

ORDINANCE NO. 21-1
AN URGENCY ORDINANCE ESTABLISHING HAZARD PAY
FOR GROCERY STORE RETAIL WORKERS

RECITALS

WHEREAS, the COVID-19 pandemic has led to the current state of emergency in local emergency in the City of Concord (“City”).

WHEREAS, on March 10, 2020, due to the COVID-19 pandemic, the Contra Costa County Board of Supervisors proclaimed the existence of a local emergency throughout Contra Costa County (County Resolution No. 2020/92). On March 13, 2020, the Director of Emergency Services of the City of Concord, designated as the City Manager, proclaimed a local emergency, which the City Council of the City of Concord (“City Council”) ratified via Resolution No. 20-12 on March 19, 2020 (“City Emergency Order”).

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 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 Governor Newsom extended the “Safer at Home” emergency order on December 3, 2020 as a result of the critically low availability of Intensive Care Unit beds.

WHEREAS, 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; as of March 9, 2021, there have been over 524,000 deaths due to COVID-19 across the country, including 125 in the City of Concord and 712 in Contra Costa County.

WHEREAS, the virus is spreading rapidly across the region with many clusters arising within grocery retail stores. Grocery retail stores remain a critical piece of infrastructure in the fight against the COVID-19 virus and in protecting the City’s food supply chain.

WHEREAS, grocery retail stores are the primary points of distribution for food and other daily necessities for the residents of the City of Concord and are therefore essential to the vitality of our community.

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

WHEREAS, grocery retail 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 turnover, inability to pay for housing and increased childcare costs as a result of school closures and other necessities could become an immediate problem for certain grocery retail workers if they are not given immediate financial relief.

WHEREAS, according to an October 29, 2020 study published in the journal Occupational and Environmental Medicine, a comprehensive test of workers at one grocery store resulted in 20 percent of grocery retail workers testing positive for COVID-19, even though three of four workers were asymptomatic.

WHEREAS, according to an August 2020 article in The Washington Post, at least 130 U.S. grocery retail workers had died from COVID-19, and more than 8,200 have tested positive for the virus.

WHEREAS, according to a January 2021 article in The Washington Post, the United Food and Commercial Workers estimates 109 of its members have died to from COVID-19 and more than 20,000 have tested positive.

WHEREAS, despite the efforts of grocery stores to take precautions and keep customers and employees safe, including requiring masks, social distancing, and sanitizing cash registers, food conveyor belts, and shopping carts, there have been highly publicized outbreaks of COVID-19 among grocery retail workers in the San Francisco Bay Area, and the health threats that these grocery retail workers face cannot be overstated.

WHEREAS, grocery retail workers face increased exposure risk due to inability to consistently practice physical distancing in the workplace, with a November 2020 Brookings Institution analysis¹ reporting that grocery retail workers with direct customer exposure were five times more likely to test positive for the COVID-19 virus than those employees without such exposure.

WHEREAS, the United States' largest grocery retail companies have earned record profits during the pandemic, and this increase in profit has not transferred to workers, according to the above-referenced Brookings Institution analysis.

WHEREAS, 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 grocery retail workers.

WHEREAS, Hero Pay has generally phased out or terminated; however, according to the Brookings Institute, the top grocery retail companies earned on average an extra \$16.7 billion in profit in 2020 compared to 2019.

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.

WHEREAS, grocery 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, have been working under these hazardous conditions for months, 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.

WHEREAS, establishing an immediate requirement for grocery stores to provide premium pay to grocery retail workers protects public health, supports stable incomes, and promotes job retention by ensuring that grocery retail workers are compensated for the substantial risks, efforts,

¹ Kinder, Molly; Stater, Laura; Du, Julia. "Windfall profits and deadly risks: How the biggest retail companies are compensating essential workers during the COVID-19 pandemic." The Brookings Institution. <https://www.brookings.edu/essay/windfall-profits-and-deadly-risks/> (date of access: 3/10/2021).

and expenses they are undertaking to provide essential services in a safe and reliable manner during the COVID-19 pandemic.

WHEREAS, this Ordinance is a temporary Hazard Pay ordinance intended to compensate certain grocery retail workers at high risk of COVID-19 infection within the workplace during the COVID-19 pandemic outbreak, and thus to serve the public peace, health, safety, and public welfare.

