



San Francisco Passes Back-To-Work Emergency Ordinance Mandating Reemployment For Certain Workers

Insights

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The San Francisco Board of Supervisors just passed the Back-to-Work Emergency Ordinance aimed at guaranteeing reemployment to certain workers who were laid off by covered employers due to the COVID-19 pandemic. This Ordinance creates a temporary right to reemployment when certain larger employers seek to hire workers for the same or substantially similar positions previously held by other workers who were recently laid off. This Ordinance also prohibits covered employers from discriminating against those laid-off workers with family care hardships and allows them to request reasonable accommodations for the hardships. The Ordinance, approved on June 23, will become effective immediately upon the Mayor's signature and will expire upon the 61st day following enactment unless extended. What do San Francisco employers need to know about this new obligation?

[Ed. Note: The Ordinance, enacted on July 3, was set to expire on September 1, 2020. However, San Francisco has reenacted the ordinance and it will remain in effect for at least another 61 days.]

Who Is A Covered Employer?

It is important to first understand that only certain "covered employers" are subject to the Ordinance's requirements. "Covered employers" are defined as for-profit and non-profit employers that directly or indirectly own or operate a business in the City or County of San Francisco and employ, or have employed, 100 or more employees on or after February 25, 2020.

Excluded from coverage are certain employers that provide healthcare operations are exempt from the Ordinance, including hospitals, clinics, COVID-19 testing locations, dentists, pharmacies, blood banks and blood drives, pharmaceutical and biotechnology companies, healthcare suppliers, home healthcare suppliers, mental health providers, and veterinary care and other healthcare service providers to animals. Federal, state, local, or other public agencies are also exempt from this Ordinance.

What Is A Covered Layoff?

Only certain lay-offs are covered as part of this new obligation. Those include any lay-off of ten or more employees in any 30-day period starting from February 25, 2020 until the expiration of the Ordinance. Also, the lay-off needs to have been caused by the employer's lack of funds and/or the

lack of work for its employees due to the COVID-19 Public Health Emergency and any Shelter-in-Place Order.

Who Is An Eligible Worker?

Eligible Workers are those who were employed for at least 90 days in the preceding calendar year and separated from their employment due to a covered lay-off.

Employer Obligations Under The Back-To-Work Emergency Ordinance

Covered employers have five basic obligations under the new Ordinance.

1. Written Notice Of Layoff To Eligible Worker

First, employers implementing a lay-off must provide each Eligible Worker with written notice, in a language the worker understands, either at the time of or before the lay-off. If the lay-off has already occurred, employers must provide the notice to each Eligible Worker within 30 days of the Effective Date of this Ordinance.

The notice must provide:

- Notice of the lay-off and the effective date;
- Summary of the right to reemployment under this Ordinance; and
- The telephone number for a hotline to be operated by the Office of Economic and Workforce Development (OEWD). **[Ed. Note: (415) 701 – 4817]**

2. Offers Of Reemployment

Employers seeking to fill the same, or substantially similar, positions previously held by Eligible Workers must hire in accordance with following the rules:

- ***Offer of to the Same Position***

Employers seeking to hire for positions formerly held by an Eligible Worker must first offer the position back to the Eligible Worker before offering the position to others.

- ***Offer of Reemployment to a Substantially Similar Position***

Employers seeking to hire for any positions that are “substantially similar” to an Eligible Worker’s former position to be held in San Francisco must first offer that position to the Eligible Worker before offering the position to others. “Substantially similar” position is defined as:

- A position with comparable job duties, pay, benefits, and working conditions to the Eligible Worker’s former position;
- Any position the Eligible Worker held in the 12 months before the lay-off; or
- Any position for which the Eligible Worker would be qualified, including a position that may require training, if the Employer would otherwise make the training available to a new employee upon hire.

- ***Offers of Reemployment Must be Made in Order of Seniority***

If there is more than one Eligible Worker with the same classification, employers must make offers of reemployment based on seniority, which is determined by the Eligible Workers' earliest date of hire.

- ***The Offer of Reemployment***

To make offers of reemployment in compliance with this Ordinance, employers must comply with the following rules:

- *By Email and Telephone:* If the telephone number or email is known to the employer, the employer must first notify the Eligible Worker of the offer for reemployment by email or telephone. The employer may then send the written offer by email only if the Eligible Worker consents to email delivery. The Eligible Worker must consent to email delivery of the written offer the following business day after notification by 5:00 p.m. If the Eligible Worker consents to email delivery, the employer must email the written offer the next business day by 5:00 p.m. If the Eligible Worker does not timely consent to email delivery, the employer must send the written offer by certified mail or courier delivery to the Eligible Worker's last known address. The offer must remain open for at least two business days following delivery.
- *By Mail:* If an Eligible Worker does not have a telephone number or email or employer is unable to notify the Eligible Worker by email or telephone, the employer must mail the written offer for reemployment to the Eligible Worker's last known address of residence by certified mail or courier delivery. The offer must remain open for at least two business days following delivery.

