
Legislative Review:	BOS File No. 200455
Name:	Emergency Ordinance – Temporary Right to Reemployment
Sponsor(s):	Supervisors Mar, Preston, Safai, Haney, Walton, and Fewer
Date Introduced:	May 5, 2020
Date Referred:	May 13, 2020
Scheduled for BOS Committee:	Government Audit and Oversight

Existing law:

At present, there is no legal requirement, at any governmental level, for employers to rehire formerly employed staff for the same position from which they had been laid off.

Proposed changes:

This Emergency Ordinance requires employers operating in San Francisco to offer a right to reemployment to certain employees laid off as a result of the COVID-19 pandemic and the related stay at home and shelter in place orders issued by the City and County of San Francisco and the State of California.

The Emergency Ordinance applies to employers of any size who layoff ten or more employees in a 30-day period as a result of the emergency. The employer must extend offers of reemployment to any employee previously employed for at least 90 days in the preceding calendar year. If the employee accepts the offer, the employer must maintain the employment relationship for 90 days, subject to certain exceptions for employee misconduct and financial hardship on the part of the business.

The Emergency Ordinance applies to layoffs between February 25, 2020 and its expiration. As this is an Emergency Ordinance, it will take effect immediately upon enactment. It will remain in effect for 60 days, unless reenacted. If not, reenacted, it will expire on the 61st day.

Legislative Intent:

Under the Federal Worker Adjustment and Retraining Notice (WARN) requirements, employers with 100 or more employees must provide a 60 day notice in advance of a business closure or mass layoff (50 or more employees), with certain conditions. The State of California administers a similar notice requirement when there is a mass layoff of 75 or more full and part-time employees. Notices must be sent to the affected employees, and state and local representatives. In San Francisco, notices are sent to the Office of Economic and Workforce Development (OEWD). When notices are received, Rapid Response services are deployed by OEWD in order to provide resources to affected employees which include information about unemployment insurance, COBRA, and other health care options; retraining and employment placement assistance; career counseling; and other workforce services.

Employers with less than 75 full or part-time employees are not required to report layoffs of any size to the federal, state, or local entities. As such, there is a concern that the actual number of layoffs in the City are not being adequately reported. The Emergency Ordinance is thusly designed to provide employee protections to those working for businesses of any size. This includes decreasing the number of laid-off employees who will be without employer-sponsored health insurance as a result of the COVID-19 pandemic by requiring employers subject to the Emergency Ordinance to rehire eligible employees. This would also, theoretically, result in fewer individuals relying on the City's public health system. The Emergency Ordinance also assumes that rehiring employees as soon as practicable would not only aid their own personal economic recovery, but also would support the local economy through increased local spending.

Definitions:

"Employer" means any person who directly or indirectly owns or operates a for-profit business or non-profit in the City that employs 10 or more employees as of the earliest date that an Employer Separates one or more employees that subsequently results in a Layoff. "Employer" does not include any federal, state, or local or other public agency

"Eligible Worker" means a person: (1) employed by the Employer for at least 90 days of the calendar year preceding the date on which an Employer provides written notice to the employee of a layoff caused by the Public Health Emergency; and (2) and who was separated from employment due to a layoff caused by the Public Health Emergency or the SIP Orders.

"Family Care Hardship" means an Eligible Worker who is unable to work due to either: (1) 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 the period of such leave; (2) or any grounds stated in Administrative Code § 12W.4(a) for which a person may use paid sick leave to provide care for someone other than themselves. For the purpose of this definition, "child" means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is under 18 years of age, or a child 18 years of age or older who is incapable of self-care because of a mental or physical disability.

"Layoff" means a separation from employment by an Employer of 10 or more employees during any 30-day period, commencing on or after February 25, 2020, and which is caused by the Employer's lack of funds or lack of work for its employees, resulting from the Public Health Emergency and SIP Orders. This definition includes any layoff conducted in conjunction with the closure or cessation of an Employer's business operations in the City.

"Separate" and "Separation" means the termination or end of employment.

"Substantially Similar Position" includes any of the following: a position with comparable job duties, pay, benefits, and working conditions to the Eligible Worker's position at the time of Layoff; any position in which the Eligible Worker worked for the Employer in the 12 months preceding the Layoff; and any position for which the Eligible Worker would be qualified, including a position that would necessitate training that an Employer would otherwise make available to a new employee to the particular position upon hire.

Key Components of the Emergency Ordinance:

Requirements Related to Layoffs

- Employers of any size who lay off with 10 or more employees would be required to provide a written “Notice of Layoff” and “Right to Reemployment for Existing Employees” for the duration of the Public Health Emergency and would apply retroactively to February 25, 2020.
- For employers who laid-off employees between February 25, 2020 and the effective date of the Emergency Ordinance, they would have to provide the Notice of Layoff and Right to Reemployment to those laid-off employees within 30 days of the effective date of the Emergency Ordinance.
- The Notice of Layoff and the Right to Reemployment would have to be provided to the employee in language they understand.
- The Notice of Layoff would have to include:
 1. The layoff’s effective date;
 2. A summary of the Right to Reemployment (described below);
 3. The number to a hotline managed by the Office of Labor Standards and Enforcement (OLSE);
 4. A hyperlink to a website, to be operated by OLSE, where affected employees *may* complete an online form, which, OLSE may use to contact the affected employee regarding services and resources related to unemployment; and,
 5. A request that an affected employee authorize their employer to provide their name and contact information to the City in order to provide information services and resources regarding unemployment, and so that the City may gather comprehensive data regarding the number of layoffs occurring in San Francisco as a result of the Public Health Emergency.

