



Office of the City Manager

ACTION CALENDAR
November 10, 2015

To: Honorable Mayor and Members of the City Council

From: *DWR* Dee Williams-Ridley, Interim City Manager

Submitted by: Kelly Wallace, Acting Director, HHCS

Subject: Paid Sick Leave Ordinance; Adding Berkeley Municipal Code Chapter 13.100

RECOMMENDATION

Review and consider the attached Paid Sick Leave Ordinance (PSLO), including the potential benefits and impacts of the ordinance on employees, employers, and the community and either:

- 1) Adopt first reading of an Ordinance adding Berkeley Municipal Code Chapter 13.100; or
- 2) Postpone adoption of the Ordinance until businesses have had a chance to assess the impact of the new state Paid Sick Leave law on business operations.

SUMMARY

This report and ordinance are in response to Council's direction to staff at the September 15, 2015 Council Meeting to draft a Paid Sick Leave Ordinance that is based on the Labor Commission's recommendation and independent from the Minimum Wage Ordinance.

FISCAL IMPACTS OF RECOMMENDATION

Adopting a Paid Sick Leave Ordinance would increase staff time required to:

- Investigate and evaluate claims related to alleged non-compliance of the Paid Sick Leave Ordinance; and
- Outreach to businesses, update the City's website, FAQs and literature relating to Paid Sick Leave regulations.

The enforcement of a Paid Sick Leave Ordinance would be assigned to the Department's Community Project Development Coordinator, paid for by the General Fund (010), who is currently tasked with the implementation and enforcement of the City's Minimum Wage Ordinance. The City of San Francisco has a Paid Sick Leave Ordinance that is similar to this proposal and their Department of Labor Standards and Enforcement has five employees dedicated to investigations and enforcement. It is difficult to predict how much time investigations and enforcement will require in the City

of Berkeley, however, it is very likely that additional staffing will be needed to handle new complaints.

CURRENT SITUATION AND ITS EFFECTS

The state paid sick leave law (AB1522)¹ went into effect in California on July 1, 2015. The attached PSLO would increase the Paid Sick Leave benefits for employees in the City of Berkeley above the state mandates when it would go into effect October 1, 2016. To create the attached ordinance, staff combined the relevant language the Labor Commission originally included in its proposed Minimum Wage Ordinance with information from San Francisco's sick leave ordinance and additional information about the public health purposes for a paid sick leave ordinance.

The attached ordinance differs from state law in that it:

- Creates a two-tiered system for large and small businesses. Employees of large employers (more than 10 employees) would be able to accrue more paid sick leave (72 hours instead of 48). State law does not distinguish between business types;
- Allows employees to use all of the paid sick leave that they have accrued, instead of allowing employers to limit use of paid sick leave to 24 hours per year as in the state law;
- Does not require that an employee work at least 30 days within a calendar year in California or in Berkeley to be eligible to accrue paid sick leave, unlike the state law;
- Allows employees to take sick leave to care for a non-family member, unlike the state law.

BACKGROUND

On September 15, 2015, the Labor Commission recommended changes to the Minimum Wage Ordinance that included new requirements for paid sick leave. The Labor Commission's rationale for the proposed paid sick leave regulations are: 1) the state law allows employees to accrue paid sick leave time that an employer can deny use of, 2) the state law does not allow for paid sick leave to be used to care for a non-family member and 3) state law applies paid sick leave regulations equally to small and large businesses. The Labor Commission adapted provisions that the cities of San Francisco, Oakland and Emeryville use for their local paid sick leave ordinances in order to develop a consistent regional approach to paid sick leave regulations that provide for enhanced benefit for employees and in the interest of public health.

At the September 15, 2015 Council meeting, staff recommended that if Council wanted to adopt a paid sick leave ordinance, these requirements should be adopted in a

¹ http://www.dir.ca.gov/dlse/Paid_Sick_Leave.htm

separate ordinance to clarify applicability and enforcement. Council directed staff to prepare a draft ordinance.

