

Ordinance No. _____

Retail Food Worker Hazard Pay Ordinance

SEC. 1 RECITALS.

The City Council finds the foregoing recitals to be true and correct and hereby incorporates those recitals into this Ordinance.

SEC. 2 TITLE AND PURPOSE.

This Ordinance shall be known as the “Retail Food Worker Hazard Pay Ordinance.” Retail Food establishments are a vibrant and integral part of the public infrastructure during the ongoing pandemic.

The retail food workers of San Leandro have continued to report to work and to serve their communities in the face of an unprecedented pandemic. Each day these workers risk their lives and the health of their families without any extra benefits or wages in order to keep the food and health supply chain operating.

The purpose of this Retail Food Worker Hazard Pay Ordinance (“Ordinance”) is to justly compensate retail food workers for the clear and present dangers of doing their jobs as essential workers during the pandemic by requiring their employers to provide hazard pay. The City has an interest in ensuring the welfare of its workers and the continued operation of its food supply chain.

Through this Ordinance, the City seeks to sustain the stability of the food and health supply chain through supporting the essential workers who continue to work during the pandemic.

SEC. 3 AUTHORITY

This Chapter is adopted pursuant to the powers vested in the City of San Leandro under the laws of the State of California, including, but not limited to, the police powers vested in the City pursuant to Article XI, Section 7 of the California Constitution, California Labor Code section 1205(b), and the Charter of the City of San Leandro.

SEC. 4 FINDINGS.

The City Council finds and declares that adoption of this Ordinance is necessary for preserving the public peace, health and safety for the following reasons:

- A. The COVID-19 pandemic has led to the current state of emergency in local emergency in the City of San Leandro.
- B. Governor Newsom extended the “Safer at Home” emergency order on December 3, 2020 as a result of the critically low availability of Intensive Care Unit (“ICU”) beds.

- C. The virus is spreading rapidly across the region with many clusters arising within retail stores. Grocery stores remain a critical piece of infrastructure in the fight against the COVID-19 virus and in protecting the City's food supply chain.
- D. Grocery stores are the primary points of distribution for food and other daily necessities for the residents of the City of San Leandro and are therefore essential to the vitality of our community.
- E. Turnover, inability to pay for housing and increased childcare costs as a result of school closures and other necessities could become an immediate problem for certain grocery workers if they are not given immediate financial relief.
- F. To protect the food supply chain and the public health and safety, the City of San Leandro must take steps to guard against turnover and ensure that grocery stores in San Leandro have well-trained, consistent, and stable staffing.
- G. The City Council of the City of San Leandro finds that there is a current and immediate threat to the public health, safety and/or welfare and a need for immediate preservation of the public peace, health, welfare and safety that warrants this ordinance, which finding is based upon the facts stated in the recitals above, and in the staff report dated February 16, 2021, as well as any oral and written testimony at the February 16, 2021 City Council meeting.

SEC. 5 RESERVED

SEC. 6 DEFINITIONS

The following shall apply to this Ordinance:

"Base Wage" shall mean the hourly wage paid to Covered Employees as of the effective date of this Ordinance less Hazard Pay owed under this Ordinance or other premium hourly rate already paid to compensate Covered Employees for working during the pandemic (referred to herein as "employer-initiated hazard pay").

"City" shall mean the City of San Leandro.

"Covered Employer" shall mean:

(a) Retail food establishments defined herein, that employ 300 or more employees nationwide regardless of where those employees are employed, including but not limited to chains, integrated enterprises, or franchises associated with a franchisor or network of franchises.

(b) To determine the number of employees, the calculation shall be based upon:

1. The actual number per calendar week of employees who worked for compensation during the pay period preceding the effective date of this Ordinance; and
2. All employees who worked for compensation shall be counted, including but not limited to:
 - (i) Employees who are not covered by this Ordinance;
 - (ii) Employees who worked inside the City;
 - (iii) Employees who worked outside the City; and
 - (iv) Employees who worked in full-time employment, part-time employment, joint employment, temporary employment, or through the services of a temporary services or staffing agency or similar entity.

