

URGENCY ORDINANCE OF THE CITY COUNCIL OF THE CITY OF BERKELEY
AMENDING THE BERKELEY MUNICIPAL CODE BY ADDING CHAPTER 13.112,
RELATING TO HAZARD PAY FOR GROCERY WORKERS IN BERKELEY;
DECLARING THE URGENCY THEREOF; AND DECLARING THAT THIS ORDINANCE
SHALL TAKE EFFECT IMMEDIATELY.

WHEREAS, since the beginning of the COVID-19 pandemic, grocery workers in the City of Berkeley have continued to report to work and serve their communities, despite the ongoing hazards and danger of being exposed to the novel coronavirus, the pandemic is far from over and the health threats that grocery workers face are just as real now as they were when this crisis began, and

WHEREAS, due to the work of essential grocery workers, families throughout the City have had access to the food they need during this pandemic, and

WHEREAS, grocery stores are unlike other essential businesses that sell goods that can readily be purchased in bulk and/or delivered directly to a residence; perishable groceries must be purchased on a regular basis, and most people cannot afford to obtain them by delivery, and

WHEREAS, in light of the needs of most residents to purchase groceries on a regular basis, public health orders throughout the COVID-19 pandemic have permitted grocery stores to operate at higher capacities than other essential businesses, resulting in greater numbers of people who may transmit the novel coronavirus entering grocery stores at any given time, and

WHEREAS, given the nature of these jobs, grocery workers must be present to help countless customers who are stressed and fearful for their wellbeing, moreover, they remain inside with large crowds daily with ventilation systems that could be spreading the novel coronavirus, and

WHEREAS, these essential grocery workers cannot choose to work from home-- they must come to work to do their jobs, which involve substantial interaction with customers, workers are wearing masks, social distancing, and constantly wiping down cash registers, food conveyor belts and shopping carts to protect the health of the public, moreover, these workers are continuously working to restock items that households desperately need including toilet paper, cleaning supplies and other essentials, and

WHEREAS, these essential grocery workers continue to live with the daily fear of not only contracting the virus but also bringing it home to their families, and

WHEREAS, the number of COVID-19 clusters within the grocery industry in the City of Berkeley continue to rise significantly, the health threat that these grocery workers face cannot be overstated, and UFCW Local 5, the Union that represents grocery workers in the San Francisco Bay Area, reports that over 600 grocery workers in their ranks have tested positive with COVID-19 in the region, and members of their union and been hospitalized or lost their life to the coronavirus, additionally, there have been highly publicized outbreaks at local grocery stores in Berkeley, and

WHEREAS, due to a record-breaking surge in regional cases recently resulted in a stay at home order in our region and ICU capacity below 15 percent, we are a long way from minimal risk where there would be 1 daily new case per 100,000 or less than 2 percent COVID-19 case positivity rate, and

WHEREAS, the City recognizes that these workers should be justly compensated for the increased hazards of doing their jobs during the pandemic by requiring their employers to provide hazard pay at all times that the City is at a coronavirus risk level of moderate, substantial, or widespread under the State Health orders, and

WHEREAS, the City already knows that wage raises result in more money being spent in our small businesses and also act as a stimulus for our local economy, and

WHEREAS, the United States' top retail companies have earned record-breaking profits during the pandemic, this increase in profit has not transferred to workers, according to a Brookings Institution analysis, and

WHEREAS, the City has lawfully crafted wage ordinances specific to employment sectors in the past, and

NOW, THEREFORE, the City Council of the City of Berkeley ordains as follows:

Section 1. The Berkeley Municipal Code is amended by adding Chapter 13.112 to read as follows:

CHAPTER 13.112

HAZARD PAY FOR GROCERY WORKERS

13.112.010 Purpose.

This Chapter aims to protect and promote the public health, safety, and welfare during the novel coronavirus disease of 2019 (COVID-19) emergency by requiring grocery stores to provide hazard pay for grocery workers performing work in Berkeley. Some grocery stores have voluntarily provided additional compensation but others have not. Requiring competing grocery stores to provide hazard pay will ensure that grocery

workers are compensated for the risks of working during a pandemic. Grocery workers face increased risk of catching or spreading COVID-19 because the nature of their work involves close contact with the public and co-workers, including individuals who are not showing symptoms of COVID-19 but who can spread the disease. Hazard pay also ensures the retention of these essential grocery store workers who are on the frontlines of this pandemic providing essential services and who are needed throughout the duration of the COVID-19 emergency.

