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Title:	Report regarding an urgency ordinance requiring large grocery stores in South San Francisco to pay employees an additional four dollars (\$4.00) per hour in “hazard pay” during the coronavirus (COVID-19) pandemic (Alex Greenwood, Director of Economic & Community Development, and Sky Woodruff, City Attorney)		
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Report regarding an urgency ordinance requiring large grocery stores in South San Francisco to pay employees an additional four dollars (\$4.00) per hour in “hazard pay” during the coronavirus (COVID-19) pandemic (Alex Greenwood, Director of Economic & Community Development, and Sky Woodruff, City Attorney)

RECOMMENDATION

At the request of City Council, staff drafted a proposed ordinance mandating “hazard pay” for grocery workers within the City. Should Council desire to adopt a hazard pay ordinance, staff recommends adopting the proposed ordinance as an urgency ordinance. Because the proposed ordinance is an urgency ordinance, a four-fifths vote of the City Council is required for adoption. Alternatively, staff recommends Council consider the proposed ordinance after a scheduled February 19, 2021 hearing in a pending lawsuit against a similar Long Beach ordinance, as the outcome of the hearing may alert staff to any legal issues that the courts see with this type of ordinance.

BACKGROUND

A. Hazard Pay Ordinances in California

At least a dozen local jurisdictions in California are currently considering a version of a “hazard pay” ordinance that would provide extra hourly pay to certain types of retail workers during the COVID-19 pandemic in recognition of the heightened health risks associated with their work. The ordinances are prospective and would not apply retroactively. Jurisdictions considering these measures include Los Angeles County, Santa Clara County, San Francisco, the City of Los Angeles, San Jose, Santa Monica, West Hollywood, Pomona, Santa Ana, Berkeley, and San Leandro.

The ordinances considered by these jurisdictions all take a similar approach. They require large stores to pay

all non-managerial workers an additional hourly wage during the COVID-19 pandemic; smaller, mom-and-pop stores are excluded. Within this framework, however, the proposals being considered vary between cities in how they are tailored in terms of: (1) the specified rate of pay, (2) what types of retail stores are covered, (3) the specific size or other threshold requirements that determine which retailers are covered, and (4) how long the hazard pay is required.

As of the date of this staff report, three cities have adopted hazard pay through urgency ordinances:

- On Jan. 19, Long Beach adopted a hazard pay rate of \$4 per hour;
- On Jan. 27, Montebello (a city in eastern Los Angeles County with a population of approximately 70,000 people) adopted a hazard pay rate of \$4 per hour;
- On Feb. 2, Oakland adopted a hazard pay rate of \$5 per hour.

The proposed ordinance is drafted as an urgency measure, reflecting Council's initial direction to take action on this matter quickly, if it chooses to proceed. The recitals contained in the ordinance establish the basis for the urgency, including citing studies reflecting the dangers faced by the workers who would be eligible for the hazard pay and how the additional compensation would further the immediate preservation of the public health and safety.

B. Active Litigation

The California Grocers Association has sued all of the cities that have adopted a hazard pay ordinance. The lawsuits are substantively identical. Each claims that the hazard pay ordinance is invalid because it is preempted by the National Labor Relations Act (for allegedly interfering with collective bargaining) and because it is unconstitutional (for allegedly violating equal protection and contracts clauses of the United States constitution). The City Attorney's Office is still reviewing the strength of these claims.

In each of these cases, the Grocers Association seeks to enjoin the ordinance from taking effect. In Long Beach, the group requested a temporary restraining order, which was denied by the court. A hearing is set for February 19, 2021 in Los Angeles federal court on the grocers' motion for a preliminary injunction, which will determine whether the grocers' are likely to prevail on their claims. No hearings have been set in the Oakland or Montebello cases.

The grocers have also threatened to sue other jurisdictions that adopt similar ordinances.

C. Arguments made by supporters

Supporters of hazard pay ordinances, including the United Food and Commercial Workers, note that grocery and other front-line retail workers are essential workers in the COVID-19 pandemic. These workers bear a heightened risk infection, given that many work in enclosed settings where they are required to make close contact with large numbers of members of the public. Even with mask mandates in effect, this has led to a number of outbreaks in grocery stores and other retail outlets across the state. Workers shouldering this risk are low-wage workers, who are primarily women and people of color, and their families.

Supporters have argued that, while health risks have risen for front-line workers, many of their employers have seen substantial increases in sales and profits during the pandemic. According to a November 2020 Brookings Institution report, for instance, 13 of the largest retailers in the country saw their profits rise 40 percent in 2020 over the previous year. This includes Kroger (Ralphs/Food 4 Less) and Albertsons (Safeway/Lucky), which

both saw profits more than double in the first two quarters of 2020 compared with the same period in 2019. Front-line workers saw little of those increased profits, according to the study; while all of the retailers studied had provided temporary hazard pay at the start of the pandemic (typically \$2 per hour), this extra pay had largely ended by June 2020. Thus, over the course of the pandemic in 2020, a worker at a Kroger or Albertsons store saw an average pay increase of \$0.87 or \$0.83 per hour, respectively.