The attached Ordinance includes all of the same Paid Sick Leave regulations as originally proposed by the Labor Commission with the following changes:

- Raising the cap on accrued sick leave for small employers from 40 hours to 48 hours to be consistent with state law. The City would not be able to enforce a lower cap.
- Adding a new Title Section (13.100.010) and Purpose Section (13.100.020)
- Adding new sections based on San Francisco's sick leave ordinance: (13.100.090) City Undertaking Limited Promotion of General Welfare, (13.100.100) Severability, (13.100.110) Other Legal Requirements, and (13.100.120) More Generous Leave Policies.

In the proposed ordinance paid sick leave provides employees protection against loss of income during absences from work due to illness or injury that prevent performance of duties. It is intended to cover the needs of the employee and provide a reasonable amount of coverage for situations related to the illness or injury of a family member or another designated person that requires direct care by the employee.

Individuals without paid sick leave are forced to make a choice every time they are ill: stay home to recover or go to work because they cannot afford to work fewer hours. Given this choice, many US workers decide to work while they are sick. As a result, they compromise their health as well as the wellness of those they encounter at work, on transportation systems, and elsewhere in their community. Therefore, there are public health benefits associated with the provision of paid sick leave.

As noted above, workers with paid sick leave have fewer pressures to come to work when they are sick. Thus they are less likely to spread illness to others. This is particularly important among food workers/food handlers, who can potentially spread food to large numbers of patrons; and among childcare providers or in-home care providers, who can potentially infect vulnerable clients—infants and young children, the elderly, and the ill or disabled. Food workers and care providers are among those who frequently work without benefit of paid sick leave. Working while ill also poses the risk of infecting co-workers, and thus increasing the impact on workplace health and productivity.

Employers benefit by having a healthy workforce, and paid sick leave helps improve workplace health by limiting spread of disease among employees. Additionally, employees with paid sick leave receive more consistent preventive health care in that they are able to use sick leave to cover time spent at doctor's appointments, which improves worker health and thus diminishes absenteeism and improves productivity.

Arguments against adopting a local Paid Sick Leave Ordinance include that given that the state law recently went into effect as of July 1, 2015, businesses are adapting their

operations to meet the state mandate, which many business operators believe is sufficient to address employee's paid sick leave needs, and need additional time to understand its full impact. Additionally, business owners have expressed concern that the combined impact of new paid sick leave requirements in addition to potential rising minimum wage requirements will be detrimental to businesses operations and may threaten business viability.

ENVIRONMENTAL SUSTAINABILITY

There are no identifiable environmental effects or opportunities associated with the subject of this report.

RATIONALE FOR RECOMMENDATION

At the September 15, 2015 meeting, Council directed staff to bring a draft Paid Sick Leave Ordinance back to the November 10, 2015 meeting for consideration.

ALTERNATIVE ACTIONS CONSIDERED

Delay adopting the PSLO until businesses have had a chance to assess the impact of the new state law on business operations.

CONTACT PERSON

Nathan Dahl, Community Development Project Coordinator, HHCS (510) 981-5405

Attachments:

1: Ordinance

ORDINANCE NO. -N.S.

ADDING BERKELEY MUNICIPAL CODE CHAPTER 13.100 PAID SICK LEAVE
ORDINANCE

BE IT ORDAINED by the Council of the City of Berkeley as follows:

Section 1. That Berkeley Municipal Code Chapter 13.100 is adopted to read as follows:

Chapter 13.100
PAID SICK LEAVE

Sections:

- 13.100.010 Title.
- 13.100.020 Purpose.
- 13.100.030 Definitions.
- 13.100.040 Accrual and Use of Paid Sick Leave.
- 13.100.050 Waiver Through Collective Bargaining.
- 13.100.060 Notice, Posting and Payroll Records.
- 13.100.070 Retaliation Prohibited.
- 13.100.080 Implementation and Enforcement.
- 13.100.090 City Undertaking Limited Promotion of General Welfare.
- 13.100.100 Severability.
- 13.100.110 Other Legal Requirements.
- 13.100.120 More Generous Employer Leave Policies.

13.100.010 Title.

This chapter shall be known as the "Paid Sick Leave Ordinance"

13.100.020 Purpose.

Paid sick leave provides employees protection against loss of income during absences from work due to illness or injury to themselves, a family member or another designated person that requires direct care by the employee. Sick leave is intended to be used only for the purposes set forth herein.