13.112.020 Short title.

This Chapter shall constitute the “Hazard Pay for Grocery Workers Ordinance” and may be cited as such.

13.112.030 Definitions.

The following terms shall have the following meanings:

A. “Adverse action” means reducing the compensation to a grocery worker, garnishing gratuities, temporarily or permanently denying or limiting access to work, incentives, or bonuses, offering less desirable work, demoting, terminating, deactivating, putting a grocery worker on hold status, failing to rehire after a seasonal interruption of work, threatening, penalizing, retaliating, or otherwise discriminating against a Covered Employee. “Adverse action” also encompasses any action by the Covered Employer or a person acting on the Covered Employer’s behalf that would dissuade a Covered Employee from exercising any right afforded by this ordinance.

B. “Baseline Compensation” means the hourly compensation paid to Covered Employees as of the effective date of this Chapter after subtracting any premium compensation used to compensate Covered Employees for working during the pandemic. Baseline Compensation does not include Hazard Pay owed under this

Ordinance, but does include premium compensation unrelated to the pandemic, such as holiday premiums paid for performing work during a holiday.

C. "City" means the City of Berkeley.

D. "Covered Employee" means a Grocery Worker who is entitled to Hazard Pay pursuant to this Chapter.

E. "Covered Employer" means any entity that employs over three hundred (300) Grocery Workers nationwide, regardless of whether the entity owns or operates Grocery Stores.

F. "Grocery Worker" means a worker employed to work at a grocery store. Grocery worker does not include managers, supervisors, or independent contractors.

G. "Grocery Store" means an establishment primarily engaged in selling a range of foods including fresh, frozen or canned meats, fish and poultry, fruits and vegetables, bread and/or grain products and dairy products, including, but not limited to, grocery stores, markets, or supermarkets; or produce stores, cheese, uncooked meat/butcher shops and fish markets.

H. "Hazard Pay" means additional compensation owed to a grocery worker that is separate from Baseline Compensation and does not include tips earned from customers.

13.112.040 Applicability.

A. For purposes of this Chapter, Covered Employers are limited to those who employ three hundred (300) or more Grocery Workers in the state of California.

B. For purposes of this Chapter, the number of Grocery Workers employed by an employer is the total number of Grocery Workers who worked for compensation during the two week period immediately preceding the effective date of this Chapter.

C. Covered Employers shall provide the Hazard Pay required by this Chapter to any Covered Employee in the City of Berkeley until such time as the 7-Day Average COVID-19 positivity rate for Alameda County falls below 2.0%.

D. Unless extended by the City Council, the Hazard Pay requirement set forth in this Chapter shall only remain in effect for a limited period of 120 days from the effective date of this Chapter.

13.112.050 Hazard Pay Requirement.

A. A Covered Employer shall provide Grocery Workers with Hazard Pay consisting of an additional Five Dollars (\$5.00) per hour for each hour worked within the City of Berkeley.

B. All compensation above Baseline Compensation shall be credited against the Hazard Pay requirement, as follows:

1. A Covered Employer that is already providing additional compensation above Baseline Compensation equivalent to Hazard Pay (as set forth in Section 13.112.030), on an ongoing basis prior to the effective date of this Chapter may use the hourly rate of that additional compensation to offset the amount due under this Chapter (e.g., a Covered Employer who is already paying two dollars (\$2.00) per hour above Baseline Compensation owes an additional three dollars (\$3.00) per hour in Hazard Pay).

2. Health insurance premiums may be considered Hazard Pay only where those premiums were not a part of Baseline Compensation and only where the cost of the premium can be directly attributed to the particular employee whose Hazard Pay is offset.

3. The Covered Employer bears the burden of proof that the additional compensation is Hazard Pay and not Baseline Compensation. 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, however there shall be a rebuttable presumption that compensation paid by a Covered Employer at a particular Grocery Store in January 2020 was Baseline Compensation for purposes of calculating Hazard Pay at that particular Grocery Store. Nothing herein shall be interpreted to prohibit any employer from paying more than five dollars (\$5.00) per hour in Hazard Pay.