D. Responses from affected retailers

Staff has begun outreach to potentially affected local businesses to solicit their feedback on a potential hazard pay ordinance, including: Safeway, Grocery Outlet, Seafood City, Smart & Final, Costco, and others. Staff will update the City Council with responses received.

Across the state, however, the Grocers Association has vocally opposed these ordinances. It has argued that retailers on whole have invested in safety measures, incentive pay, and improved health benefits for workers since the pandemic began. It has also argued that consumers will bear the brunt of the mandated pay increase, with the impact felt most by low-income families and those struggling since the pandemic began. For instance, in a letter to Oakland and San Jose city councils co-signed with a number of other trade groups, the Association argued that a \$5 per hour hazard pay mandate would lead to an average increase in food costs of \$400 per year for a family of four.

The association has also warned that pay increases will lead to store closures or employers cutting shifts and reducing hours. This week, for instance, Kroger announced it was closing two stores in Long Beach—a Food 4 Less and a Ralphs—because of the city’s ordinance. (The stores had been underperforming, a Kroger spokesperson told the Los Angeles Times.)

As the Grocers Association has noted, some retailers have continued to provide—and have increased—incentive pay during the epidemic. For instance, Trader Joe’s has provided all hourly, non-managerial workers \$2 per hour in “thank you” pay throughout the pandemic. It announced on Feb. 2 that it will increase this extra pay to \$4 per hour in response to new hazard pay ordinances in California and Washington. (According to a message from the CEOs, workers will forgo their usual \$0.65-\$0.75 annual, permanent raises in 2021, and will receive the extra pay until they “generally . . . are eligible for vaccinations as ‘grocery workers.’”)

E. Potentially Impacted Businesses

Based on an initial review of Business License data, staff estimates there are 18 to 20 grocery store establishments in the city. This includes larger establishments such as Safeway, Costco, Trader Joe’s, Pacific Supermarket, Grocery Outlet, and Smart & Final; and it also includes smaller groceries such as La Tapatia, School House Grocery, Seafood City, and Mike & Ken’s Grocery. The City’s business license program does not have a specific category for groceries, so these establishments are included in several different business categories, such as “Retail General Merchandise.” In addition, the 18-20 grocery stores noted above would not include several types of businesses that can sometimes offer services very similar to groceries, such as retail bakeries, convenience stores, liquor stores, or wholesale produce markets with a retail component.

As discussed below, the proposed ordinance could be constructed to exclude businesses with less than 500 employees nationwide. With such a provision, the ordinance would potentially apply to about eight or nine establishments.

PROPOSED ORDINANCE

At the request of Council, staff has drafted a proposed ordinance using the Oakland ordinance as a base.

- *Rate of Hazard Pay.* The proposed rate of pay is \$4 per hour, in addition to workers' existing hourly base salary. This matches the rate adopted in Long Beach and Montebello; it is \$1 lower than the Oakland's pay and \$1 more than the proposed rate in San Jose.
- *Types of retailers covered.* The proposed ordinance applies only to grocery stores, which are defined as stores that "primarily sell household foodstuffs for offsite consumption." It is unclear whether Costco meets this definition. The proposed ordinance does not follow Montebello's approach (also being considered by Los Angeles County) to include drug stores, as well.
- *Threshold for grocery stores subject to the ordinance.* The proposed ordinance is limited to grocery stores that (1) are over 15,000 square feet in size and located within the geographic limits of the city, and (2) employ 500 or more employees nationwide, regardless of where those employees are employed, or is a franchisee associated with a store that employs more than 500 employees in the aggregate.
- *Enforcement.* Enforcement of the proposed ordinance mirrors the City's minimum wage ordinance, adopted in 2019 and codified in chapter 8.71 of the South San Francisco Municipal Code. This includes a private right of action. (By contrast, the Oakland ordinance includes specific provisions related to enforcement by that city's workplace and employment standards department.)
- *Duration of ordinance.* The duration of the proposed ordinance is tied to the City's status under the state health order. It would require covered employers to pay hazard pay for any period in which the City is within a widespread (purple), substantial (red) or moderate (orange) risk level (or its equivalent), and until the City's risk level returns to minimal (yellow).

FISCAL IMPACT

The potential fiscal impact to the City is unknown. The proposed ordinance does not create any substantive obligations on the City, and staff does not anticipate any additional City staff time or resources are necessary. There would be currently un-estimated litigation costs associated with defending a likely challenge to the ordinance.

RELATIONSHIP TO STRATEGIC PLAN

This effort potentially aligns with Priority #2 which is focused on enhancing quality of life.

CONCLUSION

Should the City Council desire to adopt a hazard pay ordinance for grocery workers within the City, staff recommends City Council adopt the proposed ordinance as an urgency ordinance. In the alternative, staff recommends the City Council consider the proposed ordinance after the scheduled February 19th hearing in the Long Beach lawsuit.