BERNALILLO COUNTY

BOARD OF COUNTY COMMISSIONERS

ORDINANCE NO. 2019-17

MANDATING EMPLOYER PAID TIME OFF TO EMPLOYEES WITHIN BERNALILLO COUNTY; PRESCRIBING RULES AND PENALTIES; SETTING AN EFFECTIVE DATE

WHEREAS, all workers at some time during each year need limited time off from work to take care of their own health needs or those of family members; and

WHEREAS, according to analysis of paid sick leave in Albuquerque by the University of New Mexico's Bureau of Business and Economic Research:

- Employees least likely to have the right to earn sick time are part-time workers, those earning less than $15,000/year and those employed in leisure, hospitality and retail sectors;
- Bernalillo County lags behind the rest of the country in rates of access to paid sick leave;
- Employees without paid leave go to work sick approximately 3.5 times a year; 1.8 times with risk of spreading the illness;
- Businesses that do have paid leave experience lower turnover; and

WHEREAS, workers in jobs with high public contact, such as health care, services, restaurant and retail employees, are unlikely to have the right to earn sick time, thereby increasing their risk of passing illnesses to co-workers and customers; and

WHEREAS, the right to earn paid time off, as provided herein, will reduce recovery time from illnesses, enable people to obtain preventive medical care and prenatal care, promote the use of regular medical providers rather than emergency care, enable parents to care for sick children instead of sending them to school, prevent people from spreading illness to the public and enable victims of domestic abuse, sexual assault and stalking to get away from their abusers, thereby protecting the health, safety and general welfare of people in Bernalillo County; and

WHEREAS, victims of domestic abuse, stalking and sexual assault often lose days of paid employment or lose their jobs because they need time off to escape and recover from such situations, and that lost income is particularly devastating for such victims, who need economic security to ensure safety; and

WHEREAS, the right to use earned sick time to care for a family member must reflect the diversity of family caregiving relationships today; and

WHEREAS, one in six employees in the U.S. report that they or a family member has been fired, suspended, punished or threated by an employer because they needed to take sick time to care for themselves or a family member; and

WHEREAS, employers are encouraged to provide more generous paid time off policies if they choose, and should not be burdened by the provisions of this ordinance in doing so.

WHEREAS, the County recognizes that mental wellness is as important as physical wellness in the maintenance of a healthy community and workforce.

Section 1. Title and Purpose

This Ordinance may be cited as the "Employee Wellness Act." The Board of County Commissioners intends to add this new Article XIII to Chapter 14 to encourage the promotion of a healthy workforce in Bernalillo County.

Section 2. Definitions

As used in this article:

COUNTY. The County of Bernalillo.

EARNED PAID TIME OFF. Time that is compensated at the same hourly rate and with the same benefits, including health care benefits, as the employee normally earns during hours worked and is provided by an employer to an employee for the purposes described in this Ordinance.

EMPLOYEE. Any person an EMPLOYER, as defined in this Ordinance, suffers or permits to perform work for monetary compensation for at least 56 hours in a year within the unincorporated limits of the County. "EMPLOYEE" shall include persons who perform work for an employer on a full-time, part-time, seasonal, or temporary basis. Employee shall not include any person who is excluded from the definition of employee under NMSA 1978, §§ 50-4-21(C)(2)–(4), (6) of the New Mexico Minimum Wage Act, except that persons employed by the County of Bernalillo are employees.

"EMPLOYEE" shall not include interns working for an employer for academic credit in connection with a course of study at an accredited school, college or university or employees working for an accredited school, college or university pursuant to a work-study program while attending that school, college or university. "EMPLOYEE" shall not include any person who has received a certificate from the state labor commission pursuant to NMSA 1978, § 50-4-23 or § 50-4-21(C)(11). "EMPLOYEE" shall not include independent contractors or per diem employees. "EMPLOYEE" shall not include any person employed by a parent, spouse, sibling, aunt, uncle, or cousin.

EMPLOYER. Any person, estate, business trust, association, receiver, cooperative association, club, corporation, non-profit corporation, company, firm, partnership, joint venture, syndicate, legal representative, or other entity or group of persons or entities that is required to apply for a business registration from the County, such entities' corporate officers or executives, with a physical premises within the unincorporated limits of the County, which employs two or more employees within the unincorporated limits of the County. Employer shall include the County of Bernalillo.