WHEREAS, to protect the food supply chain and the public health and safety, the City of Concord must take steps to guard against turnover and ensure that grocery stores in Concord have well-trained, consistent, and stable staffing.

WHEREAS, Government Code Section 36937 authorizes the adoption of an urgency ordinance for the “immediate preservation of public peace, health or safety,” as long as such ordinance contains a declaration of the facts constituting the urgency and it is passed by a four-fifths (4/5) vote of the City Council; and

WHEREAS, for reasons set forth above, this Ordinance is declared by the City Council to be necessary for preserving the public peace, health, safety, welfare and to avoid a current, immediate and direct threat thereto, and the recitals above taken together constitute the City Council’s statements of the reasons constituting such necessity and urgency; and

WHEREAS, by the staff report, public testimony, and documentary evidence presented at the February 2, 2021 regular City Council meeting, the City Council referred the issue to the Policy Development and Internal Operations Committee (PD&IO); and the PD&IO Committee met on February 12, 2021 and March 2, 2021 to discuss the issue, took public comment, and formulated a recommendation for consideration by the City Council.

WHEREAS, by the staff report, public testimony, and documentary evidence presented at the March 30, 2021 special City Council meeting, the City Council has been provided with information upon which the findings and actions set forth in this Ordinance is based.

THE CITY COUNCIL OF THE CITY OF CONCORD DOES ORDAIN AS FOLLOWS:

SECTION 1. Recitals. The City Council finds and determines that the foregoing recitals to be true and correct and hereby incorporates them into this Ordinance.

SECTION 2. CEQA. Adoption of this Ordinance is exempt from review under the California Environmental Quality Act (“CEQA”) pursuant to the following, each a separate and independent basis: California Public Resources Code Section 21080(b)(4) and CEQA Guidelines Section 15269(c) because adoption of this Ordinance is to prevent or mitigate an emergency; CEQA Guidelines Section 15061(b)(3) because it because this Ordinance only regulates evictions and rents and it can be seen with certainty that is no potential for it to cause a significant effect on the environment; CEQA Guidelines Section 15183 because this Ordinance is consistent with the City’s General Plan policies and goals and/or CEQA Guidelines Section 15378(b) because this Ordinance is not a project but an administrative action that will not result in direct or indirect physical changes to the environment.

SECTION 3. Authority; Term; Extension. This Ordinance is enacted pursuant to the City of Concord’s general police powers, Section 7 of Article XI of the California Constitution, and California Government Code Sections 8634, 36934 and 36937, the Governor’s Proclamation of a State Emergency dated March 4, 2020, City Emergency Order, and any other rights or obligations under local, Contra Costa County, State of California, and Federal law, including the State and federal constitutions. This Ordinance is effective immediately and shall expire as set forth in Section 8(b) (Duration of Hazard Pay). All references to the “term” of this Ordinance shall mean the effective date hereof through the expiration hereof as set forth in Section 8(b) (Duration of Hazard Pay).

SECTION 4. Title and Purpose.

a. This Ordinance shall be known as the “Grocery Retail Worker Hazard Pay Ordinance.” Large Grocery Stores are a vibrant and integral part of the public infrastructure during the ongoing pandemic.

b. The grocery retail workers of Concord have continued to report to work and to serve their communities in the face of an unprecedented pandemic. Each day these workers risk their lives and the health of their families without any extra benefits or wages in order to keep the food supply chain operating.

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c. The purpose of this Ordinance is to justly compensate grocery retail workers for the clear and present dangers of doing their jobs as essential workers during the pandemic by requiring their employers to provide hazard pay. The City has an interest in ensuring the welfare of its workers and the continued operation of its food supply chain.

d. Through this Ordinance, the City seeks to sustain the stability of the food and health supply chain through supporting the grocery retail workers who continue to work during the pandemic.

SECTION 5. Definitions. The following shall apply to this Ordinance:

“**Base Wage**” shall mean the hourly wage paid to Covered Employees as of the effective date of this Ordinance less Hazard Pay owed under this Ordinance or other premium hourly rate already paid to compensate Covered Employees for working during the pandemic (referred to herein as “employer-initiated hazard pay”).

“**City**” shall mean the City of Concord.

