

ORDINANCE NO. NS-XXX

AN UNCODIFIED ORDINANCE OF THE CITY COUNCIL OF
THE CITY OF SANTA ANA ESTABLISHING PREMIUM PAY
AND ASSOCIATED LABOR PROTECTIONS FOR
GROCERY AND RETAIL PHARMACY WORKERS
WORKING IN SANTA ANA

City Attorney Summary

The Ordinance aims to protect and promote the public health, safety, and welfare during the COVID-19 emergency by requiring grocery and retail pharmacy stores to provide premium pay for grocery and retail pharmacy workers performing work in Santa Ana.

WHEREAS, the new coronavirus 19 (“COVID-19”) disease is caused by a virus that spreads easily from person to person and may result in serious illness or death, and is classified by the World Health Organization (“WHO”) as a worldwide pandemic; and

WHEREAS, COVID-19 has broadly spread throughout California and remains a significant health risk to the community, especially members of our most vulnerable populations; and

WHEREAS, on March 4, 2020, California Governor Gavin Newsom proclaimed a state of emergency in response to new cases of COVID-19, directing state agencies to use all resources necessary to prepare for and respond to the outbreak; and

WHEREAS, on March 17, 2020, the City Council approved Resolution No. 2020-016 proclaiming the existence of a local emergency regarding COVID-19 and authorizing the City Manager to exercise the emergency powers necessary to take extraordinary measures to prevent death or injury of persons and to protect the public peace, safety and welfare; and

WHEREAS, on March 19, 2020, California Governor Gavin Newsom issued a “Stay Home – Stay Healthy” proclamation 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. In addition to healthcare, public health and emergency services, the “Stay Home – Stay Healthy” proclamation identified grocery and retail pharmacy 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; and

WHEREAS, on December 3, 2020, Governor Newsom extended the “Stay Home – Stay Healthy” proclamation; and

WHEREAS, on January 25, 2021, Governor Newsom lifted the stay-at-home order, returning California counties back to a “tiered” system; and

WHEREAS, Orange County remains in the most restrictive purple tier, where many non-essential business operations remain closed and the virus widespread; and

WHEREAS, as of February 25, 2021, the WHO Situation Report reported a global total of 112,209,815 confirmed cases of COVID-19, including 2,490,776 deaths; California reported 3,455,361 confirmed cases of COVID-19, including 49,877 deaths; and Santa Ana has reported 43,835 cases of COVID-19, including 688 deaths; and

WHEREAS, grocery and retail pharmacy stores are essential businesses operating in Santa Ana during the COVID-19 emergency, making grocery and retail pharmacy workers highly vulnerable to economic insecurity and health or safety risks; and

WHEREAS, grocery and retail pharmacy workers have been unable to work from home, including those with children engaged in distance learning, and have therefore likely incurred additional childcare expenses; and

WHEREAS, grocery and retail pharmacy workers are essential workers who perform services that are fundamental to the economy and health of the community during the COVID-19 crisis. They work in high risk conditions with inconsistent access to protective equipment and other safety measures; work in public situations with limited ability to engage in physical distancing; and continually expose themselves and the public to the spread of disease; and

WHEREAS, 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; and

WHEREAS, during the early stages of the COVID-19 pandemic, many grocery companies provided premium pay, which was generally implemented as either a temporary hourly wage increase or a one-time bonus, but this practice has either generally been phased out or terminated; and

WHEREAS, grocery and retail pharmacy workers working during the COVID-19 emergency merit additional compensation because they are performing hazardous duty due to the significant risk of exposure to the COVID-19 virus. Grocery and retail pharmacy 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. Additionally, new and potentially more contagious variants of the coronavirus have now been detected in California; and

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

WHEREAS, establishing a requirement for grocery and retail pharmacy stores to provide premium pay to grocery and retail pharmacy workers protects public health, supports stable incomes, and promotes job retention by ensuring that grocery and retail pharmacy 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 emergency; and

WHEREAS, the City Council finds that this Ordinance is necessary for the preservation of public peace, health, and safety of grocery and retail pharmacy workers working in Santa Ana.

NOW, THEREFORE, the City Council of the City of Santa Ana ordains as follows:

Section 1. Incorporation of Recitals. The findings and determinations reflected above are true and correct, and are incorporated by this reference herein as the cause and foundation for the action taken by and through this Ordinance.

