DEPARTMENT OF ADMINISTRATIVE SERVICES
OFFICE OF LABOR STANDARDS ENFORCEMENT
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San Francisco Private Sector Military Leave Pay Protection Act Implementation Guidance

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The Private Sector Military Leave Pay Protection Act ("MLPPA" or "Ordinance") requires certain employers to provide employees with supplemental paid leave for up to 30 days of military duty. The San Francisco Office of Labor Standards Enforcement administers and enforces the Ordinance's paid leave requirements.

I. Operative Date

1. Q: What is the operative date of the Ordinance?

A: The Private Sector Military Leave Pay Protection Act is operative as of February 19, 2023.

2. Q: Are the Ordinance's requirements retroactive?

A: No. The Ordinance's requirements are operative as of February 19, 2023 and thereafter.

II. Scope of Ordinance

1. Q: What is the MLPPA?

A: The MLPPA is a San Francisco law that requires Covered Employers to provide supplemental pay to an Employee (who works in San Francisco) while on leave for Military Duty for up to 30 days in a calendar year. This supplemental pay ensures an employee will not suffer financial hardship during Military Duty. The Ordinance can be found at https://codelibrary.amlegal.com/codes/san_francisco/latest/sf_police/0-0-0-52699.

2. Q: What does the MLPPA require Employers to do?

A: Pursuant to the MLPPA, in summary, all Covered Employers must meet the following obligations:

- Provide the appropriate Military Leave Pay, or Supplemental Compensation, to an Employee on Military Duty, for up to 30 days in a calendar year, such as when the Employee is deployed to respond to a natural disaster or military conflict, or attends required annual military training. The Employer must supplement the

gross military pay provided to the employee to ensure the employee receives their total gross pay for the schedule they would have worked had they not been required to complete their Military Duty.

- Ensure that employees are aware of their right to Military Leave Pay (notification guidance is discussed below).

III. Covered Employer

1. Q: Which employers are "Covered Employers"?

A: Employers with 100 or more employees worldwide ("Covered Employers") must comply with the Ordinance for their covered San Francisco employees. The City and County of San Francisco and all other governmental entities are not Covered Employers.

2. Q: Who should be counted in determining employer size?

A: All Employees performing work for the employer worldwide should be counted. If the number fluctuates above and below 100 over the course of a year, calculate business size based upon the average number of employees per pay period during the preceding calendar year.

3. Q: Are owners counted for the purpose of determining employer size?

A: Owners who perform work for compensation for the business are considered "persons performing work" and must be counted as such in determining whether the business is a Covered Employer.

4. Q: Does it matter if the employer is based or headquartered outside of San Francisco?

A: No, the employer is covered by the MLPPA – regardless of its location – if it meets the criteria as a Covered Employer.

IV. Covered Employee

1. Q: Who is an Employee covered by the MLPPA?

A: Any person providing labor or services for remuneration who is an employee under California Labor Code Section 2775, including a part-time and temporary employee, who performs work as an employee within the geographic boundaries of San Francisco, is an "Employee" covered by the Ordinance **if** they are a member of the reserve corps of the United States Armed Forces, National Guard, or other uniformed service organization of the United States.

2. Q: Are employees of private sector employers at the San Francisco International Airport (SFO) covered by the Ordinance?

A: No. The Ordinance covers employees who are employed within the geographic boundaries of San Francisco, which does not include SFO.

3. Q: Are employees of private sector employers at the Presidio covered by the Ordinance?

A: No. The Ordinance does not cover private businesses located in "federal enclaves" such as the Presidio, Fort Mason, and the Golden Gate National Recreation Area (GGNRA).

V. Calculating Supplemental Pay

1. Q: When must a Covered Employer pay "Supplemental Compensation" to an Employee?

A: A Covered Employer must pay Supplemental Compensation to an Employee when the Employee is on leave for Military Duty, up to 30 calendar days in a calendar year. The MLPPA defines "Military Duty" as active military service in response to the September 11, 2001 terrorist attacks, international terrorism, the conflict in Iraq, or related extraordinary circumstances, or military service to provide medical or logistical support to federal, state, or local government responses to the COVID-19 pandemic, natural disasters, or engagement in military duty ordered for the purposes of military training, drills, encampment, naval cruises, special exercises, Emergency State Active Duty, or like activity.