“Covered Employee” shall mean any person who:

- (a) In a calendar week performs at least two hours of work within the geographic boundaries of the City for a Covered Employer; and
- (b) Qualifies as an employee entitled to payment of a minimum wage from any employer under the California minimum wage law, as provided under Section 1197¹ of the California Labor Code and wage orders published by the California Industrial Welfare Commission, and the City of San Leandro’s Minimum Wage Ordinance.

¹ Lab. Code § 1197. The minimum wage for employees fixed by the commission or by any applicable state or local law, is the minimum wage to be paid to employees, and the payment of a lower wage than the minimum so fixed is unlawful. This section does not change the applicability of local minimum wage laws to any entity.

“Designated Administrative Agency” means the Department of Finance or other City Department or agency the City Manager may designate.²

“Holiday Premium” shall mean the hourly wage paid to Covered Employees for performing work during a holiday or holiday season.

“Hazard Pay” shall mean an additional \$5.00 per hour wage bonus in addition to the Covered Employee’s Base Wage or Holiday Premium wage for each hour worked for any pay period during the duration of this Ordinance.

“Hours Worked” means the time during which a Covered Employee is subject to the control of a Covered Employer, including all the time the employee is suffered or permitted to work, and on-call.³

“Person” shall mean any individual, corporation, partnership, limited partnership, limited liability partnership, limited liability company, business trust, estate, trust, association, joint venture, agency, instrumentality, or any other legal or commercial entity, whether domestic or foreign.⁴

“Retail Food Establishment” shall mean a retail store in the City of San Leandro that is either:

(a) over 15,000 square feet in size and that sells primarily household foodstuffs for offsite consumption, including the sale of fresh produce, meats, poultry, fish, deli products, dairy products, canned foods, dry foods, beverages, baked foods and/or prepared foods. Other household supplies or other products shall be secondary to the primary purpose of food sales;

(b) over 85,000 square feet and with 10% of its sales floor area dedicated to sale of non-taxable merchandise including, but not limited to, the sale of fresh produce, meats, poultry, fish, deli products, dairy products, canned foods, dry foods, beverages, baked foods and/or prepared foods;⁵ or

(c) a drug retail store in the City of San Leandro that sells a variety of prescription and nonprescription medicines and miscellaneous items, including but not limited to drugs, pharmaceuticals, sundries, fresh produce, meats, poultry, fish, deli products, dairy products, canned foods, dry foods, beverages, prepared foods, and other merchandise.

“Retaliatory Action” shall mean the failure to hire, or the discharge, suspension, demotion, penalization, lowering of the Base Wage or Holiday Premium wage, or discrimination or any other adverse action against a Covered Employee with

² San Leandro Minimum Wage Ordinance, San Leandro Municipal Code Section 4-35.

³ California Code of Regulations, Title 8, Section 11040

⁴ Living Wage Ordinance, San Leandro Municipal Code Section 1-6-615

respect to the terms and conditions of the Covered Employee’s employment, for opposing any practice proscribed by this Ordinance, for participating in proceedings related to this Ordinance, for seeking to enforce his or her rights under this Ordinance by any lawful means, or for otherwise asserting rights under this Ordinance.

SEC. 7 PAYMENT OF HAZARD PAY TO COVERED EMPLOYEES

(a) Hazard Pay. Covered Employers shall pay Covered Employees a wage of no less than the premium hourly rate set under the authority of this Ordinance. The premium hourly rate for each Covered Employee shall be an additional

\$5.00 per hour for all hours worked on top of the Covered Employee's Base Wage or Holiday Premium Wage, whichever is applicable at the time of hours worked. The Hazard Pay rate shall not include compensation already owed to Covered Employees, Holiday Premium rates, gratuities, service charge distributions, or other bonuses. Covered Employers providing employer-initiated hazard pay will be credited for doing so in accordance with Sections 6 and 13.

