



CITY OF SAN MATEO

City Hall
330 W. 20th Avenue
San Mateo CA 94403
www.cityofsanmateo.org

Agenda Report

Agenda Number: 11

Section Name: {{section.name}}

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TO: City Council
FROM: Drew Corbett, City Manager
PREPARED BY: City Attorney Department
MEETING DATE: February 16, 2021
SUBJECT:
Grocery Store Workers – Hazard Pay Consideration

RECOMMENDATION:

Receive report from staff and provide direction on the preparation of an ordinance to require the payment of hazard pay by certain grocery stores to workers who work during the pandemic.

BACKGROUND:

Introduction

At the recent city council goal setting meeting, Councilwoman Papan informed the council that she had received information about efforts by some cities to require grocery stores to pay “hazard pay” to their frontline employees working through the pandemic. Councilwoman Papan expressed interest in the concept of requiring large grocery stores to pay hazard pay and asked whether the council supported an effort to investigate this concept and report back for council consideration. The council agreed and directed staff to research this topic and report back to the council for further direction. Staff has researched what local agencies have done in this area and how the regulated industry has responded to these actions.

What local government agencies have adopted ordinances?

This is a rapidly evolving situation and many cities and counties throughout the state are considering the adoption of hazard pay ordinances. As of the writing of this report, it appears that two cities (Long Beach and Oakland) have formally adopted ordinances and two others (Montebello and Irvine) have introduced ordinances and will adopt them in the next week or so.

Several Peninsula communities are also considering the adoption of hazard pay ordinances. San Mateo County is considering adopting an ordinance, and the San Jose City Council and the Santa Clara County Board of Supervisors have directed their staffs to draft ordinances for adoption. On February 9, the Belmont discussed the concept but decided not to move forward with the preparation of an ordinance.

What obligations do these ordinances impose on business owners?

While the ordinances that have been adopted differ in some respects, the basic obligation they impose is to pay eligible workers an additional amount per hour. The ordinances also prohibit retaliation against workers asserting their rights under the ordinances and require the business owners to maintain records that demonstrate compliance.

The adopted and introduced ordinances vary in some respects.

Long Beach

The Long Beach ordinance requires large grocery stores to pay their employees an additional \$4 for each hour worked. The ordinance defines “grocery stores” as those businesses that devote 70% or more of their business to retailing a general range of food products. The ordinance only applies to businesses that employ more than 300 persons nationally and employ more than 15 persons per store in the city. Under the ordinance, employers need not provide hazard pay to their managers, supervisors, and confidential employees.

Oakland

The Oakland ordinance requires large grocery stores to pay their employees an additional \$5 per hour; however, those employers who have voluntarily provided additional pay related to the pandemic are entitled to a credit against the \$5 requirement. The ordinance defines “large” stores by reference to their size and applies to stores that are over 15,000 square feet. In addition, the ordinance only applies to employers with more than 500 employees nationwide. The ordinance requires the additional pay for any employee entitled to minimum wages under state law.

Montebello

The Montebello ordinance requires large grocery stores *and drugstores* to pay \$4 per hour of hazard pay. The ordinance applies to businesses that employ 300 or more employees nationwide and more than 15 employees per store in the city. The ordinance exempts managers, supervisors, and confidential employees.

Irvine

The Irvine ordinance is substantially similar to the Montebello ordinance.

How has the regulated businesses responded to the adoption of these ordinances?

The grocery store interests have aggressively responded to the adoption of hazard pay ordinances. On January 20, one day after the City of Long Beach adopted its ordinance, the California Grocers Association (“CGA”), a grocery industry association, sued the city to prevent its enforcement. Along with their complaint, the CGA applied for a temporary restraining that would go into effect immediately to prevent enforcement of the ordinance. That request was denied. The CGA has also filed a motion for a preliminary injunction seeking to prevent the ordinance from going into effect while the legal challenges to the ordinance are litigated in the court. This motion is scheduled to be heard on February 19. The GCA has also sued Oakland to prevent the enforcement of its ordinance and indicated that it intends to sue Montebello and Irvine. It appears that the organization is intent on suing any agency that adopts a hazard pay ordinance.

It should also be noted that the GCA suggests that it may seek more than simply an injunction preventing the enforcement of any hazard pay ordinance. In their arguments in support of their application for a temporary restraining order in Long Beach, the GCA suggests that the city could be ordered to compensate the stores forced to pay hazard pay from the time the ordinance goes into effect until the time it is declared illegal by the courts.

