

San Francisco's COVID-19 Response: Emergency Back-to-Work Ordinance Requires Re-employment of Laid-Off Workers

On June 23, 2020, the San Francisco Board of Supervisors passed an emergency ordinance, known as the “Back to Work” emergency ordinance. It provides re-employment rights to workers laid off as a result of the COVID-19 public health emergency and requires covered employers to give priority to laid-off employees as they re-open and resume business operations. The ordinance becomes effective immediately upon signature by Mayor London Breed. It expires 61 days following enactment, unless the ordinance is re-enacted.

Covered Employers

Under the ordinance, a covered “employer” is defined as any for-profit or non-profit employer directly or indirectly owning or operating a business in the City or County of San Francisco, and beginning on or after February 25, 2020, that employed or employs **100 or more employees** as of the earliest date that an employer separated or separates one or more employees that subsequently resulted in a layoff. Government entities and certain healthcare operations as defined under the Health Officer’s Order are exempted.

Covered Employees and Layoffs

Employees are covered if they’re deemed an “eligible worker,” which means a person:

1. Employed by their employer for at least 90 days of the calendar year preceding the date on which their employer provided or provides written notice to the employee of a covered layoff; and
2. Who was separated due to a covered layoff.

The ordinance doesn’t apply to eligible workers covered by a bona fide collective bargaining agreement as long as the requirements of the ordinance are expressly waived in the collective bargaining agreement in clear and unambiguous terms.

A covered “layoff” under the ordinance means a separation of 10 or more employees during any 30-day period, beginning on or after February 25, 2020, by a covered employer, and 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 and any shelter-in-place (SIP) order. The definition includes any layoff conducted in conjunction with the closure or cessation of an employer’s business operations in the city.

Written Notice of Layoff for Existing and Former Employees

When an employer implements a covered layoff after the beginning of the public health emergency, the employer must provide eligible workers with written notice of the layoff and right to re-employment, at or before the time the layoff becomes effective.

The written notice must include:

- A notice of the layoff and the layoff’s effective date;
- A summary of the right to re-employment created by this emergency ordinance; and

- A telephone number for a hotline, to be operated by the [Office of Economic and Workforce Development](#) (OEWD) , which eligible workers may call to receive information regarding the right to re-employment created by this emergency ordinance, as well as navigation services and other city resources related to unemployment.

The notice must be in a language understood by the eligible worker. An employer must also provide notice to any eligible worker/former employee who was separated or laid off prior to the effective date of this emergency ordinance. A written notice meeting the same requirements listed above must be provided within 30 days of the effective date of this emergency ordinance.

Re-employment Rights

When reopening, an employer must first seek to rehire the employee who previously held the position, or a substantially similar position, before offering the position to another person. If more than one employee from the same job classification could be rehired for the same position, the employer must make offers of re-employment in order of seniority (based on the employee's earliest date of hire with the employer).

An employer must make a good faith effort to notify eligible workers by telephone and email of offers of re-employment. The ordinance provides additional details for the methods of notification and how offers of re-employment should be delivered. Eligible workers must accept an offer of re-employment in writing by any reasonable means identified by the employer.

An employer may withhold an offer of employment under a few circumstances:

- If after the layoff, the employer learned the employee engaged in any act of dishonesty, violation of law, violation of policy or other misconduct.
- If the employee executed a severance agreement at the time of the layoff.
- If the layoff occurred between the beginning of the public health emergency and the effective date of this emergency ordinance and, prior to the effective date of the ordinance, the employer hired someone else to the employee's former position or to a substantially similar position.

Eligible Workers Experiencing a Family Care Hardship

The ordinance prohibits employers from discriminating or taking adverse action against an eligible worker who is experiencing a "family care hardship," which means an eligible worker 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; or
2. Any reason for which a person may use paid sick leave to care for another person.

An eligible worker is entitled to reasonable accommodation of a job duty or job requirement if a family care hardship impacts their ability to perform a job duty or satisfy a job requirement. In response to a such a request for accommodation, an employer must make good faith efforts to reasonably accommodate an eligible worker, which may include but is not limited to, modifying an eligible worker's schedule, modifying the number of hours to be worked, or permitting telework, to the extent

operationally feasible. The duty to accommodate expires along with expiration of this emergency ordinance.

Notification to the City Regarding Layoff and Offers of Re-employment

Employers must notify the OEWD of a layoff in writing, within 30 days of the date it initiates such layoff. If the employer did not foresee that separation of employees would result in a layoff, the employer must provide written notice within seven days of its separation of the tenth employee in a 30-day period as a result of the public health emergency and any SIP order.

Written notice to OEWD must identify:

- The total number of employees located in San Francisco affected by the layoff;
- The job classification at the time of separation for each eligible worker;
- The original hire date for each eligible worker; and
- The date of separation from employment for each eligible worker.

Employers must also notify the OEWD in writing of all offers of re-employment made under this ordinance, in addition to all acceptances and rejections by eligible workers of such offers of re-employment.

Record Retention

Employers that implement covered layoffs must retain the following records for at least two years, for each 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
- A copy of the written notice regarding layoff provided.

Enforcement and Violations

The [Office of Labor Standards and Enforcement](#) (OLSE) may issue regulations regarding this emergency ordinance.

Eligible workers alleging violations may bring an action in civil court against an employer and may be awarded hiring and reinstatement rights, back pay and front pay, the value of benefits that would have been received, attorney's fees and costs, and any other remedies deemed appropriate by the court.

San Francisco employers should determine whether they are covered under this ordinance and take any steps in preparation to comply.

Ordinance: <https://sfgov.legistar.com/View.ashx?M=F&ID=8626060&GUID=D44003BC-BC73-4F60-979F-3531071ABF9A>