

San Francisco Supplemental Pay for Military Leave

San Francisco now requires certain employers to provide up to 30 days of supplemental pay to employees who are on leave for military duty.

■ Background

On January 20, 2023, the mayor of San Francisco approved an Ordinance passed by the Board of Supervisors called the “Private Sector Military Leave Pay Protection Act.” This Ordinance is intended to minimize the financial hardship of an employee who is absent from work due to military duty by mandating the employer provide partial pay to the employee for up to 30 days.

This Ordinance is administered and enforced by the San Francisco Office of Labor Standards Enforcement (“OLSE”). On February 16, 2023, the OLSE published implementation guidance on this Ordinance in the form of Frequently Asked Questions.

The requirements of the Ordinance became effective on February 19, 2023.

■ Covered Employers

The Ordinance applies to every employer with at least 100 employees worldwide, regardless of company location or headquarters. However, the Ordinance does not apply to any governmental employer (including the City and County of San Francisco) or to private businesses located in the Presidio, Fort Mason, the Golden Gate National Recreation Area, or other federal enclave.

All employees performing work for the employer worldwide are counted toward the threshold. If the number of employees fluctuates above and below 100 over the course of a year, the employer’s size is calculated based on the average number of employees per pay period during the prior calendar year.

■ Covered Employees

The Ordinance applies to any employee (including any part-time or temporary employee) who both:

- performs work within the geographic boundaries of San Francisco for a covered employer, and
- is a member of the reserve corps of the US Armed Forces, National Guard, or other US uniformed service organization.

■ Covered Military Duty

The Ordinance applies to a covered employee's leave for military duty, for up to 30 days in a calendar year.

“Military duty” is defined as:

- active military service in response to the September 11, 2001 terrorist attacks, international terrorism, the conflict in Iraq, or related extraordinary circumstances, or military service to provide medical or logistical support to federal, state, or local government responses to the COVID-19 pandemic, natural disasters, or engagement in military duty ordered for the purposes of military training, drills, encampment, naval cruises, special exercises, Emergency State Active Duty, or like activity.

Examples of military duty are when the covered employee is deployed to respond to a natural disaster or military conflict, or attends required annual military training.

■ Supplemental Pay Calculation

For the period during which covered employees are on leave for military duty, the covered employer must pay them (for up to 30 days in a calendar year) the difference between their gross military pay and the amount of gross pay they would have received from the employer had they worked their regular work schedule (for the hours that would have been worked in San Francisco) instead of being absent for military leave.

Gross military pay is the basic pay rate the employee receives for military service, excluding military pay allowances such as those for combat, clothing, housing, or aviation. The employer can estimate the amount of gross military pay by asking employees to provide a copy of their military orders (which disclose their military rank), and then looking up the federal Armed Forces basic pay rate for their military rank at www.dfas.mil (if the military orders do not already state their gross military pay). Also, after the leave ends, the employer can ask the employees to provide a wage statement verifying the military gross pay they actually received during the relevant period of military leave, and adjust for any discrepancies on the next paycheck.

Gross pay from the employer is easily calculated if covered employees have a regular work schedule (e.g., 40 hours per week every week), or have a work schedule predetermined for the time when they are required to take military leave. Otherwise, their “regular work schedule” can be determined by looking at the three monthly pay periods, six bi-weekly or semi-monthly pay periods, or twelve weekly pay periods immediately preceding the relevant period of military leave. Gross pay includes overtime pay if the employee's regular work schedule includes overtime. The calculation of gross pay should not include any pay periods during which the employee was on unpaid or partially paid leave prior to the relevant period of military leave.

The employer is required to make a good faith effort to provide the supplemental pay no later than the payday for the payroll period when the employee's military leave begins. Covered employees receiving supplemental pay while on leave for military duty should not receive more total compensation than they would have received by working their regular work schedule.

For those employees who receive supplemental pay under the Ordinance but who fail to return to their position with the employer within 60 days after being released from military duty (despite being fit for employment), the employer is permitted to treat the supplemental pay as a loan at a specified interest rate that must be paid back to the employer in equal monthly installments over a period not to exceed five years.

■ Employer Action

- Covered employers may require covered employees to comply with reasonable notice procedures, such as providing the employer with advance notice of the employee's use of supplemental pay for military leave, but only when the need for military leave is foreseeable (such as for scheduled trainings).
- Within a reasonable time after covered employees tell their covered employer they received written military orders and will require time off work, the employer should provide them with a notice of their right to supplemental pay under the Ordinance.
- If a covered employer publishes an employee handbook that describes other kinds of leave available to its employees, the employer must include a description of the right to supplemental pay under the Ordinance in the next edition of the handbook that is published.
- A covered employer should stay up-to-date on displaying the current labor law posters required at each San Francisco workplace or jobsite. The OLSE has indicated it will include a notification of the employee right to supplemental pay under the Ordinance in the labor law posters it updates annually and provides for employers.
- Covered employers must retain records for at least four years relating to employee schedules and hours worked, and military leave taken by covered employees, for purposes of documenting their compliance with the supplemental pay requirements of the Ordinance.