

BOARD of SUPERVISORS



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## MEMORANDUM

TO: Elaine Forbes, Executive Director, Port Department

FROM: *dw*  
*for* Alisa Somera, Legislative Deputy Director  
Rules Committee

DATE: August 9, 2018

SUBJECT: LEGISLATION INTRODUCED

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The Board of Supervisors' Rules Committee has received the following proposed legislation, introduced by Supervisor Peskin on July 31, 2018:

**File No. 180802**

**Ordinance amending the Administrative Code to require Labor Peace Agreements between employers operating excursion vessels under a Port lease and labor organizations seeking to represent their employees to protect the City's ongoing proprietary interest.**

If you have comments or reports to be included with the file, please forward them to me at the Board of Supervisors, City Hall, Room 244, 1 Dr. Carlton B. Goodlett Place, San Francisco, CA 94102 or by email at: [alisa.somera@sfgov.org](mailto:alisa.somera@sfgov.org).

c: Daley Dunham, Port Department

1 [Administrative Code - Labor Peace Agreements for Excursion Vessel Operations Under  
2 Lease with the Port]

3 **Ordinance amending the Administrative Code to require Labor Peace Agreements**  
4 **between employers operating excursion vessels under a Port lease and labor**  
5 **organizations seeking to represent their employees to protect the City's ongoing**  
6 **proprietary interest.**

7 NOTE: **Unchanged Code text and uncodified text** are in plain Arial font.  
8 **Additions to Codes** are in *single-underline italics Times New Roman font*.  
9 **Deletions to Codes** are in *strikethrough italics Times New Roman font*.  
10 **Board amendment additions** are in double-underlined Arial font.  
11 **Board amendment deletions** are in ~~strikethrough Arial font~~.  
12 **Asterisks (\* \* \* \*)** indicate the omission of unchanged Code  
13 subsections or parts of tables.

14 Be it ordained by the People of the City and County of San Francisco:

15 Section 1. Chapter 23 of the Administrative Code is hereby amended by adding Article  
16 VIII, consisting of Sections 23.70, 23.71, 23.72, 23.73, 23.74, 23.75, 23.76, and 23.77, to read  
17 as follows:

18 **ARTICLE VIII: MINIMIZING LABOR/MANAGEMENT CONFLICT**

19 **IN PORT LEASES INVOLVING EXCURSION VESSELS**

20  
21 **SEC. 23.70. FINDINGS AND PURPOSE.**

22 (a) San Francisco is a world-class tourist destination, welcoming more than 24 million visitors  
23 annually. The City and County of San Francisco ("City"), acting through the Port Commission  
24 ("Port"), owns and operates property along the City's waterfront, a major tourist hub and destination.  
25 The City, acting through the Port, leases its real property along the waterfront and harbor facilities to

1 companies engaged in tourism, and in so doing faces the same risks and liabilities as private businesses  
2 participating in management of similar facilities. As a result, the City has an ongoing Proprietary  
3 Interest in the management and use of that Port real property and harbor facilities and must make  
4 prudent business decisions, as would any private business, to ensure efficient and cost-effective  
5 management of its business concerns, and to maximize benefit and minimize risk.

6 (b) This Article VIII is intended to maximize the returns and minimize the risk to the City's  
7 Proprietary Interest resulting from possible conflict between Employers leasing, and operating  
8 Excursion Vessels on, Port property, and Labor Organizations, arising out of labor union organizing  
9 campaigns, labor negotiations, and disruption caused by such conflict. Experience of public entities  
10 and private employers demonstrates that union organizing drives and union efforts to secure  
11 representation rights and an initial collective bargaining agreement can deteriorate into protracted  
12 and acrimonious conflict. Such conflict threatens the City's Proprietary Interest when private  
13 employers enter into leases to use Port property, and labor conflict could jeopardize base rent  
14 payments or rent payments calculated on a percentage of sales. That threat is most acute during the  
15 period when a Labor Organization seeks to gain recognition as collective bargaining representative for  
16 an Employer's employees, and, if recognition is gained, in seeking a First Contract with the Employer.

17 (c) The sole purpose of this Article VIII is to protect the City's Proprietary Interest in the  
18 covered Excursion Vessel Leases. This Article is not enacted to: favor any particular procedure for  
19 determining employee preference, or lack of preference, regarding union representation, or the  
20 outcome of any such procedure; skew the procedures in such a procedure to favor or hinder any party  
21 to such a procedure; interfere with the negotiation of, or terms or scope of, a First Contract, if  
22 applicable; or express or implement any generally applicable policy regarding private sector  
23 labor/management relations, or regulate such relations in any way.

