

ORDINANCE NO. 1693

ORDINANCE OF THE CITY COUNCIL FOR THE CITY OF BUENA PARK, CALIFORNIA, ESTABLISHING PREMIUM PAY FOR GROCERY WORKERS

A. Recitals.

(i) The City of Buena Park is a charter city organized pursuant to Article XI of the California Constitution and pursuant to the authority so granted, the City has the power to make and enforce within its limits all ordinances and regulations with respect to municipal affairs not in conflict with its own charter, with such powers including, without limitation, the ability to adopt regulations pertaining generally to the protection and promotion of the public health, safety, and welfare;

(ii) On March 4, 2020, California Governor Gavin Newsom proclaimed a “state of emergency” throughout the State in response to the COVID-19 pandemic, and on March 17, 2020, the City Council for the City of Buena Park unanimously adopted a Resolution proclaiming a “local emergency” thereby formalizing the City’s initiation of its Emergency Operations Plan, allowing prompt response to emergency conditions at the local level, and providing the City access to federal, state, and local resources during the crisis;

(iii) On March 19, 2020, California Governor Gavin Newsom issued a “Stay at Home Order” closing all non-essential workplaces, requiring people to stay home except to participate in essential activities or to provide essential business services, and banning all gatherings for social, spiritual, and recreational purposes; and in addition, the proclamation identified grocery stores as essential business sectors necessary to protecting and providing for the health and well-being of all Californians, and designated their workers as essential critical infrastructure workers;

(iv) The COVID-19 virus has broadly spread throughout California and remains a significant health risk to the community, especially members of our most vulnerable populations, and the conditions giving rise to the “state emergency” and “local emergency” proclamations made by the Governor and City Council, respectively, continue to exist;

(v) As of February 1, 2021, there have been over 435,000 deaths due to COVID-19 across the United States, and as of February 17, 2021, nearly 7,500 persons had tested positive in the City of Buena Park for COVID-19, and 85 residents of the City had passed away from the virus;

(vi) As a result of the Governor’s “Stay at Home Order,” and subsequent mandates issued by State and county health officers, the public has become increasingly reliant on grocery retail establishments as a source of food and consumable products, and at times during the pandemic the public have rushed to grocery stores and drug retail stores to “stock up” on supplies;

(vii) According to the Brookings Institute, the top retail companies earned on average an extra \$16.7 billion in profit in 2020 compared to 2019 resulting from increased sales and the health orders that have largely eliminated competing outlets for food and consumable products;

(viii) Under these circumstances, grocery and drug retail workers face increased exposure risk due to inability to consistently practice physical distancing in the workplace, and the face-to-face contact with members of the public for extended periods of time, and researchers

have reported that employees with direct customer exposure were five times (5x) more likely to test positive for the COVID-19 virus than those employees without such exposure;

(ix) Frontline grocery and drug retail workers have been unable to work from home, thereby preventing them from avoiding these increased risks, and in the case of workers that have children engaged in distance learning, has resulted in additional childcare expenses, and such workers have incurred such personal risks and expenses for the benefit of the broader public;

(x) Though grocery and drug retail establishments are not the only business sectors that have been deemed “essential” by State and local health orders, grocery and drug retail establishments and their workers are distinguishable from others in that the goods and consumable products they offer are indispensable to life and the health and welfare of the public;

(xi) During the early stages of the COVID-19 pandemic, many grocery companies provided “Hero Pay,” which was generally implemented as either a temporary hourly wage increase or a one-time bonus for certain essential workers, but Hero Pay has generally phased out or terminated by these private businesses over time even though COVID-19 continues to have significant spread throughout the community;

(xii) Orange County is currently vaccinating individuals falling within “Tier 1A” of the County’s COVID-19 vaccination plan, which prioritizes and directs distribution of the vaccine among the population, but frontline grocery and drug retail workers are listed in “Tier 2” of the plan, meaning distribution to such workers is not anticipated until Spring 2021;

(xiii) 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;

(xiv) Grocery and drug 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. Grocery and drug retail workers have been working under these hazardous conditions for months. They are working in these hazardous conditions now 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;

(xv) The availability of grocery and drug retail stores is fundamental to the health of the community and is made possible during the COVID-19 emergency because grocery and drug retail workers are on the frontlines of this devastating pandemic supporting public health, safety, and welfare by working in hazardous situations;

(xvi) Establishing a requirement for grocery and drug retail stores to provide premium pay to grocery and drug retail workers protects public health, supports stable incomes, and promotes job retention by ensuring that grocery and drug 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;

(xvii) The City Council has carefully reviewed and considered all of the evidence, including the staff report and public comments presented, and based on the foregoing finds and declares that this ordinance is reasonable and necessary remedial action to advance the public health, safety, and general welfare, and a valid exercise of police powers; and

(xvii) All legal prerequisites to the adoption of this Ordinance have occurred, and the City Council had duly considered all evidence presented in connection with its consideration of this Urgency Ordinance.

