



Legislation Text

File #: 2020-0696, **Version:** 1

To: Board of Supervisors

Department or Agency Name(s): Board of Supervisors

Staff Name and Phone Number: Supervisor Susan Gorin 565-2241

Vote Requirement: Majority

Supervisory District(s): Countywide

Title:

Emergency Paid Sick Leave - Options for a Local Ordinance

Recommended Action:

Provide direction to the Office of County Counsel on whether to draft a local Urgency Paid Sick Leave Ordinance that would require private employers, within the unincorporated territory of the County, who are not covered under the Families First Coronavirus Response Act ("the FFCRA" or "the Act"), to provide paid sick-leave benefits to employees during the COVID-19 public health emergency, and if so, provide direction regarding the application and scope of the proposed ordinance.

Executive Summary:

On June 9, 2020, your Board directed County Counsel to research whether general law counties such as the County of Sonoma may legally enact emergency paid sick leave ordinances in response to the COVID-19 pandemic, and to provide policy options for such an ordinance, if feasible. This item requests your Board to determine whether to direct the Office of County Counsel to draft an Emergency Paid Sick Leave Ordinance. The Ordinance would bridge the coverage gap by extending paid sick leave benefits to include additional employees who are not otherwise covered by the Act (i.e., employees of private employers with over 500 employees). As there are a number of significant policy considerations in any such Ordinance, this item requests further input from your Board regarding the scope of coverage and related issues. If the Board chooses to move forward with an Ordinance, Counsel will incorporate the Board's policy direction in an urgency Ordinance that would come before your Board on August 18, 2020.

Discussion:

On January 31, 2020, the United States Health and Human Service Secretary declared a public health emergency for the United States to aid the nation's healthcare community in responding to the novel coronavirus. On March 3, 2020, the Board of Supervisors ratified the declaration of the local health emergency by the Public Health Officer and the proclamation of a local emergency by the Director of Emergency Services that began on March 2, 2020, due to COVID-19. Virus infection spread and hospitalizations have resulted in the County being placed on a State Watch List that resulted in State orders to close a number of business sectors; however, significant segments of the economy remain open. On April 16, 2020, Governor Gavin Newsom issued Executive order No. N-51-20, which required private employers to provide supplemental paid sick leave to food sector workers for reasons related to COVID-19.

On March 18, 2020, President Trump signed into law the Families First Coronavirus Response Act to provide emergency paid sick leave to certain employees who are unable to work or telework due to the COVID-19 public health emergency. Generally, the FFCRA provides that employers with fewer than 500 employees must provide to employees: (1) up to 80 hours of paid sick leave at the employee's regular rate of pay where the employee is unable to work because the employee is quarantined, and/or experiencing COVID-19 symptoms and seeking a medical diagnosis; and (2) up to 80 hours of paid sick leave at two-thirds the employee's regular rate of pay because the employee is unable to work due to the need to care for an individual subject to quarantine, or to care for a child whose school or child care provider is closed or unavailable for reasons related to COVID-19. The Act also requires that employers with fewer than 500 employees provide up to an additional 10 weeks of paid expanded emergency family and medical leave for employees who are unable to work due to a bona fide need for leave to care for a child whose school or child care provider is closed or unavailable for reasons related to COVID-19.

The Act affords private employers who provide their employees the sick leave and expanded FMLA benefits under the legislation with a dollar-for-dollar Federal tax credit for the cost of providing the leave. Conversely, employers subject to similar local paid sick leave ordinances are unable to avail themselves of any tax credits, so the cost of the leave is borne entirely by the employer.

The Families First Coronavirus Response Act does not apply to employers with 500 or more employees. In addition, the Act affords discretion to covered employers of health care workers and emergency responders in terms of affording such employees the paid sick leave and expanded family and medical leave benefits, should operational needs dictate otherwise. Further, small businesses with fewer than 50 employees may qualify for exemption from the requirement to provide paid leave to an employee who requests leave due to school closings or child care unavailability, if providing leave to care for a child would jeopardize the viability of the business as a going concern.