NEW LOCAL BUSINESS. A business first incorporated within the State of New Mexico that maintains its principal office and place of business within the unincorporated limits of the County and that has not previously been issued a business registration from the County.

SEPARATION FROM EMPLOYMENT. The end of an employment relationship for any reason including termination, retirement, or resignation.

YEAR. A regular and consecutive 12-month period as determined by the EMPLOYER.

Section 3. Employer requirement to provide paid time off to employees. Use of paid time off. Employer compliance.

(A) Accrual of Paid Time Off

(1) Employees shall accrue a minimum of one (1) hour of earned paid time off for every 32 hours worked, provided that employers may choose a higher accrual rate or to provide for accrual of all earned paid time off at the beginning of the year.

(2) The requirement to provide paid time off shall be enacted via three incremental increases of sixteen hours per year over three years.

(3) Effective July 1, 2020, employees shall not accrue more than 24 hours of earned paid time off in a year, unless the employer's policy provides for a higher limit on use or accrual.

(4) Effective July 1, 2021, employees shall not accrue more than 40 hours of earned paid time off in a year, unless the employer's policy provides for a higher limit on use or accrual.

(5) Effective July 1, 2022, employees shall not accrue more than 56 hours of earned paid time off in a year, unless the employer's policy provides for a higher limit on use or accrual.

(6) Earned paid time off shall begin to accrue on the employee's 90th day of employment, or on the effective date of this ordinance if an employee is already employed for at least 90 days on that date, or whichever is later.

(7) An employer may, but is not obligated to loan earned paid time off to an employee in advance of accrual or eligibility by such employee.

(8) Employees exempt from overtime requirements under federal and state law will be assumed to work no more than 40 hours in each work week for purposes of earned paid time off accrual, unless the employer selects a higher limit.

(9) Carry-over of earned paid time off. Unused accrued earned paid time off shall be carried over to the following year, but employees shall not carry over more than the total annual amount available to accrue, unless the employer's policy provides otherwise.

(10) If an employee is transferred but remains employed by the same employer, or if a successor employer replaces the original employer, or if an employee separates from employment but is rehired by the same employer within 12 months, the employer shall reinstate all previously accrued and unused earned paid time off to the employee, up to a maximum of 56 hours unless the employer chooses to provide more, or unless the employer previously chose to pay out the earned paid time off upon transfer or separation.

(11) The Board of County Commissioners will review a report of paid time off every year after the effective date of the ordinance in order to assess its adequacy.

(B) Permitted Uses and Procedures for Paid Time Off

(1) An employer shall permit an employee to use the earned paid time off accrued for any use.

(2) An employee shall not be entitled to use accrued earned paid time off until the employee has worked 56 hours in a year.

(3) Maximum 90-day delay in benefit.

(a) Employees shall be entitled to use accrued earned paid time off beginning on the 90th calendar day following the date of employment, or the effective date of this law, whichever is later, unless the employer's policy provides that employees may use accrued time earlier.

(4) Request for earned paid time off.

(a) An employer shall provide earned paid time off upon the request of an employee or a family member, caretaker, or medical professional acting on the employee's behalf. At the time of employment, the employer shall instruct the employee on the manner in which such request shall be made, whether it may be made orally, in writing, by electronic means, or by any other means acceptable to the employer. When possible, the request shall include the expected duration of the absence.

(b) When the use of earned paid time off is foreseeable, such as a scheduled medical appointment or similar matters, the employee shall provide notice to the employer as soon as practicable and when possible, shall schedule the use of earned paid time off for these purposes in a manner that does not unduly disrupt the operations of the employer. At the time of employment, the employer shall instruct the employee on the manner in which such notice shall be given, whether it may be made orally, in writing, by electronic means, or by any other means acceptable to the employer. Advance notice cannot be required for paid leave taken under this ordinance due to an emergency or illness.

(5) An employer shall not require an employee to find a replacement worker as a condition of using earned paid time off nor count use of earned paid time off in a way that will lead to discipline, discharge, demotion, non-promotion, suspension or any other adverse action.