(b) Duration of Hazard Pay. Covered Employers shall pay Hazard Pay to all workers for any pay period for 120 days from the effective date of this Ordinance, or during which the City of San Leandro is within a Widespread (purple), Substantial (red) or Moderate (orange) Risk Level, and until such time as risk levels return to Minimal (yellow) under State Health Orders, or until such time as all Covered Employers' Covered Employees are vaccinated, excluding those Covered Employees who are prevented from receipt of vaccination by disability or sincerely held religious beliefs, whichever is later.

SEC. 8 NOTICE AND POSTING.⁶

Every Employer shall post in a conspicuous place at any workplace or job site where any Employee works, a notice informing Employees of their rights under this Ordinance. Every Employer shall post notices in the top three languages spoken in San Leandro as determined by the last U.S. Census. Every Employer shall provide each Employee at the time this Ordinance becomes effective or at the time of hire, whichever is later, the Employer and owner or manager's name; address; telephone number; and whether it is part of a chain, integrated enterprise, or franchise associated with a franchisor or network of franchises. If the information the Employer provided to the Employee changes, the Employer shall provide the updated information in writing within ten days of the change.

SEC. 9 RETALIATION PROHIBITED.⁷

It shall be unlawful for an Employer or any other party to discriminate in any manner or take adverse action against any Employee in retaliation for exercising rights

⁶ San Leandro Minimum Wage Ordinance, San Leandro Municipal Code Section 4-35-600

⁷ San Leandro Minimum Wage Ordinance, San Leandro Municipal Code Section 4-35-700

protected under this Ordinance. Rights protected under this Ordinance include, but are not limited to: the right to file a complaint or inform any person about any party's alleged noncompliance with this Ordinance; and the right to inform any person of his or her potential rights under this Ordinance and to assist him or her in asserting such rights. Protections of this Ordinance shall apply to any Employee who mistakenly, but in good faith, alleges noncompliance with this Ordinance. Taking adverse action against an Employee, including lowering Covered Employees' Base Wage or Holiday Premium Wages or reduction of hours, within 90 days of the Employee's exercise of rights

protected under this Ordinance shall raise a rebuttable presumption of having done so in retaliation for the exercise of such rights.

SEC. 10 IMPLEMENTATION.⁸

The Department may promulgate guidelines and rules consistent with this Ordinance for the implementation of the provisions of this Ordinance. Any guidelines or rules shall have the force and effect of law, and may be relied upon by Covered Employers, Covered Employees and other parties to determine their rights and responsibilities under this Ordinance.

SEC. 11 RECORDS

Covered Employers shall keep records necessary to demonstrate compliance with this Ordinance, including but not limited to payroll records that specify the amount of compensation paid to employees under sections 6 and 7 of this Ordinance. Employers shall retain such records at the place of employment or in a central records office for a period of four years, and shall allow the Department access to such records, with appropriate notice and at a mutually agreeable time, to monitor compliance with the requirements of this Ordinance. When an issue arises as to a Covered Employer's compliance with this Ordinance, if the Covered Employer does not maintain or retain adequate records documenting compliance or does not allow the Department reasonable access to such records within 30 days of the Department's request, it shall be presumed that the Covered Employer has violated the Ordinance, absent clear and convincing evidence otherwise.

SEC. 12 ENFORCEMENT.

The provisions related to enforcement set forth in the San Leandro Municipal Code Section 4-35-900 shall apply equally to the enforcement of this Chapter and individuals and entities afforded rights and protections under those Sections are hereby granted those same rights and protections in connection with the enforcement of any provision of this Chapter. Covered Employers shall have all obligations of "Employers" and "employers" under Section 4-35-300. The terms "Employer," "Employ," and "Employee," when used in Section 4-35-300 for purposes of enforcing provisions of this Ordinance,

⁸ San Leandro Minimum Wage Ordinance, San Leandro Municipal Code Section 4-35-800

shall have the meanings set forth in Section 6 of this Ordinance. The provisions of this Ordinance do not diminish, alter, or negate any other legal rights, remedies, or procedures available to an Employee.

