

COVID-19: New Ordinance Requires Hotel Employers to Guarantee Re-Employment

The City of San Francisco rolls out new rules regarding hotel hiring procedures

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Due to the novel coronavirus (COVID-19), many San Francisco businesses have closed in order to contain the spread of the pandemic, resulting in declining revenues and widespread business interruption. These economic conditions have led to employee layoffs across San Francisco, including layoffs affecting hospitality and hotel workers across the city and county.

As San Francisco hotel employers work to restore their business operations in the wake of COVID-19, they should be aware of new rules that may affect how they rebuild their workforce.

On June 23, 2020, the San Francisco Board of Supervisors passed a Back to Work Emergency Ordinance guaranteeing re-employment to certain employees who were laid off due to the COVID-19 pandemic. The Ordinance was returned unsigned by Mayor London Breed on July 3. In the mayoral letter accompanying her response, Mayor Breed noted that the Ordinance, "in trying to get people back to work, is instead yet another heavy handed, short-term regulation that doesn't explicitly help any of our workers." In spite of this stated concern, the Mayor's return of the unsigned Ordinance rendered it effective immediately, starting July 3.

The Ordinance creates a temporary right to re-employment when covered employers seek to hire workers for the same positions previously held by employees who were recently laid off for COVID-19 reasons. Moreover, if covered employers seek to fill a job position that is "substantially similar" to a previously held position, they must first offer the position to a laid-off employee before offering the position to others. A "substantially similar position" is defined very broadly, and includes any position for which a laid-off employee would be qualified.

The Ordinance includes certain notice and record-keeping requirements associated with COVID-19 layoffs. These notice requirements are retroactive, and apply even if employers had previously provided notice to employees and local workforce development boards in compliance with previously existing notice requirements under federal and state Worker Adjustment and Retraining Notification (WARN) laws. The Ordinance also prohibits covered employers from discriminating against laid-off workers with family care hardships and allows them to request reasonable accommodations for the hardships. The Ordinance is set to expire on the 61st day following enactment, September 2, 2020, unless extended.

Who Is Covered By The Emergency Ordinance?

The Ordinance will apply to hotel and hospitality employers that operate in the City or County of San Francisco and employ, or have employed, 100 or more employees on or after February 25, 2020.

The Ordinance only covers workers who meet all of the below criteria:

- They were employed for at least 90 days in the preceding calendar year before notice of the layoff was provided.
- They were part of a layoff covered by the Ordinance. A covered layoff must involve a separation of ten or more employees in any 30-day period, beginning on or after February 25, 2020, until the expiration of the Ordinance. This includes any layoff related to the closure or cessation of a covered employer's business operations in the City or County of San Francisco.

- They were laid off due to 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.

Requirements for Instituting a Layoff

1. Notice Requirements

Covered employers must provide eligible workers with written notice, in a language the worker understands, either at the time of or before a covered layoff. If a covered layoff occurred before the effective date of the ordinance, employers must provide the notice to each employee within 30 days of the effective date of the Ordinance, on August 2, 2020.

For many hospitality employers who were required to engage in layoffs at the outset of the COVID-19 public health emergency, this will mean providing another round of employee notices to supplement those previously sent out pursuant to federal and state WARN laws.

Although there is some overlap between employee notices under federal and California WARN, on the one hand, and notices under the city's Ordinance, there are some notable differences. In particular, the written notice to laid-off employees must include (1) notice of the layoff and the layoff's effective date; (2) a summary of the right to re-employment under the Ordinance; and (3) the telephone number for a hotline to be operated by the Office of Economic and Workforce Development (OEWD).

A covered employer must also provide written notice to the OEWD, generally within 30 days of initiating a covered layoff. The notice must identify: (1) the total number of employees located in San Francisco affected by the layoff; (2) the job classification at the time of separation for each affected worker; (3) the original hire date for each affected worker; (4) and the date of separation from employment for each affected worker. The Mayor recognized that the Ordinance does in fact require retroactive notice to the city. However, Ordinance does not specify a deadline for providing retroactive notice in connection with layoffs that occurred prior to the Ordinance's effective date.

2. Retention of Records

When a covered employer initiates a covered layoff, they must retain the following records for at least two years regarding each affected Eligible Worker: (1) full legal name; (2) job classification at the time of separation; (3) date of hire; (4) last known address of residence; (5) last known email address; (6) last known telephone number; and (7) copy of the written notice regarding the layoff. The two-year period is measured from the date the written notice was provided to the eligible worker.

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 experiencing a family care hardship. "Family care hardship" means an eligible worker is unable to work due to either:

- 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
- Any reasons that a person may use leave under San Francisco's Paid Sick Leave Ordinance to provide care for someone other than themselves.

Further, 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 to satisfy a job requirement. In response to a request for accommodation by an eligible worker, employers must make good faith efforts to reasonably accommodate the worker during the period in which they experience a family care hardship. Reasonable accommodations may include modifying the eligible worker's schedule, modifying the number of hours worked, or to the extent feasible, permitting telework.

The Scope Of The Right To Re-Employment

1. Offers Of Reemployment

If an employer seeks to expand its workforce after a layoff has occurred, the employer will first have to offer the position to a person who had been employed prior to that layoff, if the new job position is the same or substantially similar to the employee's previous position. The Ordinance's requirements for rehiring laid-off employees include the following:

- **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 another person.
- **Substantially Similar Position:** Employers seeking to hire for any positions that are "substantially similar" to an eligible worker's former position must first offer that position to the Eligible Worker before offering the position to another person. The position must be located in the City or County of San Francisco. A "substantially similar" position will include any of the following:
 - 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.
- **Seniority:** If there is more than one eligible worker with the same classification, employers must make offers of re-employment based on seniority, which is determined by the eligible workers' earliest date of hire.

2. Exceptions

A covered employer may withhold an offer of re-employment under the following circumstances:

- **Misconduct:** After a covered layoff, the employer learns the eligible worker engaged in any act of dishonesty, violation of law, violation of policy or rule of the employer or other misconduct during their employment with the employer.
- **Severance Agreement:** The eligible worker was laid off before the effective date of the Ordinance and executed a severance agreement.
- **Rehiring:** The eligible worker was laid off before the effective date of the Ordinance, and the employer hired another person to the worker's former position or to a substantially similar position.

As the industry continues to adjust to the public health and economic conditions occasioned by the COVID-19 pandemic, it remains to be seen how the new San Francisco right to re-employment will affect hotel and hospitality employers looking to restart their operations. In the meantime, employers with San Francisco employees should be mindful of the Ordinance's hiring procedures and other new obligations moving forward.