ORDINANCE NO. 857

AN URGENCY ORDINANCE OF THE TOWN COUNCIL OF THE TOWN OF FAIRFAX TO ESTABLISH PAID SICK LEAVE REQUIREMENTS FOR ALL EMPLOYERS IN THE TOWN WITH 25 OR FEWER EMPLOYEES FOR COVID-19 RELATED REASONS

WHEREAS, there is a widespread, ongoing global outbreak of respiratory illness known as COVID-19 that can be spread from person-to-person, and on February 26, 2020, community transmission was confirmed by the Centers for Disease Control and Prevention (CDC) in the Bay Area; and

WHEREAS, on March 3, 2020, the Marin County Public Health Officer issued a Declaration of Local Health Emergency pursuant to Health and Safety Code section 101080 due to an imminent and proximate threat to public health from the introduction of the novel coronavirus, "COVID-19;" and

WHEREAS, on March 4, 2020, California Governor Newsom declared a state of emergency in the State of California; and

WHEREAS, on March 16, 2020, a Shelter in Place Order for all of Marin County was issued by the Marin County Public Health Officer; since then, subsequent amendments to the Order and new orders have been issued by the County Public Health Officer; and

WHEREAS, on March 16, 2020, the Town Manager, in his capacity as Director of Emergency Services, declared a Local Emergency in the Town of Fairfax due to the COVID-19 pandemic, which was affirmed by resolution of the Town Council on March 17, 2020; and

WHEREAS, on March 19, 2020, the Governor issued Executive Order N-33-20 ordering all individuals living in the State of California to stay home or at their place of residence, except to obtain or perform essential services; subsequent Orders have set forth a staged process for allowing more business operations to begin, with appropriate health measures to reduce the risk inherent in increased activities during the pandemic; and

WHEREAS, to limit the exponential spread of COVID-19, County Public Health Guidelines require any individual testing positive or coming into contact with someone who has tested positive to quarantine for at least ten (10) days, and due to these Public Health requirements, individuals and entire households may be required to quarantine, thereby losing income; and

WHEREAS, due to the continuing public health emergency related to COVID-19 and the actions required to respond to the emergency, many workers in the Town are and

will be unable to work (including telework) due to illness, exposure to others with the coronavirus, the need to obtain or recover from the COVID-19 vaccine, and family and household caregiving obligations related to closures of schools and care facilities, and an inability to secure caregiving assistance; and

WHEREAS, due to a continued downturn in economic conditions and in order not to experience a loss of wages, many workers may decide to come into work notwithstanding that they exhibit symptoms of COVID-19 or have contracted COVID-19; and

WHEREAS, the COVID-19 pandemic has disproportionately impacted historically marginalized and under-resourced communities, and whose contributions are critical to the success of our local and regional economies as they are clients to our local businesses and are members of the essential workforce; and

WHEREAS, the disproportionate impacts of COVID-19 have only reaffirmed the inequalities that exist in Marin County and have highlighted the urgent need to pursue bold, collaborative solutions that place equity at the forefront of local government actions; and

WHEREAS, on March 18, 2020, then-President Trump signed into law the Families First Coronavirus Response Act ("FFCRA"), which provided emergency paid sick leave to certain employees who were unable to work or telework due to the COVID-19 crisis; and

WHEREAS, the mandatory provisions of the FFCRA expired on December 31, 2020, although covered employers who voluntarily elected to provide sick leave benefits were entitled to a tax credit through March 21, 2021; and

WHEREAS, the FFCRA refundable tax credit reimburses employers, dollar-for-dollar, for the total cost of providing COVID-19-related paid sick and family leave wages to employees; and

WHEREAS, on April 16, 2020, the Governor signed Executive Order N-51-20, which extended paid sick leave benefits for food sector workers impacted by COVID-19; and

WHEREAS, on September 9, 2020, the Governor signed Assembly Bill 1867, which required private employers with 500 or more employees to provide COVID-19 related supplemental paid sick leave to their employees. AB 1867 expired on December 31, 2020; and

