ORDINANCE NO. 9.298

AN UNCODIFIED ORDINANCE OF THE BOARD OF SUPERVISORS OF THE COUNTY OF SANTA CLARA ESTABLISHING AS A TEMPORARY MINIMUM LABOR STANDARD A COVID-19 HAZARD PREMIUM FOR SPECIFIED GROCERY STORE AND DRUGSTORE WORKERS IN UNINCORPORATED AREAS OF SANTA CLARA COUNTY

Summary

This Ordinance imposes a temporary minimum labor standard that requires specified grocery stores and drugstores to pay specified workers a COVID-19 hazard premium of $5 per hour to compensate those workers for the added costs and health risks attendant to their work until the earlier of (i) 180 days after its effective date or (ii) the end of the declared County COVID-19 health emergency.

THE BOARD OF SUPERVISORS OF THE COUNTY OF SANTA CLARA ORDAINS AS FOLLOWS:

COVID-19 HAZARD PREMIUM FOR SPECIFIED FRONTLINE WORKERS

SECTION 1. Intent, Purpose, and Findings.

The Board of Supervisors of the County of Santa Clara hereby finds and declares the following:

(a) The Board of Supervisors has the authority to adopt ordinances and issue rules and regulations within the unincorporated areas of the County that are designed to protect and promote public health, safety, and welfare.

(b) This Ordinance protects and promotes public health, safety, and welfare during the COVID-19 local health emergency by requiring grocery stores and drugstores to provide a hazard premium to employees performing work in the unincorporated areas of the County. This labor standard will compensate those employees for the hazards of working with significant exposure to COVID-19, the costs of taking preventative safety measures to protect themselves and others from spreading the virus, and the expenses they incur in order to perform work they cannot do remotely.
(c) Grocery store and drugstore workers endure hazardous conditions to provide essential goods that the community needs to sustain itself through the COVID-19 crisis. Although these low-wage workers provide a critical service to the community, they struggle to pay the high cost of living in the Santa Clara County region. For these reasons, the Board finds it appropriate to act to establish a minimum labor wage standard in these industries first.

(d) County residents cannot live even from day to day without a ready and stable supply of food and medicine that grocery stores and drugstores offer. At the same time, workers in these establishments face a particularly high risk of infection with COVID-19 and present a particularly high risk of transmission of the coronavirus, including because they must interact to a substantial degree with members of the public, often in indoor settings.

(e) Unlike workers in many sectors of the economy, grocery store and drugstore workers cannot work from home, because their work—receiving deliveries, stocking shelves, preparing food, assisting customers, operating cash registers, and so on—cannot be done remotely. Moreover, many of these workers’ job functions involve in-person, face-to-face, high-frequency contact. In many cases, these workers have contact with many members of the public (e.g., cashiers, store clerks). Each of these aspects of the work increases the risk of COVID-19 infection and transmission.

(f) For example, a study recently published in Occupational & Environmental Medicine found that, within grocery stores, employees with direct customer exposure were five times more likely to test positive for COVID-19, even after adjusting for age, gender, COVID-19 community prevalence where workers live, and other factors.1 Another recent study underscored that grocery stores present particularly high risks of transmission to both workers and customers.2 These studies’ findings are further borne out by recent experience in the Bay Area, where over 700 union-represented grocery workers have tested positive for COVID-19, several such workers

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2 See M. Edelstein, Why Older Adults Should Shop From Home While the Pandemic is Surging, Rutgers Today (Dec. 1, 2020), https://perma.cc/8ADX-SAXS (quoting public health professor as noting that “data from England shows that the most frequent location where people had visited or worked prior to testing positive was a supermarket” and that some jurisdictions in the United States are recognizing or experiencing similar results).
have died, and where there have been publicized reports of COVID-19 outbreaks at grocery stores.\(^3\)

(g) Likewise, public reports reflect that drugstore workers are at particularly high risk of COVID-19 infection because pharmacies are busier during the pandemic, often attract people who are sick, and do not always take adequate safety measures.\(^4\)

(h) The COVID-related risks and burdens that grocery store and drugstore workers face threaten both themselves and their immediate families, and also the broader community that they serve. The provision of financial support to these workers not only recognizes and compensates them for the risks and costs they incur to provide essential food and medicine to the community, but it also helps protect the community as a whole because it enables workers to take precautions—like procuring personal protective equipment and using more expensive but health-protective modes of transportation to get to work—that reduce the risk that these workers will contract or transmit COVID-19.