Paid sick leave benefits both the individuals receiving the benefit and their families, as well as community public health. Many workers without paid sick leave choose to go to work while ill to avoid a reduction in their paychecks and threat to job security. As a result, the Centers for Disease Control and Prevention and other public health researchers have linked the lack of paid sick leave with the transmission of illness. Sick workers may infect their coworkers and members of the public in the workplace, on public transit, and in between. Studies have also found that workers with paid sick leave are more likely to access preventative health care.

13.100.030 Definitions.

The following terms shall have the following meanings:

A. "City" shall mean the City of Berkeley.

B. "Employer" shall mean any person, including corporate officers or executives, as defined in Section [18](#) of the California Labor Code, who directly or indirectly through any other person, including through the services of a temporary employment agency, staffing agency, subcontractor or similar entity, employs or exercises control over the wages, hours or working conditions of any Employee, or any person receiving or holding a business license through Title [9](#) of the Berkeley Municipal Code.

C. "Employee" shall mean any person who:

1. In a calendar week performs at least two (2) hours of work for an Employer within the geographic boundaries of the City; and

2. Qualifies as an employee entitled to payment of a minimum wage from any employer under the California minimum wage law, as provided under Section [1197](#) of the California Labor Code and wage orders published by the California Industrial Welfare Commission, or is a participant in a Welfare-to-Work Program.

D. "Paid Sick Leave" shall mean have the meaning defined in California Labor Code § 233(b)(4) as follows: "Sick leave means accrued increments of compensated leave provided by an Employer to an Employee as a benefit of the employment for use by the Employee during an absence from the employment for any of the following reasons: (a) The Employee is physically or mentally unable to perform his or her duties due to illness, injury, or a medical condition of the Employee; (b) The absence is for the purpose of obtaining professional diagnosis or treatment for a medical condition of the Employee; (c) The absence is for other medical reasons of the Employee, such as pregnancy or obtaining a physical examination. "Sick leave" does not include any benefit provided under an Employee welfare benefit plan subject to the federal Employee Retirement Income Security Act of 1974 (Public Law 93-406, as amended) and does not include any insurance benefit, workers' compensation benefit, unemployment compensation disability benefit, or benefit not payable from the Employer's general assets", except that the definition here extends beyond the Employee's own illness, injury, medical condition, need for medical diagnosis or treatment, or medical reason, to also encompass time taken off work by an Employee for the purpose of providing care or assistance to other persons, as specified further in 13.100.040(B)(2), with an illness, injury, medical condition, need for medical diagnosis or treatment, or other medical reason.

E. "Small business" shall mean an Employer for which fewer than ten persons work for compensation during a given week. In determining the number of persons performing work for an Employer during a given week, all persons performing work for compensation on a full-time, part-time, or temporary basis shall be counted, including persons made available to work through the services of a temporary services or staffing agency or similar entity.

13.100.040 Accrual and Use of Paid Sick Leave.

A. Accrual of Paid Sick Leave.

1. Employees shall begin to accrue Paid Sick Leave on October 1, 2016, or at the commencement of employment with the Employer, whichever is later.

2. For every 30 hours worked after Paid Sick Leave begins to accrue for an Employee, the Employee shall accrue one hour of Paid Sick Leave. Such leave shall accrue only in hour-unit increments; there shall be no accrual of a fraction of an hour of such leave.

3. For Employees of Small Businesses, there shall be a cap of 48 hours of accrued Paid Sick Leave. For Employees of other Employers, there shall be a cap of 72 hours of accrued Paid Sick Leave. Accrued Paid Sick Leave for Employees carries over from year to year (whether calendar year or fiscal year), but is limited to the aforementioned cap.

4. An Employer is not required to provide financial or other reimbursement to an Employee upon the Employee's termination, resignation, retirement, or other separation from employment, for accrued Paid Sick Leave that the Employee has not used.

5. The rate of pay shall be the Employee's hourly wage. If the Employee in the 90 days of employment before taking accrued sick leave had different hourly pay rates, was paid by commission or piece rate, or was a nonexempt salaried Employee, then the rate of pay shall be calculated by dividing 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.