1           **SEC. 23.71. DEFINITIONS.**

2           *For purposes of this Article VIII, the following definitions shall apply:*

3           *“Demand for Recognition Period” means the period during which the Labor Organization*  
4 *seeks recognition as the collective bargaining representative of the Employer’s employees.*

5           *“Director” means the Executive Director of the Port, or the Executive Director’s designee.*

6           *“Economic Action” means concerted action initiated or conducted by a Labor Organization, or*  
7 *employees acting in concert with a Labor Organization, at the employees’ worksite, to bring economic*  
8 *pressure to bear on an Employer, as part of a campaign to organize employees or prospective*  
9 *employees of that Employer, or in attempting to secure a First Contract, if applicable. “Economic*  
10 *Action” includes such activities as striking, picketing, or boycotting. “Economic Action” does not*  
11 *include a lawsuit to enforce this Article VIII.*

12           *“Employer” means any person or entity, including a Subcontractor, who employs individuals in*  
13 *Excursion Vessel Operations.*

14           *“Excursion Vessel” means a passenger vessel that is (1) Coast-Guard certified for intra-coastal*  
15 *passengers for hire; (2) used for transporting the public to or from Port property for sightseeing and*  
16 *similar activities, which may include dining and other services; (3) not acting as a common carrier*  
17 *regulated by the California Public Utilities Commission; and (4) not transporting public passengers in*  
18 *commuter services, nor a water taxi providing point-to-point service.*

19           *“Excursion Vessel Lease” means a lease, sublease, license, sublicense, berthing agreement,*  
20 *other similar agreement, or other means of granting a right to conduct Excursion Vessel Operations on*  
21 *Port property in which the City has a Proprietary Interest, but excluding any lease or other agreement*  
22 *with a term of less than six months.*

23           *“Excursion Vessel Operation” means any operation under an Excursion Vessel Lease relating*  
24 *to transport and maintenance of an Excursion Vessel and services to support the customer experience.*

25           *“Excursion Vessel Operation” includes, but is not limited to, work done by pilots, masters, engineers,*

1 journeymen, deckhands, or other staff relating to vessel operation, maintenance and safety, ticket sales,  
2 food and beverage service, janitorial services, photography, or other customer services. "Excursion  
3 Vessel Operation" includes operations on the Excursion Vessel as well as leased Port property.

4 "First Contract" means the first enforceable collective bargaining agreement between an  
5 Employer and a Labor Organization setting terms and conditions of employment for the Employer's  
6 employees.

7 "First Contract Period" means if, and only if, the Labor Organization is recognized as the  
8 collective bargaining representative of an Employer's employees, the period between such recognition  
9 and execution of a First Contract.

10 "Labor Organization" means any organization of any kind, or any agency or employee  
11 representation committee, in which employees participate and which exists for the purpose, in whole or  
12 in part, of dealing with Employers concerning grievances, labor disputes, wages, rates of pay, hours of  
13 employment, or other terms and conditions of work.

14 "Labor Peace Agreement" means an enforceable written agreement between an Employer and  
15 a Labor Organization in which the parties agree, at a minimum, to the following:

16 (1) The Labor Organization will not take Economic Action against the Employer in  
17 relation to an organizing campaign or negotiation of a First Contract, so long as the Employer  
18 complies with the terms of the Labor Peace Agreement; and

19 (2) The parties will submit to binding arbitration all disputes relating to interpretation  
20 and application of the parties' Labor Peace Agreement, and how to implement the procedures included  
21 in the Agreement.

22 "Pre-existing Lease" means any Excursion Vessel Lease entered into before the effective date  
23 of this Article VIII.

24 "Proprietary Interest" means any nonregulatory arrangement or circumstance in which the  
25 City has a financial or other nonregulatory interest, e.g., arrangements in which the Port receives

1 ongoing revenue from Excursion Vessel Operations (such as base rent payments or a percentage rent  
2 calculated on revenues, excluding government fees or tax or assessment revenues, or the like) under an  
3 Excursion Vessel Lease.

4 “Subcontract” means any agreement between the authorized tenant, licensee, or other user  
5 under an Excursion Vessel Lease and another person that contemplates or permits such other person to  
6 operate or manage all or a portion of the Excursion Vessel Operations.