Section 2. PREMIUM PAY FOR GROCERY AND RETAIL PHARMACY WORKERS

Purpose.

As a result of the COVID-19 pandemic and the “Stay at Home” order issued by California Governor Gavin Newsom, this Ordinance aims to protect and promote the public health, safety, and welfare during the new coronavirus 19 (“COVID-19”) emergency by requiring grocery and retail pharmacy stores to provide premium pay for grocery and retail pharmacy workers performing work in Santa Ana. Requiring grocery and retail pharmacy stores to provide premium pay to grocery and retail pharmacy workers compensates grocery and retail pharmacy workers for the risks of working during a pandemic. Grocery and retail pharmacy workers face magnified risks of catching and/or spreading the COVID-19 disease because the nature of their work involves close contact with the public, including members of the public who are not showing symptoms of COVID-19 but who can spread the disease. The provision of premium pay better ensures the retention of these essential workers who are on the frontlines of this pandemic providing essential services and who are needed throughout the duration of the COVID-19 emergency. As such, they are deserving of fair and equitable compensation for their work.

Short title.

This Ordinance shall constitute the “Premium Pay for Grocery and Retail Pharmacy Workers Ordinance” and may be cited as such.

Definitions.

For purposes of this Ordinance:

“Adverse action” means reducing the compensation to a designated worker, garnishing gratuities, temporarily or permanently denying or limiting access to work, incentives, or bonuses, offering less desirable work, demoting, terminating, deactivating, putting a designated worker on hold status, failing to rehire after a seasonal interruption of work, threatening, penalizing, retaliating, or otherwise discriminating against a designated worker for any reason prohibited by this Ordinance.

“Adverse action” also encompasses any action by the hiring entity or a person acting on the hiring entity’s behalf that would dissuade a designated worker from exercising any right afforded by this Ordinance.

“Aggrieved party” means a designated worker or other person who suffers tangible or intangible harm due to a hiring entity or other person’s violation of this Ordinance.

“City” means the City of Santa Ana.

“Designated worker” means a grocery worker or retail pharmacy worker employed by a hiring entity who is entitled to premium pay pursuant to this Ordinance.

“Grocery worker” means a worker employed by a hiring entity at a grocery store for hourly compensation, including a worker who has full-time employment, part-time employment, joint employment, temporary employment, or employment through the services of a temporary services or staffing agency.

“Grocery store” means a store that devotes seventy percent (70%) or more of its business to retailing a general range of food products, which may be fresh or packaged, and/or a store that has at least fifteen thousand square feet (15,000 sf) of floor space dedicated to retailing a general range of food products. There is a rebuttable presumption that if a store receives seventy percent (70%) or more revenue from retailing a general range of food products, or if a store has at least fifteen thousand square feet (15,000 sf) of floor space dedicated to retailing a general range of food products, then it qualifies as a grocery store.

“Hiring entity” means a grocery store or retail pharmacy that employs over three hundred (300) workers nationally and employs more than fifteen (15) employees per grocery store location or retail pharmacy location in the City of Santa Ana. For purposes of this section, the number of workers counted toward the national total shall encompass all employees who work for compensation, including employees not covered by this Ordinance.

“Premium pay” means cash compensation owed to a designated worker that is in addition to the worker’s existing base salary, commissions, tips, gratuities, bonuses, or any other form of payment owed to the worker, including, but not limited to, any holiday, overtime, or vacation pay, or other benefits such as additional sick leave pay, retirement contributions, or store discounts.

“Respondent” means a grocery store, retail pharmacy, parent company or any person who is alleged or found to have committed a violation of this Ordinance.

“Retail pharmacy” means a corporate or chain (three or more locations nationally) pharmacy or publicly-traded company that is licensed as a pharmacy by the State of California and that dispenses medications to the general public at retail prices. Such term does not include a pharmacy that dispenses prescription medications to patients primarily through the mail, nursing home pharmacies, long-term care facility pharmacies, hospital pharmacies, clinics, charitable or not-for-profit pharmacies, government pharmacies, or pharmacy benefit managers.