B. Ordinance.

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF BUENA PARK, CALIFORNIA, DOES ORDAIN AS FOLLOWS:

SECTION 1. RECITALS. The facts set forth in the Recitals, Part A, of this Ordinance are true and correct, and incorporated into this Ordinance as substantive findings.

SECTION 2. ADOPTION OF PREMIUM PAY FOR GROCERY WORKERS.

A. DEFINITIONS. For purposes of this Ordinance, the following definitions apply.

1. "Adverse action" means reducing compensation, garnishing gratuities, temporarily or permanently denying or limiting access to work, or offering less desirable work, demoting, terminating, deactivating, placing on hold status, failing to rehire after a seasonal interruption of work, threatening, penalizing, retaliating, or otherwise discriminating against a grocery worker.

2. "Aggrieved party" means a grocery worker or other person who suffers tangible or intangible harm due to a covered employer or other person's violation of this Ordinance.

3. "Base wage rate" means the regular hourly wage rate paid to a grocery worker.

4. "City" means the City of Buena Park.

5. "Grocery worker" means an individual who performs at least two (2) hours of work in a calendar week for a covered employer within the City of Buena Park, but does not include managerial, supervisory, or confidential employees of a covered employer.

6. "Covered employer" means any retail establishment, as defined herein, that is located in the City of Buena Park, employs at least twenty (20) employees at the retail establishment, and whose owner, parent company, franchisor or network of franchises employs five hundred (500) or more employees nationally. For purposes of this definition, all employees who worked for compensation shall be counted, including but not limited to (a) employees who are not covered by this Ordinance; and (b) 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.

7. "Hours worked" means the time during which a grocery worker is subject to the control of a covered employer, including any time that the employee is suffered or permitted to work or on-call.

8. "Person" means 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.

9. "Premium pay" means an additional \$4.00 per hour wage premium for each hour worked that is in addition to a grocery worker's base pay rate and any commissions, gratuities, bonuses or any other form of regular or premium pay that is owed to the grocery worker, including but not limited to any holiday, overtime, or vacation pay.

10. "Retail establishment" means a retail establishment located in the City of Buena Park that:

a. Offers more than fifteen thousand (15,000) square feet and devotes seventy percent (70%) or more of its sales floor area to retailing a general range of food products, which may be fresh or packaged, or receives seventy percent (70%) or more revenue from retailing a general range of food products;

b. Is more than eighty-five thousand (85,000) square feet and devotes ten percent (10%) or more of its sales floor area to the sale of merchandise that is non-taxable pursuant to Section 6359 of the Revenue and Taxation Code, including retail establishments with multiple tenants, so long as consumer goods and nontaxable items are sold under the same roof with shared checkout stands, entrances, and exits; or

c. Is retail pharmacy that sells a variety of prescription and nonprescription medicines, as well as any combination of miscellaneous items, including but not limited to sundries, dry foods, packaged foods, beverages, fresh produce, meats, deli products, dairy products, canned foods, or prepared foods.

B. PREMIUM PAY REQUIREMENT.

1. Each covered employer shall pay each grocery worker premium pay consisting of an additional four dollars (\$4.00) per hour for each hour worked.

2. Covered employers shall provide the pay required for a minimum of one hundred twenty (120) days from the effective date of this Ordinance, or until the City is classified as within the "Moderate Tier (Orange)" category of the California Department of Public Health's "Blueprint for a Safer Economy," whichever first occurs.

C. GROCERY WORKER PROTECTIONS.

1. It shall be unlawful for a covered employer to fund the premium pay required under this Ordinance by reducing the base wage rate, overtime, holiday or other premium pay rate, hours of work, vacation, pension contributions, or other wage-related benefits of any grocery worker, or by increasing charges to any grocery worker for parking, uniforms, meals, or other work-related materials or equipment.

2. A covered employer violates the prohibition if a motivating factor in the covered employer's decision to take any adverse actions, unless the covered employer proves that it would have taken the same action at the time that it did irrespective of the Ordinance's operation.

D. NOTICE OF RIGHTS.

1. Each covered employer shall provide grocery workers with a written notice of rights established by this Ordinance in a form published by City. The notice of rights shall be in a form and manner sufficient to inform grocery workers of their rights under this Ordinance. The notice of rights shall provide information on:

- a. The right to premium pay guaranteed by this Ordinance;
- b. The right to be protected from retaliation for exercising in good faith the rights protected by this Ordinance; and
- c. The right to bring a civil action for a violation of the requirements of this Ordinance, including a covered employer's denial of premium pay as required by this Ordinance and a covered employer's or other person's retaliation against a grocery worker or other person for asserting the right to premium pay or otherwise engaging in an activity protected by this Ordinance.

2. Covered employers shall post the notice of rights required in a conspicuous location, and in an electronic format that is readily accessible to the grocery workers, including smartphone application or online web portal. The notice shall be in English, Spanish, and any other primary language spoken by at least 10% of the covered employer's retail establishment.