7 “Substantial Amendment” means an amendment to, or the City’s discretionary renewal or  
8 extension of, a Pre-existing Lease that provides for, or permits, any of the following:

9 (1) A change in use that brings the agreement under the scope of this Article VIII (e.g., a  
10 change to include Excursion Vessel Operations);

11 (2) A new term of lease of greater duration than the term provided in the Pre-existing  
12 Lease;

13 (3) The right to construct improvements to support or serve Excursion Vessel  
14 Operations, if not previously allowed under the Pre-existing Lease;

15 (4) Rent credits or potential rent credits to a Port tenant that may be applied against  
16 25% or more of the fixed rent under the Pre-existing Lease during the period in which the rent credits  
17 may be used; or

18 (5) Rent credits or potential rent credits to a Port tenant that may be applied against  
19 50% or more of the remaining percentage or participation rent (not including any portion of the rent),  
20 if any, under the Pre-existing Lease during the period in which the rent credits may be used.

21 “Territorial Sea” means waters, three nautical miles wide, as measured seaward from the mean  
22 low water line on the coast of the United States or the boundary between an ocean or sea and any  
23 internal or inland body of water in the United States, including without limitation, the boundaries of  
24 any bays, rivers, or lakes.

25 “Vessel” means any ship, boat, or other watercraft that transports passengers for a fee.

1                    **SEC. 23.72. PROCEDURES TO MINIMIZE DISRUPTION CAUSED BY**  
2 **LABOR/MANAGEMENT CONFLICT.**

3                    (a) When the Port retains or acquires a Proprietary Interest in an Excursion Vessel Lease, an  
4 Employer, upon written request of a Labor Organization, shall:

5                    (1) Inform the Port that a Labor Organization seeking to represent a unit of its  
6 employees working on Excursion Vessel Operations under an Excursion Vessel Lease has requested the  
7 Employer to enter into a Labor Peace Agreement required by this Article VIII for either or both of the  
8 Demand for Recognition Period and the First Contract Period, within five business days of receiving  
9 such a request;

10                    (2) Enter into an enforceable Labor Peace Agreement with the Labor Organization as to  
11 the unit of employees it seeks to represent. The Labor Peace Agreement must have the following  
12 characteristics:

13                    (A) Prohibit the Labor Organization from engaging in Economic Action against  
14 an Employer for the Demand for Recognition Period and, if applicable, the First Contract Period.

15                    (B) Be in effect for the Demand for Recognition Period and, if applicable, the  
16 First Contract Period.

17                    (C) Require the parties to submit to binding arbitration all disputes relating to  
18 interpretation, application, and implementation of the Labor Peace Agreement. The Labor Peace  
19 Agreement must also include the following provisions:

20                    (i) If the parties are unable to agree on a procedure by which the parties  
21 will determine majority preference of the employees regarding union representation within 60 days of a  
22 demand for recognition, the parties shall submit the matter to a mutually-agreed mediator to assist the  
23 parties in reaching a Labor Peace Agreement governing the Demand for Recognition Period;

24                    (ii) If the parties are unable to reach a Labor Peace Agreement for the  
25 Demand for Recognition Period through mediation within 30 days of beginning mediation, the parties

1 shall submit the dispute to a mutually agreed arbitrator, who will be authorized to impose a reasonable  
2 procedure, permissible under federal labor law, for determining employee preference regarding  
3 representation by a Labor Organization under terms that effectuate the purpose of this Article VIII.

4 (D) If a Labor Organization is recognized as the bargaining representative for  
5 the Employer's employees, the Labor Peace Agreement for the First Contract Period must include the  
6 following provisions:

7 (i) If the parties are unable, within 60 days of such recognition, to  
8 voluntarily negotiate the terms of a First Contract, the parties shall submit the matter to a mutually-  
9 agreed mediator to assist the parties in agreeing on a First Contract;

10 (ii) If the parties are unable to agree on a First Contract through  
11 mediation within 30 days of beginning mediation, the parties shall submit the dispute to a mutually-  
12 agreed arbitrator, authorized to impose reasonable terms of a First Contract resolving the proposals  
13 and positions of the parties under terms that effectuate the purpose of this Article VIII;

14 (3) Promptly provide to the Port, upon the Port's request, a report attesting to the status  
15 of the Employer's compliance with the requirements of this Section 23.72, including a statement by any  
16 Labor Organization that has requested that the Employer enter into a Labor Peace Agreement  
17 certifying the accuracy of the Employer's report; and