WHEREAS, Cal/OSHA COVID-19 related benefit protections became effective November 30, 2020, requiring employers to provide paid time off to employees who are excluded from the workplace due to COVID-19 reasons and who are otherwise able and available to work; and

WHEREAS, on March 11, 2021, President Biden signed into law the American Rescue Plan, which extended the FFCRA tax credit providing full reimbursement for the costs of providing COVID-19 related paid sick and family leave through September 30, 2021; and

WHEREAS, on March 19, 2021, the Governor signed SB 95 into law, which requires all employers with more than 25 employees to provide COVID-19 related supplemental paid sick leave to their employees; this legislation took effect immediately and will expire on September 30, 2021; and

WHEREAS, this urgency ordinance addresses the supplemental paid sick leave coverage gap created by the expiration of the FFCRA and the failure of SB 95 to apply to employers with 25 or fewer employees; and

WHEREAS, in the absence of paid sick leave, many workers facing employment and economic insecurity will make the difficult decision to work when they should be quarantining or isolating themselves at home, posing a significant public health risk; and

WHEREAS, in the absence of paid sick leave, many workers will have no option other than to send their children to childcare providers or school when those children should be quarantining or isolating themselves at home, thereby posing a significant public health risk; and

WHEREAS, in the absence of paid sick leave, workers may choose not to schedule an appointment to receive the COVID-19 vaccine; and

WHEREAS, there is an urgent need to expand the supplemental paid COVID-19 sick leave to also apply to those employers in the Town with 25 or fewer employees, so as to close the coverage gap left by the expiration of the FFCRA and the omission of these employers from SB 95; and

WHEREAS, this Ordinance is intended to assist employees working in the Town so that they will be financially better able to stay home and quarantine if exposed to COVID-19; if they are exhibiting symptoms related to COVID-19; they are caring for an individual affected by COVID-19; or they are obtaining a COVID-19 vaccine; and thereby reduce the spread of COVID19 in the Town; and

WHEREAS, this Ordinance will also address the current financial crisis of those employees working in the Town who are struggling to make ends meet due to widespread closures, lack of access to childcare and elder care, and other workplace disruptions, and which would cause such employees to otherwise choose between receiving a paycheck or minimizing the risk of the spread of COVID-19; and

WHEREAS, in recent weeks, despite the high vaccination rate in Marin County, the Delta variant has caused a spike in the number of COVID-19 cases in the County and demonstrates the need for employers to provide COVID-related paid sick leave to employees; and

WHEREAS, due to the significant and extensive impact of COVID-19 on workers in the Town and the extension of the economic downturn into 2021, this Ordinance will provide protection to covered employees through September 30, 2021; and

WHEREAS, this Ordinance is temporary and not a general ordinance in force and is not required to be codified.

NOW, THEREFORE, the Town Council of the Town of Fairfax does ordain as follows:

Section 1. Declaration of Threat to Public Health, Safety, and Welfare Necessitating Urgency Ordinance.

The Town Council of the Town of Fairfax hereby finds and declares that there is a current and immediate threat to the public health, safety and welfare and a need for the immediate preservation of the public health and safety that warrants this urgency ordinance, based upon the facts, findings, and declarations stated in the findings of this Ordinance, and all oral and written testimony presented at the September 1, 2021, regular Town Council meeting.

Section 2. Title.

This Ordinance shall be known as the "COVID-19 Supplemental Sick Leave Ordinance."

Section 3. Term.

This Ordinance shall become effective on September 1, 2021, upon its adoption by a 4/5 vote of the Town Council pursuant to California Government Code section 36937 and shall sunset on September 30, 2021.

Section 4. Definitions.

For the purposes of this Ordinance, the following words, terms, and phrases have the meanings given to them in this section:

1. "Employer" means any person, including any person, association, organization, partnership, business trust, limited liability company, or corporation, who directly or indirectly or through an agent or any other person, including through the services of a temporary service or staffing agency or similar entity, employs or exercises control over the wages, hours, or working conditions of any Employees, and that employs 25 or fewer Employees. This Ordinance and the definition of Employer do not apply to federal, state, or local government agencies. For clarity, this Ordinance applies to all private Employers within the Town of Fairfax who employ 25 or fewer employees.

