

INTRODUCED BY COUNCIL PRESIDENT BAS AND  
COUNCIL MEMBER GALLO

**DRAFT**

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CITY ATTORNEY’S OFFICE

# OAKLAND CITY COUNCIL

## ORDINANCE NO. \_\_\_\_\_ C.M.S.

**EMERGENCY ORDINANCE (1) ADDING CHAPTER 5.96 TO THE OAKLAND MUNICIPAL CODE TO REQUIRE LARGE GROCERY STORES IN OAKLAND TO PAY EMPLOYEES AN ADDITIONAL FIVE DOLLARS (\$5.00) PER HOUR IN HAZARD PAY DURING THE NOVEL CORONAVIRUS (COVID-19) PANDEMIC AND (2) AMENDING CHAPTER 2.44 OF THE OAKLAND MUNICIPAL CODE TO INCLUDE ENFORCEMENT OF EMERGENCY HAZARD PAY TO GROCERY EMPLOYEES AS PART OF THE DUTIES OF THE DEPARTMENT OF WORKPLACE AND EMPLOYMENT STANDARDS**

**WHEREAS**, on March 19, 2020, the California State Public Health Officer, designated specific sectors and their workers, including grocery stores, as Essential Critical Infrastructure Workers (“essential workers”) to ensure the “continuity of functions critical to public health and safety, as well as economic and national security;” and

**WHEREAS**, since the beginning of the COVID-19 pandemic, grocery workers in the City of Oakland have continued to report to work and serve their communities, despite the ongoing hazards and danger of being exposed to and infected by the novel coronavirus, helping to ensure individuals throughout the City of Oakland have had access to the food they need during this pandemic; and

**WHEREAS**, grocery workers are not highly paid, and according to an August 2020 article in *The Washington Post*, at least 130 U.S. grocery workers have died from COVID-19, and more than 8,200 have tested positive for the virus; and

**WHEREAS**, essential grocery workers cannot choose to work from home--they must come to work to do their jobs, which involve heightened risk of exposure and infection of COVID-19 through substantial interaction with customers on an ongoing basis and indoors where there is less air circulation; and

**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 store employees in the City of Oakland, and the health threats that these grocery workers face cannot be overstated; and

**WHEREAS**, Latinos comprise about 40% of California’s population but 54.9% of positive cases, according to state data as of January 20, 2021, and according to health experts, one of the main reasons Latinos are especially vulnerable to COVID-19 is because many work in jobs deemed “essential,” that require them to leave home and interact with the public, many in the retail food industry, which includes grocery stores; and

**WHEREAS**, United Food and Commercial Workers (“UFCW”) Locals in Northern California, which represent grocery workers, report that over 700 grocery workers in their ranks have tested positive with COVID-19, and members of their union have been hospitalized or have died from the coronavirus; and

**WHEREAS**, we are now in the height of the pandemic with a stay at home order in many regions of the state, including the Bay Area region, where ICU capacity is below fifteen (15) percent, and we are a long way from minimal risk where there would be one (1) daily new case per 100,000 or less than two (2) percent positivity; and

**WHEREAS**, the City of Oakland recognizes that essential grocery workers must be justly compensated for the clear and present dangers of doing their jobs during the pandemic, and increases in wages result in more money being spent to stimulate our local economy; and

**WHEREAS**, the United States’ top grocery retail companies have earned record-breaking profits during the pandemic, and this increase in profit has not transferred to workers, according to a Brookings Institution analysis published in November 2020; and

**WHEREAS**, the City of Oakland has recently adopted ordinances to address COVID-19-related protections for workers, including Emergency Paid Sick Leave; and

**WHEREAS**, the City of Oakland has adopted wage and employment ordinances specific to employment sectors in the past; and

**WHEREAS**, there are numerous large grocery chains operating in Oakland that employ workers in Oakland, and have at least 500 employees nationwide, with workers who are facing the hazards of COVID-19 in the workplace every day; and

**WHEREAS**, on January 17, 2021, the California Department of Public Health reported another COVID-19 variant that had grown more common across the state since December, with worrisome signs that this variant may be highly transmissible; and