The employer would also request that the affected employee’s written consent be provided to disclose to the City the employee’s full legal name, last known address of residence, last known telephone number(s), and last known email address(es). The consent form would also include an attestation from the employee, indicating which of the above-listed categories of personal information they consent for the employer to disclose to the City and the affected employee’s signature authorizing such disclosure.

The employer would also have to provide pre-addressed and stamped envelope with the written notice to facilitate the employee’s return of the requested information. The employee would have to return that written authorization within seven days of receipt of the Notice.
- Employers would also have to provide written notice of a layoff to OLSE within 30 days of the date they initiate the layoff. The written notice to OLSE would have to include:
 1. The total number of employees located in San Francisco affected by the Layoff; The job classification at the time of Separation for each affected employee;
 2. The original hire date for each affected employee; The date of Separation from employment for each affected employee; and,
 3. The extent that any separated employee has consented to disclose personally identifiable Information to OLSE.

- If an employer does not anticipate a layoff of 10 or more employees, the requirement to issue a Notice of Layoff will be triggered once a 10th employee has been laid off;
- Employers will be required to retain records relating to layoffs occurring due to the Public Health Emergency for at least two years beginning from the date of the written Notice of Layoff.

Requirements Related to Rehiring:

- If an employer should seek to rehire after a layoff, the employer will first have to offer the position to a person who had been employed prior to that layoff, if that position is substantially similar to the employee's previous job duties.
- Reemployment offers must be made to employees that had been laid off in order of seniority, meaning to the individual who held the earliest date of hire.
- The employer will have to extend the offer of reemployment via mail, the employer may also submit via email. The employer will also extend the offer via phone call in a good faith effort, and the employee
- The rehire offer will last for two days if made by telephone and the employee consents to receiving the offer via email.
- The rehire offer will last for seven days after the written notice is confirmed to have been received by the employee.
- If the employer does not receive a confirmation that the offer has been received by mail, the offer must remain open for 10 days after it is sent.
- If there is not a response to the offer, the offer can be considered rejected.
- If the eligible worker accepts the offer, they must do so in writing or email.
- The eligible worker is guaranteed at least 90 days of reemployment unless the eligible worker engages in activity that would disqualify them from employment or, if the employer suffers demonstrable financial hardship.
- The employer also must accommodate eligible workers who are experiencing a "Family Care Hardship" by modifying their schedule, hours worked, or permitting telework where feasible.
- Employers must also notify OLSE in writing of all offers of reemployment.

Remedies for Violations

Eligible workers may bring an action against an employer for alleged violations of this Emergency Ordinance to the Superior court of California. The eligible worker, should they be the prevailing party, would receive hiring and reinstatement rights, and back-pay for each day of the violation. The employer would also be responsible for paying reasonable attorney's fees and costs.

Issues and Considerations:

At present, there are approximately 49,727 small businesses with 100 or fewer employees that this legislation could potentially impact, not accounting for those that have temporarily or permanently closed due to the Public Health Emergency. Although, the City Controller has indicated that just ~14,000 businesses have been specifically affected and approximately ~166,000 employees.

The pandemic has created insurmountable challenges for most of our small businesses. In addition to administering layoffs through no fault of their own, they have been unable to pay rents and mortgages and other fixed costs due to lack of revenue. And, while attempting to find the means for paying those fixed costs employers have been applying for federal, state, and local assistance programs, often to no avail. Temporary closures have resulted in permanent closures and permanent layoffs. While this legislation would indeed provide the City with critical information related to layoffs of less than 75 employees, it would present small businesses with significant challenges and would establish a strain on City resources.

During the Public Health Emergency, small businesses must comply with guidance being issued from the state and the local Department of Public Health. Directives from those entities have resulted in temporary closures for most, and significantly modified business operations for others. These directives are also frequently issued with little notice leaving small businesses with little time to prepare. For example, one week's notice was given to allow most retailers to conduct curbside pick-up. And, guidance for conducting curbside pick-up was provided just four days before retailers were permitted to operate in that manner. Should this legislation pass, the timelines outlined in the requirements for rehiring may inadvertently leave small businesses significantly understaffed. As such a business preparing to reopen or open with a limited capacity would be left without the staffing necessary to get themselves open and ready to serve customers in a timely manner. This would thusly subvert the legislation's intent to support the local economy.

The emergency legislation would also require that eligible employees affected by a layoff respond to offers of reemployment. If eligible employees do not respond within the prescribed timelines, the offer would be considered declined. A condition for receiving unemployment insurance is that an individual is actively seeking work. Should there be a record made that an individual has effectively declined an offer of employment, it may jeopardize their receipt of unemployment benefits. Again, this requirement paired with the record retention policy would effectively undermine the legislation's intent to provide employee protections and support an individual's own economic recovery.

Eligible workers are able to bring legal action to the Superior Court of the State of California for alleged violations of the Emergency Ordinance. Standards for bringing legal action to the Superior Court of the State of California are not prescribed. And, options for reconciling alleged violations at the local level are also not addressed. Legal action can be extraordinarily costly. In this fiscal climate, arbitration could quite possibly mean that the business would be forced into permanent closure.

This emergency legislation also indicates that the Office of Labor Standards and Enforcement would be responsible for its administration. However, OEWD has historically provided services related to layoff assistance and has provided Rapid Response services. OLSE would be thusly required to create a novel program which would include the development of a hotline and an entirely new website, to be administered for just 60 days. At the same time, it is widely understood that City Departments have been advised of a hiring freeze that is likely to last for many months to come. Should this legislation pass, it is likely to create an undue burden on City resources.