Are these ordinances legal?

The grocery store industry has sued to have hazard pay ordinances declared illegal. The industry argues that such ordinances violate the Constitution’s Equal Protection Clause by singling out grocery stores of a certain size for regulation. In addition, they argue that the ordinances violate constitutional prohibitions against the impairment of contracts and that they are preempted by the National Labor Relations Act, the federal law regulating labor relations and the collective bargaining process.

Hazard pay ordinances are an extraordinary response to extraordinary challenges inflicted upon the communities across the state by the coronavirus pandemic. Not surprisingly, there is not a well- established body of caselaw to provide guidance on the legal issues presented. The grocery store industry presents nuanced, sophisticated arguments that hazard pay ordinances simply go too far in attempting to address the pandemic's impacts on grocery store workers. Your legal staff has not had the time to adequately evaluate these arguments to give you a confident answer to whether a hazard pay ordinance would withstand a legal challenge. At this point, I am able to say that I have read the arguments offered on behalf of the Long Beach ordinance and they appear to be persuasive. If the council does decide to direct staff to prepare an ordinance, staff will continue to evaluate the arguments presented and should be in a better position by the time the ordinance is presented for introduction or adoption to opine as to its legality.

What direction is the council being asked to provide to staff?

As noted above, the hazard pay ordinances that have been adopted (or are being considered for adoption) to date, differ in a few important ways. At your meeting on this item, staff will seek direction from the council on these issues.

The amount of the hazard pay and a credit for voluntary bonus pay previously provided

Since the beginning of the pandemic last year, some large grocery stores voluntarily gave their employees bonus pay in recognition of the hazards store workers exposed themselves to by continuing to come to work. The Long Beach, Montebello, and Irvine ordinances require the regulated businesses to pay an additional \$4 per hour, regardless of whether the covered employees have received, or continue to receive, additional pay. The Oakland ordinance requires the payment of an additional \$5 per hour but provides a credit against this requirement to account for any additional pay voluntarily paid by the employer in response to the pandemic.

Staff will seek direction from the City Council on the amount of the hazard pay and whether a credit for voluntary payments should be provided.

The grocery stores to be subject to the ordinance

All of the ordinances that have been adopted limit the application of the hazard pay requirement to "large" businesses. They differ in the definition of the term. The Long Beach, Montebello, and Irvine ordinances define the term by reference to the number of employees employed nationally and locally. Each defines a business as "large" if it employs about 300 employees nationally and more than 15 workers in the city. Oakland defines a "large" business across two dimensions: the number of employees and the physical size of the store. In Oakland a business is subject to the hazard pay requirement if (1) the business employs 500 people nationwide, regardless of the number employed in the city and (2) its stores are larger than 15,000 square feet. (Perhaps this provision is intended to exclude convenience stores.)

Staff will seek direction from the City Council on the characteristics of those businesses that will be required to provide hazard pay.

Any other businesses to be included?

The Long Beach and Oakland ordinances only apply to grocery stores. The Montebello and Irvine ordinances require that large drugstore companies also provide hazard pay. According to media reports some jurisdictions are also considering adding fast food restaurants to the list of businesses required to provide hazard pay.

Staff will seek direction from the City Council the types of businesses that will be subject to the hazard pay requirement.

Waiver through collective bargaining agreements

All of the ordinances expressly state that waiver of hazard pay requirement by a worker is against public policy and is prohibited. However, the Oakland ordinance provides that waiver is permissible if the waiver is part of a collective

bargaining agreement and explicitly references the ordinance.

Staff will seek direction from the City Council on whether the ordinance should allow for waiver as part of a collective bargaining agreement.

BUDGET IMPACT:

The adoption of this ordinance will not have a material impact on the City's budget. It is expected that staff resources would be needed to provide outreach on the provisions of the ordinance. Staff resources, including attorney services, could also be required in the enforcement of the ordinance.

ENVIRONMENTAL DETERMINATION:

This item is not a project subject to CEQA, because it can be seen with certainty that it will not cause a physical change in the environment. (Public Resources Code Section 21065.)

NOTICE PROVIDED

All meeting noticing requirements were met.

ATTACHMENTS

None

STAFF CONTACT

Shawn Mason, City Attorney
smason@cityofsanmateo.org
(650) 522-7022