B. Use of Paid Sick Leave.

1. An Employee may begin using Paid Sick Leave 90 calendar days after commencement of employment.

2. An Employee may use Paid Sick Leave not only when he or she is ill or injured or for the purpose of the Employee's receiving medical care, treatment, or diagnosis, as specified more fully in California Labor Code § 233(b)(4), but also to aid or care for the following persons when they are ill or injured or receiving medical care, treatment, or diagnosis: child, parent, legal guardian or ward, sibling, grandparent, grandchild, and spouse, registered domestic partner under any state or local law, or designated person. "Child" includes a child of a domestic partner and a child of a person standing in loco parentis. The Employee may use all or any percentage of his or her Paid Sick Leave to aid or care for the aforementioned persons. The aforementioned child, parent, sibling, grandparent, and grandchild relationships include not only biological relationships but also relationships resulting from adoption; step-relationships; and foster care relationships.

3. An Employer may not require, as a condition of an Employee's taking Paid Sick Leave, that the Employee search for or find a replacement worker to cover the hours during which the Employee is on Paid Sick Leave.

4. If the need for paid sick leave is foreseeable, the Employee shall provide reasonable advance notification. If the need for paid sick leave is unforeseeable, the Employee shall provide notice of the need for the leave as soon as practicable.

5. An Employer may lend paid sick days to an Employee in advance of accrual, at the Employer's discretion and with proper documentation of Paid Sick Leave lent and accrued.

6. If an Employee's use of Paid Sick Leave extends beyond two consecutive calendar days or two scheduled work shifts over a minimum of two calendar days, an Employer may request verification that an Employee's use of Paid Sick Leave is lawful. An Employer may only take reasonable measures to verify or document that an Employee's use of Paid Sick Leave is lawful, and shall not require an Employee to incur expenses in excess of \$5 in order to show his or her eligibility for such paid leave.

7. An Employer may not require that the documentation explain the nature of the illness or the details of the use of the Paid Sick Leave, such as the nature of an appointment.

8. The Employer shall not delay the taking of earned sick time or delay pay for the period in which earned sick time was taken for Employees entitled to pay under subsection A, on the basis that the Employer has not yet received the documentation permitted under subsection B(6).

9. An Employer shall provide payment for sick leave taken by an Employee no later than the payday for the next regular payroll period after the sick leave was taken.

10. It shall be unlawful for any Employer to interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right provided under or in connection with this section, including, but not limited to, by using the taking of earned sick time under this section as a negative factor in any employment action such as evaluation, promotion, disciplinary action or termination, or otherwise subjecting an Employee to discipline for the use of earned sick time under this section.

11. Employers who provide their Employees paid time off under a paid time off, vacation or other paid leave policy who make available an amount of paid time off sufficient to meet the accrual requirements of section A that may be used for the same purposes and under the same conditions as earned paid sick time under this section are not required by this Chapter to provide additional earned paid sick time.

13.100.050 Waiver Through Collective Bargaining.

To the extent required or allowed by state or federal law, all or any portion of the applicable requirements of this Chapter 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.

13.100.060 Notice, Posting and Payroll Records.

A. Every Employer shall post in a conspicuous place at any workplace or job site in the City where any Employee works, the notice published each year by the City informing Employees of their Paid Sick Leave rights under this Chapter. Every Employer shall post such notices in any language spoken by at least five percent of the Employees at the work-place or job site. In instances where an Employee does not have a regular physical location where they perform their work, the Employer shall provide a copy of the Paid Sick Leave public notice to the Employee when they are hired or assigned to complete work within the City of Berkeley. The notice shall be provided to the employee before they commence work within the City limits and must be provided in the language most easily comprehended by the Employee. Failure to post such notice shall render the Employer subject to administrative citation pursuant to Section 13.100.080(B) of this Chapter.

B. Employers shall retain payroll records pertaining to Employees for a period of four years, and shall allow the City access to such records, with appropriate notice and at a mutually agreeable time, to monitor compliance with the requirements of this Chapter. Where an Employer does not maintain or retain adequate records documenting accrued paid sick leave or does not allow the City reasonable access to such records, the Employee's account of how much he or she was paid shall be presumed to be accurate, absent clear and convincing evidence otherwise. Furthermore, failure to maintain such

records or to allow the City reasonable access shall render the Employer subject to administrative citation, pursuant to Section 13.100.080(B) of this Chapter. Such records shall include the amount of hours worked, wages paid, and Paid Sick Leave accrued.

