San Francisco To Revise COVID-19 Retaliation Ordinance

Insights
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The San Francisco Board of Supervisors has just unanimously approved a proposed ordinance prohibiting retaliation against San Francisco employees who missed work after contracting or being suspected of contracting COVID-19. If the Mayor of San Francisco signs it or returns it unsigned, the legislation would codify an emergency ordinance that currently provides essentially the same employee protections on a temporary basis, and also modify the scope of the existing law to cover employer retaliation based on COVID-19-related absences. The new law would remove protections previously provided to independent contractors under the emergency ordinance, however, and would instead apply only to employees and applicants. San Francisco employers would also be required to provide notice to workers of the protections. What do you need to know about this impending development?

[Ed. Note: Mayor Breed signed the Ordinance on February 5, 2021, and the Ordinance will become effective March 8, 2021.]

Who Is Covered?

The law would apply to any person or entity who employs, contracts with, or hires an "Employee," including for temporary services or through staffing agencies. "Employee" is defined to include any person who is providing labor or services within the boundaries of the City and County of San Francisco and qualifies as an employee under California Labor Code section 2750.3. The law would also apply to job applicants.

Employer Obligations

There are five primary obligations that would fall upon the shoulders of San Francisco employers should this legislation take effect.

1. ***Notice To Employees***
   Within seven days after the law becomes effective, the San Francisco Office of Labor Standards Enforcement (OLSE) would publish on its website a notice to employees of their rights under the law. Employers would have **seven days** after the notice is published to provide the notice to their employees in a manner calculated to reach all of them, by (a) posting it in a conspicuous location in the workplace, (b) sending it out by email, and/or (c) posting it in a conspicuous place on their

web-based platform. The notice must be provided in English, Spanish, Chinese and any language spoken by at least 5% of the employees at the workplace or job site.

2. ***No Retaliation For Contracting COVID-19 Or Missing Work***
   Employers would be prohibited from discriminating or taking any adverse action against an employee who (a) contracts COVID-19, (b) is suspected of contracting COVID-19, or (c) misses work or requests time off because they tested positive for COVID-19 or quarantined due to COVID-19 symptoms or exposure. The requirement also prohibits employers from counting such absences as an absence that could lead to any adverse action.
3. ***Only Reasonable Measures To Verify Employee Absence Is Protected***
   Policies or practices that require documentation for the employee's absences of *three or fewer* consecutive work days would be *presumed unreasonable*. Employers could not require an employee to disclose more information than necessary to confirm that the absence is covered under this law.
4. ***Applicant Protections***
   Employers would not be permitted to rescind an offer or decide not to employ an applicant based on whether the applicant tested positive for COVID-19 or is isolating due to COVID-19 symptoms or exposure. This includes accommodating applicants who are unable to begin on their scheduled start date.
5. ***No Retaliation For Reporting Suspected Violations***
   Any adverse action taken against an employee within 90 days of the person filing a complaint with the OLSE would create a rebuttable presumption of retaliation.

What Are the Penalties For Violations?

If the OLSE concludes that a violation occurred, it would have authority to:

1. Order an employer to hire an applicant or reinstate an employee;
2. Pay lost wages to an employee or applicant;
3. Issue administrative penalties of up $1,000 for the first violation, $5,000 for the second violation and $10,000 for each subsequent violation;
4. Order the employer to pay the City the cost of investigating and remedying the violation; and
5. Award interest on all amounts unpaid after the date specified for payment.

There is no private right of action entitling an employee to file a lawsuit in court for any alleged violations. Rather, only the OLSE may bring an action to enforce the Ordinance.

Can Employers Appeal The OLSE Determination?

Employers would have **15 days** to appeal a determination of violation after receiving notice of their right to do so. If the employer fails to appeal the determination within 15 days, the determination

would become a final administrative decision enforceable as a judgment by the Superior Court.

Conclusion

The changes to the current law under Emergency Ordinance No. 162-20 — prohibiting retaliation against employees who miss work due to COVID-19 — will be relatively limited, but San Francisco employers will need to keep an eye out for the OLSE to publish the notice in approximately one to two weeks, and ensure they make it available to their employees. Also, prior to taking any action related to an employee, employers should consider whether the action could potentially be viewed as retaliation in violation of this law.

We will continue to monitor the rapidly developing COVID-19 situation and provide updates as appropriate. Employers should ensure that they are subscribed to Fisher Phillips' Alert System to get the most up-to-date information. For further information, contact your Fisher Phillips attorney or any attorney in our San Francisco office.

This Legal Alert provides an overview of a proposed city ordinance. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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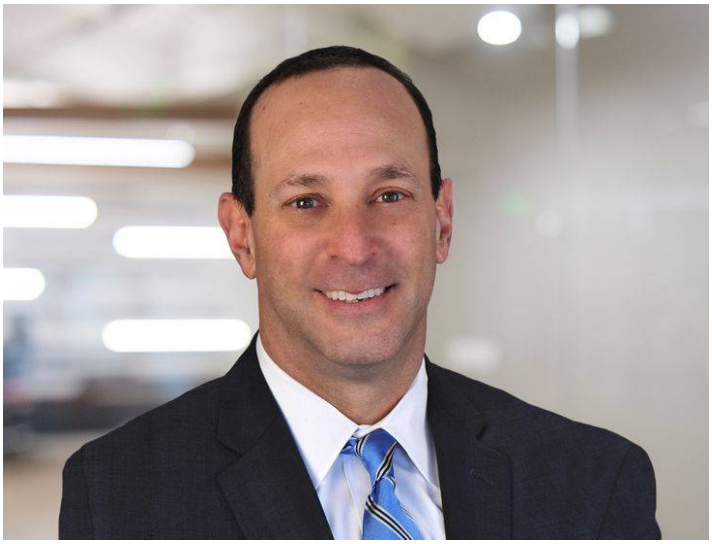

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