The leave for Military Duty with Supplemental Compensation can be taken in daily increments for one or more days at a time, for up to 30 days in a calendar year.

2. Q: How is Supplemental Compensation calculated?

A: The Covered Employer must pay the Employee the difference between the Employee's gross military pay and the amount of gross pay the Employee would have received from the Employer had the Employee worked the Employee's regular work schedule. The Employee should not receive more compensation than they would have received had they worked their regular work schedule.

"Gross military pay" includes the basic pay rate which can be assessed for the federal Armed Forces at www.dfas.mil which lists the current basic pay rates according to the Employee's rank. An Employee's gross military pay may be stated on their written military orders. Gross military pay does not include any Military Pay Allowances, such as combat, clothing, housing, or aviation.

The Employee's gross pay includes the Employee's wages for hours they would have worked, including overtime if they were regularly scheduled for overtime hours. All benefits, including, but not limited to, health care, retirement, and profiting sharing benefits must be paid as if the employee had worked their regular work schedule.

3. Q: How is the Employee's "regular work schedule" determined?

A: If an Employee does not work a regular schedule (e.g. 40 hours per week every week) or have a work scheduled predetermined for the time when they will be required to take military leave, their "regular work schedule" can be determined by looking at the three monthly pay periods, six bi-weekly or semi-monthly pay periods, or 12 weekly pay periods immediately preceding the relevant period of military leave. The calculation shall not include any pay periods during which the employee was on unpaid or partially paid leave prior to the relevant period of military leave.

4. Q: When must Employees be paid their Supplemental Compensation for taking military leave?

A: Covered Employers should make a good faith effort to provide the Supplemental Compensation no later than the payday for the payroll period when the Employee's military leave began.

5. Q: How can an Employer verify the military gross pay the Employee will receive to complete the calculation for their paycheck (i.e. employee gross pay – military gross pay)?

A: The gross military pay will differ depending on the employee's rank. A Covered Employer may request the Employee provide their written military orders which may confirm the pay the Employee will receive while on the military leave. An Employer can also use the current rate chart to anticipate the military gross pay. The Covered Employer may request an Employee provide a wage statement verifying the military gross pay paid to the Employee during their leave for Military Duty for which they are seeking Supplemental Compensation. The employer may then adjust any discrepancies in the following paycheck.

6. Q: Which party is responsible for providing Supplemental Compensation when a worker is supplied by a staffing agency?

A: The person or business that employs or exercises control over the wages, hours, or working conditions of the worker is responsible for providing the Supplemental Compensation.

7. **Q: Does the Ordinance require Covered Employers to provide Supplemental Compensation to independent contractors?**

   A: No. The Ordinance applies to Employees. However, merely labeling someone as an "independent contractor" does not make it so. Consistent with California law, whether a person is an employee or independent contractor is a fact-specific inquiry that is determined by a variety of factors.

   For more information on how the State of California reviews issues relating to independent contractor status in wage and hour cases, see the California Labor & Workforce Development Agency Employment Status Portal.

8. **Q: Does the Ordinance require Covered Employers to permit Employees to receive Supplemental Compensation for hours when they would have been working outside of San Francisco?**

   A: No.

9. **Q: Does the Ordinance require Covered Employers to permit Employees to receive Supplemental Compensation for hours they are not scheduled to work?**

   A: No.

10. **Q: Can Covered Employers require advance notice for an Employee's use of Military Leave Pay?**

    A: Employers may require Employees to comply with reasonable notice procedures, but only when the need for Military Duty is foreseeable, such as scheduled trainings.

11. **Q: Can a Covered Employer require an Employee using Military Leave Pay to find a replacement worker?**

    A: No. An Employer may not require, as a condition of an Employee's taking Military Leave Pay, that the Employee search for or find a replacement worker to cover the hours during which the Employee is on the leave for Military Duty.

