour (but not in larger increments, such as a half-day or full day)
- An employee may use PHE leave for all hours that s/he is scheduled to work in a particular day, including regular and overtime hours; however, all of the hours of

PHE leave would be paid at the employee's regular sick leave rate of pay

- PHE leave may be taken regardless of whether and when the employee is scheduled to work; for example, an employee who is not scheduled to work for a particular week may still take PHE leave for that week
- An employer may limit an employee's use of PHE leave in a given work week to the average number of hours for which the employee is normally scheduled over a one-week period
- An employee may use PHE leave before using other accrued paid time off
- An employee may voluntarily choose to use other accrued paid time off provided by the employer before the employee uses PHE leave; however, the employer may not require the employee to use other accrued paid time off before using PHE leave
- An employer must provide payment for PHE leave taken by an employee by no later than the payday for the next regular payroll period after the PHE leave is taken.

Employers are not required by the Ordinance to pay any unused PHE leave to employees upon their termination of employment.

■ Notice and Posting

The OLSE has published a PHE leave notice (linked below) that employers must provide to employees as soon as possible in a manner calculated to reach all employees:

- by posting in a conspicuous place at the workplace,
- via electronic communication, and/or
- by posting in a conspicuous place in an Employer's web-based or app-based platform.

Every employer must provide the notice in English, Spanish, Chinese, and any language spoken by at least 5% of the employees who are, or prior to the Public Health Emergency were, at the workplace or job site.

The employer must also retain records related to PHE leave on the same basis as other records related to compliance with other San Francisco ordinances.