2. "Employee" means an individual, regardless of immigration status, employed by an Employer and who has worked for the employer for more than two (2)

hours within the geographic boundaries of the Town of Fairfax. For purposes of this Ordinance, a worker is presumed to be an Employee, and an Employer has the burden to demonstrate that a worker is a bona fide independent contractor and not an Employee. For purposes of determining Employee status, applicable California law shall apply, including, but not limited to Labor Code section 2775.

3. "Emergency Responder" and "Health Care Provider" are given the same meanings as were set forth in the FFCRA, and its rules, regulations and other guidance issued by the U.S. Department of Labor regarding the FFCRA.

4. "Individual" or "Care for an Individual," for the purposes of this Ordinance means an Employee's immediate family member, a person who regularly resides in the Employee's home, or a similar person with whom the Employee has a relationship that creates an expectation that the Employee would care for the person if he or she were quarantined or self-quarantined, or whose senior care provider or whose school or childcare provider is closed or is unavailable in response to a public health or other public official's recommendation. For this purpose, the term "Individual" does not include persons with whom the Employee has no personal relationship. The meaning of these terms is intended to be consistent with those set forth in the FFCRA and in the rules, regulations, and guidance documents issued by the U.S. Department of Labor regarding the FFCRA.

5. "Supplemental Paid Sick Leave" or "Leave" means time an Employee is compensated by an Employer for COVID-19 related leave as described in this Ordinance.

Section 5. Paid Sick Leave.

1. Supplemental Paid Sick Leave Entitlements.

   a. *Covered and Non-Covered Employers.* This Ordinance applies to all Employers within the Town of Fairfax with 25 or fewer Employees.

   b. *Applicability to Health Care Providers and Emergency Responders.* Employers of Health Care Providers and Emergency Responders in the Town of Fairfax are required to furnish the Supplemental Paid Sick Leave benefits to such Employees in all instances where the Leave is taken when a Health Care Provider or Emergency Responder has COVID-19 or is experiencing symptoms of COVID19 and is seeking a medical diagnosis, or is subject to a government quarantine or isolation order or a health care provider's advice to self-quarantine, regardless of whether taking leave for such purposes creates an operational hardship to the Employer. Supplemental Paid Sick Leave Benefits may also be taken by Health Care Providers and Emergency Responders employed by Employers in Fairfax when the purpose of the Leave is to Care for an Individual who has COVID-

19 or is experiencing symptoms of COVID-19, or where the Individual is subject to a government quarantine or isolation order or a health care provider's advice to self-quarantine, regardless of whether taking Leave for such purposes creates an operational hardship to the Employer. Supplemental Paid Sick Leave Benefits may also be taken by Health Care Providers and Emergency Responders employed by Employers in Fairfax when the purpose of the Leave is to obtain a COVID-19 vaccine or when the Health Care Provider or Emergency Responder is experiencing symptoms related to a COVID-19 vaccine that prevent the individual from being able to work or telework, regardless of whether taking Leave for such purposes creates an operational hardship to the Employer.

Supplemental Paid Sick Leave Benefits may also be taken by Health Care Providers and Emergency Responders in the Town of Fairfax when the purpose of the Leave is to provide Care for an Individual whose senior care provider or whose school or childcare provider is closed or is unavailable due to COVID-19 reasons. However, when the need for the Leave is due to such reasons, the Leave request may be denied in such instances where the Employer makes a good faith determination that granting such Leave would create a staffing shortfall such that operational needs dictate denial of some or all of the Employee's request for use of the Leave.

c. *Amount of Paid Sick Leave Benefits.* An Employee who has worked a minimum of two (2) hours for an Employer has accrued Supplemental Paid Sick Leave hours as follows:

   i. A full-time Employee who is normally scheduled to work forty (40) or more hours per week may use up to eighty (80) hours of Supplemental Paid Sick Leave.

   ii. A part-time Employee who is normally scheduled to work fewer than forty (40) hours per week may use Supplemental Paid Sick Leave in an amount no greater than the Employee's average number of work hours in a two-week period, calculated over the prior six (6) months.

