

ORDINANCE NO. 2021-05-017

AN ORDINANCE OF THE CITY OF BELLINGHAM, WASHINGTON, RELATING TO EMPLOYMENT IN BELLINGHAM; ESTABLISHING LABOR STANDARDS REQUIREMENTS FOR ADDITIONAL COMPENSATION FOR CERTAIN GROCERY EMPLOYEES WORKING IN BELLINGHAM.

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 as a worldwide pandemic; and

WHEREAS, in response to COVID-19, on February 29, 2020, Governor Inslee declared a state of emergency; and

WHEREAS, in response to COVID-19, on March 12, 2020, Mayor Fleetwood declared a local emergency; and

WHEREAS, in response to COVID-19, the federal and state governments have imposed eviction moratoria, provided financial support, and imposed public health orders to protect people and businesses; and

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

WHEREAS, the dangers of working during the pandemic are especially significant for Black, Indigenous, and People of Color (“BIPOC”) employees who are overrepresented among the retail frontline workforce and who are disproportionately impacted by COVID-19; and

WHEREAS, during this pandemic, in addition to governmental workers (including public transit workers, postal workers, corrections officers, firefighters/EMTs, and police officers), and healthcare workers, other workers have provided “essential” services, including grocery and general merchandise store workers (especially cashiers), janitors, maintenance workers, agricultural workers, truck drivers, gasoline attendants, food processing workers, and manufacturing workers; and

WHEREAS, recognizing the ongoing threat to frontline grocery employees, several California and Washington cities, including Berkeley, Long Beach, Los Angeles, San Francisco, Seattle, and Burien as well as Los Angeles and King County, have announced legislative efforts to require hazard pay of \$4 to \$5 per hour for grocery employees during the COVID-19 emergency, and more cities are expected to announce similar legislation in 2021; and

WHEREAS, the City seeks to be a leader on wage, labor, and workforce practices that improve workers' lives, support economic security, and contribute to a fair, healthy, and vibrant economy; and

WHEREAS, establishing a labor standard that requires hazard pay for grocery employees is a subject of vital and imminent concern to the community and requires appropriate action by the City Council; and

WHEREAS, establishing a requirement for grocery employees to receive hazard pay for work performed in Bellingham during the COVID-19 emergency will promote job retention, compensate applicable employees for the risks of working on the frontlines of a global pandemic, improve their financial ability to access resources for protecting themselves and their families from catching or spreading the virus or coping with illness caused by the virus, and support the welfare of the greater community that depends on grocery employees for safe and reliable access to food; and

WHEREAS, grocery employees have been supporting grocery businesses' operations and facilitating community access to food during the pandemic, despite facing a clear and present danger of workplace exposure to COVID-19 and receiving limited or inconsistent additional pay in recognition of this hazard; and

WHEREAS, based on the Brookings Metropolitan Policy Program study that revealed that top retail companies, including grocery businesses, are making record profits during the global pandemic, Bellingham seeks to improve grocery worker safety, compensation for risk by requiring compliance with the federal, state, and county health standards, and to pay employees a wage that reflects the risk to the employees, the employees' families, acquaintances, and the increased costs to be safe, to obtain and manage personal protective equipment and other expenses; and

WHEREAS, these profits are at least in part due to the efforts of grocery employees and other essential workers working despite a lethal pandemic and an above-average susceptibility and risk of exposure to COVID-19 in their workplace; and

WHEREAS, to protect the general public by allowing frontline or essential workers to earn enough to be able to afford to take sick leave, to ensure that grocery workers continue to work and provide the public with food, that grocery workers have the incentive and means to protect their health and the public's health, and to protect the public and other workers from ill frontline or essential workers; and

WHEREAS, the City of Bellingham recognizes that it will not be able to please everyone or to treat each grocer the same way, but since Bellingham does not have the resources to manage a waiver process for stores to opt-out of a hazard pay ordinance, Bellingham is considering the impact on smaller and/or independent grocers in Bellingham since these grocers may not have the financial reserves, purchasing or borrowing power, or access to compete during the pandemic while paying hazard pay since some of them are already working at a loss; and

WHEREAS, the City encourages employers of essential frontline workers to help facilitate the distribution of COVID-19 vaccines to their employees as vaccines become available; and

WHEREAS, the Bellingham City Council intends to consider modifying or eliminating hazard pay requirements after four months of implementation and review of the current health, safety, and economic risks of frontline work during the COVID-19 emergency; Bellingham considers the following ordinance for the benefit of the frontline or essential workers and the community.

NOW, THEREFORE, THE CITY OF BELLINGHAM DOES ORDAIN:

SECTION 1. Findings of Fact

The City Council (Council) adopts the above “WHEREAS” recitals as finding of fact and conclusions of law in support of this Ordinance.

