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San Francisco's Public Health Emergency Leave Ordinance

San Francisco's Public Health Emergency Leave Ordinance ["PHELO" or the "Ordinance"] requires **businesses with 500+ employees** to provide employees with **up to 80 hours of paid leave** for COVID-related reasons ["PHELO Leave"].

While the Ordinance passed on April 7, 2020, the Ordinance was amended and went into effect on April 17, 2020. Shortly after, on April 24, 2020, the San Francisco Office of Labor Standards Enforcement [OLSE] updated its guidance on the Ordinance. Please click [here](#) for the OLSE's latest Frequently Asked Questions, as of April 24, 2020.

Note that the Ordinance expires on June 17, 2020, unless reenacted, or upon the termination of the San Francisco mayor's declaration of a public health emergency, whichever occurs first.

What employers must provide PHELO Leave? Employers with 500 or more employees nationwide; with one or more eligible employees. Employers that are defined as "Covered Employers" under the FFCRA are not covered by the Ordinance.¹

[The Ordinance is aimed to bridge the federal Families First Coronavirus Response Act [FFCRA] coverage gap as the FFCRA *exempts* employers with 500+ employees.² And, unlike the FFCRA, the Ordinance applies to businesses that have temporarily closed or suspended operations.

Which employees are eligible to receive PHELO leave? The following employees are eligible to receive PHELO Leave:

- Full-time, part-time and temporary employees who perform work within the geographic boundaries of the City and County of San Francisco;
- Employees who perform limited work within the geographic boundaries of the City and County of San Francisco and who are considered "employees" under the existing San Francisco Paid Sick Leave Ordinance [PSLO]; and

¹ Under the FFCRA, separate companies will be treated as separate employers unless they are sufficiently integrated to be considered a single employer. The test for determining whether related properties will be considered a single enterprise or separate companies is known as the "Integrated Employer" test, as set forth in FMLA regulations. The "integrated employer" test considers the following factors: [i] common management; [ii] interrelation between operations; [iii] centralized control of labor relations; and [iv] degree of common ownership/financial control. Please contact legal counsel with questions. [See 29 CFR § 825.104].

² The federal FFCRA requires certain employers to provide employees with up to 80 additional hours of paid sick leave and up to 10 weeks of paid family and medical leave for conditions related to the Coronavirus. These provisions will apply from April 1, 2020 through December 31, 2020.

- Employees who are participants in a Welfare-to-Work program, including but not limited to CalWORKS and the County Adult Assistance Program (CAAP), and any successor programs that are substantially similar to them that require a public assistance applicant or recipient to work in exchange for their grant.

How many hours of PHELO Leave will an employee receive? Full-time employees, as of Feb. 25, 2020, shall receive up to 80 hours. Part-time employees, as of Feb. 25, 2020, shall receive a number of hours equal to the scheduled average number of hours over a two-week period from August 25, 2019 through February 25, 2020 (including any leave the employees took).

An employer may offset these hours if they provided paid time off for COVID-19 on or after February 25, 2020, not including employees' accrued or regular paid time off/vacation or paid sick leave.

When can an employee use PHELO Leave? An employee may use PHELO Leave when they are unable to work (or telework) due to the following reasons:

- (1) The employee is subject to an individual or general government quarantine or isolation order related to COVID-19, including shelter-in-place orders. This includes an employee who is a member of a "vulnerable population," which include people who are:
 - 60 years old and older;
 - Have certain health conditions such as heart disease, lung disease, diabetes, kidney disease, and weakened immune systems; or
 - 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 meets one of the categories listed above.
- (5) The employee is caring for a family member if that person's school or place of care has been closed, or the care provider of that person is unavailable, due to the Public Health Emergency.
- (6) The employee is experiencing any other substantially similar condition specified by the Local Health Officer or federal law.

Note, employees may voluntarily choose, but an employer may not require the employee, to use other accrued PTO before the employee uses PHELO Leave.

Since the Ordinance went into effect on April 17, 2020, when can employees start to use PHELO Leave? Immediately—regardless of how long an employee has worked for the employer and regardless of whether and when the employee is scheduled to work. However, the number of hours taken may not exceed the average number of hours over a one-week period from August 25, 2019 through February 25, 2020 (including any leave the employees took).

How do we pay out PHELO Leave?

Employers may calculate PHELO Leave in one of two ways:

- [1] Use the regular rate of pay for the workweek in which the employee uses the PHELO, whether or not the employee works overtime in that week; OR
- [2] Divide the employee's total wages, not including overtime premium pay, by the employee's total hours worked in the full pay periods of the prior 90 days of employment.

Keep in mind:

- Employers must pay PHELO Leave no later than the payday for the next regular payroll period after the PHELO Leave is taken.
- Tips are not included when calculating PHELO Leave.
- If an employee works two jobs at different pay rates for the same employer or an employee whose rate of pay fluctuates for the same job, the employer shall reimburse the employee at the employee's average hourly rate of pay for the 90 days prior to the date upon which PHELO Leave begins.

Additional Conditions for PHELO Leave Use:

Employers may not require employees to:

- Work a different shift instead of taking PHELO Leave.
- Use an alternative school or place of care when they have been closed or are unavailable due to COVID-19 related reasons.
- Provide the disclosure of health information or other documentation [e.g., doctor's note or letter from a child care facility] in order to use PHELO Leave.*
- Take off the full day to use PHELO Leave.
- Use PHELO Leave to find replacement workers covering for them.

*Employers may require employees to comply with reasonable notice procedures, but only when the need for PHELO Leave is foreseeable; and to identify the basis for requesting PHELO Leave.

Who is not eligible for PHELO Leave?

- Employees covered by a bona fide collective bargaining agreement that expressly, clearly, and unambiguously waives the right to leave.
- Former employees.
- Employees of private employers at San Francisco International Airport.
- Employees who did not perform work in San Francisco prior to February 25, 2020, and subsequently switched to teleworking in San Francisco.

Do we have to provide employees with notice of the Ordinance? Yes. Covered employers must provide [this notice](#) to employees in a manner calculated to reach all employees [e.g., posting at a job site, sending electronically, and/or posting to web-based or app-based platform].

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Page 4 of 4

Additional Paid Sick Leave Relief

As a final reminder, the City of San Francisco has agreed to contribute up to 40 hours of additional paid sick leave program through the Workers and Families First Program. This new program provides financial assistance to businesses and nonprofits providing paid sick leave (beyond the existing SF PSL requirements) or PHELO Leave. All San Francisco businesses are eligible, with up to 20% of funds reserved for small businesses with 50 or fewer employees. Employers may apply through the Office of Economic & Workforce Development [here](#).

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Questions? Contact Stokes Wagner.