“Retail pharmacy worker” means a worker employed by a hiring entity at a retail pharmacy for hourly compensation, including a worker who has full-time employment, part-time employment, joint employment, temporary employment, or employment through the services of a temporary services or staffing agency.

Designated worker coverage.

For the purposes of this Ordinance, covered designated workers are limited to those who perform work for a hiring entity where the work is performed in the City of Santa Ana.

Hiring entity coverage.

A. For purposes of this Ordinance, hiring entities are limited to those who employ three hundred (300) or more designated workers nationally and employ more than fifteen (15) employees per grocery store or retail pharmacy location in the City of Santa Ana.

B. To determine the number of designated workers employed for the current calendar year:

1. The calculation is based upon the average number per calendar week of designated workers who worked for compensation during the preceding calendar year for any and all weeks during which at least one (1) designated worker worked for compensation. For hiring entities that did not have any designated workers during the preceding calendar year, the number of designated workers employed for the current calendar year is calculated based upon the average number per calendar week of designated workers who worked for compensation during the first ninety (90) calendar days of the current year in which the hiring entity engaged in business.

2. All designated workers who worked for compensation shall be counted, including but not limited to:

(a) Grocery workers and retail pharmacy workers who are not covered by this Ordinance; and

(b) Designated workers who worked in Santa Ana.

Premium pay requirement.

A. Hiring entities shall provide each designated worker with premium pay consisting of an additional four dollars (\$4.00) per hour for each hour worked.

B. Hiring entities shall provide the pay required by this Ordinance for a minimum of one hundred twenty (120) days from the effective date of this Ordinance.

C. If a hiring entity already provides hourly premium pay as of the effective date of this Ordinance, such compensation may be credited towards the additional four dollars per hour of premium pay required by this Ordinance. Accordingly, compliance with this Ordinance may be achieved if a hiring entity provides hourly premium pay in the full amount required by this Ordinance as of the effective date of this Ordinance and for the duration of its effectiveness, provided that all other requirements of this Ordinance are satisfied. In no event shall premium pay provided prior to the effective date of this Ordinance be credited towards the premium pay required by this Ordinance.

D. Unless extended by the City Council, this Ordinance shall expire in one hundred twenty (120) days from its effective date.

Designated worker and consumer protections.

A. No hiring entity shall, as a result of this Ordinance going into effect, take any of the following actions:

1. Reduce a designated worker's compensation compensation by reducing the base wage rate, overtime, holiday or other premium pay rate, hours of work, vacation, pension contributions, or other non-wage benefits of any designated worker, or by increasing charges to any designated worker for parking, uniforms, meals, or other work-related materials or equipment;

2. Limit a designated worker's earning capacity.

B. It shall be a violation if this Ordinance is a motivating factor in a hiring entity's decision to take any of the actions immediately above, unless the hiring entity can prove that its decision to take the action(s) would have happened in the absence of this Ordinance going into effect.

Notice of rights.

A. Hiring entities shall provide covered designated workers with a written notice of rights established by this Ordinance. The notice of rights shall be in a form and manner sufficient to inform designated workers of their rights under this Ordinance. The notice of rights shall provide information on:

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

B. Hiring entities shall provide the notice of rights required by posting a written notice of rights in a location of the grocery store or retail pharmacy location utilized by employees for breaks, and in an electronic format that is readily accessible to the designated workers. The notice of rights shall be made available to the designated workers via smartphone application or an online web portal, in English and any language that the hiring entity knows or has reason to know is the primary language of the designated worker(s).

Hiring entity records.

A. Hiring entities shall retain records that document compliance with this Ordinance for covered designated workers.

B. Hiring entities shall retain the records required above for a period of two (2) years.

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

Retaliation prohibited.

No hiring entity employing a designated worker shall discharge, reduce in compensation, or otherwise discriminate against any designated 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 by any lawful means, or for otherwise asserting rights under this Ordinance.

Violation.

The failure of any respondent to comply with any requirement imposed on the respondent under this Ordinance is a violation.

Remedies.

A. The payment of unpaid compensation, liquidated damages, civil penalties, penalties payable to aggrieved parties, fines, and interest provided under this Ordinance is cumulative and is not intended to be exclusive of any other available remedies, penalties, fines, and procedures.