“**Covered Employer**” shall mean:

a. Any Person who (a) directly or indirectly or through an agent or any other Person owns or operates a Large Grocery Store and employs or exercises control over the wages, hours or working conditions of any Covered Employee; and (b) employs 300 or more employees nationwide regardless of where those employees are employed, or is a Franchisee associated with a Franchisor or a network of Franchises with Franchisees that employ more than 300 employees in the aggregate, regardless of where those employees are employed.

b. To determine the number of employees, the calculation shall be based upon:

1. The actual number per calendar week of employees who worked for compensation during the pay period preceding the effective date of this Ordinance; and

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

i. Employees who are not covered by this Ordinance;

ii. Employees who worked within the geographic limits of the City;

- iii. Employees who worked outside the geographic limits of the City; and
- iv. 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 or similar entity.

“**Covered Employee**” shall mean any person who: (a) in a calendar week performs at least two hours of work within the geographic boundaries of the City for a Covered Employer; and (b) qualifies as an employee entitled to payment of a minimum wage from any employer under the California minimum wage law, as provided under Section 1197 of the California Labor Code and wage orders published by the California Industrial Welfare Commission, and the City of Concord’s Minimum Wage Ordinance. It is a Covered Employer’s responsibility to demonstrate, through factual support and accompany evidence that a Complainant can understand, whether or not certain employees do not qualify as Covered Employees (“**Coverage Records**”).

“**Franchise**” means a written agreement by which: (a) 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 affiliates; and (b) the operation of the business is substantially associated with a trademark, service mark, tradename, advertising, or other commercial symbol; designating, owned by, or licensed by the grantor or its affiliate; and (c) the Person pays, agrees to pay, or is required to pay, directly or indirectly, a Franchise fee.

“**Franchisee**” means a Person to whom a Franchise is offered or granted.

“**Franchisor**” means a Person who grants a franchise to another Person.

“**Holiday Premium**” shall mean the hourly wage paid to Covered Employees for performing work during a holiday or holiday season.

“**Hazard Pay**” shall mean an additional \$5.00 per hour wage bonus in addition to the Covered Employee’s Base Wage or Holiday Premium wage for each hour worked for any pay period during the duration of this Ordinance.

“**Hours Worked**” means the time during which a Covered Employee is subject to the control of a Covered Employer, including all the time the employee is suffered or permitted to work, and on-

call (California Code of Regulations, Title 8, Section 11040).

“**Person**” shall mean 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.

“**Large Grocery Store**” shall mean a retail grocery store located within the geographic limits of the City of Concord that is operated by a Covered Employer and sells primarily 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 and/or prepared foods. Other household supplies or other products shall be secondary to the primary purpose of foodsales. This definition expressly excludes convenience stores or food marts primarily engaged in retailing a limited line of goods that generally includes milk, bread, soda, and snacks; and further excludes membership based stores, club stores, and certified farmers’ markets.

“**Retaliatory Action**” shall mean the discharge, suspension, demotion, penalization, lowering of the Base Wage or Holiday Premium wage, or discrimination or any other adverse action against a Covered Employee with respect to the terms and conditions of the Covered Employee’s employment, for opposing any practice proscribed by this Ordinance, for participating in proceedings related to this Ordinance, for seeking to enforce their rights under this Ordinance by any lawful means, or for otherwise asserting rights under this Ordinance.

SECTION 6. Payment of Hazard Pay To Covered Employees.

a. Hazard Pay. Covered Employers shall pay Covered Employees a wage of no less than the premium hourly rate set under the authority of this Ordinance. The premium hourly rate for each Covered Employee shall be the Hazard Pay per hour for all hours worked on top of the Covered Employee’s Base Wage or Holiday Premium Wage, whichever is applicable at the time of hours worked. The Hazard Pay rate shall not include compensation already owed to Covered Employees, Holiday Premium rates, gratuities, service charge distributions, or other bonuses. Covered Employers providing employer-initiated hazard pay will be credited for doing so in accordance with Sections 5 (Definitions) and 11 (Credit For Employer-Initiated Hazard Pay).

b. Duration of Hazard Pay. Covered Employers shall pay Hazard Pay to all Covered Employees for any pay period for a minimum of 120 days from the effective date of this Ordinance, i.e., during which the City of Concord is within a Widespread (purple), Substantial (red) or Moderate (orange) Risk Level, or until such time as risk levels return to Minimal (yellow) under State Health Orders, whichever is later.