E. RECORD KEEPING.

1. Covered employers shall retain records that document compliance with this Ordinance, including payroll records listing the premium pay required by this Ordinance as a separate item, for a period of two years.

2. If a covered employer fails to retain adequate records required, there shall be a presumption, rebuttable by clear and convincing evidence, that the covered employer violated this Ordinance for each grocery worker for whom records were not retained.

F. RETALIATION PROHIBITED. No covered employer shall discharge, reduce in compensation, or take any other adverse action against a grocery worker for opposing any practice proscribed by this Ordinance, for participating in proceedings related to this Ordinance, for seeking to exercise their rights under this Ordinance, or for otherwise asserting rights under this Ordinance. The protections of this Ordinance shall apply to any grocery worker who mistakenly, but in good faith, alleges non-compliance with this Ordinance.

G. VIOLATION. The failure of any person to comply with any requirement imposed on it under this Ordinance is a violation.

H. CIVIL ENFORCEMENT AND REMEDIES.

1. The remedies provided for in this Ordinance are cumulative and are not intended to be exclusive of any other available remedies, damages, penalties, fines, or relief.

2. Any grocery worker aggrieved by a violation of this Ordinance may bring a civil action in a court of competent jurisdiction against the covered employer or other person violating this Ordinance and, upon prevailing, shall be awarded reasonable attorneys' fees and

costs and such legal or equitable relief as may be appropriate to remedy the violation including, without limitation, the payment of any unpaid compensation due under this Ordinance plus interest, back pay, reinstatement, front pay in lieu of reinstatement, and rescission.

3. In addition to any other remedies set forth in this Ordinance, a person that acts with malice, fraud, or oppression in violating a grocery worker's rights shall be liable for exemplary damages in the amount of two times the monetary damages suffered by the aggrieved grocery worker.

I. ENCOURAGEMENT OF MORE GENEROUS POLICIES.

1. Nothing in this Ordinance 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.

2. Nothing in this Ordinance 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 grocery worker than those required by this Ordinance.

3. Notwithstanding any contrary provision herein, this Ordinance shall not apply to a covered employer or grocery worker that have mutually agreed to waive the provisions of this Ordinance in a collective bargaining agreement, or an amendment thereto, that is dated after the effective date of this Ordinance.

4. Notwithstanding any contrary provision in this Ordinance, a covered employer that was providing hazard or similar premium pay to grocery workers on an hourly basis as of the effective date of this Ordinance, and that continues to provide such hazard or similar premium pay at the same rate while this Ordinance is in effect, may credit an amount equal to the amount of such pay for each hour worked by a grocery worker towards meeting its obligations under this Ordinance.

SECTION 3. MINIMUM REQUIREMENTS. This Ordinance provides minimum requirements for premium pay while working for a covered employer 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 premium pay, or that extends other protections to grocery workers. Nothing in this Ordinance shall be interpreted or applied so as to create any power or duty in conflict with federal or state law. Nothing in this Ordinance shall be construed as restricting a grocery worker's right to pursue any other remedies at law or equity for violation of their rights.

SECTION 4. CEQA. This ordinance is exempt from the requirements of the California Environmental Quality Act ("CEQA") pursuant to State CEQA Guidelines, as it is not a "project" and has no potential to result in a direct or reasonably foreseeable indirect physical change to the environment. (14 Cal. Code Regs. § 15378(a).) Further, the ordinance is exempt from CEQA because there is no possibility that the ordinance or its implementation would have a significant negative effect on the environment. (14 Cal. Code Regs. § 15061(b)(3).) The City Clerk shall cause a Notice of Exemption to be filed as authorized by CEQA and the State CEQA Guidelines.

SECTION 5. SEVERABILITY. If any section, subsection, sentence, clause, phrase or portion of this ordinance is held for any reason to be invalid or unconstitutional by a decision of any 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 ordinance and each section, subsection, clause, phrase or portion thereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses, phrases or portions be declared invalid or unconstitutional.

SECTION 6. EFFECTIVE DATE. This Ordinance shall take effect thirty (30) days after its adoption.

SECTION 7. CERTIFICATION AND PUBLICATION. The City Clerk shall certify to the passage of this Ordinance and this Ordinance shall be published as required by law and shall take effect as provided by law.

PASSED AND ADOPTED this 9th day of March 2021, by the following called vote:

AYES: COUNCILMEMBERS: Brown, Traut, Park, Sonne

NOES: COUNCILMEMBERS: Swift

ABSENT: COUNCILMEMBERS: None

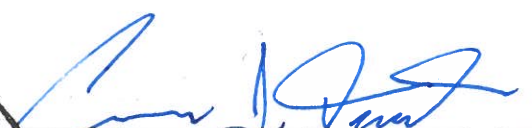
ABSTAIN: COUNCILMEMBERS: None

ATTEST:



City Clerk





Mayor

I, Adria Jimenez, MMC, City Clerk of the City of Buena Park, California, do hereby certify that the foregoing ordinance was introduced and passed at a regular meeting of the City Council of the City of Buena Park held on the 9th day of March 2021.



City Clerk