(i) The Board is also concerned with ensuring that its actions regarding COVID-19 not only protect individuals and public health, but also advance community equity and social sustainability in response to a pandemic that has exacerbated and laid bare preexisting social inequities—including within communities of front-line workers in grocery stores and drugstores. For example, one recent study showed that exposure risks are twice as high in grocery stores in low-income areas as in high-income areas.\(^5\)

(j) For these reasons, the Board has determined that public health, safety, and welfare are well served by requiring that workers at grocery stores and drugstores earn a hazard pay premium to recognize and compensate them for the risks they incur and to enable them to take preventive measures that

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reduce the risk of transmission of COVID-19 at their places of employment.

(k) In making this determination, the Board observes that federal, state, and local laws all recognize hazard pay as a well-established type of compensation for employees performing hazardous duties or work involving physical hardship. As described in these Findings, grocery store and drugstore workers have been working under hazardous conditions month after month and will continue to face these conditions as the virus (including new, more contagious variants) presents an ongoing threat.

(l) There is, moreover, ample evidence that when grocery stores and drugstores have thrived during the pandemic, they often have not shared those profits with the employees who incur risks to perform the essential, in-person work that generates those profits. To great public attention, several large companies provided temporary hazard pay increases or bonuses to workers at the start of the pandemic—almost a year ago—but almost all of them long ago stopped paying hazard premiums.

(m) The Board recognizes both the immediate needs of frontline grocery and drugstore workers, as well as the financial challenges that many small business grocery stores and drugstores in the county are facing because of the pandemic. Many small businesses do not have the revenues, reserves, access to capital, widespread brand recognition or loyalty, or economy of scale to afford to pay their employees a hazard premium without going out of business. Accordingly, the Board has determined to exempt specified small businesses and higher wage earners to avoid exacerbating rather than mitigating the public health and economic harms caused by the pandemic.

(n) Yet pandemic-related losses and challenges are not borne equally among all grocery stores and drugstores, even those that are small businesses. In particular, some grocery stores and drugstores are operated on a franchise model that does not neatly fit the Board’s concerns about small businesses.

(o) Franchisees may be relatively small entities when considered in a vacuum, but in fact they operate within and draw advantages from a large network of affiliated businesses that exists under the control and pursuant to terms set by a franchisor that is frequently regional, national, or multinational in size. As a result, franchisees derive significant economic benefits from participation in a tightly controlled franchise system that provides advantages unavailable to small businesses that are truly independent.
In exchange for the franchise fee and other fees paid to a franchisor, franchisees frequently gain access to valuable brand names; advertising (including cooperative marketing activities, sometimes at the national level, directed by experienced franchisors); sophisticated market research and marketing assistance; trade secrets; software; economies of scale in purchasing and other costs; site selection assistance; financing on favorable terms; operational training; human resource guidance and assistance; human resource policies and handbooks; ongoing training and operational assistance; access to customers directed to them by the franchisor, including through the franchisor’s website; and the right to operate under a well-known brand name and use trade secrets to attract customers that truly independent small businesses cannot. These unique benefits make franchisees better equipped to withstand the economic challenges caused by the pandemic—and, therefore, to afford paying the hazard premium required by this Ordinance—than non-franchisee small businesses.

Moreover, franchisees’ financial advantages over truly independent small businesses grow with scale, so that larger franchisees are even better able to afford paying employees the hazard premium than smaller franchisees. Therefore, the Board has determined that this Ordinance cover franchisees above a defined size threshold, while exempting truly small, independent businesses as well as smaller franchisees.

SECTION 2. **Geographic Scope.**

This Ordinance shall apply to all unincorporated areas of Santa Clara County.

SECTION 3. **Definitions.**

For purposes of this Ordinance:

(a) “Base Wage” means the regular rate of pay earned by a Covered Employee. “Base Wage” excludes any Employer-Initiated Hazard Pay and the Hazard Premium to which the Covered Employee is entitled under this Ordinance.

(b) “Covered Employee” means an employee of a Covered Employer who:

(1) has performed Hours Worked at a Drugstore or Grocery Store in the unincorporated areas of Santa Clara County; and

(2) with respect to such work, earned a Base Wage that is less than two times the applicable minimum wage for full-time employment (as
that term is defined in Labor Code section 515(c)) or the monthly salary equivalent.

(c) “Covered Employer” means any Person that:

(1) individually, jointly, directly, indirectly, or through an agent or any other Person, owns, operates, or controls at least one Drugstore or Grocery Store in the unincorporated areas of Santa Clara County; and

(2) meets either of the following two conditions:

(i) employs

(1) 300 or more employees in the United States; and

(2) 15 or more employees in Drugstores or Grocery Stores in the unincorporated areas of Santa Clara County; or

(ii) is a Franchisee that:

(1) is associated with a Franchisor or a network of Franchises with Franchisees that employ more than 300 employees in the aggregate in the United States; and

(2) owns, operates, or controls at least 10 Drugstores or Grocery Stores in the State of California.