The small business hardship exemption only potentially provides an exemption from the obligation to provide paid leave to an employee who requests leave due to school or childcare closures. All small businesses are nonetheless obligated to provide Emergency Paid Sick Leave under the Act to employees who need leave because: they themselves are subject to a quarantine or an isolation order; they have been advised by a health care provider to self-quarantine; they are experiencing COVID-19 symptoms and are seeking a medical diagnosis; or they are caring for an individual who is subject to a quarantine order or has been advised to quarantine. There is no exception for small businesses from these requirements.

The FFCRA caps pay for Emergency Paid Sick Leave at \$511 per day (\$5,110 in the aggregate), for an employee who is experiencing symptoms of COVID-19 and is seeking a medical diagnosis, or is subject to a government quarantine or isolation order or a health care provider's advice to self-quarantine the employee. Pay is capped at \$200 per day (\$2,000 in the aggregate), paid at 2/3's the employee's regular rate of pay, if the employee is caring for his/her minor son or daughter whose school or place of care is closed due to COVID-19, or is caring for an individual subject to a government quarantine or isolation order or a health care provider's advice to self-quarantine.

While the federal legislative history of the FFCRA reveals that employers with more than 500 employees were

excluded from the Act because it is thought that such employers already furnish their employees with adequate paid sick leave benefits, and thus there is no need to include such employers in the Act, there is nonetheless the potential that certain employees of private employers that have more than 500 employees in the unincorporated areas of the County may not necessarily provide their employees with at least 80 hours of paid sick leave or paid time off in a year that they can use for COVID-19 related purposes.

General Law County Authority

Your Board met on June 9, 2020, and gave direction to County Counsel to research whether it is legally permissible for a general law county such as the County of Sonoma to enact a local ordinance that would require private employers to afford employees not covered by the Families First Coronavirus Response Act with paid sick leave benefits in response to the COVID- 19 pandemic.

Generally speaking, charter cities and counties have more authority and leeway to adopt ordinances impacting the employment relationship of private sector employers and their employees than do general law cities and counties. There do not appear to be any California legal decisions that squarely address the issue of the authority of a general city or county to mandate paid sick leave for private sector employees. To date, it appears as though the vast majority of cities and counties in California that have enacted paid sick leave ordinances have been charter cities and counties. Further, many such ordinances simply serve to broaden the scope of already existing paid sick leave ordinances to specifically provide that the sick leave benefits can be used for certain COVID related reasons.

County Counsel examined whether there is a potential preemption argument that could be raised that the Legislature intended to “occupy the field” and preempt a general law county’s ability to require that private employers furnish employees paid sick leave benefits. On balance, we have determined that while the law is not clear, existing statutes, read in conjunction with Article XI section 7 of the California Constitution (which gives general law counties broad police powers within their jurisdictional limits), appear to provide general law counties the ability to legislate in this area. For example, California Labor Code Section 249(d), which provides that the Healthy Workplace Family Act that affords annual sick leave benefits to workers establishes minimum requirements pertaining to paid sick days, does not preempt, limit or otherwise affect the applicability of any other local law, regulation, requirement, policy, or standard that provides for greater accrual or use by employees of sick days. This general law authority, and lack of state preemption, is further reinforced in the current situation, where County Health Officers exercise broad powers regarding ordinances impacting health and safety.

Ordinance Impact

According to the Economic Development Board, there are two private businesses in the unincorporated area of Sonoma County that have more than 500 employees locally, Fairmont Sonoma Mission Inn and Spa, and Korbel Champagne Cellars. The EDB estimates that there are approximately 275 private employers who have less than 500 employees in the unincorporated area of Sonoma County, but more than 500 employees

nationally. There is at least one private employer, and perhaps more, with more than 500 employees locally who employs health care workers and first responders. In addition, the EDB estimates that there are approximately 11,831 businesses in the unincorporated area that have fewer than 50 employees.

If your Board wishes to proceed with the ordinance, policy decision points to determine the scope of the Ordinance include the following:

1. Apply to Employers with more than 500 Employees Locally or Nationally?

As seen in the attachment, the vast majority of local paid sick leave ordinances enacted apply only to employers who have more than 500 employees nationally. The few exceptions to the 500 or more employees' nationally scope limitation include, for example, the Los Angeles City ordinance that applies to employers who have 500 or more employees within the City of Los Angeles or who have more than 2,000 employees nationwide, and the City San Jose ordinance that applies to all businesses within the city. The paid sick leave ordinance that was recently adopted by the City of Santa Rosa generally covers all private employers operating within the City who have more than 500 employees nationally.