   iii. These Supplemental Paid Sick Leave hours may have already been accumulated by Employees under the now-expired FFCRA. This Ordinance will reinstate the time to use accrued Supplemental Paid Sick Leave benefits to the extent Employees have not already exhausted their COVID-19 paid sick leave accruals during the pandemic. Employers are only required to provide the Supplemental Paid Sick Leave hours on a one-time basis. An Employer may credit the total COVID-19 paid sick leave hours already furnished to an Employee under the FFCRA or Cal/OSHA regulations, as well as any substantially similar State or Federal COVID-19 paid sick leave legislation that may be enacted in the future, against the Supplemental Paid Sick Leave obligations required by this

Ordinance. Nothing in this Ordinance shall require that Employers provide Employees with a new accrual of Supplemental Paid Sick Leave hours. This Ordinance will provide protection to covered Employees through September 30, 2021.

d. *Permissible Basis for Receipt of the Benefit.* An Employer shall provide Supplemental Paid Sick Leave upon the written, including, but not limited to, electronic mail and text message, request of an Employee if the Employee cannot work, or telework, because:

   i. The Employee has been advised by a health care provider to isolate or self-quarantine to prevent the spread of COVID-19;

   ii. The Employee is subject to a federal, state, or local quarantine or isolation order due to COVID-19;

   iii. The Employee is experiencing COVID-19 symptoms and is seeking a medical diagnosis;

   iv. The Employee needs to care for an Individual who is subject to a federal, state, or local quarantine or isolation order related to COVID-19, or has been advised by a health care provider to self-quarantine related to COVID-19, or is experiencing COVID-19 symptoms and is seeking a medical diagnosis;

   v. The Employee needs to provide care for an Individual whose senior care provider or whose school or childcare provider is closed or unavailable in response to a public health or other public official's recommendation;

   vi. The Employee is attending an appointment to receive a COVID-19 vaccine; or

   vii. The Employee is experiencing symptoms related to a COVID-19 vaccine that prevent the Employee from being able to work or telework.

Supplemental Paid Sick Leave benefits are not available to Employees who are able to work from home.

e. *Rate of Pay and Pay Cap.* The Supplemental Paid Sick Leave hours shall be paid at not less than the Employee's regular rate of pay, subject to the cap set forth below. In no event shall the Supplemental Paid Sick Leave amount paid to an Employee exceed $511 per day and $5,110 in the aggregate, regardless of the reason for the Leave, unless Federal legislation is enacted that increases these amounts beyond the amounts that were included in the FFCRA, in which case the new federal dollar amounts shall apply to this section as of the date the new amounts are

applicable under the federal law. Employees of joint Employers are only entitled to the total aggregate amount of leave specified for Employees of one Employer.

f. *Documentation and Replacements.* Employers may only take reasonable measures to confirm an Employee's eligibility for Supplemental Paid Sick Leave, in accordance with the limitations, applicable regulations or guidance issued by the United States Department of Labor. An Employer may require Employees to follow reasonable notice procedures only for foreseeable absences. Employers may require Employees to identify the basis for which the Employee is requesting leave under the Ordinance but cannot require Employees to furnish a doctor's note or other supporting documentation. Employers are prohibited from requiring Employees to find or confirm a replacement as a condition of obtaining Leave under the Ordinance.

g. *Coexistence with Other Available Forms of Leave.* The total number of hours of Supplemental Paid Sick Leave to which an Employee is entitled pursuant to this Ordinance shall be in addition to any paid sick leave that may be available to the Employee under California Labor Code section 246, as well as any pre-existing paid time off (vacation, sick and/or PTO) provided to Employees prior to March 16, 2020, subject to the below potential offsets. An Employer may not require an Employee to use any other paid or unpaid leave, sick pay, paid time off, or vacation time provided by the Employer to the Employee before the Employee uses Supplemental Paid Sick Leave.

