



CITY AND COUNTY OF SAN FRANCISCO
LONDON BREED, MAYOR

OFFICE OF SMALL BUSINESS
REGINA DICK-ENDRIZZI, DIRECTOR

September 21, 2020

Ms. Angela Calvillo, Clerk of the Board
City Hall Room 244
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102-4689

RE: BOS File No. 200830 – Police Code - Right to Reemployment Following Layoff Due to COVID-19 Pandemic

Small Business Commission Recommendation to the Board of Supervisors: **Oppose.**

Dear Ms. Calvillo,

On September 14, 2020 the Small Business Commission (SBC or Commission) heard BOS File No. 200830 – Police Code - Right to Reemployment Following Layoff Due to COVID-19 Pandemic. Edward Wright, legislative aide to Supervisor Mar provided the SBC with an overview of the legislation.

After reviewing the legislation, the Office of Small Business staff legislative review, written public comment, and engaging with Mr. Wright on the matter, the Commission concluded that this legislation would not be in the best interest of workers, employers, or the City's efforts toward recovery and rebuilding. The Commission voted (6-0) to recommend that the Board of Supervisors oppose the legislation.

The Commission engaged in a substantive discussion regarding the legislation with Mr. Wright and were provided with ample opportunity to ask important questions. One concern expressed by the Commission addressed potential unintended consequences relative to an affected worker's receipt of and eligibility for Unemployment Insurance. Per the California Employment Development Department, an employer must affirm an affected worker's eligibility for Unemployment Insurance and must affirm whether the affected worker has refused employment. While records of an affected worker's rejection of the offer of reemployment are not required to be retained by the proposed legislation, it is in the best interest of the employer to do so, especially if an affected worker seeks a remedy for an alleged violation of the legislation in the Superior Court of California, per Section 3300K.9. As such, an employer may be compelled to report that an affected worker had refused an employment offer that the City required them to make. Mr. Wright could not guarantee that an affected worker's receipt of and eligibility for Unemployment Insurance would *not* be compromised by the legislation. Additionally, Mr. Wright expressed that since this issue has not yet been raised relative to the administration of related [Ordinance 104-20](#), it was not concern for the sponsor's office. But, if it became an issue it would be addressed accordingly. The Commission countered that, it may not yet be an issue due to the fact that many San Francisco businesses still remained closed due to local Shelter in Place

orders.

The Commission also addressed equity as it relates to the rehiring requirements outlined in Section 3300K.4. Specifically, that offers of reemployment must be made in order of seniority within a job classification. The Commission noted that those who hold seniority within a job classification are not likely to be workers of color and women, and that the rehiring requirements this legislation seeks to codify may exacerbate racial and gender disparities in the workforce. Mr. Wright asserted that while discrimination exists across different sectors with respect to promotion tracks and hiring practices, this legislation would not exacerbate those racial and gender disparities. The Commission disagreed. The Commission also highlighted that there is likely to be higher turnover in lower wage positions, which Mr. Wright agreed was likely true. The Commission noted that this may also adversely impact affected workers from more vulnerable populations who are more likely to be employed in low-wage positions.

Lastly, the Commission also expressed concerns regarding the cost to the City for administering this legislation relative to the potential outcomes. While a summary of data points collected by the Office of Economic and Workforce Development (OEWD) relative to the administration of [Emergency Ordinance 104-20](#) was provided in the staff review of the proposed legislation, OEWD submitted a correction to that data after the review was published. Please note, although it was reported that 1,347 re-employment offers were made, **this number was actually 466**. The 1,347 figure represents the number of workers laid off from the companies who submitted the 16 rehire notices. Among the 466 re-employment offers made 328 were accepted, 113 were declined, and 25 have an unknown outcome.

Small Business (OSB) staff also reported that the OEWD currently dedicates a .7 full time equivalent (FTE) to administer [Emergency Ordinance 104-20](#). They have estimated that that 2.5 FTEs would be needed to adequately implement this proposed legislation. Mr. Wright asserted that the sponsor's office considers this to be a good use of City resources. The Commission countered that they are still not sure as to who this legislation will help, how much it will help, and whether the cost of its administration could be justified.

