

**IFPTE, Local 21  
Cupertino  
Employees  
Association**



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*2019 – 2022 MOU*

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**Side  
Letter  
Agreement**

**SIDE LETTER AGREEMENT TO THE  
2019 – 2022 IFPTE, LOCAL 21, CUPERTINO EMPLOYEES  
ASSOCIATION MEMORANDUM OF UNDERSTANDING  
CONCERNING CONSTRUCTIVE RECEIPT AND LEAVE  
SELLBACKS**

**DATE: November 30, 2021**

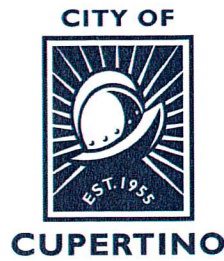
Background Overview

This Side Letter Agreement (“Agreement”) relates to modifications to the City of Cupertino’s (“City”) sell back provisions whereby an employee has the option to receive the cash value of annual leave earned instead of taking the time off. Specifically, and pursuant to the current Memorandum of Understanding between the City and IFPTE, Local 21, Cupertino Employees Association (“Union”) effective July 16, 2019 through June 30, 2022 (“MOU”), employees have the options to sell back the following types of leaves:

- Under Section 7.6, employees may exercise the option twice each calendar year to convert any/or all accumulated compensatory time to cash.
- Under Section 17, employees may convert, on a twice per calendar year basis, unused vacation time for payment subject to the following conditions: i) the employee must have accrued vacation of at least 120 hours; ii) any payments made for unused vacation will be subject to all appropriate taxes; iii) minimum exchange will be 8 hours; maximum exchange will be 80 hours; and, iv) all changes are irrevocable.

Under these Internal Revenue Service (“IRS”) Regulations, the IRS considers income to be received for tax purposes if the individual actually receives it or has an option to receive it during each tax year. This is known as the constructive receipt doctrine.

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Application of this constructive receipt doctrine to the City's sell back of leave provisions would mean that any annual leave subject to sell back would have to be taxed as it is earned because the City's program allows the employee an unimpeded option to take this leave as cash rather than to take the time off.

However, IRS Regulations also provide that the constructive receipt doctrine will not apply if an individual's control over the receipt of income is subject to substantial limitations or restrictions. Several private letter rulings have held that income is not constructively received as annual leave accrues if an individual has made an irrevocable election before the tax year in which it accrues to receive only a designated portion of this annual leave as cash.

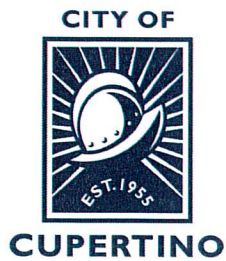
Relying on these private letter rulings as an indication of how the IRS would view the City's sell back of leave provisions, the City has proposed and the Union has agreed to modify the program prospectively to comply with applicable IRS Regulations.

Summary of Modifications to Existing Leave Sell Back Provisions and Intent of This Agreement

The modification contained in this Agreement is designed to preserve the employee's ability to receive sell back of leave provisions but substantially limit that ability so that there is no "constructive receipt" as the IRS defines it. To accomplish this, an employee will be required to make an irrevocable election annually by December 31 or by the preceding Friday if December 31 falls on a Saturday or Sunday, to specify how much pay-in-lieu of leave to be earned in the following calendar year the employee wishes to receive during that calendar year.

The details related to the administration of this modified sell back of leave provisions are set forth below. Unless otherwise noted herein, an employee's right to earn and use annual leave as specified in any applicable MOU or City policies or Personnel Rules, remains unchanged.

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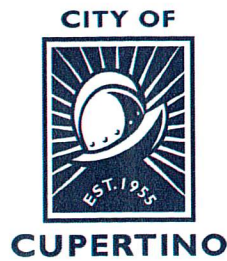
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Terms of Agreement

The City and the Union enter into this Agreement and hereby agree to as follows:

1. Effective for all calendar years beginning on and after January 1, 2022, employees may sell back any applicable vacation or comp time leaves (as specified under Sections 7.6 and 17 of the MOU, respectively; collectively referred to hereinafter as “annual leave hours”), each calendar year, subject to the following rules:
  - a. If an employee fails to elect by December 31 each year or by the preceding Friday if December 31 falls on a Saturday or Sunday, to receive any of the annual leave hours he or she will earn in the following calendar year as pay-in-lieu, his or her annual leave will accrue in accordance with the applicable MOU, City policy or Personnel Rules provisions.
  - b. If an employee irrevocably elects by December 31 each year or by the preceding Friday if December 31 falls on a Saturday or Sunday, to receive a portion of the annual leave hours he or she will earn in the following calendar year, not to exceed 80 hours of vacation or 80 hours of comp time for the calendar year, as pay-in lieu, the City will make payments to the employee as designated on the City-approved form, which may occur up to twice annually on: the second full pay period in July and the second full pay period in December of the following year. However, an employee cannot request the pay-out of any pay-in-lieu hours until those hours have been earned and accrued. Further, at the time of payment, the employee must have the requisite number of hours available and meet the requirements pursuant to the applicable MOU section for sell back. Otherwise, the amount to be cashed out will be based on the number of hours available at the time of the sell back payment.
  - c. An employee must make an irrevocable election by December 31 each year or by the preceding Friday if December 31 falls on a Saturday or Sunday, if the employee wishes to participate in the pay-in-lieu of annual leave program for the following calendar year. Elections will not automatically carry over from one calendar year to the next calendar year. An employee

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who fails to elect by December 31 each year or by the preceding Friday if December 31 falls on a Saturday or Sunday, to participate in the pay-in-lieu of annual leave program for the following year will be deemed to have elected not to participate and he or she will be prohibited from receiving any pay-in-lieu during that year except as, and only to the extent, permitted under Section 4 below.

- d. Each year, in advance of this annual December 31 deadline, the City will provide employees with notice and an explanation regarding the need for an irrevocable election as well as the relevant form for making the election.
2. When pay-in-lieu is cashed out, it will be paid based on the employee's rate of pay at the time it is paid. All pay-in-lieu pay-outs are taxable income, subject to all applicable withholdings and payroll deductions.
3. Existing caps on the accrual of annual leave will remain in effect.
4. Effective for calendar years beginning on and after January 1, 2022, an employee's election with regard to pay-in-lieu shall be irrevocable except in the event of an unforeseeable financial emergency subject to the following rules:
  - a. In the event of an unforeseeable emergency, as defined in subsection b, an employee may apply to receive pay-in-lieu of annual leave accrued on or after January 1, 2022, but limited to the amount that is reasonably necessary to satisfy the emergency need, including any amounts that may be necessary to pay any federal, state, or local income taxes or penalties reasonably anticipated as a result of the cash out. If Human Resources approves an employee's application, the City will pay the employee the pay-in-lieu amount it deems necessary to meet the emergency need.
  - b. "Unforeseeable emergency" means a severe financial hardship of the employee resulting from an illness or accident of the employee, the employee's spouse, or the employee's dependent (as defined in Internal Revenue Code section 152, and, without regard to Internal Revenue Code sections 152(b)(1), (b)(2), and (d)(1)(B)); loss of the employee's property due to casualty (including the need to rebuild a home following damage to a home not otherwise covered by homeowner's insurance, such as damage that is the result of a natural disaster); or other similar extraordinary and

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unforeseeable circumstances arising as a direct result of events beyond the control of the employee. For example, the imminent foreclosure or eviction from the employee's home may constitute an unforeseeable emergency. In addition, the need to pay for medical expenses, including non-refundable deductibles, as well as for the cost of prescription drug medication, may constitute an unforeseeable emergency. Finally, the need to pay for the funeral expenses of a spouse or dependent (as defined in Internal Revenue Code section 152, and, without regard to Internal Revenue Code sections 152(6)(1), (6)(2), and (d)(1)(B)) of the employee may also constitute an unforeseeable emergency. Neither the purchase of a home nor the payment of college tuition is an unforeseeable emergency. Pay-in-lieu of annual leave on account of an unforeseeable emergency will not be paid to the extent that such an emergency is or may be relieved through reimbursement or compensation from insurance or otherwise, by liquidation of the employee's assets, to the extent liquidation of such assets would not itself cause severe financial hardship. Employees who face an unforeseen emergency and experience the need for an emergency cash out of annual leave are advised to contact Human Resources for a determination, which will be made based on the individualized and specific circumstances presented.