18 (4) Include as a material term in any Subcontract a provision requiring the  
19 Subcontractor to comply with this Article VIII. This provision shall be a material and mandatory term  
20 of such Subcontract, and shall state: "The City and County of San Francisco has enacted  
21 Administrative Code Chapter 23, Article VIII, commencing at Section 23.70, which apply to  
22 [Subcontractor]. Article VIII's terms are expressly incorporated by reference hereto. To the extent  
23 [Subcontractor] employs employees in Excursion Vessel Operations within the scope of Administrative  
24 Code Chapter 23, Article VIII, [Subcontractor] hereby agrees as a material condition of this  
25 [Subcontract] to enter into and abide by a Labor Peace Agreement with a Labor Organization or



1 Organizations that represents, or seeks to represent [Subcontractor's] employees, if and as required by  
2 that Article VIII, and to otherwise fully comply with the requirements of that Article."

3 (b) Any Employer that has in good faith fully complied with the requirements in subsection (a)  
4 will be excused from further compliance as to a Labor Organization that has taken Economic Action  
5 against that Employer, except that Economic Action by one Labor Organization shall not excuse an  
6 Employer from the obligations of this Article VIII or a Labor Peace Agreement as to a different Labor  
7 Organization.

8 (c) The Port shall include in every Excursion Vessel Lease a provision requiring the tenant, and  
9 any Employers operating under the Excursion Vessel Lease, to comply with the requirements of this  
10 Article VIII and all other applicable laws.

11  
12 **SEC. 23.73. EXEMPTIONS.**

13 (a) This Article VIII shall not apply to:

14 (1) Any Employer employing fewer than 40 employees engaged in Excursion Vessel  
15 Operations;

16 (2) Any Excursion Vessel Operations under a Pre-existing Lease. This exemption applies  
17 to an Employer for the duration of such Pre-existing Lease unless it is amended during its term  
18 resulting in a Substantial Amendment;

19 (3) Any Employer that is a signatory to a valid and binding collective Bargaining  
20 agreement for its employees engaged in Excursion Vessel Operations;

21 (4) Any Excursion Vessel Operations for which the Employer requests, and the Director  
22 determines, that the risk to the City's Proprietary Interest resulting from disruption as a result of  
23 labor/management conflict is so minimal or speculative as not to warrant concern for the City's  
24 Proprietary Interest;

1 (5) Any Employer that is a governmental agency, and applicable law would prohibit  
2 application of this Article VIII;

3 (6) Any Employer where applying the requirements of this Article VIII would violate or  
4 be inconsistent with the terms or conditions of a grant, subvention, or agreement with a governmental  
5 agency related to such Excursion Vessel Operations, or any related rules or regulations; or

6 (7) Any Excursion Vessel Operations between States, or seaward of the seaward  
7 boundary of the Territorial Sea of the United States

8 (b) The Director shall determine the applicability of an exemption on a case-by-case basis.  
9 Any Employer claiming an exemption under subsection (a) shall have the burden of proving that the  
10 exemption is applicable.

11  
12 **SEC. 23.74. ENFORCEMENT.**

13 (a) The requirement that Employers enter into, and comply with, Labor Peace Agreements with  
14 Labor Organizations when required under this Article VIII, and the requirement that Excursion Vessel  
15 Operators contractually obligate Subcontractors to be bound by that requirement, are essential  
16 considerations for the Port's agreement to any Excursion Vessel Lease.

17 (b) The City shall investigate complaints that this Article VIII has been violated, and the Port or  
18 the City may take any action necessary to enforce compliance, including but not limited to the City's  
19 instituting a civil action for monetary damages, declaratory relief, injunction and/or specific  
20 performance.

21 (c) If the City brings a civil enforcement action for violation of this Article VIII, any taxpayer or  
22 any person with a direct interest in compliance with this Article may join in that enforcement action as  
23 a real party in interest. If the City declines to institute a civil enforcement action for violation of this  
24 Article, a taxpayer or directly interested person or association may bring a civil proceeding on its own  
25 behalf against that Employer and seek all remedies available for violation of this Article, or breach of a

1 Labor Peace Agreement required by this Article, or available under state law, including but not limited  
2 to monetary, injunctive, and declaratory relief.

3 (d) An Employer seeking to challenge the applicability or validity of this Article VIII by civil  
4 action must first seek an exemption under Section 23.73, as an administrative prerequisite to suit. The  
5 Employer must file any civil action within 60 days after notification that the Director has denied the  
6 application for an exemption.