Direction is needed regarding whether the Ordinance should apply to private employers within the County's jurisdiction who have more than 500 employees locally, or private employers within the County's jurisdiction who have more than 500 employees nationally, or some combination.

It is generally thought that larger employers are better able to sustain the financial impact a paid sick leave ordinance would have, whereas the financial impact will be greater for smaller employers. If your Board elects to extend coverage to only those private employers who have more than 500 employees locally, the scope of the ordinance will be very limited.

2. Include Health Care Workers and First Responders of Private Employers, but Allow for an Exemption Based on Operational Needs?

An employee working as a health care provider or an emergency responder can be excluded from the paid sick leave and expanded family and medical leave by his or her employer under the FFCRA.

Only very few cities and counties such as the City of Santa Rosa and the City of San Jose have required that the benefits be afforded unconditionally to health care workers and emergency responders; the vast majority of cities and counties have afforded employers the option to limit benefits to health care workers and emergency responders, should operational needs dictate.

Direction is needed regarding whether the ordinance should mandate that all private employers of health care workers and first responders who are not subject to the FFCRA afford such employees the sick leave benefits, or should the ordinance give such employers the option of electing not to furnish the benefits should operational needs dictate otherwise. Alternatively, your Board could exclude all health care workers and first responders of private employers from the ordinance.

Some factors in making this determination include the fact that the State has told hospitals they need to

prepare for a significant increase in the number of patients, and on June 13th, the State released “COVID-19 County/Regional Surge Planning Guidance,” suggesting in part the need for a collaborative approach when enacting local paid sick leave ordinances. Further, it has been reported that local health care facilities, such as hospitals, already afford their employees with paid sick leave benefits so as to allow employees to not have to come to work if they have COVID or have COVID symptoms. A local paid sick leave ordinance that applies universally to all health care providers and first responders without the possibility of exemption for operational needs, could inadvertently reduce staff levels at a time when needs increase due to a surge in infections.

It has also been reported by the Hospital Council of Northern & Central California that many local health care facilities have recently extended supplemental benefits for both union and non-union employees that include up to an additional 80 hours of COVID-related paid leave time for employees diagnosed with COVID or who are awaiting test results.

3. Offsets for Leave Benefits Already Afforded Employees?

The FFCRA provides that an employer may not require an employee to use other paid leave provided by the employer to the employee before the employee uses the FFCRA paid sick time; the paid sick leave benefits that are afforded to employees under the FFCRA are *in addition to* employees’ preexisting leave entitlements.

As evidenced in the attached comparison chart, most jurisdictions in California that have enacted paid sick leave ordinances have provided that employers may satisfy the new emergency paid sick leave requirements so long as they already furnish their employees with at least a minimum amount of combined paid time off consisting of sick leave, vacation or PTO, ranging from 80 hours to 160 hours of leave a year. The Santa Rosa ordinance provides that it does not apply to an employer that has provided employees, on July 7, with some combination of paid personal leave at least equivalent to the paid sick leave the ordinance requires.

Direction is needed from your Board whether the ordinance should provide that the emergency 80 hours of paid sick leave is supplemental to any sick leave or paid time off benefits already afforded to employees, or if employers may use sick leave and other paid time off benefits already afforded to employees so as to offset the emergency 80 hours of paid sick leave. If the latter option, how many hours of sick leave or paid time off benefits will serve to satisfy the paid sick leave requirements of the ordinance such that an employer need not furnish additional paid sick leave?

This decision will greatly influence the financial impact this Ordinance has on local employers, as well as the scope of the benefit afforded employees.

Related issues include whether the ordinance should require that employers, subject to the ordinance, may not require that employees use their existing sick, vacation, or paid time off leave balances before they may use the new emergency paid sick leave; and whether the ordinance should mandate that employers, subject to the ordinance, may not change any of the leave benefits they currently afford employees (for example, decreasing the amount of vacation pay employees receive). Most local paid sick leave ordinances have such requirements.