C. If a violation of this Chapter has been finally determined, the City shall require the Employer to post public notice of the Employer's failure to comply in a form determined by the City. Failure to post such notice shall render the Employer subject to administrative citation, pursuant to Section 13.100.080(B) of this Chapter.

D. Reporting of Paid Sick Leave. Employers shall include the number of hours of Paid Sick Leave accrued to date in such records that they provide to Employees at the end of each pay period. Failure to provide such records shall render the Employer subject to administrative citation, pursuant to Section 13.100.080(B), of this Chapter.

13.100.070 Retaliation Prohibited.

A. It shall be unlawful for an Employer or any other party to discriminate in any manner or take any adverse action (including action relating to any term, condition or privilege of employment) against any person in retaliation for exercising rights protected under this Chapter. Rights protected under this Chapter include, but are not limited to: the right to file a complaint or inform any person about any party's alleged noncompliance with this Chapter; and the right to inform any person of his or her potential rights under this Chapter or otherwise educate any person about this Chapter or to assist him or her in asserting such rights. Protections of this Chapter shall apply to any person who mistakenly, but in good faith, alleges noncompliance with this Chapter. Taking adverse action against a person within ninety (90) days of the person's exercise of rights protected under this Chapter shall raise a rebuttable presumption of having done so in retaliation for the exercise of such rights. Failure to comply with this provision shall render the Employer subject to administrative citation, pursuant to Section 13.100.080(B) of this Chapter.

13.100.080 Implementation and Enforcement.

A. The City shall be authorized to coordinate implementation and enforcement of this Chapter and may promulgate appropriate guidelines or rules for such purposes. Any guidelines or rules promulgated by the Agency shall have the force and effect of law and may be relied on by employers, employees, and other persons to determine their rights and responsibilities under this Chapter. Any guidelines or rules may establish procedures for ensuring fair, efficient, and cost-effective implementation of this Chapter, including supplementary procedures for helping to inform employees of their rights under this Chapter, for monitoring employer compliance with this Chapter, and for providing administrative hearings to determine whether an employer or other person has violated the requirements of this Chapter.

B. Where prompt compliance is not forthcoming, the City shall take any appropriate enforcement action to secure compliance, including but not limited to the following:

1. The City may issue an Administrative Citation pursuant to Chapter [1.28](#) of the Berkeley Municipal Code. The amount of this fine shall vary based on the provision of this Chapter being violated, as specified below:

- a. A fine of one thousand dollars (\$1,000.00) may be assessed for retaliation by an Employer against an Employee for exercising rights protected under this Chapter for each Employee retaliated against.

- b. A fine of five hundred dollars (\$500.00) may be assessed for any of the following violations of this Chapter:
 - i. Failure to post notice of the Paid Sick Leave Ordinance
 - ii. Failure to provide notice of investigation to Employees
 - iii. Failure to post notice of violation to public
 - iv. Failure to maintain payroll records documenting accrual of Paid Sick Leave for four years; and
 - v. Failure to allow the City access to payroll records
 - c. A fine equal to the total amount of appropriate remedies, pursuant to subsection B. Any and all money collected in this way that is the rightful property of an Employee, such as back wages, interest, and civil penalty payments, shall be disbursed by the City in a prompt manner.
2. Alternatively, the City may pursue administrative remedies in accordance with the following procedures:
- a. Whenever the City determines that a violation of any provision of this Chapter is occurring or has occurred, the City may issue a written compliance order to the Employer responsible for the violation.
 - b. A compliance order issued pursuant to this chapter shall contain the following information:
 - i. The date and location of the violation;
 - ii. A description of the violation;
 - iii. The actions required to correct the violation;
 - iv. The time period after which administrative penalties will begin to accrue if compliance with the order has not been achieved;
 - v. Either a copy of this Chapter or an explanation of the consequences of noncompliance with this Chapter and a description of the hearing procedure and appeal process; and
 - vi. A warning that the compliance order shall become final unless a written request for hearing before the City is received within fourteen days of receipt of the compliance order.
 - c. Following receipt of a timely request for a hearing, the City shall provide the Employer responsible for the violation with a hearing and, if necessary, a subsequent appeal to the City Council that affords the Employer due process. During the pendency of the hearing and any subsequent appellate process, the City will not enforce any aspect of the compliance order.
3. The City may initiate a civil action for injunctive relief and damages and civil penalties in a court of competent jurisdiction.
- C. The City or any person aggrieved by a violation of this Chapter, any entity a member of which is aggrieved by a violation of this Chapter, or any other person or entity acting on behalf of the employee and all other employees affected by the employer's violations or 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 Employer or other person violating this Chapter and, upon prevailing, shall be awarded reasonable attorneys' fees and costs and shall be entitled to such legal or equitable relief as may be appropriate to remedy the violation including, without limitation, the payment of any back wages unlawfully withheld, the payment of an additional sum as a civil penalty in the amount of

