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San Francisco Enacts a Temporary Ordinance Granting Workers Laid Off Due to COVID-19 a Right to Reinstatement

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On July 3, 2020, San Francisco enacted a temporary emergency ordinance requiring businesses with more than 100 employees to offer reemployment to employees laid off due to the COVID-19 pandemic. Known as the "Back to Work" emergency ordinance and aimed at mitigating the severe economic harm to individuals who have been unable to work due to the public health emergency caused by COVID-19, this enactment creates a right to reemployment for eligible laid-off workers if their prior covered employer resumes business operations and/or seeks to re-staff. According to its terms, this statute will remain in effect for only 60 days. Thus, unless it is extended or reenacted, the statute will remain in effect only through September 1. However, what its lingering legal effect will be in terms of hiring rights, duties and obligations in San Francisco beyond its expiry remains an open question.

Some of its more salient points include the following:

The Employers Who Are Covered by the New Law and Who Might Be Held Liable for Non-Compliance

For the purposes of this new law, the term, "Employer," means any "*person"* who directly or indirectly owns or operates a for-profit or non-profit business in the City of San Francisco and who employed or employs 100 or more employees as of the date that the employer first terminated or laid off an employee on or after February 25, 2020 (when Mayor Breed first declared a health state of emergency due to COVID-19). *For the purposes of this article and ease of reference, these covered employers are referred to as "**Employer(s)**."*

Though the definition is specific to "person(s)" and says nothing about the actual businesses they may own or operate, this new law presumably also applies to those businesses. The legal effect of the definition's reference to "person" may, therefore, mean that liability for violation of this new law could be personal to a covered business' owners/operators as well as apply to the businesses that they may own or operate.

Excluded from this definition of "Employer" are federal, state, local, or other public agencies. Also

excluded are those employers that provide services that qualify as healthcare operations including hospitals, clinics, virus testing locations, dentists, pharmacies, blood banks, pharmaceutical and biotech companies, healthcare suppliers, home healthcare service providers, mental health providers, and any related/ancillary healthcare services as well as veterinary care and healthcare services to animals.

The Employees Who Are Covered and Protected by This New Law

Employees eligible for the protection of this new law, *referred to as "**Employees** or **Workers,**"* are those who (1) were previously employed by an Employer for at least 90 days of the calendar year preceding the date on which their Employer provides them with a written notice of a covered termination/layoff and (2) who were separated due to a layoff within the meaning the new statute, *a "**Layoff.**"* Those whose layoff is not covered by the statute, i.e. those layoffs that are unrelated to the COVID-19 public health emergency do not appear to be covered.

The Layoffs That Are Covered by the New Law

For the purposes of the new law, a covered layoff is any separation due to layoff of 10 or more Employees by an Employer during any 30-day period, commencing on or after February 25, 2020, which is caused by the Employer's lack of funds or lack of work for its Employees, resulting from the COVID-19 public health emergency (declared by the Governor and/or the Mayor) and any shelter in place order directing residents to stay at home and shelter in place and prohibiting the operation of any business activities. Included in this definition is any layoff conducted in conjunction with the closure or cessation of an Employer's business operations in the City. However, workers who work from home, telework or telecommute probably are not laid off for the purposes of this new law and, thus, probably not covered and protected by this new law.

The New Law's Substantive Requirements

- **<u>Mandatory Notifications/Records Regarding Layoff</u>**

    - Written Notice of Layoff and Right to Reemployment to Be Given to Existing Employees – Under the new law, when an Employer implements a Layoff after February 25, 2020, the Employer must provide Workers with a written notice at or before the effective date of the Layoff that contains the following information: a notification that they are being laid off within the meaning of the new law, the effective date of that Layoff, a summary of their right to reemployment created by this new statute and the telephone number for a hotline, to be operated by the City's Office of Economic and Workforce Development (OEWD), which Workers may call to receive information regarding their rights under the law and City resources related to unemployment.

    - Written Notice of Layoff and Right to Reemployment for Former Employees – Likewise, on or before August 2, an Employer must provide Employees adversely affected by a Layoff *prior to July 3* with a written notice containing the following information: a notification that they were laid off within the meaning of the new law, the effective date of that Layoff, a summary of their right to reemployment created by this new statute and the telephone number for a hotline, to be operated by the OEWD, which Workers may call to receive information regarding their rights under the law and

City resources related to unemployment.

- Notification to the City Regarding Layoff – An Employer must provide written notice to the OEWD of a covered layoff within 30 days of the date it initiates that layoff. If a covered employer does not foresee the occurrence of a covered layoff, then the employer must provide such written notice within seven days of its termination (resulting in a covered layoff) of the tenth employee in a 30-day period. Written notice to the OEWD must identify the total number of Employees located in San Francisco affected by a Layoff, the job classification at the time of separation for each laid-off Worker, the original hire date for each affected Worker, and the date of their separation due to Layoff.

- Records Retention – Where an Employer initiates a Layoff, it must retain the following records for a minimum of two years (from the date that written notice is provided to an Employee) regarding that Employee – the Employee's full legal name, their classification at the time of Layoff, their date of hire, their last known address of residence, their last known email address, their last known telephone number, and a copy of the written notice regarding their Layoff provided to the Employee.