SECTION 2. Regulations Imposed

In the exercise of the City of Bellingham’s police powers, the City is granted authority to pass regulations designed to protect and promote public health, safety, and welfare; the City hereby imposes this regulation; as described in this ordinance, as described below.

SECTION 3. Scope

As the substantive effects of this ordinance are not permanent, this ordinance is not intended to be codified. Section numbers are for ease of reference within this ordinance, and section and subsection references refer to numbers in this ordinance unless stated otherwise.

SECTION 4. Short title: This ordinance shall constitute the “Hazard Pay for Grocery Employees Ordinance” and may be cited as such.

SECTION 5. Definitions:

For purposes of this ordinance:

“Adverse action” means reducing compensation, garnishing gratuities, denying a job or promotion, demoting, terminating, failing to rehire after a seasonal interruption of work, threatening, penalizing, retaliating, engaging in unfair immigration-related practices, filing a false report with a government agency, or otherwise discriminating against any person for any reason prohibited by Section 11. “Adverse action” for an employee may involve any aspect of employment, including compensation, work hours, responsibilities, or other material change in the terms and conditions of employment. “Adverse action” also encompasses any action by the employer or a person acting on the employer’s behalf that would dissuade a reasonable person from exercising any right afforded by this ordinance.

“Aggrieved party” means an employee or other person who suffers tangible or intangible harm due to an employer or other person's violation of this ordinance.

“City” means the City of Bellingham.

“Compensation” means the payment owed to an employee by reason of employment, including but not limited to, salaries, wages, tips, service charge distributions, overtime, commissions, piece rate, bonuses, rest breaks, promised or legislatively required pay or paid leave, and reimbursement for employer expenses.

“Employ” means to suffer or permit to work.

“Employee” means any individual employed by an employer, including but not limited to full- time employees, part-time employees, and temporary workers. An alleged employer who disputes that an individual is an employee bears the burden of proving that the individual is not, as a matter of economic reality, economically dependent upon the employer, but instead is in business for him, her, or their self (i.e., an independent contractor).

“Employer” includes any individual, partnership, association, corporation, business trust, or any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee. More than one entity may be the “employer” if employment by one employer is not completely separate from employment by any other employer.

“Franchise” means an 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; 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.

“Franchisor” means a person who grants a franchise to another person.

“Grocery business” means a retail store operating in Bellingham that is either:

1. Over 10,000 square feet in size and that is primarily engaged in retailing groceries for offsite consumption, including but not limited to the sale of fresh produce, meats, poultry, fish, deli products, dairy products, canned and frozen foods, dry foods, beverages, baked foods, and/or prepared foods. Other household supplies or other products shall be secondary to the primary purpose of groceries sales; or
2. Over 85,000 square feet and with 30 percent or more of its sales floor area dedicated to sale of groceries, including but not limited to the sale of fresh produce, meats, poultry, fish, deli products, dairy products, canned and frozen foods, dry foods, beverages, baked foods, and/or prepared foods.

“Grocery business” does not include convenience stores or food marts primarily engaged in retailing a limited line of goods that generally includes milk, bread, soda, and snacks. “Grocery business” also does not include farmers’ markets.

“Grocery employee” means an employee employed by a grocery business.

“Hazard pay” means additional compensation owed to an employee on top of the employee’s other compensation, including but not limited to salaries, wages, tips, service

charge distributions, overtime, commissions, piece rate, bonuses, rest breaks, promised or legislatively required pay or paid leave, and reimbursement for employer expenses, that has been specifically designated as additional compensation being paid due to the increased risk of contracting COVID-19 that is inherent in being a grocery employee.

“Primary language” means the language in which the employee feels most comfortable communicating.

“Written” or “writing” means a printed or printable communication in physical or electronic format, including but not limited to a communication that is transmitted through email, text message, or a computer or mobile system, or that is otherwise sent and maintained electronically.

SECTION 6. Employee coverage

For the purposes of this ordinance:

A. Covered employees are limited to those who perform work for a covered employer at a retail location in the City.

B. Time spent by an employee in the City solely for the purpose of travelling through the City from a point of origin outside the City to a destination outside the City, with no employment-related or commercial stops within the City except for refueling or the employee's personal meals or errands, is not covered by this ordinance.

SECTION 7. Employer coverage

A. For the purposes of this ordinance, covered employers are limited to grocery businesses that:

1. employ 40 or more employees in the City of Bellingham; and
2. employ 500 or more employees worldwide regardless of where those employees are employed, including but not limited to chains, integrated enterprises, or franchises associated with a franchisor or network of franchises that employ 500 or more employees in aggregate.