While the Commission voted to oppose this legislation responsive to the discussion summarized above, they were nonetheless appreciative for the opportunity to discuss it with the sponsor's office in the public forum.

Thank you for considering the Commission's recommendation.

Sincerely,



Regina Dick-Endrizzi
Director, Office of Small Business

cc: Gordon Mar, Member, Board of Supervisors
Sophia Kittler, Mayor's Liaison to the Board of Supervisors
Tyra Fennel, Mayor's Liaison to Boards and Commissions
Patrick Mulligan, Director, Office of Labor Standards and Enforcement
Lisa Pagan, Office of Economic and Workforce Development
John Carroll, Clerk, Public Safety and Neighborhood Services Committee

Legislative Review:	BOS File No. 200830
Name:	Police Code - Right to Reemployment Following Layoff Due to COVID-19 Pandemic
Sponsor(s):	Supervisor Mar
Date Introduced:	July 28, 2020
Date Referred:	August 5, 2020
BOS Committee:	Public Safety & Neighborhood Services Committee
Committee Date:	TBD

EXISTING LAW

Layoff and Rehiring Requirements for Employers

At present there is not a legal requirement, at any governmental level, for employers to rehire workers for the same position from which they had been laid off. Additionally, under Federal law, employers with less than 100 workers are not required to provide layoff notices under the Worker Adjustment and Retraining Act¹. Employers with less than 75 full or part-time workers are not required to provide layoff notices under the California Worker Adjustment and Retraining Act².

Emergency Ordinance No. 104-20, known as the Back to Work Ordinance, establishes a *temporary* right to reemployment for certain workers laid off due to the COVID-19 pandemic³. Specifically, this temporary right to reemployment Emergency Ordinance applies to San Francisco employers of 100 or more workers who layoff 10 or more of those workers. Employers must supply workers with a written notice of the layoff at the time of or before the layoff becomes effective in a language that the worker understands. The written notice must also include a summary of the worker's right to reemployment, and a telephone number for a hotline to be managed by the Office of Economic and Workforce Development (OEWD).

The employer must also supply OEWD with a written notice of the layoff which includes the total number of workers located in San Francisco affected by the layoff, the job classification at time of the separation for each laid off worker, the original hire date for each laid off worker, and the date of separation for each laid off worker. Employers must retain these notices for at least two years.

If after administering a layoff, employers seek to rehire for substantially similar work, they are required to first make an offer of reemployment to workers that were initially laid off and who had been employed for at least 90 days preceding the layoff. The offer of reemployment must be for a position substantially similar to the worker's former position and must also be located in San Francisco. If the

¹ <https://www.dol.gov/sites/dolgov/files/ETA/Layoff/pdfs/WARN%20FAQ%20for%20COVID19.pdf>

² https://edd.ca.gov/Jobs_and_Training/Layoff_Services_WARN.htm#GeneralProvisionsoftheFederalandCaliforniaWARNLas

³ <https://sfgov.legistar.com/View.ashx?M=F&ID=8652534&GUID=DF73110D-AD36-4BB7-B91E-C8AB4D4B95CC>

employer laid off multiple workers in substantially similar positions, they must offer to rehire based on the worker seniority. If the offer of reemployment is rejected by the worker or, the worker fails to respond within two business days, the offer of reemployment may be made to the next most senior worker. If there are not alternative workers to make an offer of reemployment to, then an offer of employment may be made to an alternative applicant. The employer must notify OEWD that they have made an offer of reemployment and the workers' acceptance or rejection status.

There are certain exceptions to the temporary right to reemployment. Specifically, if an employer learns after a separation that a worker was engaged in any act of dishonesty, violation of law, violation of policy, or rule of the employer or other misconduct, the employer is not required to make an offer of reemployment to that worker. And, if a worker received a mutually agreed upon severance package prior to the effective date of the ordinance, the employer is not required to make an offer of reemployment.

A worker who believes that an employer violated the ordinance may bring an action to the Superior Court of the State of California and may be awarded the following relief: hiring and reinstatement rights; backpay for each day of the violation and front pay for each day the violation continues; and, the value of the benefits the worker would have otherwise received if still employed.