(6) An employer shall not take or threaten any adverse action whatsoever against an employee because the employee has exercised or attempted to exercise rights protected under this Ordinance or has in good faith alleged violations of this Ordinance.

(7) Confidentiality. All information an employer obtains related to the employee's reasons for taking earned paid time off shall be treated as confidential and not disclosed except with the permission of the employee or as necessary for the employer for validation purposes for insurance disability claims or accommodations consistent with the Americans with Disabilities Act.

(C) Record Keeping

(1) Employers shall accurately track and record the amount of earned paid time off accrued or used by each employee for each pay period in any format the employer chooses, keep such records for the time period required for employment and payroll records set forth in 11.3.400.401(F) NMAC, and make such records available to the County upon request.

(2) Upon an employee's request, an employer shall inform an employee of the amount of earned paid time off accrued and used by the employee.

(3) An employer's failure to maintain records of the amount of earned paid time off accrued or used by each employee is a violation of this Ordinance.

(4) In the absence of records, the fact finder may rely on accurate and contemporaneously maintained records of the employee's work time to determine the amount of paid time off accrued and used, or, if no accurate records are available, on the employee's reasonable estimates of hours worked.

Section 4. Enforcement of paid time off provisions.

(A) Administrative investigation and enforcement.

(1) Any covered employee or his or her representative may file an administrative complaint with the County charging that an employer has violated this Ordinance as to that employee.

(2) When the County receives a complaint, the County shall notify the complainant's employer and shall provide information about the requirements of the process for investigating and adjudicating the complaint.

(3) The County shall establish and maintain a timely process for investigating and adjudicating complaints that is fair to employees and employers. The County must publish information about the process on its website and resolve to educate employers and employees about the requirements of this Ordinance and the process for resolving complaints.

(4) The County may review records regarding all employees at the employer's worksite in order to protect the identity of any employee identified in the complaint and to determine whether a pattern of violations has occurred.

(5) The name of any employee identified in a complaint to the County shall be kept confidential as long as possible. Where the County determines that an employee's name must be disclosed in order to investigate a complaint further, it may do so only with the employee's consent.

(6) When the County identifies a violation, it may attempt to reach an administrative resolution for payment of damages and penalties as set forth herein prior to bringing enforcement action in court.

(7) Any guidelines or rules promulgated by the County shall have the force and effect of law and may be relied on by employers, employees and other parties to determine their rights and responsibilities under this Ordinance.

(8) The County may suspend a business's County Business registration if the business fails to comply with a notice of inspection within forty-five (45) business days. The County shall reinstate the suspended license upon compliance with the notice of inspection.

(9) When a complaint filed with the County is closed by the County, or when one hundred eighty (180) days have passed from the filing of such complaint and the County has not yet filed a civil action, whichever is earlier, the County shall so notify the complainant. The notification shall include authorization to the complainant to bring a civil action under Section 4(B).

(B) Civil Enforcement

(1) Upon exhaustion of the administrative process, or upon receipt of the authorization to bring a civil action, as outlined in Section 4(A) above, the County, or the covered

employee, or his or her representative, alleging a violation of this Ordinance, may bring a civil action in a court of competent jurisdiction against an employer. Exhaustion of the administrative process or receipt of the authorization to bring a civil action by one member of class suing as a representative party satisfies this requirement for all class members.

(2) Upon prevailing, the employee shall recover all appropriate legal or equitable relief, the costs and expenses of suit, and reasonable attorney's fees; and, in the case of retaliation or adverse action, the plaintiff shall also recover actual damages, including but not limited to back pay, and shall have a right to reinstatement, rescission of discipline or other appropriate relief.

(3) In an action brought by the County, any damages recovered shall be payable to the individual employees who experienced the violation.

(C) Penalties.

(1) In addition to the civil remedies, any employer found to be in violation of this Ordinance shall also be liable for a civil penalty payable to the county of fifty dollars per week for each separate violation, not to exceed a maximum of $500 for each offense.

(2) Each section of this Ordinance and employee for whom a violation is identified shall be counted separately for purposes of identifying a separate offense.