\$50 to each Employee or person whose rights under this Chapter were violated for each day that the violation occurred or continued, reinstatement in employment and/or injunctive relief. Provided, however, that any person or entity enforcing this Chapter on behalf of the public as provided for under applicable state law shall, upon prevailing, be entitled only to equitable, injunctive or restitutionary relief to Employees, and reasonable attorneys' fees and costs.

D. This Section shall not be construed to limit an Employee's right to bring legal action for a violation of any other laws concerning wages, hours, or other standards or rights nor shall exhaustion of remedies under this Chapter be a prerequisite to the assertion of any right.

E. Except where prohibited by state or federal law, City agencies or departments may revoke or suspend any registration certificates, permits or licenses held or requested by the Employer until such time as the violation is remedied. The City shall not renew any such license of an Employer with outstanding violations, as finally determined under this Chapter, until such time as the violation is remedied.

F. The remedies for violation of this Chapter include but are not limited to:

1. The issuance of Paid Sick Leave time unlawfully withheld.
2. Reimbursement of the City's administrative costs of enforcement and reasonable attorney's fees.
3. If a repeated violation of this Chapter has been finally determined, the City may require the Employer to pay an additional sum as a civil penalty in the amount of \$50 to the City for each Employee or person whose rights under this Chapter were violated for each day or portion thereof that the violation occurred or continued, and fines imposed pursuant to other provisions of this Code or state law.

G. The remedies, penalties and procedures provided under this Chapter are cumulative and are not intended to be exclusive of any other available remedies, penalties and procedures established by law which may be pursued to address violations of this Chapter. Actions taken pursuant to this Chapter shall not prejudice or adversely affect any other action, civil or criminal, that may be brought to abate a violation or to seek compensation for damages suffered.

13.100.090 City Undertaking Limited Promotion of General Welfare.

In undertaking the adoption and enforcement of this Chapter, the City is undertaking only to promote the general welfare. The City is not assuming, nor is it imposing on its officers and employees, an obligation for breach of which it is liable in money damages to any person who claims that such breach proximately caused injury. This Chapter does not create a legally enforceable right by any member of the public against the City.

13.100.100 Severability.

If any part or provision of this Chapter, or the application of this Chapter to any person or circumstance, is held invalid, the remainder of this Chapter, including the application of such part or provision to other persons or circumstances, shall not be affected by such a holding and shall continue in full force and effect. To this end, the provisions of this Chapter are severable.

13.100.110 Other Legal Requirements.

This Chapter provides minimum requirements pertaining to paid sick leave and shall not be construed to preempt, limit, or otherwise affect the applicability of any other law, regulation, requirement, policy, or standard that provides for greater accrual or use by employees of sick leave, whether paid or unpaid, or that extends other protections to employees.

13.100.120 More Generous Employer Leave Policies.

This Chapter provides minimum requirements pertaining to paid sick leave and shall not be construed to prevent employers from adopting or retaining leave policies that are more generous than policies that comply with this Chapter. Employers are encouraged to provide more generous leave policies than required by this Chapter.

Section 2. Copies of this Ordinance shall be posted for two days prior to adoption in the display case located near the walkway in front of Council Chambers, 2134 Martin Luther King Jr. Way. Within 15 days of adoption, copies of this Ordinance shall be filed at each branch of the Berkeley Public Library and the title shall be published in a newspaper of general circulation.