12. **Q: How many hours of Military Leave Pay may an Employee be paid for on days when the Employee is scheduled to work more than 8 hours (i.e., when the Employee is scheduled to work overtime hours)?**

    A: An Employee may use Military Leave Pay for all hours the Employee is regularly scheduled to work, including overtime hours if the employee is regularly scheduled to

work overtime as part of the employee's regular work schedule. The employee must receive the gross pay they would have received had they worked their regular schedule.

13. Q: Are tips included when calculating the Supplemental Compensation for tipped Employees?

A: No. The employer gross pay is based only upon compensation paid by the Employer.

VI. Separation from Employment

1. Q: Is an Employees required to pay back the Supplemental Compensation if they do not return to employment after their Military Duty?

A: If an Employee received Supplemental Compensation and is fit for employment upon release from Military Duty, but does not return to their position with the Employer within 60 days of release from Military Duty, the Supplemental Compensation may, at the Employer's discretion, be treated as a loan payable with interest at a rate equal to the minimum amount necessary to avoid imputed income under the Internal Revenue Service Code of 1986 and any successor law.

Interest shall begin to accrue 90 days after the Employee's release from Military Duty or return to fitness for employment, whichever is later. The loan will be payable in equal monthly installments over a period not to exceed five years, starting 90 days after the Employee's release from Military Duty or return to fitness for employment, whichever is later.

VII. Noticing Employees of their Right to Supplemental Compensation

1. Q: Are Covered Employers required to provide notice informing Employees of their rights under the Ordinance?

A: Covered Employers should provide employees with notice of their right to Supplemental Compensation within a reasonable time after the Employee tells the employer they received written military orders and will require time off work. Further, if the Covered Employer publishes an employee handbook that describes other kinds of leave available to its employees, the employer shall include a description of the rights to Supplemental Compensation under the MLPPA in the next edition of its handbook it publishes following the ordinance becoming operative.

Notification of the MLPPA will be incorporated in OLSE's annual poster mailings.

VIII. Employer Records

1. Q: What records do Employers need to retain to ensure compliance with the Ordinance?

A: Employers must retain records documenting schedules and hours worked by Employees and military leave taken by Employees, for a period of four years, and must allow the Agency access to such records, with reasonable notice, to monitor compliance with the requirements of this ordinance. When an issue arises as to an Employee's entitlement to Supplemental Compensation, if the Employer does not maintain or retain accurate and adequate records documenting schedule and hours worked by the Employee and military leave taken by the Employee or does not allow the Agency reasonable access to such records, it shall be presumed that the Employer has violated the Ordinance, absent clear and convincing evidence otherwise.

IX. Waiver through Collective Bargaining

1. Q: Does the Ordinance apply to Employees covered by a collective bargaining agreement?

A: Yes. Generally, the Ordinance applies to persons who perform work in San Francisco, including those employees covered by a bona fide collective bargaining agreement. A bona fide collective bargaining agreement is a written contract concerning wages, hours, and working conditions that is collectively bargained by an employer and a recognized union that represents the employees.

2. Q: May a collective bargaining agreement waive some or all of the provisions of the Ordinance?

A: Yes. The Ordinance permits waiver of some or all of its provisions through a collective bargaining agreement. The waiver must be in a bona fide collective bargaining agreement (including a side letter agreement to such agreement), must be express, and must be in clear and unambiguous terms. The parties to a collective bargaining agreement may negotiate any language they desire to effectuate a waiver, provided that the language meets the "clear and unambiguous" standard of the Ordinance. OLSE will not interfere with or participate in the negotiation of such language.

X. Prohibition on Retaliation Under Services Employment and Reemployment Rights Act (USERRA)

Q: Does the MLPPA prohibit retaliation?

A: While the MLPPA does not expressly prohibit retaliation, retaliation for taking leave for Military Duty is prohibited pursuant to the USERRA. The U.S. Department of Labor, Veterans Employment and Training Service (VETS) is authorized to investigate and resolve complaints of USERRA violations.

For assistance in filing a complaint, or for any other information on USERRA, contact VETS at 1-866-4-USA-DOL or visit its website at www.dol.gov/agencies/vets. An interactive

online USERRA Advisor can be viewed at webapps.dol.gov/elaws/userra.htm.

Please email further questions to MLPPA@sfgov.org