Section 5. Notice to employees of paid time off requirements. Regulations.

(A) Each employer subject to the provisions of Section 3 shall, at the time of ~~hiring~~ employment, provide notice to each employee:

(1) of the entitlement to earned paid time off for employees, the amount of paid time off provided to employees and the terms under which earned paid time off may be used;

(2) ways in which an employee may submit a request for, or notify, an employer of the use of paid time off, whether orally, in writing or electronically, and to whom;

(3) that retaliation by the employer against the employee for requesting or using paid time off for which the employee is eligible is prohibited; and,

(4) that the employee has a right to file a complaint with the county for any violation of this Ordinance.

(B) Employers may comply with the provisions of this section by displaying a poster in a conspicuous place, accessible to employees, at the employer's place of business that contains the information required by this section in both English and Spanish.

(C) The County may adopt regulations to establish additional requirements concerning the means by which employers shall provide such notice.

(D) On or before the effective date of this Ordinance, the County shall make available on its website a summary notice to employees in English and Spanish of each provision of this Ordinance.

Section 6. Relationship to other requirements.

(A) This Ordinance shall not be construed as creating or imposing any requirement in conflict with, nor to preempt or otherwise limit or affect the applicability of any other law, collective bargaining agreement, regulation, requirement, or policy.

(B) This Ordinance shall not be construed to diminish or impair the rights or obligations of an employee or employer under any valid contract, collective bargaining agreement, employment benefit plan or other agreement providing more generous earned sick time or vacation time to an employee than required herein.

Section 7. No impact on more generous sick time, vacation time, or paid time off policies; no separate tracking; no additional paid time off required.

(A) Nothing in this Ordinance prohibits an employer from providing more generous policies than the minimum established under this Ordinance, and this Ordinance shall not be interpreted in a way that makes it in any way more difficult for employers to offer benefits that exceed the requirements of this Ordinance.

(B) Any employer with a paid time off policy that makes available an amount of paid time off sufficient to meet or exceed this Ordinance's accrual and use requirements, is not required to provide additional or separate earned paid time off, nor to track paid time off separately, nor to in any way reduce the benefits provided to employees.

(C) Employers with probationary employment periods, as they relate to sick leave policies or vacation leave policies, so long as the policies are equivalent or greater in leave provided, may allow for greater delay in benefits than prescribed in Section 3(B)(3).

Section 8. Temporary exemption for new local business

(A) New local businesses shall be exempt from the requirements of this ordinance during the first twelve (12) months of operation as calculated from the date the new local business is issued its initial business registration permit with the County. Upon the expiration of 90 days from the date of its business registration with the County, the County shall provide written notice to each new local business of the business' obligation to comply with the requirements of this Ordinance after its first twelve (12) months of operation.

Section 9. Severability Clause

If any section, paragraph, sentence, clause, word or phrase of this Ordinance is for any reason held to be invalid or unenforceable by any court of competent jurisdiction, such decision shall not affect the validity of the remaining provisions of this Ordinance. The Commission hereby declares that it would have passed this Ordinance and each section, paragraph, sentence, clause, word or phrase thereof irrespective of any provisions being declared unconstitutional or otherwise invalid.

Section 10. Compilation

The Ordinance amendment prescribed by Sections 1 through 8 shall amend, be incorporated in, and made part of the Bernalillo County Code.

Section 11. Effective Date.

This Ordinance shall take effect July 1, 2020 or on the date of termination of any collective bargaining agreement.

BE IT ORDAINED BY THE BOARD OF COUNTY COMMISSIONERS OF BERNALILLO COUNTY, NEW MEXICO this 20th day of August, 2019.

APPROVED AS TO FORM

W. Ken Martinez, County Attorney

BERNALILLO COUNTY COUNTY CLERK SEAL STATE OF NEW MEXICO

ATTEST:

Linda Stover, County Clerk

BOARD OF COUNTY COMMISSIONERS

Maggie Hart Stebbins, Chair

Debbie O'Malley, Vice Chair

Steven Michael Quezada, Member

VOTED 'NO'

Lonnie C. Talbert, Member

VOTED 'NO'

Charlene E. Pyskoty, Member