B. To determine the number of employees for the current calendar year:

1. The calculation is based upon the average number per calendar week of employees who worked for compensation during the preceding calendar year for any and all weeks during which at least one employee worked for compensation. For employers that did not have any employees during the preceding calendar year, the number of employees(s) for the current calendar year is calculated based upon the average number per calendar week of employees who worked for compensation during the first 90 calendar days of the current year in which the employer engaged in business.

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

- a. Employees who are not covered by this ordinance;
- b. Employees who worked in the City;
- c. Employees who worked outside the City; and
- d. 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.

C. Separate entities that form an integrated enterprise shall be considered a single employer under this ordinance. Separate entities will be considered an integrated enterprise and a single employer under this ordinance where a separate entity controls the operation of another entity. The factors to consider in making this assessment may include, but are not limited to:

1. Degree of interrelation between the operations of multiple entities;
2. Degree to which the entities share common management;
3. Centralized control of labor relations;
4. Degree of common ownership or financial control over the entities; and
5. Use of a common brand, trade, business, or operating name.

D. An alleged employer bears the burden of proof to show that the employer is not a “grocery business” as defined in Section 5.

E. When determining whether an employer is “primarily engaged in retailing groceries” according to the definition of “grocery business” under Section 5, all relevant factors may be taken into account, including but not limited to the following: grocery sales as a percentage of the retail store’s overall sales; sales floor area dedicated to grocery sales; marketing or promotional materials from the employer; or other public statements from representatives of the employer.

SECTION 8. Hazard pay requirements

A. Except for those employees described in subsection D below, employers shall provide each employee with hazard pay at a rate of four dollars per hour for each hour worked in the City.

1. No employer shall, as a result of this ordinance going into effect, take steps to reduce employee compensation so as to prevent, in whole or in part, employees from receiving hazard pay at a rate of four dollars per hour for each hour worked in the City in addition to those employees’ other compensation. Employers shall maintain records to establish the reason(s) for any reduction in employee compensation, pursuant to Section 10.

2. Employers providing hazard pay, as defined under Section 5, on the effective date of this ordinance may use the hourly rate of that hazard pay to offset the amount due under Section 8 A.

a. Employers shall comply with requirements for providing compensation in Section 8(B) for the entire amount due under Section 8(A).

b. Employers bear the burden of proof to show that the additional compensation is hazard pay as defined in this ordinance.

B. With respect to payment of hazard pay as set forth in this ordinance, employers shall comply with all requirements related to the payment of wages otherwise set forth by law.

C. Employers shall comply with the hazard pay requirements in this Section 8 until:

1. the City of Bellingham's mayoral COVID emergency proclamation is ended or revoked or

2. this ordinance is terminated or repealed by Bellingham City Council.

D. The following employees are excluded from receiving the hazard pay specified in subsection A above:

1. Employees of a grocery employer, who perform administrative functions that entail regular visits to grocery businesses located in the City of Bellingham, but those employees are not based or do not primarily work at any of those locations; and

2. Delivery-truck-driver employees of a grocery employer, whose duties primarily involve driving from one grocery business location to another, who are not based at any particular grocery business location, who spend little time in proximity to grocery employees and whose work does not require them to interact with members of the public; and

3. Home delivery truck driver employees of a grocery employer, whose duties primarily involve driving from grocery business locations to fill customers' orders, who are not based at any particular grocery business location, who spend little time in proximity to grocery employees and whose work does not require them to interact with members of the public.

SECTION 9. Notice and posting

A. Within 30 days of the effective date of this ordinance, employers shall display a written notice of rights established by this ordinance in a conspicuous and accessible place at any workplace or job site where any of their employees work. Employers shall display the notice of rights in English and in the primary language(s) of the employee(s) at the workplace or job site. Employers shall make a good faith effort to determine the primary languages of the employees at the workplace or job site. If display of the notice of rights is not feasible, including situations when the employee does not have a regular workplace or job site, employers may solely provide the notice of rights on an individual basis in the employee's primary language in a physical or electronic format that is reasonably conspicuous and accessible.

B. The notice of rights shall provide information on:

1. The right to hazard 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 an employer's denial of hazard pay as required by this ordinance and an employer or other person's retaliation against an employee or other person for asserting the right to hazard pay or otherwise engaging in an activity protected by this ordinance.

C. Employers are responsible for providing employees with the notice of rights required by Section 9(A) and (B) in a form and manner sufficient to inform employees of their rights under this ordinance.