**WHEREAS**, in December 2020 and January 2021, a growing list of cities across California, including Berkeley, Los Angeles, Long Beach, San Jose, and San Leandro began announcing legislation for hazard pay for essential grocery workers during the period where counties are in the Purple, Red, or Orange level of Community Transmission for COVID-19 under State Health orders; and

**NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF OAKLAND DOES ORDAIN AS FOLLOWS:**

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

**SECTION 2. Emergency Need.** In accordance with Section 213 of the Oakland City Charter, the City Council finds and declares that adoption of this Emergency Ordinance is necessary for preserving the public peace, health and safety for the following reasons:

- A. The COVID-19 pandemic has led to the current state of emergency in California.
- B. Governor Newsom issued the “Safer at Home” emergency order on December 3, 2020 as a result of the critically low availability Intensive Care Unit (“ICU”) beds. The City of Oakland is currently operating at maximum capacity in its ICUs.
- C. The virus is spreading rapidly across the region with many clusters arising within retail stores. Grocery stores remain a critical piece of infrastructure in our fight against the COVID-19 virus and in protecting the food supply chain.
- D. Grocery stores are the primary points of distribution for food and other daily necessities for the residents of the City of Oakland and are therefore essential to the vitality of our community.
- E. 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 workers if they are not given relief.
- F. To protect the food supply chain and the public health and safety, the City of Oakland must take steps to guard against turnover and ensure that large grocery stores in Oakland have well-trained, consistent and stable staffing.

**SECTION 3. Effective Date.** This Ordinance shall take effect immediately if adopted in accordance with Section 216 of the Oakland City Charter.

**SECTION 4. Emergency Grocery Worker Hazard Pay Sunset.** Section 5 of this Ordinance shall remain in effect during any period the City of Oakland is within a Widespread (purple), Substantial (red) or Moderate (orange) Risk Level and shall become ineffective during any period when the Risk Level in the City of Oakland returns to Minimal (yellow) under State of California Health Orders.

**SECTION 5. Emergency Grocery Worker Hazard Pay.** A new Chapter 5.96 is added to the Oakland Municipal Code as follows:

**5.96.010. Title.**

This Chapter shall be known as the "Grocery Worker Hazard Pay Emergency Ordinance."

**5.96.020 – Authority.**

This Chapter is adopted pursuant to the powers vested in the City of Oakland under the laws of the State of California, including, but not limited to, the police powers vested in the City pursuant to Article XI, Section 7 of the California Constitution, California Labor Code section 1205 (b), and the Charter of the City of Oakland.

**5.96.030. Definitions.**

The definitions set forth in this Section shall govern the construction and meaning of the terms used in this Chapter:

- A. "Base Wage" means the hourly wage paid to Covered Employees as of the effective date of this Chapter less Hazard Pay owed under this Ordinance or any other premium hourly rate already paid to compensate Covered Employees for working during the pandemic (referred to herein as "employer-initiated hazard pay").
- B. "City" means the City of Oakland.
- C. "Covered Employee" means any individual who 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 who works in a Large Grocery Store on either a full-time or part-time basis.
- D. "Covered Employer" means 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 500 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 500 employees in the aggregate, regardless of where those employees are employed. To determine the number of employees employed by a Large Grocery Store, the calculation shall be based upon:
  - a. The actual number of employees who worked for compensation during the two workweeks preceding the effective date of this Chapter; and

- b. All employees who worked for compensation shall be counted, including but not limited to:
  - i. Employees who are not covered by this Chapter;
  - 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.
  
- E. “Employer-Initiated Hazard Pay” means a premium hourly rate to compensate Covered Employees for the hardships and/or risks associated with working during the COVID-19 pandemic. If a Covered Employer pays such Employer–Initiated Hazard pay on a flat rate basis, the premium hourly rate is derived by dividing the flat rate payment for a workweek by the number of hours worked in the workweek.
  
- 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 affiliates; and
  - 2. 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
  - 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. “Hazard Pay” means an additional \$5.00 per hour wage bonus in addition to each Covered Employee’s Base Wage or Holiday Premium wage for each hour worked within the City.
  