13.112.060 Notice of rights.

A. A Covered Employer shall provide covered grocery workers with a written notice of rights established by this Chapter. The notice of rights shall provide information on:

1. The right to Hazard Pay guaranteed by this Chapter;
2. The right to be protected from retaliation for exercising or assisting in the exercise of the rights set forth in this Chapter; and
3. The right to bring a civil action for a violation of the requirements of this Chapter, including a Covered Employer's denial of Hazard Pay as required by this Chapter and/or retaliation against a Grocery Worker or other person or entity exercising or assisting in the exercise of the rights set forth in this Chapter.

B. A Covered Employer shall provide the written notice of rights by posting in the same conspicuous location used for other mandatory employment postings such as the State of California Wage Orders and the Federal Family Medical Leave Act, and shall also provide the written notice of rights in an electronic format that is readily accessible to all employees. The notice of rights shall be made available in English and Spanish and any other language that the Covered Employer knows or has reason to know is the primary language of the Covered Employees.

13.112.070 Recordkeeping.

A. Covered Employer shall retain records that document compliance with this Chapter for Covered Employees for a period of two (2) years after the date of the record.

B. If a Covered Employer fails to retain adequate records, there shall be a presumption, rebuttable by clear and convincing evidence, that the Covered Employer violated this Chapter for each Covered Employee for whom records were not retained.

13.112.080 Retaliation prohibited.

No Covered Employer shall discharge, reduce compensation, take Adverse Action against or otherwise retaliate against any grocery worker for exercising or assisting in the exercise of rights under this Chapter by any lawful means.

13.112.090 Remedies.

A. 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 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:

1. Reinstatement, payment of back wages wrongfully withheld, liquidated damages, civil penalties, penalties payable to aggrieved parties, fines, the payment of an additional sum as a civil penalty in the amount of \$50 to each Covered Employee 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.

2. Interest on all due and unpaid wages at the rate of interest specified in subdivision (b) of Section 3289 of the California Civil Code, which shall accrue from the date that the wages were due and payable as provided in Part 1 (commencing with Section 200) of Division 2 of the California Labor Code, to the date the wages are paid in full.

C. A Covered Employer found to have retaliated in violation of this Chapter shall be subject to any additional remedy at law or equity including, but not limited to front pay in lieu of reinstatement with full payment of unpaid compensation plus interest and a punitive damages in an additional amount of up to twice the unpaid compensation.

13.112.100 Waiver Through Collective Bargaining.

To the extent required or permitted by federal or state 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. Any request to an individual Employee by an Employer to waive their rights under this Chapter shall constitute a violation of this Chapter.

13.112.110 Encouragement of more generous policies.

A. Nothing in this Chapter shall be construed to discourage or prohibit a Covered Employer from the adoption or retention of premium pay policies more generous than the one required herein.

B. Nothing in this Chapter shall be construed as diminishing the obligation of a Covered Employer to comply with any contract or other agreement providing more generous protections to a Covered Employee than required by this Chapter.

13.112.120 Other legal requirements.

This Chapter provides minimum requirements for Hazard Pay while working for a Covered Employer during the COVID-19 emergency 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 higher hazard pay, or that extends other protections to grocery workers; and nothing in this Chapter shall be interpreted or applied so as to create any power or duty in conflict with federal or state law. Nothing in this Section shall be construed as restricting a grocery worker's right to pursue any other remedies at law or equity for violation of their rights.

13.112.130 Severability.

If any section, subsection, sentence, clause, phrase, or word of this Chapter, or any application thereof to any person or circumstance, is held to be invalid or unconstitutional by a decision of a court of competent jurisdiction, such decision shall not affect the validity of the remaining portions or applications of this Chapter. The Council of the City of Berkeley hereby declares that it would have passed this Chapter and each and every section, subsection, sentence, clause, phrase, and word not declared invalid or unconstitutional without regard to whether any other portion of this Chapter or application thereof would be subsequently declared invalid or unconstitutional.

Section 2. Vote Required, Immediately Effective

Based on the findings and evidence in Section 13.112.010 of this Urgency Ordinance, the Council determines that this Ordinance is necessary for the immediate preservation of the public health, peace and safety in accordance with Article XIV Section 93 of the Charter of the City of Berkeley and must therefore go into effect immediately. This

Ordinance shall go into effect immediately upon a seven-ninths vote of the City Council,
in satisfaction of the Charter of the City of Berkeley.

[CITY CLERK ATTESTATION BLOCK]