4. Should the Local Ordinance Maintain the FFCRA Hardship Exemption for Small Businesses for Child Care Purposes?

The Act provides that businesses with less than 50 employees who obtained an exemption based on financial hardship do not have to provide employees with paid leave time only when the use is for the purpose of caring for a child whose school or child care is unavailable due to COVID-19 related reasons and the small business can demonstrate that providing the benefit would jeopardize the viability of the business as a going concern. (Under the Act, all small businesses are required to furnish all of the other paid sick leave benefits to employees, regardless of financial hardship.)

The paid sick leave ordinances in other jurisdictions afford employees with the sick leave benefits, but not typically the expanded family medical leave benefits to care for children whose schools and child care are closed due to COVID-19. A majority of the local ordinances do not apply to small businesses with fewer than 50 employees; only very few jurisdictions, such as the City of San Jose, have elected to require employers with less than 50 employees to provide sick pay to employees who need to care for children whose schools and child care are closed due to COVID-19. The Santa Rosa ordinance does not alter the Families First Coronavirus Response Act provision that employers with less than 50 employees that are experiencing economic hardship are not obligated to provide the benefits for employees needing to provide child care.

Direction is needed regarding whether the ordinance should address small businesses.

5. Remove any of the FFCRA Pay Caps?

The FFCRA caps pay at two-thirds of an employee's pay, up to \$200 per day (up to \$2,000 in aggregate), when use is for the care of a child or family member. Pay is capped under the Act at \$511 per day (\$5,110 in the aggregate), when use is for the employee in question.

As shown in the attached comparison chart, most jurisdictions that have adopted local paid sick leave ordinances appear to have capped pay for all purposes at \$511 per day, although a few have also maintained the two-thirds rate of pay \$200 cap under the FFCRA when use is for the care of a child or family member. No jurisdictions appear to have removed the \$511 per day cap. Under the Santa Rosa ordinance, pay is capped at \$511 a day, but there is no two-thirds cap on pay up to \$200 per day for leave taken for child care purposes, as there is under the FFCRA.

Direction is needed from your Board whether the ordinance should maintain such pay caps or remove them.

6. Carve Out for Any Categories of Employees?

In terms of coverage for employees of private employers that have fewer than 500 employees, the Act does not exclude certain employees from coverage.

Most jurisdictions that have adopted local ordinances have taken a similar approach, although a few, such as San Mateo County and Los Angeles County, have specifically carved out food service workers and certain aviation employees, as food service workers are already covered under Executive Order No. N-51-20, and it is

thought by some jurisdictions that certain aviation employees are critical employees whose services are of such necessity that they should not be covered by the local paid sick leave ordinance. The City of Santa Rosa's ordinance only applies to workers performing "allowed or essential work", as defined in the County Health Orders.

Direction is needed from your Board whether the ordinance should carve out any categories of employees from the scope of the ordinance or, alternatively, provide broad coverage.

This is a policy call in terms of just how broad of application your Board desires to have for the ordinance. To the extent certain categories of employees of private employers are not carved out, this makes administration of the ordinance simpler.

Next Steps

If the Board wants to move forward with a local ordinance and provides policy direction on the issues stated above, County Counsel will incorporate the information and come back with an urgency ordinance at the August 18, 2020 meeting. Given the dire circumstances created by the coronavirus and impacts on businesses and employees, it would be presented as an urgency ordinance that could take effect immediately upon four-fifths approval and adoption.

Prior Board Actions:

June 9, 2020 Minute Order directing County Counsel to return with options for a local Emergency Sick Leave Ordinance.

FISCAL SUMMARY

Expenditures	FY 19-20 Adopted	FY20-21 Projected	FY 21-22 Projected
Budgeted Expenses			
Additional Appropriation Requested			
Total Expenditures			
Funding Sources			
General Fund/WA GF			
State/Federal			
Fees/Other			
Use of Fund Balance			
Contingencies			
Total Sources			

Narrative Explanation of Fiscal Impacts:

There are no financial impacts to the County if the ordinance is adopted; only financial impacts to those private employers in the County who would be subject to the ordinance.

Staffing Impacts:			
Position Title (Payroll Classification)	Monthly Salary Range (A-I Step)	Additions (Number)	Deletions (Number)

Narrative Explanation of Staffing Impacts (If Required):

Attachments:

Attachment A - Paid Sick Leave Comparison Chart

Attachment B - List of Employers in the Unincorporated Areas of the County based on Number of Employees

Related Items "On File" with the Clerk of the Board: