

CITY OF BENICIA

URGENCY ORDINANCE NO. 21-

AN URGENCY ORDINANCE OF THE CITY COUNCIL OF THE CITY OF BENICIA ESTABLISHING A TEMPORARY HAZARD PAY REQUIREMENT FOR GROCERY STORE RETAIL WORKERS IN THE CITY OF BENICIA

THE CITY COUNCIL OF THE CITY OF BENICIA DOES ORDAIN AS FOLLOWS:

SECTION 1. Authority. This urgency ordinance (“Ordinance”) is adopted pursuant to the provisions set forth in Government Code Sections 36934 and 36937(b) and pursuant to other applicable law.

SECTION 2. Findings.

The City Council hereby finds as follows:

1. Pursuant to Benicia Municipal Code Section 2.36.050(A)(1), the Director of Emergency Services declared the existence of a Local Emergency, which Local Emergency was ratified by the City Council on March 19, 2020;
2. The COVID-19 pandemic and conditions of the Local Emergency continues to persist in the City of Benicia;
3. On March 19, 2020, California Governor Gavin Newsom issued Executive Order N-33-20, closing all non-essential workplaces, requiring people to stay home except to participate in essential activities or to provide essential business services, and barring public gatherings in order to prevent the transmission of COVID-19;
4. Executive Order N-33-20 identified grocery stores as essential business sectors critical to protecting the health and well-being of all Californians and designated their workers as essential critical infrastructure workers;
5. On August 28, 2020, the Governor announced the “Blueprint for a Safer Economy”, which introduced a four tier, color-coded framework, authorizing activities to occur on a county-by-county basis, depending on metrics such as case positivity rates;
6. Due to worsening conditions, on December 3, 2020, the Governor announced a regional shelter in place framework, dependent on regional intensive care unit capacity, and provides that in the event ICU capacity recedes below 15 percent in a region, the region must cease operations of certain businesses and scale down activities;
7. On January 25, 2021, the Governor lifted the December 3, 2020 Order, reverting to the color-coded tier framework previously established, and Solano County remained in the most restrictive Tier 1 purple category through March 9, 2021;
8. On March 9, 2021, Solano County entered the Tier 2 red category, which allows the resumption of certain categories of activities, indicating that although COVID-19 case rates are

improving in the community, the spread of the virus remains a threat to the public health, safety, and welfare of the community;

9. As of April 9, 2021, Solano County is the sole Bay Area County that remains in the Tier 2 red category, while all other Bay Area counties qualify for the less-restrictive Tier 3 orange category;

10. As of April 9, 2021, data from the Center for Disease Control provides that there is “substantial” risk of community transmission of COVID-19 in Solano County;

11. Although mass vaccination efforts are currently underway, according to the Center for Disease Control, as of April 8, 2021, just 17.7% of Solano County residents are fully vaccinated, and just 50.2% of individuals of age 65 and over in Solano County are fully vaccinated despite having priority for vaccinations for several weeks;

12. Public health experts have warned that the current phase of the pandemic is the most dangerous yet for unvaccinated individuals, due to the increased transmissibility and lethality of variants, which are now becoming the most dominant strains of the COVID-19 virus;

13. COVID-19 has broadly spread throughout California and remains a significant health risk to the community, especially members of our most vulnerable populations, and as of April 9, 2021, there have been over 557,093 deaths due to COVID-19 across the country, including 203 in Solano County;

14. COVID-19 is still spreading across the region with many clusters arising within grocery retail stores and amongst grocery retail workers;

15. Grocery retail stores remain a critical piece of infrastructure in the fight against the COVID-19 virus and in protecting the City’s food supply chain;

16. Grocery retail stores are the primary points of distribution for food and other daily necessities for the residents of the City of Benicia and are therefore essential to the vitality of our community;

17. The continued availability of grocery retail stores is fundamental to the health of the community and is made possible during the COVID-19 emergency because grocery retail workers, who continue to brave hazardous conditions that put them at increased risk for contracting the COVID-19 virus, and have served on the frontlines of this devastating pandemic;

18. Grocery retail workers are unable to work from home, including those with children engaged in distance learning, and have therefore likely incurred additional childcare expenses, and grocery retail workers’ inability to pay for necessities such as housing and increased childcare costs as a result of school closures constitute an immediate problem for certain grocery retail workers if they are not given immediate financial relief;

19. Financial hardships to grocery retail workers potentially results in increased employee turnover, which implicates the health safety and welfare of the entire community;

20. According to an October 29, 2020 study published in the journal Occupational and Environmental Medicine, a comprehensive test of workers at one grocery store resulted in 20

percent of grocery retail workers testing positive for COVID-19, even though three out of four workers were asymptomatic;

21. According to an August 2020 article in The Washington Post, at least 130 U.S. grocery retail workers had died from COVID-19, and more than 8,200 have tested positive for the virus;

22. According to a January 2021 article in The Washington Post, the United Food and Commercial Workers estimates 109 of its members have died to from COVID-19 and more than 20,000 have tested positive;

23. Despite the efforts of grocery stores to take precautions and keep customers and employees safe, including requiring masks, social distancing, and sanitizing cash registers, food conveyor belts, and shopping carts, there have been highly publicized outbreaks of COVID-19 among grocery retail workers in the San Francisco Bay Area, and the health threats that these grocery retail workers face cannot be overstated;

24. Grocery retail workers face increased exposure risk due to inability to consistently practice physical distancing in the workplace, with a November 2020 Brookings Institution analysis reporting that grocery retail workers with direct customer exposure were five times more likely to test positive for the COVID-19 virus than those employees without such exposure;

25. The United States's largest grocery retail companies have earned record profits during the pandemic, and this increase in profit has not transferred to workers, according to the above-referenced Brookings Institution analysis;

26. During the early stages of the COVID-19 pandemic, many large grocery store companies provided "Hero Pay" which was generally implemented as either a temporary hourly wage increase or a one-time bonus for certain grocery retail workers;

27. Hero Pay has generally phased out or terminated, but according to the Brookings Institute, the top grocery retail companies earned on average an extra \$16.7 billion in profit in 2020 compared to 2019, and the substantial risk to grocery store retail workers in contracting the COVID-19 virus continues to persist in Solano County;

28. Premium pay, paid in addition to regular wages, is an established type of compensation for employees performing hazardous duty or work involving physical hardship that can cause extreme physical discomfort and distress;

29. Grocery retail workers working during the COVID-19 pandemic merit additional compensation because they are performing hazardous duty due to the significant risk of exposure to the COVID-19 virus, have been working under these hazardous conditions for months, and will continue to face safety risks as the virus presents an ongoing threat for an uncertain period, potentially resulting in subsequent waves of infection;

30. Establishing an immediate requirement for grocery stores to provide premium pay to grocery retail workers protects public health, supports stable incomes, and promotes job retention by ensuring that grocery retail workers are compensated for the substantial risks, efforts and expenses they are undertaking to provide essential services in a safe and reliable manner during the COVID-19 pandemic;

31. This urgency Ordinance temporarily mandates Hazard Pay for grocery store retail employees, and is intended to compensate grocery retail workers, who remain at high risk for contracting COVID-19 within the workplace, and is immediately necessary to protect the public peace, health, safety, and public welfare to ensure that grocery retail workers in Benicia continue to work at their essential jobs and are adequately compensated for their work amidst present conditions;
32. To protect the food supply chain and the public health and safety, the City of Benicia must take immediate steps to guard against turnover and ensure that grocery stores in Benicia have well-trained, consistent, and stable staffing;
33. Pursuant to Article XI, Section 7 of the California Constitution, the City of Benicia may make and enforce all regulations and ordinances using its police powers;
34. Government Code Section 36937 authorizes the adoption of an urgency ordinance for the immediate preservation of public peace, health or safety as long as such ordinance contains a declaration of the facts constituting the urgency and is adopted by a four-fifths (4/5) vote of the City Council;
35. For reasons set forth above, this urgency Ordinance is declared by the City Council to be necessary for preserving the public peace, health, safety, welfare and to avoid a current, immediate and direct threat thereto, and the recitals above taken together constitute the City Council's statements of the reasons constituting such necessity and urgency;
36. On April 6, 2021, at a regular meeting of the City Council, the Council directed staff to prepare an urgency Ordinance establishing Hazard Pay for grocery retail workers in Benicia.

SECTION 3. Declaration of Urgency. Based on the foregoing findings, all of which are deemed true and correct, pursuant to Government Code section 36937(b), the City Council hereby declares that this Ordinance is urgently needed for the immediate preservation of the public peace, health, safety, or welfare. This Ordinance shall take effect immediately upon adoption.

SECTION 4. Title and Purpose. This Ordinance shall be known as the "Grocery Retail Worker Hazard Pay Ordinance."

- a. Large Grocery Stores are a vibrant and integral part of the public infrastructure during the ongoing COVID-19 pandemic and are necessary for obtaining and distributing essential, lifesaving provisions.
- b. The grocery retail workers of Benicia have continued to report to work and to serve their community despite significant increased risks associated with such work in the midst of the COVID-19 pandemic. Retail grocery store workers are essential workers and are keeping the food supply chain operating, thereby ensuring the community's safety and well-being.
- c. The purpose of this Ordinance is to compensate grocery retail workers for the 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.

d. Through this Ordinance, the City seeks to sustain the stability of the food and health supply chain through supporting the grocery retail workers, who continue to work during the COVID-19 pandemic, despite significant and increased health risks and inconveniences.

SECTION 5. Definitions.

The following shall apply to this Ordinance:

1. “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”).

2. “City” shall mean the City of Benicia.

3. “Covered Employer” shall mean any Person who (1) directly or indirectly or through an agent or any other Person owns or operates a Large Grocery Store and employs or exercises control over the wages, hours or working conditions of any Covered Employee; and (2) employs 300 or more employees nationwide regardless of where those employees are employed, or is a Franchisee associated with a Franchisor or a network of Franchises with Franchisees that employ more than 300 employees in the aggregate, regardless of where those employees are employed.

(a) 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: (a) Employees who are not covered by this Ordinance; (b) Employees who worked within the geographic limits of the City; (c) Employees who worked outside the geographic limits of the City; and (d) 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.

4. “Covered Employee” shall mean any person who: (1) in a calendar week performs at least two hours of work within the geographic boundaries of the City for a Covered Employer; 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. It is a Covered Employer’s responsibility to demonstrate, through factual support and accompany evidence that a Complainant can understand, whether or not certain employees do not qualify as Covered Employees (“Coverage Records”).

5. “Franchise” means a written agreement by which: (1) a Person is granted the right to engage in the business of offering, selling, or distributing goods or services under a marketing plan prescribed or suggested in substantial part by the grantor or its affiliates; and (2) the operation of the business is substantially associated with a trademark, service mark, tradename, advertising, or other commercial symbol; designating, owned by, or licensed by the grantor or its

affiliate; and (3) the Person pays, agrees to pay, or is required to pay, directly or indirectly, a Franchise fee.

6. “Franchisee” means a Person to whom a Franchise is offered or granted.

7. “Franchisor” means a Person who grants a franchise to another Person.

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

9. “Hazard Pay” shall mean an additional \$ 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.

10. “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 (California Code of Regulations, Title 8, Section 11040).

11. “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.

12. “Large Grocery Store” shall mean a retail grocery store located within the geographic limits of the City of Benicia that is operated by a Covered Employer and 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. This definition expressly excludes convenience stores or food marts primarily engaged in retailing a limited range of goods that generally includes milk, bread, soda, and snacks.

13. “Retaliatory Action” shall mean 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 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 their rights under this Ordinance by any lawful means, or for otherwise asserting rights under this Ordinance.

SECTION 6. 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 the Hazard Pay 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 5 (Definitions) and 11 (Credit For Employer-Initiated Hazard Pay).

b. Duration of Hazard Pay. Covered Employers shall pay Hazard Pay to all Covered Employees for any pay period for [REDACTED] days from the effective date of this Ordinance.

SECTION 7. Notice and Posting. Every Covered Employer shall post in a conspicuous place at any workplace or job site where any Covered Employee works, a notice informing Covered Employees of their rights under this Ordinance. Every Covered Employer shall post notices in the top three languages spoken in Benicia as determined by the last U.S. Census. Every Covered Employer shall provide each Covered Employee at the time this Ordinance becomes effective or at the time of hire, whichever is later, the Covered Employer and owner or manager's name, address, telephone number, and information regarding whether it is part of a chain, integrated enterprise, or Franchise associated with a Franchisor or network of Franchises. In the event the information the Covered Employer provided to the Covered Employee changes, the Covered Employer shall provide the updated information in writing within ten days of the change.

SECTION 8. Retaliation Prohibited. It shall be unlawful for a Covered Employer or any other party to discriminate in any manner or take adverse action against any Covered Employee in retaliation for exercising rights protected under this Ordinance. Rights protected under this Ordinance include, but are not limited to, the right to file a complaint, the right to inform any person about any party's alleged noncompliance with this Ordinance, the right to inform any person of their potential rights under this Ordinance, and the right to assist any individual in asserting such rights.