h. *Employer Offsets and Exhaustion of Benefits.* To the extent an Employee had at least eighty (80) hours of accrued paid sick leave benefits as of the date of this Ordinance or at least one hundred sixty (160) hours of a combination of paid sick leave, vacation and PTO paid time off benefits ("Accrued Leave Benefits"), the obligation to provide Supplemental Paid Sick Leave under this Ordinance shall be deemed to be satisfied. To the extent accrued paid sick leave benefits afforded Employees as of the date of this Ordinance were less than eighty (80) hours, or Accrued Leave Benefits were less than one hundred sixty (160) hours, an Employer is required to furnish Supplemental Paid Sick Leave to the extent of such deficiency. An Employer may credit the total COVID-19 paid sick leave hours already furnished to an Employee under the FFCRA or Cal/OSHA regulations, as well as any substantially similar State or Federal COVID-19 paid sick leave legislation that may be enacted in the future, against the Supplemental Paid Sick Leave obligations required by this Ordinance.

i. *Enforcement.* An Employee claiming a violation of this Ordinance may bring an action in Superior Court of the State of California against an Employer and may be awarded: (1) reinstatement to the position the Employee was discharged from in violation of this Ordinance; (2) back pay and

Supplemental Paid Sick Leave unlawfully withheld, calculated at the Employee's average rate of pay; and/or (3) such other legal or equitable relief the Court may deem appropriate. If an Employee is the prevailing party in any legal action taken pursuant to this Ordinance, the Court may award reasonable attorney's fees and costs as part of the Employee's recovery. This Ordinance does not create a legally enforceable right by any member of the public against the Town of Fairfax.

j. *Retaliatory Action Prohibited.* No Employer shall discharge, reduce in compensation, or otherwise discriminate against any Employee for opposing any practice proscribed by this Ordinance, for requesting to use or actually using Supplemental Paid Sick Leave under this Ordinance, for participating in proceedings related to this Ordinance, for seeking to enforce his or her rights under this Ordinance by any lawful means, or for otherwise asserting rights under this Ordinance.

k. *Notice and Recordkeeping Requirements.* Employers must within seven (7) days of adoption of this Ordinance provide notice to Employees of their rights under this Ordinance in a manner calculated to reach all employees, including posting a notice in both English and Spanish in the workplace, on any intranet or app- based platform and/or via email. Each Employer shall also maintain a record of each Employee's name, the hours worked, and pay rate for at least a three-year period.

l. *No Waiver of Rights.* Any prospective waiver by an Employee of any or all of the provisions of this Ordinance shall be deemed contrary to public policy and shall be void and unenforceable.

m. *Other Legal Requirements.* This Ordinance provides minimum requirements pertaining to public health emergency leave, 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 greater accrual or use by Employees of public health emergency sick leave, whether paid or unpaid, or that extends other protections to Employees.

Section 6. Severability.

If any provision or clause of this ordinance or the application thereof to any person or circumstance is held to be unconstitutional or to be otherwise invalid by a final judgment of any court or competent jurisdiction, such invalidity shall not affect other provisions or clauses or application, and to this end, the provisions and clauses of this ordinance are declared to be severable.

Section 7. California Environmental Quality Act.

The Town Council finds that adoption of this Ordinance is not subject to the provisions of the California Environmental Quality Act (CEQA) pursuant to CEQA

Guidelines section 15060(c)(2), as an activity which will not result in a direct or reasonably foreseeable indirect physical change in the environment.

Section 8. Publication.

The Town Clerk shall certify as to the adoption of this Ordinance and within fifteen (15) days of its adoption shall post a certified copy of this Ordinance in three public places in the Town of Fairfax, to wit: 1. Bulletin Board, Town Hall Offices; 2. Bulletin Board, Fairfax Post Office; and 3. Bulletin Board, Fairfax Women's Club Building, located at 46 Park Road.

PASSED, APPROVED AND ADOPTED by the Town Council of Fairfax, California, at a regular meeting of the Town Council held on the 1st day of September, 2021 by the following vote:

AYES: ACKERMAN, COLER, CUTRANO, GODDARD, HELLMAN
NOES: None
ABSENT: None
ABSTAIN: None

Bruce Ackerman, Mayor

ATTEST:

Michele Gardner, Town Clerk