- J. “Holiday Premium” means the hourly wage paid to Covered Employees for performing work during a holiday or holiday season.

- K. "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.
- L. "Large Grocery Store" means a retail or wholesale store that is over 15,000 square feet in size, that is located within the geographic limits of the City, and that 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, or prepared foods. Other household supplies or other products shall be secondary to the primary purpose of food sales.
- M. "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.
- N. "Retaliatory Action" shall have the same meaning as "Retaliation" as defined in Section 5.92.050 of the Oakland Municipal Code.

**5.96.040. 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 Chapter. The premium hourly rate for each Covered Employee shall be an additional five dollars (\$5.00) per hour for all hours worked at a Large Grocery Store on top of the Covered Employee's Base Wage or Holiday Premium, whichever 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.
- B. Credits. Covered Employers providing employer-initiated hazard pay will be credited for doing so in accordance with Section 5.96.050.
- C. Duration of Hazard Pay. Covered Employers shall pay Hazard Pay to all Covered Employees for any pay period during which the City of Oakland is within a Widespread (purple), Substantial (red) or Moderate (orange) Risk Level, and until such time as Risk Levels return to Minimal (yellow) under State Health Orders.

**5.96.050. Credit for Employer-Initiated Hazard Pay.**

- A. Employer-Initiated Hazard Pay shall be credited against the five dollars (\$5.00) per hour for the hourly amount paid to each Covered Employee (e.g., A Covered Employer offering two dollars (\$2.00) per hour in Employer-Initiated Hazard Pay owes an additional three dollars (\$3.00) per hour in Hazard Pay per this Chapter.) To receive credit for paying a Covered Employee Employer-Initiated Hazard Pay, a Covered Employer must demonstrate that, as of the effective date of this Chapter and in any subsequent covered workweeks, the Covered Employer paid such Employer-

Initiated Hazard Pay to the Covered Employee. 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 paying more than five dollars (\$5.00) per hour in Hazard Pay.

- B. Covered Employers must, upon request, immediately provide the following to the Department of Workplace and Employment Standards to receive credit for Employer-Initiated Hazard Pay:
1. A copy of the Employer's Hazard Pay policy; and
  2. A statement, provided under penalty of perjury, explaining Covered Employees' hourly Base Wages, hourly Holiday Premiums, hourly employer-initiated hazard pay, and any other wage bonuses received during the last twelve (12) all months; and
  3. For any Covered Employee(s) as to whom a Covered Employer seeks credit for Employer-Initiated Hazard Pay, documentation reflecting that such payments were made, for each hour claimed; and
  4. Documentation that allows the City to review for compliance by assessing wages for the past twelve (12) months and that is itemized in such a way that the City 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.
    - a. The following constitutes acceptable evidence of employer-initiated hazard pay described in Subsection (B)(4): A spreadsheet, of all Covered Employees and their wages for each pay period for the last twelve (12) months, that allows the City to distinguish Base Wage from Holiday Pay and other bonuses or pay increases that are separate and distinct from employer-initiated hazard pay.
    - b. Production of the evidence described in Subsection (B)(4)(a) does not exempt any Covered Employer from maintaining, and providing access to, the underlying payroll records described in this Section and in Oakland Municipal Code Section 5.92.050(C).
- C. Any offer of proof under subsection shall be accompanied by a written acknowledgment that it was submitted under penalty of perjury.

**5.96.060. Waiver**

The provisions of this chapter may not be waived by agreement between an individual Covered Employee and a Covered Employer. All the provisions of this Chapter, 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.

**5.96.070. Prohibitions.**

It shall be unlawful for a Covered Employer or any other Person to interfere with, restrain or deny the existence of, or the attempt to exercise, any rights protected under this Chapter.