SECTION 7. Notice and Posting. Every Covered Employer shall post in a conspicuous place at any workplace or job site where any Covered Employee works, a notice informing Covered Employees of their rights under this Ordinance. Every Covered Employer shall post notices in the top three languages spoken in Concord as determined by the last U.S. Census. Every Covered Employer shall provide each Covered Employee at the time this Ordinance becomes effective or at the time of hire, whichever is later, the Covered Employer and owner or manager's name; address; telephone number; and whether it is part of a chain, integrated enterprise, or Franchise associated with a Franchisor or network of Franchises. If the information the Covered Employer provided to the Covered Employee changes, the Covered Employer shall provide the updated information in writing within ten days of the change.

SECTION 8. Retaliation Prohibited. It shall be unlawful for a Covered Employer or any other party to discriminate in any manner or take adverse action against any Covered Employee in retaliation for exercising rights protected under this Ordinance. Rights protected under this Ordinance include, but are not limited to the right to file a complaint or inform any person about any party's alleged noncompliance with this Ordinance; and the right to inform any person of their potential rights under this Ordinance and to assist him or her in asserting such rights.

SECTION 9. Records. Covered Employers shall keep records necessary to demonstrate compliance with this Ordinance, including but not limited to payroll records that specify the amount of compensation paid to employees under Sections 6 (Payment of Hazard Pay To Covered Employees) and 7 (Notice and Posting) of this Ordinance and Coverage Records. Covered Employers shall retain such records at the place of employment or in a central records office for a period of four years, and shall allow the Complainant access to such records, with appropriate notice

and at a mutually agreeable time, to monitor compliance with the requirements of this Ordinance. When an issue arises as to a Covered Employer's compliance with this Ordinance, if the Covered Employer does not maintain or retain adequate records documenting compliance or does not allow the Complainant reasonable access to such records within 30 days of the Complainant's request, it shall be presumed that the Covered Employer has violated the Ordinance, absent clear and convincing evidence otherwise.

SECTION 10. Covered Employee Remedies for Violations.

a. Damages and Restitution. Every Covered Employer who violates this Ordinance, or any portion thereof shall be liable to the Covered Employee whose rights were violated for any and all relief, including, but not limited to:

1. Legal and equitable relief including but not limited to reinstatement, rescission, the payment of Hazard Pay unlawfully withheld, and the payment of all penalties and fines imposed pursuant to other provisions of this Ordinance or State law. For retaliatory action by the Covered Employer, the Covered Employee shall be entitled to a trebling of lost wages and penalties owed in addition to reinstatement.

2. Interest on all due and unpaid wages at the rate of interest specified in California Civil Code Section 3289(b)², which shall accrue from the date that the wages were due and payable as provided in California Labor Code Division 2 Part 1 (commencing with Section 200³) to the date the wages are paid in full.

b. Civil Enforcement. Any Covered Employee (or any employee who in good faith asserts they are a Covered Employee despite their employer's assertion to the contrary) aggrieved by a violation of this Ordinance or any other person or entity acting on behalf of the public as provided

² Cal Civ. Code §3289: (a) Any legal rate of interest stipulated by a contract remains chargeable after a breach thereof, as before, until the contract is superseded by a verdict or other new obligation. (b) If a contract entered into after January 1, 1986, does not stipulate a legal rate of interest, the obligation shall bear interest at a rate of 10 percent per annum after a breach. For the purposes of this subdivision, the term contract shall not include a note secured by a deed of trust on real property.