The ordinance applies to layoffs on or after February 25, 2020 and until the Emergency Ordinance's expiration. The ordinance was reenacted by the Board of Supervisors on Tuesday, August 25, 2020 with a November 3, 2020 expiration date.

Requirements Related to Worker Leave and Family Care

The Back to Work Ordinance also applies to workers who experience Family Care Hardship⁴. Family Care Hardship is defined as being unable to work due to: 1) a need to care for a child whose school or place of care has been closed, or whose childcare provider is unavailable, as a result of the COVID-19 local emergency, and no other suitable person is available to care for the child during the period of such leave; or, (2) 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. Employers are required to make a good-faith effort to reasonably accommodate workers during the period in which they experience a Family Care Hardship. To "reasonably accommodate" includes, without limitation, modifying a worker's schedule, modifying the number of hours to be worked, or permitting telework, to the extent operationally feasible, to accommodate the Eligible Worker's Family Care Hardship.

Data Reporting

OEWD currently administers Ordinance 104-20, or the Back to Work Ordinance, as earlier explained and tracks the number of Layoff Notices and Rehire Notices received from eligible employers. A significant uptick in notices occurred in the week of August 31, 2020 through September 4, 2020 which brought in more than one third of all notices received since the ordinance became effective on July 3. A

⁴ <https://sfgov.legistar.com/View.ashx?M=F&ID=8652534&GUID=DF73110D-AD36-4BB7-B91E-C8AB4D4B95CC>

continued increase in volume can be expected as employers become aware and more familiar with the requirements.

As of September 4, 2020, OEWD received 79 layoff notices and 16 rehire notices affecting 6,558 workers. According to OEWD records, 1,347 workers received re-employment offers and **328 workers have been successfully rehired**. We may assume from this data that 1,019 workers *did not* accept the reemployment offer.

PROPOSED CHANGES:

This Ordinance would codify many of the employer responsibilities established in Emergency Ordinance 104-20 as they relate to layoffs due to COVID-19, as described above and with several amendments. Specifically, the definition of “Employer” has been amended to mean any person who, directly or indirectly, employed or employs 100 or more workers worldwide. Under the Emergency Ordinance, Employer is defined as any person who directly or indirectly owns or operates a for-profit business or non-profit in the City and employs 100 or more workers.

This Ordinance would also shift the rulemaking responsibilities from the Office of Labor Standard and Enforcement (OLSE) to OEWD.

This Ordinance would sunset one year from its effective date or the date on which the state of emergency terminates, whichever date occurs latest.

ISSUES AND CONSIDERATIONS:

This legislation increases challenges during recovery for small to-medium-sized businesses, including those on the Office of Small Business’s Legacy Registry, creating barriers to timely rehiring and resumed operations through additional bureaucracy, as well as limiting businesses’ adaptability to the market in a moment of crisis. By limiting businesses ability to open and staff expeditiously, the policy may inadvertently harm the very workers it seeks to support, not to mention those it does not support, including participants in the City’s First Source Hiring Program.

The pandemic has created insurmountable challenges for a large majority of San Francisco small businesses including Legacy Businesses. While many of the City’s small businesses will be exempt from this proposed Ordinance’s requirements, there are some of our treasured Legacy Businesses and other local, independently owned medium-sized businesses who will be required to comply.

In addition to administering layoffs through no fault of their own, many of these businesses are already struggling to pay rents and mortgages and other fixed costs due to lack of revenue. To try to cover these fixed costs, many employers have applied for federal, state, and local assistance programs, too often to no avail. Temporary closures have evolved into permanent closures and permanent layoffs. In addition to a deluge of local and state reopening requirements, San Francisco employers have also been tasked with the additional burden of understanding and following the notification and rehire requirements of the existing temporary right to reemployment emergency Ordinance. This proposed extension of that earlier Emergency Ordinance would exacerbate existing significant challenges for struggling small to medium-sized businesses, including those on the Legacy Registry.