SECTION 10. Employer records

A. Employers shall retain records that document compliance with this ordinance for each employee.

B. Employers shall retain the records required by Section 10(A) for a period of three years.

C. If an employer fails to retain adequate records required under Section 10(A), there shall be a presumption, rebuttable by clear and convincing evidence, that the employer violated this ordinance for the periods and for each employee for whom records were not retained.

SECTION 11. Retaliation prohibited

A. No employer or any other person shall interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right protected under this ordinance.

B. No employer or any other person shall take any adverse action against any person because the person has exercised in good faith the rights protected under this ordinance. Such rights include, but are not limited to, the right to make inquiries about the rights protected under this ordinance; the right to inform others about their rights under this ordinance; the right to inform the person's employer, the person's legal counsel, a union or similar organization, or any other person about an alleged violation of this ordinance; the right to bring a civil action for an alleged violation of this ordinance; the right to testify in a proceeding related to this ordinance; the right to refuse to participate in an activity that would result in a violation of city, state or federal law; and the right to oppose any policy, practice, or act that is unlawful under this ordinance.

C. No employer or any other person shall communicate to a person exercising rights protected in this Section 11, directly or indirectly, the willingness to inform a government worker that the person is not lawfully present or employed in the United States, or to report, or to make, an implied or express assertion of a willingness to report, suspected citizenship or immigration status of an employee or family member of an employee to a federal, state, or local agency because the employee has exercised a right under this ordinance.

D. It shall be a rebuttable presumption of retaliation if an employer or any other person takes an adverse action against a person within 90 days of the person's exercise of rights protected in this Section 11. However, in the case of seasonal work that ended before the close of the 90-day period, the presumption also applies if the employer fails to rehire a former employee at the next opportunity for work in the same position. The employer may rebut the presumption with clear and convincing evidence that the adverse action was taken for a permissible purpose.

E. Proof of retaliation under this Section 11 shall be sufficient upon a showing that

an employer or any other person has taken an adverse action against a person and the person's exercise of rights protected in this Section 11 was a motivating factor in the adverse action, unless the employer can prove that the action would have been taken in the absence of such protected activity.

F. The protections afforded under this Section 11 shall apply to any person who mistakenly but in good faith alleges violations of this ordinance.

G. A complaint or other communication by any person triggers the protections of this Section 11 regardless of whether the complaint or communication is in writing or makes explicit reference to this ordinance.

SECTION 12. Private right of action

A. Any person or class of persons that suffers financial injury as a result of a violation of this ordinance, or is the subject of prohibited retaliation under Section 11, may bring a civil suit in any court of competent jurisdiction against the employer or other person violating this ordinance and, upon prevailing, may be awarded reasonable attorney fees and costs and shall be awarded 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 penalty payable to any aggrieved party if the aggrieved party was subject to prohibited retaliation. Interest shall accrue from the date the unpaid compensation was first due at 12 percent per annum, or the maximum amount permitted under RCW 19.52.020.

B. For purposes of this Section 12, a "person that suffers financial injury as a result of a violation of the ordinance" includes any entity a member of which has suffered financial injury or retaliation, or any other individual or entity acting on behalf of an aggrieved party that has suffered financial injury or retaliation.

C. For purposes of determining membership within a class of persons entitled to bring an action under this Section 12, two or more employees are similarly situated if they:

1. Are or were hired for the same employer or employers, whether concurrently or otherwise, at some point during the applicable statute of limitations period,
2. Allege one or more violations that raise similar questions as to liability, and
3. Seek similar forms of relief.

D. For purposes of Section 12(C), employees shall not be considered dissimilar solely because the employees':

1. Claims seek damages that differ in amount, or
2. Job titles or other means of classifying employees differ in ways that are unrelated to their claims.

SECTION 13. Waiver

Any waiver by an individual of any provisions of this ordinance shall be deemed contrary to public policy and shall be void and unenforceable.

SECTION 14. Encouragement of more generous policies

A. Nothing in this ordinance shall be construed to discourage or prohibit an employer from the adoption or retention of hazard pay policies more generous than the one required herein.

B. Nothing in this ordinance shall be construed as diminishing the obligation of the employer to comply with any contract, collective bargaining agreement, employment benefit plan, or other agreement providing more generous hazard pay policies to an employee than required herein.

SECTION 15. Other legal requirements

This ordinance provides minimum requirements for hazard pay for covered employees 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 hazard pay, or that extends other protections to employees; 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 an employee's right to pursue any other remedies at law or equity for violation of their rights.

SECTION 16. 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 employer, employee, 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.

PASSED by City Council this 10th day of May, 2021.



Hannah Stone, Council President

APPROVED by me this 12th day of May, 2021.



Seth Fleetwood, Mayor

ATTEST:



Andy Asbjornsen, Finance Director

APPROVED AS TO FORM:



Office of the City Attorney

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