- **An Employer's Obligation to Offer Reemployment to Workers Following a Layoff**

The new law also gives Employees a priority right to reemployment/reinstatement when their Employer seeks to re-staff its workforce. Thus, the new law mandates that an Employer first offer an Employee's former position, or one that is substantially similar to it, to a laid off Worker before offering the job to any other person. For the purposes of this new law, a "substantially similar position" includes any of the following: a position with comparable job duties, pay, benefits, and working conditions to the Employee's position at the time of their Layoff; any position in which the Employee worked for the employer in the 12 months prior to the Layoff; and any position for which the Employee would be qualified to hold, including a position that would necessitate training where such training would otherwise be available to a new hire. Further, where there is more than one incumbent Employee to fill the same or a substantially similar position, the statute directs the Employer to make reemployment offers to Workers based on their relative date of hire seniority with reemployment going to the Employee with the earliest start date.

- **An Employer's Obligation Not to Discriminate and Its Affirmative Duty to Reasonably Accommodate Workers Experiencing a Family Care Hardship**

The new law also prohibits an Employer from discriminating against or taking adverse action against a Worker as a consequence of that Worker experiencing a Family Care Hardship. For the purposes of the new law, a Family Care Hardship means that a Worker is unable to work due to either (1) a need to care for their child whose school or place of care had been closed, or whose childcare provider is unavailable as a result of the public health emergency and no other suitable person is available to provide care to the child during a Worker's period of leave or (2) where an employee would otherwise qualify to use paid sick leave to care for someone other than themselves under the City's Paid Sick Leave Ordinance. Additionally, the new law entitles a Worker to reasonable accommodation of their job duties or job requirements if a Family Care Hardship impacts their ability to perform that job duty or job requirement. Thus, under this new law, an Employer must, in response to a request for accommodation by a Worker, make good faith efforts to reasonably

accommodate the Worker, meaning modifying the Worker's schedule, the number of hours they are required to work or permitting them to telework, to the extent operationally feasible, during the period of their Family Care Hardship. *Significantly, and unlike other obligations imposed on employers by this new law, the duty to accommodate expressly expires on September 2 when the new law expires*.

There Are Three Very Limited Exceptions to an Employer's Obligation to Offer Reemployment to Eligible Laid-Off Employees

An employer may withhold reemployment based on information learned subsequent to the covered layoff that the worker engaged in dishonesty, violation of the law, violation of a policy or rule of the employer, or other misconduct during their employment. Likewise, an employer may withhold reemployment if an employer laid off a worker before July 3, 2020 (the effective date of this law) and the employer and the worker executed a severance agreement as a result of that layoff before July 3 and that in exchange for adequate consideration the worker agreed to a general release of claims against the employer. Finally, an employer may withhold an offer of reemployment if the employer laid an eligible worker off before the effective date of this law and prior to the effective date, the employer hired a person other than the eligible worker to that laid off worker's position or to a substantially similar position.

Statutorily Mandated Methods/Requirements of Reemployment Offers and Acceptance and Notification to the City

Under the new law, Employers must engage in good faith efforts to notify Employees by telephone and email of the Employer's offer of reemployment. If an Employer does not have telephone or email contact information for an Employee or is unable to make contact with them by telephone or email, then the Employer shall attempt to contact the Worker by certified mail or courier delivery. The form, sequence and timing of the offer and acceptance communications mandated by the statute are laid out in the ordinance and in detail that is beyond the scope of this article. Those details can be found in Section 7 of the new ordinance.

In addition to the aforesaid requirements affecting offers and acceptances of reemployment, Employers are required to notify the OEWD in writing of all offers of reemployment made under the new ordinance in addition to all acceptances and rejections by Workers of such offers of reemployment.

Sanctions/Liabilities for Non-Compliance

Employees may bring actions in state court for violations of the new ordinance and be awarded the following: hiring and reinstatement rights, an award of back pay for each day of violation and front pay for each day during which the violation continues and an award of the benefits the Worker would have received under the Employer's benefit plan. Further, if the Worker is the prevailing party, the court shall award them their reasonable attorneys' fees and costs. The new law also does not in any way limit the rights and remedies that the law otherwise provides to Workers, including the right to be free from wrongful termination and unlawful discrimination.

There Is a Limited Safe Harbor for Employers Covered by Collective Bargaining

The new law does not apply to Employers covered by a bona fide collective bargaining agreement to the extent that the requirements of the new law are expressly waived in the CBA in clear and

unambiguous terms.

As you are aware, things are changing quickly and there is a lack of clear-cut authority or bright line rules on implementation. This article is not intended to be an unequivocal, one-size fits all guidance, but instead represents our interpretation of where things currently and generally stand. This article does not address the potential impacts of the numerous other local, state and federal orders that have been issued in response to the COVID-19 pandemic, including, without limitation, potential liability should an employee become ill, requirements regarding family leave, sick pay and other issues.

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