B. A respondent found to be in violation of this Ordinance for retaliation prohibited by this Ordinance shall be subject to any appropriate relief at law or equity including, but not limited to reinstatement of the aggrieved party, front pay in lieu of reinstatement with full payment of unpaid compensation plus interest in favor of the aggrieved party under the terms of this Ordinance, and liquidated damages in an additional amount of up to twice the unpaid compensation.

Private right of action.

Any covered designated worker that suffers financial injury as a result of a violation of this Ordinance, or is the subject of retaliation prohibited by this Ordinance, may bring a civil action in a court of competent jurisdiction against the hiring entity or other person violating this Ordinance and, upon prevailing, may be awarded reasonable attorney's 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 plus interest due to the person and liquidated damages in an additional amount of up to twice the unpaid compensation; and a reasonable penalty payable to any aggrieved party if the aggrieved party was subject to prohibited retaliation.

Encouragement of more generous policies.

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

B. Nothing in this Ordinance shall be construed as diminishing the obligation of a hiring entity to comply with any contract or other agreement providing more generous protections to a designated worker than required by this Ordinance.

Other legal requirements.

This Ordinance provides minimum requirements for premium pay while working for a hiring entity 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 premium pay, or that extends other protections to designated workers; and 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 designated worker's right to pursue any other remedies at law or equity for violation of their rights.

Severability.

The provisions of this Ordinance are declared to be separate and severable. If any clause, sentence, paragraph, subdivision, section, subsection, or portion of this Ordinance, or the application thereof to any hiring entity, designated worker, person, or circumstance, is held to be invalid, it shall not affect the validity of the remainder of this Ordinance, or the validity of its application to other persons or circumstances.

Exemption for collective bargaining agreement.

All of the provisions of this Ordinance, or any part thereof, may be expressly waived in a collective bargaining agreement, but only if the waiver is explicitly set forth in the agreement in clear and unambiguous terms. Unilateral implementation of terms and conditions of employment by either party to a collective bargaining relationship shall not constitute a waiver of all or any of the provisions of this Ordinance.

No waiver of rights.

Except for a collective bargaining agreement provision made pursuant to this Ordinance, any waiver by a designated worker of any or all provisions of this Ordinance shall be deemed contrary to public policy and shall be void and unenforceable. Other than in connection with the bona fide negotiation of a collective bargaining agreement, any request by a hiring entity to a designated worker to waive rights given by this Ordinance shall be a violation of this Ordinance.

Section 3. CEQA. The City Council determines that the adoption of this Ordinance is exempt from environmental review under the California Environmental Quality Act ("CEQA") pursuant to the following provisions of the CEQA Guidelines, 14 California Code of Regulations, Chapter 3: this Ordinance is exempt under CEQA Guidelines Section 15378(b)(5) in that it is not a "project" under CEQA, and will not result in direct or indirect physical changes in the environment.

Section 4. Severability. If any section or provision of this Ordinance is for any reason held to be invalid or unconstitutional by any court of competent jurisdiction, or contravened by reason of any preemptive legislation, the remaining sections and/or provisions of this Ordinance shall remain valid. The City Council hereby declares that it would have adopted this Ordinance, and each section or provision thereof, regardless of the fact that any one or more section(s) or provision(s) may be declared invalid or unconstitutional or contravened via legislation.

Section 5. Adoption, Certification, and Publication. The Clerk of the Council shall certify the adoption of this Ordinance and shall cause the same to be published as required by law.

ADOPTED this _____ day of _____, 2021.

Vicente Sarmiento
Mayor

APPROVED AS TO FORM:
Sonia R. Carvalho, City Attorney

By: John M. Funk
John M. Funk
Sr. Assistant City Attorney

AYES: Councilmembers _____

NOES: Councilmembers _____

ABSTAIN: Councilmembers _____

NOT PRESENT: Councilmembers _____

CERTIFICATE OF ATTESTATION AND ORIGINALITY

I, Daisy Gomez, Clerk of the Council, do hereby attest to and certify the attached Ordinance No. NS-XXX to be the original ordinance adopted by the City Council of the City of Santa Ana on _____, and that said ordinance was published in accordance with the Charter of the City of Santa Ana.

Date: _____

Clerk of the Council
City of Santa Ana