5. To comply with effective date of this change beginning on or after January 1, 2022, employees must make the requisite election by December 31, 2021.
6. Specific provisions in this Agreement supersede any previous agreements, whether oral or written, regarding the subject matter of this Agreement.
7. Upon approval by the City Council, this Agreement is intended to be read in conjunction with the MOU and where in conflict on the specific issue covered by this Agreement, this Agreement will control.
8. The City and the Union will incorporate the language set forth in this Agreement into any successor MOU, as well as into and applicable City policies and Personnel Rules. The terms and contents contained in this Side Letter Agreement shall remain in force beyond the expiration of the 2019 – 2022 MOU.

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All other provisions of the parties' MOU shall otherwise remain in full force and effect. This Side Letter Agreement shall only become binding and effective upon the City Council's approval and adoption of this Side Letter Agreement.

The parties' signatures below signify that they have met and conferred in good faith in accordance with California Government Code Section 3500, *et seq.* Agreed to on this 18<sup>th</sup> day of November 2021, by the parties' authorized representatives.

For the City

For the Union

\_\_\_\_\_  
Christopher Boucher      Date

Stanley Young      12/15/21  
\_\_\_\_\_  
Stanley Young      Date

\_\_\_\_\_  
Kristina Alfaro      Date

\_\_\_\_\_  
Vanessa Guerra      Date

**Signature:** Stanley A. Young  
Stanley A. Young (Dec 15, 2021 11:07 PST)  
**Email:** syoung@ifpte21.org

**Signature:** [Handwritten Signature]  
**Email:** christopher@boucher.law

**Signature:** vanessa guerra  
**Email:** VanessaG@cupertino.org

**Signature:** [Handwritten Signature]  
Kristina Alfaro (Dec 16, 2021 09:09 PST)  
**Email:** kristinaa@cupertino.org











# 2021-12-14 Rev CEA Side Letter Agreement (Clean)


Final Audit Report


2021-12-16


Created:	2021-12-15
By:	Vanessa Guerra (VanessaG@cupertino.org)
Status:	Signed
Transaction ID:	CBJCHBCAABAA3klMusHnQpgy5H_al4jjzWYsFr-bazUY


## "2021-12-14 Rev CEA Side Letter Agreement (Clean)" History

-  Document created by Vanessa Guerra (VanessaG@cupertino.org)  
2021-12-15 - 7:05:29 PM GMT- IP address: 108.213.70.66
-  Document emailed to Stanley A. Young (syoung@ifpte21.org) for signature  
2021-12-15 - 7:06:15 PM GMT
-  Email viewed by Stanley A. Young (syoung@ifpte21.org)  
2021-12-15 - 7:06:34 PM GMT- IP address: 98.47.194.239
-  Document e-signed by Stanley A. Young (syoung@ifpte21.org)  
Signature Date: 2021-12-15 - 7:07:59 PM GMT - Time Source: server- IP address: 98.47.194.239
-  Document emailed to Christopher Boucher (christopher@boucher.law) for signature  
2021-12-15 - 7:08:01 PM GMT
-  Email viewed by Christopher Boucher (christopher@boucher.law)  
2021-12-16 - 4:06:04 AM GMT- IP address: 66.249.84.223
-  Document e-signed by Christopher Boucher (christopher@boucher.law)  
Signature Date: 2021-12-16 - 4:07:46 AM GMT - Time Source: server- IP address: 104.149.140.130
-  Document emailed to Vanessa Guerra (VanessaG@cupertino.org) for signature  
2021-12-16 - 4:07:49 AM GMT
-  Email viewed by Vanessa Guerra (VanessaG@cupertino.org)  
2021-12-16 - 4:50:12 PM GMT- IP address: 104.47.73.254
-  Document e-signed by Vanessa Guerra (VanessaG@cupertino.org)  
Signature Date: 2021-12-16 - 4:50:21 PM GMT - Time Source: server- IP address: 108.213.70.66

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2021-12-16 - 4:50:24 PM GMT

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2021-12-16 - 5:09:23 PM GMT- IP address: 104.47.46.254

 Document e-signed by Kristina Alfaro (kristinaa@cupertino.org)  
Signature Date: 2021-12-16 - 5:09:44 PM GMT - Time Source: server- IP address: 208.95.236.60

 Agreement completed.  
2021-12-16 - 5:09:44 PM GMT