- A. Employers shall not take Retaliatory Action or discriminate against any employee or former employee because the individual has exercised rights protected under this Chapter. Such rights include, but are not limited to, the right to request Hazard Pay pursuant to this Chapter; the right to file a complaint with the City or inform any person about an employer's alleged violation of this Chapter; the right to participate in an investigation, hearing or proceeding or cooperate with or assist the City in its investigations of alleged violations of this Chapter, and the right to inform any person of their rights under this Chapter. Protections of this Chapter shall apply to any employee who mistakenly, but in good faith, alleges noncompliance with this Chapter. Taking adverse action against an employee, including lowering an employee's Base Wage or Holiday Premium Wages or reducing work hours, within 90 days of the employee's exercise of rights protected under this Chapter shall raise a rebuttable presumption of having done so in retaliation for the exercise of such rights.

**5.96.080. Enforcement**

The provisions related to enforcement set forth in the Oakland Municipal Code Section 5.92.050 (A), (C), and (E)-(K) shall apply equally to the enforcement of this Chapter and individuals and entities afforded rights and protections under those Sections are hereby granted those same rights and protections in connection with the enforcement of any provision of this Chapter. Covered Employers shall have all obligations of "Employers" and "employers" under Section 5.92.050. The terms "Employer," "Employ," and "Employee," when used in Section 5.92.050 for purposes of enforcing provisions of this Chapter, shall have the meanings set forth in Section 5.94.020 of this Chapter. The provisions of this Chapter do not diminish, alter, or negate any other legal rights, remedies, or procedures available to an Employee.

**5.96.090. Regulations.**

The Department of Workplace and Employment Standards may promulgate and enforce rules and regulations, and issue determinations and interpretations, consistent with and necessary for the implementation of this Chapter. Such rules and regulations, determinations, and interpretations shall have the force of law and may be relied upon by employers, employees, and other persons to determine their rights and responsibilities under this Chapter.

### **5.96.100. Conflict.**

Nothing in this article shall be interpreted or applied to create any power or duty in conflict with any federal or state law. The term "Conflict," means a conflict that is preemptive under federal or state law.

### **5.96.110. Notice.**

- A. The City shall, as expeditiously as possible, publish and make available on its website a notice suitable for Covered Employers to inform employees of their rights under this emergency Chapter. Such notice shall be translated into Spanish, Chinese, and Vietnamese.
- B. Every Covered Employer shall, within three days after the City has published and made available the notice described in Subsection A of this Section, provide the notice to employees in a manner calculated to reach all employees, including, but not limited to, posting in a conspicuous place at the workplace; via electronic communication; or posting in a conspicuous place in a Covered Employer's web-based or app-based platform. The Covered Employer's notification shall be provided in all languages spoken by more than ten percent (10%) of Employees.
- C. Every Covered Employer shall, within three days after the City has published and made available the notice described in Subsection A of this Section or at the time of hire, whichever is later, provide each Covered Employee the Covered Employer and owner or manager's name; address; telephone number; and whether it is part of a 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.
- D. Every Covered Employer shall provide notice to employees when the Risk Level in the City either moves from Widespread (purple), Substantial (red) or Moderate (orange) to Minimal (yellow), or from Minimal (yellow) to Widespread (purple), Substantial (red) or Moderate (orange) under a State of California Health Order. Notice shall be given in a manner calculated to reach all employees, including, but not limited to, posting in a conspicuous place at the workplace; via electronic communication; or posting in a conspicuous place in a Covered Employer's web-based or app-based platform. The Covered Employer's notification shall be provided in all languages spoken by more than ten percent (10%) of Employees

### **5.96.120. No Preemption of Higher Standards.**

The purpose of this Chapter is to ensure minimum labor standards. This Chapter does not preempt or prevent the establishment of superior employment standards (including higher wages) or the expansion of coverage by ordinance, resolution, contract, or any other action of the City.

### **5.96.130. Severability.**

If any subsection, sentence, clause or phrase of this Chapter is for any reason held to be invalid or unconstitutional by a court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this Chapter, which shall remain in full force and effect. The City Council hereby declares that it would have passed this Chapter and each and every subsection, sentence, clause and phrase thereof not declared invalid or unconstitutional, without regard to whether any portion of the article would be subsequently declared invalid or unconstitutional. The courts are hereby authorized to reform the provisions of this Chapter in order to preserve the maximum permissible effect of each subsection herein.