SECTION 9. 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 (Payment of Hazard Pay To Covered Employees) and 7 (Notice and Posting) of this Ordinance and Coverage Records. Covered 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 Complainant access to such records, with appropriate notice and at a mutually agreeable time, to monitor compliance with the requirements of this Ordinance. In the event an issue arises as to a Covered Employer's compliance with this Ordinance, and the Covered Employer does not maintain or retain adequate records documenting compliance, or does not allow the Complainant reasonable access to such records within 30 days of the Complainant's request, it shall be presumed that the Covered Employer has violated the Ordinance, absent clear and convincing evidence otherwise.

SECTION 10. Covered Employee Remedies for Violations.

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

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 Covered Employer, the Covered 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 California Civil Code Section 3289(b) , which shall accrue from the date that the wages were due and

payable as provided in California Labor Code Division 2 Part 1 (commencing with Section 2003) to the date the wages are paid in full.

b. Civil Enforcement. Any Covered Employee (or any employee who in good faith asserts they are a Covered Employee despite their employer's assertion to the contrary) aggrieved by a violation of this Ordinance or any other person or entity acting on behalf of the public as provided for under applicable law, may institute a civil proceeding for injunctive relief, money damages, and other relief the court deems appropriate. The remedy available under this Section shall be in addition to any other existing remedies which may be available under local, state or federal law. A Covered Employee (or any employee who in good faith asserts they are a Covered Employee despite their employer's assertion to the contrary), 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, upon prevailing, shall be entitled only to equitable, injunctive and/or restitutionary relief, and reasonable attorneys' fees and costs. The foregoing are individually and collectively referred to herein as "**Complainant.**" Nothing in this Ordinance shall be interpreted as restricting, precluding, or otherwise limiting a separate or concurrent criminal prosecution under applicable law. Jeopardy shall not attach as a result of any administrative or civil enforcement action taken pursuant to this Ordinance.

SECTION 11. Credit for Covered 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 Hazard Pay for the hourly amount paid to each Covered Employee (e.g. a Covered Employer offering a \$ [REDACTED] per hour employer-initiated hazard pay pays an additional \$ [REDACTED] 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 maintaining or offering additional employer-initiated hazard pay that is more than the Hazard Pay amount.

b. To receive credit for employer-initiated hazard pay policies, Covered Employers must offer the following showings of proof to the Complainant:

1. A copy of the Covered Employer's employer-initiated 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 Complainant to review for compliance by assessing wages for the past 12 months and that is itemized in such a way that the Complainant 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. Accepted evidence of employer-initiated hazard pay wage described in this Section (b)(4) includes a spreadsheet of all Covered Employees and their wages for each pay period for the last 12 months, which allows the Complainant to distinguish Base Wage from Holiday Pay and other bonuses or pay increases that are separate and distinct from employer-initiated hazard pay (provided, however, that the foregoing does not exempt any Covered Employer from maintaining, and providing access to, the underlying payroll records described above.

5. Any offer of proof under this Section 11(b) shall be accompanied by a written acknowledgement that it was so submitted under penalty of perjury.

SECTION 12. 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, employment agreement, or similar agreement, provided that such waiver is explicitly set forth in such agreement in clear and unambiguous terms. Nothing in this Ordinance is intended or shall be construed to affect substantive labor standards under the National Labor Relations Act, or interfere with existing collective bargaining agreements, employment agreements, or similar agreements.

SECTION 13. Environmental Determination. The City Council finds that the adoption and implementation of this Ordinance are exempt from the provisions of the California Environmental Quality Act under section 15061(b)(3) in that the City Council finds there is no possibility that the implementation of this Ordinance may have significant effects on the environment due to the fact that this Ordinance regulates wages.

SECTION 14. Severability. If any section, subsection, sentence, clause, phrase or word of this Ordinance is for any reason held to be invalid and/or unconstitutional by a court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this Ordinance.

SECTION 15. Effective Date. This Ordinance is an urgency Ordinance enacted under California Government Code sections 36934 and 36937(b). This urgency Ordinance is immediately effective upon adoption by a four-fifths (4/5) vote of the City Council.

The City Clerk shall certify the adoption of this Urgency Ordinance and shall cause a certified Urgency Ordinance to be filed in the Office of the City Clerk.

On motion of _____, seconded by _____, the foregoing urgency ordinance was introduced and adopted at a regular meeting of the Council on the 20th day of April, 2021, by the following vote:

Ayes:

Noes:

Absent:

Abstain:

Steve Young, Mayor

Attest:

Lisa Wolfe, City Clerk

Date