Employers and Eligible Workers may extend the offer periods by mutual agreement.

- ***Acceptance of the Offer of Reemployment***

Eligible Workers must accept the offer of reemployment by providing a response in writing by reasonable means identified by the employer. If an Eligible Worker notifies the employer by other means, the employer must allow two business days from that date to respond in the manner provided.

If an Eligible Worker fails to respond to the offer of reemployment within the specified timeframes, the Eligible Worker will be deemed to have rejected the offer of reemployment. The employer is then permitted to offer the position to the next most senior Eligible Worker, or, if there are no alternative Eligible Workers, to another job candidate.

3. Written Notice To The OEWD

Employers must provide written notice of a lay-off to the OEWD within 30 days of the date it initiates the lay-off. If an employer does not anticipate or foresee that there will be a Layoff, it must provide written notice within seven days of the lay-off date of the 10th affected Eligible Worker in 30 days. Employers must provide the following information to the OEWD:

- Total number of employees located in San Francisco affected by the Layoff;
- Job classifications for each affected Eligible Worker;
- Original hire date for each affected Eligible Worker; and
- Date of separation for each affected Eligible Worker.

Employers must also notify the OWED in writing of all offers of reemployment, including all acceptances and rejections.

4. Retention of Records

Employers that conduct a lay-off must retain the following records for at least two years regarding each affected Eligible Worker:

- Full legal name;
- Job classification at the time of separation;
- Date of hire;
- Last known address of residence;
- Last known email address;
- Last known telephone number; and
- Copy of the written notice regarding the lay-off.

The two-year period is measured from the date the written notice was provided to the Eligible Worker.

5. Duty to Not Discriminate and Reasonably Accommodate Family Care Hardships

Employers are prohibited from discriminating against or taking adverse employment actions against an Eligible Worker with a “Family Care Hardship.” Employers must also, when requested, provide reasonable accommodations to Eligible Workers with Family Care Hardships. Reasonable accommodations may include modifying the Eligible Worker’s schedule, modifying the number of hours worked, or to the extent feasible, permitting telework. “Family Care Hardship” means an Eligible Worker is unable to work due to either:

- The 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 the period of such leave; or
- Any reasons that a person may use leave under San Francisco’s Paid Sick Leave Ordinance to provide care for someone other than themselves.

Are There Any Exceptions?

Employers may withhold offers of reemployment for the following three reasons:

1. **Misconduct:** Employers are not required to offer reemployment to Eligible Workers if the employer, after the lay-off, learns that the Eligible Worker engaged in any act of dishonesty, violation of law, violation of employer's policy or rule, or other misconduct.
2. **Severance Agreement:** Employers are not required to offer reemployment to Eligible Workers who separated as part of a lay-off between February 25, 2020 and the Effective Date of this Ordinance and executed a severance agreement which included a general release of claims against the employer and adequate consideration.
3. **Rehiring:** Employers are not required to offer reemployment to Eligible Workers who separated as part of a lay-off between February 25, 2020 and the Effective Date of this Ordinance so long as, prior to the Effective Date of this Ordinance, the employer had hired another person.

Further, this Ordinance does not apply to Eligible Workers covered by a bona fide collective bargaining agreement to the extent that the requirements of this Ordinance are expressly waived in the collective bargaining agreement in clear and unambiguous terms.

What Are The Penalties For Non-Compliance?

Eligible Workers may bring a lawsuit in the Superior Court of the State of California against the employer for violating this Ordinance and may be awarded the following relief:

- Hiring and reinstatement rights;
- Back pay;
- Front pay;
- Value of the benefits the employee would have received; and
- Reasonable attorneys' fees and costs.

The Ordinance also does not limit an Eligible Worker's other rights and remedies, including the right to bring claims for wrongful termination and unlawful discrimination.

Conclusion

We will continue to monitor the rapidly developing COVID-19 situation and provide updates as appropriate. Make sure you are subscribed to [Fisher Phillips' Alert System](#) to get the most up-to-date information. For further information, contact your Fisher Phillips attorney, any attorney in our [San Francisco office](#), or any member of [our Post-Pandemic Strategy Group Roster](#). You can also review our [FP BEYOND THE CURVE: Post-Pandemic Back-To-Business FAQs For Employers](#) and our [FP Resource Center For Employers](#).

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