(3) For purposes of subsection (c)(2), the number of employees shall be the total number of employees (whether full-time, part-time, jointly employed, temporarily employed, or employed through a staffing or employment agency) who performed Hours Worked at any time during the period February 8, 2021 through February 21, 2021, provided, however, that for any Grocery Store or Drugstore that began business operations for the first time after February 1, 2021, the number of employees for a given pay period shall be the total number of employees (whether full-time, part-time, jointly employed, temporarily employed, or employed through a staffing or employment agency) who performed Hours Worked at any time during the fourteen-day period ending the day before the first day of that pay period.
(d) "Drugstore" means a Retail Establishment that contains a "pharmacy" as defined by Bus. & Prof. Code section 4037. "Drugstore" does not include any of the following:

(1) Health facilities as defined by Health & Safety Code section 1250;
(2) Clinics eligible for licensure under Health & Safety Code sections 1204 or 1204.1;
(3) Establishments that contain a pharmacy described in paragraphs (1), (2), (3), or (5) of subdivision (b) of Bus. & Prof. Code section 4113.5; or
(4) Establishments that contain a correctional pharmacy as defined by Bus. & Prof. Code section 4021.5.

(e) "Employer-Initiated Hazard Pay" means premium compensation:

(1) that a Covered Employer provides to a Covered Employee voluntarily or pursuant to a collective bargaining agreement;
(2) for which the only bona fide purpose is to compensate employees for the hardships or risks associated with working in person during the COVID-19 pandemic; and
(3) that a Covered Employer has provided to Covered Employees for all Hours Worked continuously since January 26, 2021.

The premium hourly rate for Employer-Initiated Hazard Pay paid on a flat rate basis shall be the flat rate payment for a specified period divided by the number of Hours Worked in that period.

(f) "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 affiliate;
(2) The operation of the business is substantially associated with a trademark, service mark, trade name, advertising, or other commercial symbol that is designated, 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.

(g) "Franchisee" means a Person to whom a Franchise is offered or granted.

(h) "Franchisor" means a Person who grants a Franchise to another Person.

(i) "Grocery Store" means a Retail Establishment for which a substantial portion of gross receipts is derived from the sale of 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, or prepared foods.

(j) "Hazard Premium" means a $5.00 per hour premium for each Hour Worked that is above, beyond, and not a part of the regular rate of pay for an employee. Hazard Premium does not include tips, gratuities, service-charge distributions, commissions, bonuses, overtime premiums, split-shift premiums, reporting time pay, or any other compensation owed to Covered Employees. The Hazard Premium shall be $5.00 per hour, and not a greater amount, for each Hour Worked for which a Covered Employee is entitled to overtime compensation (including, but not limited to, Hours Worked in excess of eight hours in one workday, in excess of 40 hours in any one workweek, or on any seventh day of work in any one workweek).

(k) "Hours Worked" has the same meaning as that term is used in Chapter 1 of Part 2 of Division 2 (commencing with section 500) of the Labor Code.

(l) "Person" has the meaning set forth in County of Santa Clara Ordinance Code section A1-21.

(m) "Retail Establishment" means an establishment that is open to the public and devoted to the retail sale of a commodity or commodities.

(n) For purposes of subsection (i), "substantial portion of gross receipts" means 25 percent or more of the establishment's gross receipts for the establishment's most recently concluded fiscal year, provided, however, that for any Grocery Store that has not been in operation for a full fiscal year, "substantial portion of gross receipts" means, with respect to a given pay period, 25 percent or more of the establishment's gross receipts for the fourteen-day period ending the day before the first day of that pay period.
SECTION 4. Payment of Hazard Premium Wage to Covered Employees.

(a) Each Covered Employer shall pay a Hazard Premium to all Covered Employees for all Hours Worked in the unincorporated areas of Santa Clara County.

(b) Each Covered Employer shall separately delineate Hazard Premiums on Covered Employees’ wage statements.

(c) A Covered Employer may reduce the Hazard Premium paid to a Covered Employee under this Ordinance by the amount of Employer-Initiated Hazard Pay the Covered Employer has paid to the Covered Employee for the same Hours Worked, provided that any Covered Employer that reduces the Hazard Premium under this paragraph shall (i) separately delineate Employer-Initiated Hazard Pay on Covered Employees’ wage statements, and (ii) upon request by a Covered Employee or the County, provide documentation demonstrating that any reduction in Hazard Premium under this paragraph is offset in its entirety for each Hour Worked by bona fide Employer-Initiated Hazard Pay.

(d) No Covered Employer shall reduce the compensation or limit the earning capacity of a Covered Employee because of this Ordinance. If the Ordinance was a motivating factor in the Covered Employer’s decision to reduce compensation or limit earning capacity, a violation has occurred.