7 (e) Notwithstanding anything contained in this Article VIII, the remedy for violation of the terms  
8 of this Article VIII shall not include termination of any Excursion Vessel Lease, nor shall any such  
9 violation defeat or render invalid or affect in any manner the status or priority of the lien of any  
10 mortgage, deed of trust, or other security interest made for value and encumbering any real property  
11 affected by an Excursion Vessel Lease, including, without limitation, any leasehold estate or other  
12 interest in such real property or improvements on such real property.

13  
14 **SEC. 23.75. PROSPECTIVE EFFECT.**

15 This Article is intended to have prospective effect only. This Article shall be interpreted to  
16 avoid violating any laws that prevent the City from impairing obligations under any Pre-existing Lease.

17  
18 **SEC. 23.76. PREEMPTION.**

19 Nothing in this Article VIII shall be interpreted or applied so as to create any right, power, or  
20 duty in conflict with any Federal or State law.

21  
22 **SEC. 23.77. SEVERABILITY.**

23 If any section, subsection, sentence, clause, phrase, or word of this Article VIII, or any  
24 application thereof to any person or circumstance, is held to be invalid or unconstitutional by a  
25 decision of a court of competent jurisdiction, such decision shall not affect the validity of the remaining

1 portions or applications of the Article. The Board of Supervisors hereby declares that it would have  
2 passed this Article and each and every section, subsection, sentence, clause, phrase, and word not  
3 declared invalid or unconstitutional without regard to whether any other portion of this Article or  
4 application thereof would be subsequently declared invalid or unconstitutional.

5  
6 Section 2. Effective Date. This ordinance shall become effective 30 days after  
7 enactment. Enactment occurs when the Mayor signs the ordinance, the Mayor returns the  
8 ordinance unsigned or does not sign the ordinance within ten days of receiving it, or the Board  
9 of Supervisors overrides the Mayor's veto of the ordinance.

10  
11 APPROVED AS TO FORM:  
12 DENNIS J. HERRERA, City Attorney

13 By:

14   
LEILA K. MONGAN  
Deputy City Attorney

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## LEGISLATIVE DIGEST

[Administrative Code - Labor Peace Agreements for Excursion Vessel Operations Under Lease with the Port]

**Ordinance amending the Administrative Code to require Labor Peace Agreements between employers operating excursion vessels under a Port lease and labor organizations seeking to represent their employees to protect the City's ongoing proprietary interest.**

### Existing Law

Since 1998, the City has had a card check ordinance in Administrative Code §§ 23.50-23.56. That Chapter requires hotel and restaurant employees working in projects in which the City has a proprietary interest, including on property under the Port's jurisdiction, to enter into agreements providing an expedited "card check" process for recognizing a bargaining representative as an alternative to the formal election procedures in the NLRA and, if they cannot agree, to participate in binding arbitration. The card check ordinance is intended to address the concern that labor-management conflict may cause delay, reduce revenues, or increase costs in the completion of real estate developments or other projects in which the City has a proprietary interest.

### Amendments to Current Law

The proposed ordinance would impose similar requirements on certain employers operating under a lease of Port property in which the City has a proprietary interest. The ordinance would apply to employers, or their subcontractors, with 40 or more employees, that operate Excursion Vessels under a lease of Port property. "Excursion Vessel" means a passenger vessel used for transporting the public to or from Port property for sightseeing and similar activities. It does not include common carrier vessels, commuter vessels, or water taxis.

The ordinance would require the employers to agree, upon request by their employees' labor representative, to enter into a labor peace agreement. The agreement would apply to the period when the union is seeking recognition as the employees' labor representative; and when, after recognition, the parties are negotiating their first collective bargaining agreement. Although the ordinance largely permits the parties to negotiate the content of the agreement, at a minimum the agreement must: (1) prohibit the labor organization from, during the periods noted above, bringing economic pressure to bear on the employer, such as striking, picketing, or boycotting; and (2) require the parties to engage in mediation and arbitration if they are unable to reach agreement on the labor peace agreement. The ordinance would also require the employer to provide a report, upon the Port's request, attesting to the status of the employer's compliance with the requirements, and to include compliance with the requirements as a material term in any subcontract under the Port lease.

The ordinance would apply only to excursion vessel operations under leases entered into after the effective date of the ordinance, and pre-existing leases that are substantially amended in specified ways after that date. The ordinance would exempt employers under specified conditions, upon a determination by the Executive Director of the Port. The Port would investigate complaints that the ordinance had been violated, and the Port and the City could take any action necessary to enforce the ordinance. Taxpayers could join the City's civil enforcement action in court, or if the City declined to file suit, initiate their own suit.

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