SEC. 11 EMPLOYEE REMEDIES FOR VIOLATIONS.

(a) **Damages and Restitution.** Every Employer who violates this Ordinance, or any portion thereof shall be liable to the Employee whose rights were violated for any and all relief, including, but not limited to:

1. Legal and equitable relief including but not limited to reinstatement, rescission, the payment of Hazard Pay unlawfully withheld, and the payment of all penalties and fines imposed pursuant to other provisions of this Ordinance or State law. For retaliatory action by the Employer, the Employee shall be entitled to a trebling of lost wages and penalties owed in addition to reinstatement.

2. Interest on all due and unpaid wages at the rate of interest specified in subdivision (b) of Section 3289 of the California Civil Code⁹, which shall accrue from the date that the wages were due and payable as provided in Part 1 (commencing with Section 200¹⁰) of Division 2 of the California Labor Code, to the date the wages are paid in full.

(b) **Civil Enforcement.** For any Covered Employee aggrieved by a violation of this Ordinance, the City Attorney or any other person or entity acting on behalf of the public as provided for under applicable state law, may bring a civil action in a court of competent jurisdiction against the Covered Employer violating this Ordinance. A Covered Employee or the City, upon prevailing, shall be entitled to such legal or equitable relief as may be appropriate to remedy the violation including but not limited to monies to be paid pursuant to this Ordinance, back pay, reinstatement, rescission, and reasonable attorneys' fees and costs. Any other person or entity enforcing this Ordinance on behalf of the public as provided for under applicable state law, upon prevailing, shall be entitled only to equitable, injunctive and/or restitutionary relief, and reasonable attorneys' fees and costs. Nothing in this Ordinance shall be interpreted as restricting, precluding, or otherwise limiting a separate or concurrent criminal

⁹ Cal Civ. Code §3289. (a) Any legal rate of interest stipulated by a contract remains chargeable after a breach thereof, as before, until the contract is superseded by a verdict or other new obligation. (b) If a contract entered into after January 1, 1986, does not stipulate a legal rate of interest, the obligation shall bear interest at a rate of 10 percent per annum after a breach. For the purposes of this subdivision, the term contract shall not include a note secured by a deed of trust on real property.

¹⁰ Labor Code § 200. As used in this Ordinance: (a) "Wages" includes all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation. (b) "Labor" includes labor, work, or service whether rendered or performed under contract, subcontract, partnership, station plan, or other agreement if the labor to be paid for is performed personally by the person demanding payment.

prosecution under the Municipal Code or state law. Jeopardy shall not attach as a result of any administrative or civil enforcement action taken pursuant to this Ordinance.

SEC. 12 ADDITIONAL REMEDIES

The City, when enforcing on behalf of an Employee, has the authority to require that payment of wages, Hazard Pay and/or penalties found to be due and owing to the Employee, be paid directly to the City for disbursement to the Employee. The City, when enforcing on the behalf of an Employee, has the authority to require that payment of all amounts due under this Ordinance be paid directly to the City. The failure of an Employer to pay any amounts due under this Ordinance shall constitute a debt to the City. The City, as plaintiff and/or judgment creditor, may file a civil action on behalf of an Employee

and/or the City or, to the extent feasible under state law, create and impose a lien against any property owned or operated by an Employer or other person who fails to pay wages, penalties and administrative fines assessed, or pursue other legal and equitable remedies available to the City. The City shall be awarded reasonable attorney's fees and costs as well as costs associated with enforcing a violation under this Ordinance.

The remedies, penalties and procedures provided under this Ordinance are cumulative and are not intended to be exclusive of any other available remedies, penalties and procedures.