SECTION 5. Recordkeeping.

(a) Covered Employers must retain, for a period of no less than three years, records that document compliance with this Ordinance.

(b) The failure to retain records required by subsection (a) shall create a presumption, rebuttable only by clear and convincing evidence, that the Covered Employer violated this Ordinance for each Covered Employee for whom such records were not retained.

SECTION 6. Waiver.

(a) The provisions of this Ordinance may not be waived or modified by agreement between an individual Covered Employee and a Covered Employer.
(b) All of the provisions of this Ordinance, or any part thereof, may be waived in a bona fide collective bargaining agreement, but only if the waiver is explicitly set forth in such agreement in clear and unambiguous terms.

SECTION 7.  Retaliation Prohibited.

(a) No employer shall discharge, demote, suspend, retaliate against, subject to an adverse action, or in any other manner discriminate against any employee in the terms or conditions of employment because the employee opposes a practice proscribed by this Ordinance, files or raises a complaint (including but not limited to a legal claim or lawsuit) or asks a question relating to this Ordinance, participates in a legal proceeding relating to this Ordinance, or seeks to exercise a right under this Ordinance, whether on behalf of that employee or another employee. These protections shall apply even if the employee mistakenly alleges noncompliance with the Ordinance.

(b) Taking an adverse action against an employee within 90 days of the employee taking any action described in subparagraph (a) shall raise a rebuttable presumption of having done so in retaliation for the exercise of such rights.


(a) Within 15 days of the effective date of this Ordinance, Covered Employers shall provide all employees who perform Hours Worked in the unincorporated area of Santa Clara County with a written notice of Covered Employees’ rights established by this Ordinance, including their rights to the Hazard Premium, to be protected from retaliation, and to bring a civil action.

(b) Covered Employers shall provide the written notice of rights in all languages spoken by more than 10% of Covered Employees.

(c) Covered Employers shall also post the notice of rights (a standard form of which may be made available by the County) in conspicuous locations of the worksite that is reasonably calculated to reach all Covered Employees.
SECTION 9. **Enforcement.**

A Covered Employee aggrieved by a Covered Employer’s violation of this Ordinance may bring a civil action for actual damages; treble damages in the case of a willful, knowing, or reckless violation; other legal or equitable relief the court may deem appropriate; reasonable attorneys’ fees and costs; and interest on all amounts due and unpaid at the rate specified in subdivision (b) of Civil Code section 3289.

SECTION 10. **No Preemption of Higher Standards.**

(a) The purpose of this Ordinance is to ensure minimum labor standards.

(b) This Ordinance does not preempt or prevent the establishment of superior employment standards, including higher wages, by either:

   (1) ordinance, resolution, or any other action by the Board of Supervisors; or

   (2) private contract.

SECTION 11. **CEQA Not Applicable.**

This Ordinance is not subject to the California Environmental Quality Act (CEQA) pursuant to CEQA Guidelines Section 15060(c)(2) (the activity will not result in a direct or reasonably foreseeable indirect physical change in the environment) and Section 15060(c)(3) (the activity is not a project as defined in Section 15378 of the CEQA Guidelines, because it has no potential for resulting in physical change to the environment, directly or indirectly).

SECTION 12. **Severability.**

If any section, subsection, sentence, clause, or phrase of this Ordinance is for any reason held to be invalid, such decision shall not affect the validity of the remaining portions of this Ordinance. The Board of Supervisors hereby declares that it would have adopted this Ordinance and each section, subsection, sentence, clause, and phrase thereof irrespective of the fact that any one or more sections, subsections, clauses, or phrases may be held invalid.

SECTION 13. **Effective Date.**

This Ordinance shall take effect 30 days after final passage, in accordance with Government Code section 25123.
SECTION 14. **Expiration; Repeal.**

Unless earlier repealed, modified, or extended by the Board, this Ordinance shall expire and be automatically repealed upon the earlier of (i) the date that the County terminates the declared Local Health Emergency related to COVID-19 or (ii) 180 days after the effective date of this Ordinance.

**PASSED AND ADOPTED** by the Board of Supervisors of the County of Santa Clara, State of California, on [MAR 09 2021], by the following vote:

**AYES:** CHAVEZ, ELLENBERG, LEE, SIMITIAN, WASSERMAN

**NOES:** NONE

**ABSENT:** NONE

**ABSTAIN:** WASSERMAN

SUSAN ELLENBERG
Vice President, Board of Supervisors

Signed and certified that a copy of this document has been delivered by electronic or other means to the President, Board of Supervisors.

**ATTEST:**

MEGAN DOYLE
Clerk of the Board of Supervisors

**APPROVED AS TO FORM AND LEGALITY:**

JAMES R. WILLIAMS
County Counsel

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