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San Francisco ordinance creates new reemployment rights

On June 23, the San Francisco Board of Supervisors passed an emergency ordinance requiring employers with 100 or more employees to rehire certain workers laid off for COVID-19 related reasons when resuming business operations. The ordinance became effective on July 3 without the Mayor's signature and will expire after 60 days unless further extended.

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Background

San Francisco Mayor London Breed declared a public health emergency as a result of COVID-19 on February 25. On March 4, Governor Gavin Newsom declared a state of emergency in California as a result of the threat posed by COVID-19. On March 6, the Health Officer of the City and County of San Francisco (the city) issued a similar declaration of local health emergency due to the coronavirus.

On March 16, the Health Officer issued Order No. C19-07, directing residents to shelter in place and requiring a cessation of nonessential business operations in the city. On March 19, the governor issued Executive Order N-33-20, ordering all individuals living in the state to stay home or at their place of residence for an indefinite period, with limited exceptions to maintain continuity of operations of identified federal critical infrastructure sectors. As a result of these and subsequent state and local orders, a substantial number of businesses have had to temporarily or permanently close and many employees working in the city have been laid off from their jobs.

Emergency ordinance

On June 23, the San Francisco Board of Supervisors passed the "Back to Work" Emergency Ordinance that guarantees reemployment to certain employees who were laid off due to the COVID-19 pandemic when covered employers resume operations and seek to refill the same or substantially similar jobs. It also prohibits discrimination against, and requires employers to reasonably

accommodate, employees experiencing a family care hardship. The ordinance became effective on July 3 without the mayor's signature and will expire after 60 days unless further extended.

Buck comment. Both Los Angeles (city and county) and Long Beach, California have enacted similar right of recall and worker retention ordinances in response to the current public health emergency.

Covered employers and eligible workers

With certain limited exceptions for health care operations, the ordinance generally applies to for-profit and not-for-profit employers that operate in the city or county of San Francisco and employed 100 or more employees as of the earliest date that they separated one or more employees, which resulted in a "layoff." The ordinance defines layoff as a separation from employment of 10 or more employees during any 30-day period on or after February 25 due to the employer's lack of funds or work for employees resulting from the public health emergency, stay at home, and shelter in place orders. This includes layoffs conducted in conjunction with the closure or cessation of an employer's San Francisco business operations.

The ordinance covers workers who were:

- Employed by their employer for at least 90 days of the calendar year preceding the date on which notice of the layoff was provided, and
- Separated due to a qualifying layoff

Workers covered by a collective bargaining agreement that expressly waives protections under this ordinance are not covered.

Layoff notices

Employers subject to the new ordinance are required to provide both current and former employees with written notice of layoff and their right to reemployment. The notice, which must be provided on or before the layoff becomes effective, must include: the effective date of the layoff; a summary of the right to reemployment created by the emergency ordinance; and a telephone number for a hotline operated by the Office of Economic and Workforce Development (OEWD) to provide information for workers on their right to reemployment under the ordinance, as well as navigation services and other city resources related to unemployment. The notice must be provided to any eligible worker who was laid off prior to July 3 — the effective date of the ordinance — by August 2.

An employer must also provide written notice of a covered layoff to OEWD, generally within 30 days of initiating it. Notice to OEWD must include the total number of employees located in San Francisco who are affected by the layoff along with the job classification, original hire date, and separation date for each eligible worker.

Recordkeeping

An employer that initiates a covered layoff must retain the following records regarding each eligible worker: the worker's full legal name; job classification; date of hire; last known address; last known email address; last known telephone number; and a copy of the written layoff notice provided to the employee. The records must be maintained for at least two years, measured from the date the employer provided the written layoff notice described above.

Offering reemployment

With limited exceptions, the ordinance requires covered employers to first extend an offer of reemployment to recently laid-off eligible workers before offering the same or a substantially similar position to others as they resume business operations. A "substantially similar position" is broadly defined to include a position: with comparable job duties, pay, benefits, and working conditions; in which the eligible worker worked in the 12 months preceding the layoff; and for which the eligible worker would be qualified, including a position that would require training that would otherwise be made available to a new hire. Where multiple workers in the same job classification were laid off, offers must be based on seniority determined solely on the earliest hire date.

The ordinance does, however, allow employers to refuse to rehire a laid off eligible worker under the following circumstances:

- Employee misconduct learned of after the layoff, such as an act of dishonesty, violation of law, employer policy, or rule
- Severance agreement executed before the effective date of the ordinance that included a general release of claims against the employer
- Replacement hired before the effective date of the ordinance for the eligible worker's former position or a substantially similar position

It also requires employers to notify OEWD in writing of all such offers of reemployment made, in addition to all acceptances and rejections by eligible workers of those offers.

Delivering and accepting the offer

Employers must make a good faith effort to extend an offer of reemployment to the eligible worker by telephone and/or email. Where that is not possible, the offer must be delivered by certified mail or courier to the worker's last known address. Where more than one worker is eligible for an offer of reemployment, offers must be transmitted in seniority order.

An eligible worker must accept an offer of reemployment in writing by reasonable means identified by the employer, including by email or other reasonable electronic method. The offer will be deemed to have been rejected if the eligible worker fails to respond within the timeframes prescribed by the ordinance.

Nondiscrimination and reasonable accommodations

The ordinance prohibits discrimination or taking an adverse employment action against an eligible worker due to a “family care hardship.” For these purposes, family care hardship means the inability to work due to either:

- A need to care for their child whose school or place of care has been closed, or whose childcare provider is unavailable, as a result of the public health emergency, and no other suitable person is available to care for the child during this period; or
- Any reasons for which a person may use paid sick leave to provide care for someone other than themselves under San Francisco’s Paid Sick Leave Ordinance.

Under the ordinance, an eligible worker is entitled to reasonable accommodation of a job duty or requirement if such a hardship impacts their ability to perform or satisfy it. It requires a covered employer to make good faith efforts when rehiring to reasonably accommodate an eligible worker requesting such an accommodation. For these purposes, reasonable accommodations include, without limitation, modifying the worker’s schedule or work hours, and permitting telework where feasible. This duty to accommodate ends when the emergency ordinance expires.

Remedies for violations

Eligible workers may file a lawsuit in state court for violations of this emergency ordinance. If successful, the worker may be awarded: reinstatement; back pay for each day of the violation and front pay for each day the violation continues; the value of the benefits they would have received under the employer’s benefit plan had the violation not occurred; and reasonable attorneys’ fees and costs. Notably, the ordinance does not limit other rights and remedies that the law may provide to eligible workers, including the rights to be free from wrongful termination and unlawful discrimination.

In closing

In addition to creating new reemployment rights for laid off employees, San Francisco’s “Back to Work” Emergency Ordinance imposes new notice, reporting, recordkeeping and other obligations on businesses that have engaged in qualifying layoffs since February 25. While the ordinance will automatically expire on September 1, the San Francisco Board of Supervisors may reenact or extend it. As San Francisco employers resume or consider resuming business operations, they should ensure compliance with these and other COVID-19 related obligations.

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