For the reasons established below, especially those relating to labor availability, equitable access to employment opportunities, and potential risks created to worker benefits, it is not recommended that the Small Business Commission support this proposed Ordinance.

Labor Availability During the Local Emergency

During the Public Health Emergency, businesses must comply with guidance 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 virtually all businesses. The situation has also created incredible uncertainty for businesses of all sizes. It has been difficult at many times for small businesses to keep abreast of constantly evolving rulemaking, to know which rules to follow, where to find those rules, and how to implement them.

Health directives are frequently issued without sufficient notice, leaving small to medium sized businesses already under stress and with severely limited capacity with little time to prepare. For example, small businesses may learn about new opportunities for reopening on the Thursday before the changes go into effect and only receive the new rules for said reopening the day its allowed.

Should this legislation pass, the requirements for rehiring will further burden small businesses and may inadvertently leave them significantly understaffed, possibly for days, when every hour and every day may count for their survival. **Where this legislation may leave a business without the staffing necessary to get themselves open and ready to serve customers in a timely and safe manner, it is not recommended that it be supported.**

Equity Impacts:

Until the economy fully rebounds and the labor market returns to pre-COVID levels, we can expect that there will be significantly fewer jobs available than jobseekers. As the local economy gradually reopens, employers may not be able to rehire at pre-pandemic staffing levels. This may be due to a lack of financial resources or local regulations requiring that the business only operate in a limited capacity. The businesses hardest hit by COVID-19 include small to medium sized businesses and those in the hospitality, entertainment, and personal services industries which also disproportionately employ women and people of color. Because this Ordinance requires businesses with over 100 workers to rehire their previously laid off workers, these workers from the hardest-hit industries and from small to medium size businesses are now competing for even fewer available jobs and are put at a distinct disadvantage. Importantly, we also know that workers of color face much higher rates of unemployment than their white counterparts. **As such, workers of color and women may be further disadvantaged by the hiring requirements that this proposed Ordinance seeks to codify.**

It bears repeating that workers of color have historically been overrepresented in those aforementioned and hardest hit industries and in low-wage positions⁵. We also know that workers of color have been historically discriminated against when seeking promotions or equal pay as compared to their white counterparts. **Where this Ordinance requires that workers be rehired in order of**

⁵ <https://www.americanprogress.org/issues/race/news/2020/04/14/483125/economic-fallout-coronavirus-people-color/>

seniority, it may exacerbate existing racial inequities in the workforce, and prolong the economic recovery for the City's workers of color, especially women. As such, it is strongly recommended that it not be supported.

Additionally, this proposed Ordinance is also in tension with the intent of City's First Source Hiring program that requires certain employers to first consider economically disadvantaged San Franciscans for openings⁶. This proposed ordinance solely relies on previous employment and does not account for economic status or need. As a result, it diminishes the City's ability to connect disadvantaged San Franciscans to employment opportunities as intended by the First Source Hiring Ordinance⁷.

Potential Risk to Unemployment Benefits

The proposed Ordinance requires that eligible workers affected by a layoff respond to offers of reemployment. If eligible workers do not respond within the prescribed timeline, the offer would be considered declined and a record of the declination would be retained by the employer for at least two years. A condition for receiving unemployment insurance is that a laid off worker is actively seeking work.

It is not unreasonable to assume that a worker laid off due to the local emergency may have moved out of the City due to the high cost of living and is not within a reasonable commuting distance. And, that said worker is receiving unemployment insurance benefits. Should there be a record made that an individual has effectively declined an offer of employment, it could jeopardize or otherwise create new barriers for the worker to qualify for unemployment benefits. While the California Employment Development Department may make case-by-case exceptions regarding an affected worker's refusal of the offer of reemployment, it is not guaranteed that the determination would be in the affected worker's favor. **Where this proposed Ordinance may jeopardize an affected worker's eligibility for unemployment insurance, it is not recommended that this legislation be supported.**

⁶ <https://oewd.org/first-source>

⁷ <https://sfgov.legistar.com/View.ashx?M=F&ID=3047384&GUID=08963D5D-F9AB-41C6-83B0-90B9F5D46BB2>