³ Labor Code § 200. As used in this Ordinance: (a) "Wages" includes all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation. (b) "Labor" includes labor, work, or service whether rendered or performed under contract, subcontract, partnership, station plan, or other agreement if the labor to be paid for is performed personally by the person demanding payment.

for under applicable law, may institute a civil proceeding for injunctive relief, money damages, and whatever other relief the court deems appropriate. The remedy available under this Section shall be in addition to any other existing remedies which may be available under local, state or federal law. A Covered Employee (or any employee who in good faith asserts they are a Covered Employee despite their employer's assertion to the contrary), upon prevailing, shall be entitled to such legal or equitable relief as may be appropriate to remedy the violation including but not limited to monies to be paid pursuant to this Ordinance, back pay, reinstatement, rescission, and reasonable attorneys' fees and costs. Any other person or entity enforcing this Ordinance on behalf of the public as provided for under applicable, upon prevailing, shall be entitled only to equitable, injunctive and/or restitutionary relief, and reasonable attorneys' fees and costs. The foregoing are individually and collectively referred to herein as "**Complainant.**" Nothing in this Ordinance shall be interpreted as restricting, precluding, or otherwise limiting a separate or concurrent criminal prosecution under applicable law. Jeopardy shall not attach as a result of any administrative or civil enforcement action taken pursuant to this Ordinance.

SECTION 11. Credit for Covered Employer-Initiated Hazard Pay.

a. Any Covered Employer already providing a premium hourly rate to compensate Covered Employees for working during the pandemic (hereinafter "employer- initiated hazard pay") shall be credited against the Hazard Pay for the hourly amount paid to each Covered Employee (e.g. a Covered Employer offering a \$2.00 per hour employer-initiated hazard pay pays an additional \$3.00 per hour in Hazard Pay per this Ordinance). Such Covered Employer must demonstrate that, as of the effective date of this Ordinance and in any subsequent covered pay periods, all Covered Employees are receiving such employer-initiated hazard pay. 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. Nothing herein shall be interpreted to prohibit any employer from maintaining or offering additional employer- initiated hazard pay that is more than the Hazard Pay amount.

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b. To receive credit for employer-initiated hazard pay policies, Covered Employers must offer the following showings of proof to the Complainant:

1. A copy of the Covered Employer's employer- initiated hazard pay policy.

2. A concise statement explaining Covered Employees' hourly base wages, hourly Holiday Premiums, hourly employer-initiated hazard pay, and any other wage bonuses received during the last 12 months.

3. Evidence that, since the effective date of the Ordinance and for so long as this Ordinance is applicable, each and every Covered Employee has received employer-initiated hazard pay.

4. Evidence that allows the Complainant to review for compliance by assessing wages for the past 12 months and that is itemized in such a way that the Complainant can understand a Covered Employee's Base Wage distinguished from Holiday Premiums and other bonuses or pay increases that are separate and distinct from employer-initiated hazard pay. Accepted evidence of employer-initiated hazard pay wage described in this Section (b)(4) includes a spreadsheet, of all Covered Employees and their wages for each pay period for the last 12 months, which allows the Complainant to distinguish Base Wage from Holiday Pay and other bonuses or pay increases that are separate and distinct from employer-initiated hazard pay (provided, however, that the foregoing does not exempt any Covered Employer from maintaining, and providing access to, the underlying payroll records described above.

5. Any offer of proof under subparagraph (b) shall be accompanied by a written acknowledgement that it was so submitted under penalty of perjury.

SECTION 12. Waiver Through Collective Bargaining. To the extent required by Federal law, all or any portion of the applicable requirements of this Ordinance may be waived in a bona fide collective bargaining agreement, employment agreement, or similar agreement, provided that such waiver is explicitly set forth in such agreement in clear and unambiguous terms. Nothing in this Ordinance is intended or shall be construed to affect substantive labor standards under the National Labor Relations Act, or interfere with existing collective bargaining agreements, employment

agreements, or similar agreements.

SECTION 13. Severability. If any section, subsection, sentence, clause or phrase of this Ordinance is for any reason held by a court of competent jurisdiction to be invalid, such decision shall not affect the validity of the remaining portions of this Ordinance. The City Council 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 section, subsection, sentence, clause, or phrase be declared invalid.

SECTION 14. Codification. This Ordinance is effective immediately pursuant to Government Code Section 36937(b) and shall NOT be codified.

AYES: Councilmembers - D. Aliano, E. Birsan, L. Hoffmeister, C. Obringer, T. McGallian

NOES: Councilmembers - None

ABSTAIN: Councilmembers - None

ABSENT: Councilmembers - None

I HEREBY CERTIFY that the foregoing is a true and correct copy of an Ordinance duly and regularly introduced, passed, and adopted by the City Council of the City of Concord, California.



Joelle Fockler, MMC
City Clerk