**SECTION 6.** Oakland Municipal Code Chapter 2.44, which established the Department of Workplace and Employment Standards, is hereby amended to modify sections as set forth below; additions are indicated by underscoring and deletions are indicated by strike-through type; portions of the Chapter not cited or not shown in underscoring or strike-through type are not changed:

### **2.44.010. Department of Workplace and Employment Standards**

There is hereby created under the jurisdiction of the City Administrator a Department of Workplace and Employment Standards. Effective July 1, 2020, the Department of Workplace and Employment Standards shall enforce Chapter 2.28 ("Living Wage Ordinance"); Chapter 2.36 ("Worker Retention at Large-Scale Hospitality Business Ordinance"); Chapter 5.92 ("City Minimum Wage, Sick Leave, and Other Employment Standards"); Chapter 5.93 ("Hotel Minimum Wage and Working Conditions"); Prevailing Wage Resolution (Resolution No. 57103 C.M.S.), Local Employment Program (Part IV of the Local and Small Business Enterprise Program, Resolution No. 69687 C.M.S., as amended and codified by Ordinance No. 12389 C.M.S., and as subsequently amended), Fifteen (15) Percent Apprenticeship Program (Resolution No. 74762 C.M.S.), Chapter 5.94 ("Protecting Workers and Communities During the Pandemic – COVID-19 Emergency Paid Sick Leave Ordinance"), Chapter 5.95 ("Hospitality and Travel Worker Right to Recall"), and Chapter 5.96 ("Grocery Worker Hazard Pay Emergency Ordinance"), and shall carry out such additional duties and functions as assigned by the City Administrator, or by Charter, ordinance, or City Council resolution. The Department of Workplace and Employment Standards may impose penalties and take any and all appropriate action to enforce the requirements of such provisions. The Department of Workplace and Employment Standards shall have authority to adopt rules and regulations consistent with and necessary for the implementation of the foregoing laws. Such rules and regulations shall have

the force and effect of law, and may be relied upon by employers, employees and other persons to determine their rights and responsibilities. The Department of Workplace and Employment Standards may enforce the provisions of the California labor Code to the extent permitted by State law.

IN COUNCIL, OAKLAND, CALIFORNIA,

PASSED BY THE FOLLOWING VOTE:

AYES – FIFE, GALLO, KALB, KAPLAN, REID, TAYLOR, THAO AND  
PRESIDENT FORTUNATO BAS

NOES –  
ABSENT –  
ABSTENTION –

ATTEST: \_\_\_\_\_

ASHA REED  
Acting City Clerk and Clerk of the  
Council of the City of Oakland, California

Date of Attestation: \_\_\_\_\_

## NOTICE AND DIGEST

### **EMERGENCY ORDINANCE (1) ADDING CHAPTER 5.96 TO THE OAKLAND MUNICIPAL CODE TO REQUIRE LARGE GROCERY STORES IN OAKLAND TO PAY EMPLOYEES AN ADDITIONAL FIVE DOLLARS (\$5.00) PER HOUR IN HAZARD PAY DURING THE NOVEL CORONAVIRUS (COVID-19) PANDEMIC AND (2) AMENDING CHAPTER 2.44 OF THE OAKLAND MUNICIPAL CODE TO INCLUDE ENFORCEMENT OF EMERGENCY HAZARD PAY TO GROCERY EMPLOYEES AS PART OF THE DUTIES OF THE DEPARTMENT OF WORKPLACE AND EMPLOYMENT STANDARDS**

This Emergency Ordinance adds Chapter 5.96 to the Oakland Municipal Code to establish emergency hazard pay for grocery workers during the Coronavirus (COVID–19) pandemic and amends Chapter 2.44 of the Oakland Municipal Code to include enforcement of the Grocery Worker Hazard Pay Emergency Ordinance as part of the duties of the Department of Workplace and Employment Standards.

This Emergency Ordinance is necessary for preserving the public peace, health, or safety during the COVID–19 health emergency. Pursuant to section 213 of the City Charter, upon final adoption on first reading this Ordinance will become effective immediately if it receives six or more affirmative votes.