SEC. 13 CREDIT FOR EMPLOYER-INITIATED HAZARD PAY

- (a) Any Covered Employer already providing a premium hourly rate to compensate Covered Employees for working during the pandemic (hereinafter "employer-initiated hazard pay") shall be credited against the \$5.00 per hour for the hourly amount paid to each Covered Employee (e.g. A Covered Employer offering a \$2.00 per hour employer-initiated hazard pays an additional \$3.00 per hour in Hazard Pay per this Ordinance.) Such Covered Employer must demonstrate that, as of the effective date of this Ordinance and in any subsequent covered pay periods, all Covered Employees are receiving such employer-initiated hazard pay. No Covered Employer shall be credited prospectively for any past payments. No Covered Employer shall be credited for any hourly premiums already owed to Covered Employees, such as but not limited to, Holiday Premiums. Nothing herein shall be interpreted to prohibit any employer from paying more than \$5.00 per hour in Hazard Pay.
- (b) To receive credit for employer-initiated hazard pay policies, Covered Employers must offer the following showings of proof to the Department:
 - (1) A copy of the Employer's hazard pay policy.
 - (2) A concise statement explaining Covered Employees' hourly base wages, hourly Holiday Premiums, hourly employer-initiated hazard pay, and any other wage bonuses received during the last 12 months.
 - (3) Evidence that, since the effective date of the Ordinance and for so long as this Ordinance is applicable, each and every Covered Employee has received employer-initiated hazard pay.
 - (4) Evidence that allows the City to review for compliance by assessing wages for the past 12 months and that is itemized in such a way that the City can understand a Covered Employee's Base Wage distinguished from Holiday Premiums and other bonuses or pay increases that are separate and distinct from employer-initiated hazard pay.
 - i. Accepted evidence of employer-initiated hazard pay wage described in (b)(4):
 - 1. A spreadsheet, of all Covered Employees and their wages for each pay period for the last 12 months, that allows the City to distinguish Base Wage from Holiday Pay and other bonuses or pay increases that are separate and distinct from employer-initiated hazard pay. The foregoing does not exempt any Covered Employer from maintaining, and

providing access to, the underlying payroll records described above. The foregoing notwithstanding if the City creates an online submission form for its Online Certified Payroll System (OCPS) that meets the above criteria then all offers of proof under subparagraph (b) shall be submitted directly to the OCPS.

- b. Any offer of proof under subparagraph (b) shall be accompanied by a written acknowledgement that it was so submitted under penalty of perjury.

SEC. 14 WAIVER THROUGH COLLECTIVE BARGAINING

To the extent required by Federal law, all or any portion of the applicable requirements of this Ordinance may be waived in a bona fide collective bargaining agreement, provided that such waiver is explicitly set forth in such agreement in clear and unambiguous terms.

SEC. 15 COEXISTENCE WITH OTHER AVAILABLE RELIEF FOR SPECIFIC DEPRIVATIONS OF PROTECTED RIGHTS.¹¹

The provisions of this Ordinance shall not be construed as limiting any Covered Employee's right to obtain relief to which he or she may be entitled at law or in equity.

SEC. 16 CONFLICTS.¹²

Nothing in this Ordinance shall be interpreted or applied so as to create any power or duty in conflict with any federal or state law.

¹¹ San Leandro Minimum Wage Ordinance, San Leandro Municipal Code Section 4-35-1000

¹² San Leandro Minimum Wage Ordinance, San Leandro Municipal Code Section 4-35-1000

SEC. 17 SEVERABILITY.

If any subsection, sentence, clause or phrase of this Ordinance is for any reason held to be invalid or unconstitutional by a court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this ordinance. The City Council hereby declares that it would have adopted this section, and each and every subsection, sentence, clause and phrase thereof not declared invalid or unconstitutional, without regard to whether any portion of the ordinance would be subsequently declared invalid or unconstitutional.

SEC. 18 EFFECTIVE DATE AND PUBLICATION.

This ordinance shall take effect thirty (30) days after adoption. The City Clerk is directed to publish the title once and post a complete copy thereof on the City Council Chamber bulletin board for five (5) days prior to adoption.