From:	Wright, Edward (BOS)
To:	Somera, Alisa (BOS); BOS Legislation, (BOS)
Subject:	Fwd: File #200455 Amendment Support - SF Chamber of Commerce
Date:	Monday, June 22, 2020 6:06:05 PM
Attachments:	File #200455_Amendment_Support .pdf

Alisa,

We'd like to add this letter to File. No 200455.

Thank you,
Edward

Get Outlook for iOS

From: Emily Abraham <eabraham@sfchamber.com>
Sent: Monday, June 22, 2020 5:07:43 PM
To: Emily Abraham <eabraham@sfchamber.com>
Cc: Jay Cheng <jcheng@sfchamber.com>; Rodney Fong <rfong@sfchamber.com>
Subject: File #200455 Amendment Support - SF Chamber of Commerce

Dear Supervisor Mar,

On behalf of the Chamber of Commerce, please see attached for our letter offering our support of the amendments you introduced last week to File #200455 Emergency Ordinance - Temporary Right to Reemployment Following Layoff Due to COVID-19 Pandemic. We sincerely thank you for your collaboration with the business community.

We greatly appreciate your time, consideration, and diligence in response to our proposed amendments.

Respectfully,

Emily Abraham

Emily Abraham
Public Policy Manager
SF Chamber of Commerce

235 Montgomery St., Ste. 760, San Francisco, CA 94104
tel: 415.392.4520 • fax: 415.392.0485
sfchamber.com • twitter: @sf_chamber

June 22, 2020

Honorable Supervisor Mar
San Francisco City Hall
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102

Re: File #200455 "Emergency Ordinance - Temporary Right to Reemployment Following Layoff Due to COVID-19 Pandemic"

Dear Supervisor,

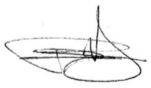
On behalf of the Chamber of Commerce and the hundreds of small businesses we represent, I sincerely thank you for your collaboration with the business community around your Emergency Ordinance - Temporary Right to Reemployment Following Layoff Due to COVID-19 Pandemic. We greatly appreciate your time, consideration, and diligence in response to our proposed amendments.

We sincerely hope that you and your team had a good experience collaborating with the businesses community. Being able to work through amendments together, at an early stage, helps ensure that proposed legislation can be the most efficient and impactful to San Francisco workers. Our goal at the San Francisco Chamber of Commerce is to drive the businesses community towards a progressive economy, and we believe this can be done through bringing together San Francisco small businesses, workers, employers, and legislators to create policies to address not only emergency responses, but the future of our City.

We deeply support the amendments that you introduced last week. Thank you again for your communication and collaboration on legislation that will greatly impact the businesses community.

Thank you for your service and communication.

Respectfully,



Rodney Fong
President & CEO

June 17, 2020

Dear members of the Government Audit and Oversight Committee,

We are writing in support of the back to work ordinance and in opposition of any amendment exempting employers based on business size beyond what is currently stated in the ordinance as it was introduced to the San Francisco Board of Supervisors on May 5, 2020. As it is written, the ordinance exempts businesses with fewer than 10 employees. We believe this is an appropriate threshold for exemption, and raising that threshold higher will defeat the purpose of the ordinance in protecting workers who most need it.

Our members are low-wage immigrant workers, the majority of whom work in the service sector. Many of them work in the restaurant and hospitality industries where they were already struggling prior to the economic crisis. According to a May 2020 report from the California Budget & Policy Center[1], "the average weekly earnings for workers in the leisure and hospitality industry – primarily restaurant and hotel workers – in February 2020 was $548, or about $28,500 annually, well below the income a family needs to meet basic needs." Following the COVID-19 economic crisis, job losses were highest in low paying industries. Workers who had the least cushion to begin with are most likely to have been laid off. For undocumented workers in particular, who are unable to access unemployment insurance or the federal stimulus package, this is a disastrous economic blow.

As more businesses reopen, older workers, those with more seniority, and those who have previously advocated for better working conditions may be at risk for not being rehired by their previous employers. Our organizations have already seen some instances of this. The back to work ordinance will ensure job security for older workers, prevent wages from falling, as well ensure that employers do not use this as an opportunity to retaliate against workers who have organized in the workplace.

A community needs assessment conducted by CPA during shelter-in-place found the following[2]:

- 55% of respondents are not currently doing paid work but are willing and able to go back;

[1] https://calbudgetcenter.org/resources/job-loss-figures-052120/

[2] Please note that because this survey was disseminated on social media, respondents also included some retirees, people not working prior to COVID, and some business owners.

- 20% expressed that a back to work ordinance will help them and their families at this time
- 27% worked in the restaurant industry, the most frequent response and the most likely to be impacted by a small business carveout

Immigrant workers are the backbone of small businesses in San Francisco and deserve the right to return to their jobs during the recovery. As a member of Young Workers United said:

> My name is Alejandra Sanchez and I am from Celaya Guanajuato Mexico and I have 19 years of living in the United States. I am out of work and out of income for my family. It was a temporary dismissal and I do not know if I will have my job back, my employer has given me documents that I need to sign but they are not in my primary language which is Spanish - I can't pay for rent, help my family in Mexico, and I don't know how long it will last me the little I saved. Our undocumented community is not being supported by the government when it should support everyone as we have all been affected by this situation.

In order to ensure economic stability for those hardest hit by the COVID-19 economic crisis, a right to return ordinance is both urgent and timely. It will ensure that workers who want to go back to their jobs are able to, and that small businesses preserve a workforce that is experienced and dedicated.

Thank you for your time and consideration. If you have additional questions, you may contact Lucia Lin, co-director of Young Workers United, at lucia@youngworkersunited.org.

Sincerely,

Chinese Progressive Association
Young Workers United

CALIFORNIA RESTAURANT ASSOCIATION

June 17, 2020

Mayor London Breed
Office of the Mayor
City Hall, Room 200
1 Dr Carlton B Goodlett Place
San Francisco, CA 94102

Re: File No. 200455-Emergency Ordinance- Oppose

Dear Mayor Breed,

In the midst of the COVID-19 public health threat- aggressive, necessary steps to protect the public health and safety have been taken. Unfortunately, the trade-off for these protective public health measures has been a near decimation of the restaurant community due to the government ordered closure of most restaurant operations.

As restaurants are just now trying to re-open on limited service models, we would like to work with you on ways we can collectively take equally aggressive steps to address the economic harm caused by these measures. At a bare minimum, we ask for a "do no harm" approach to allow restaurants the ability to recover from this public health and economic crisis.

I am writing today to express our opposition to the proposed emergency ordinance that would restrict how we manage our operations, right at the very time we have to be nimble and are trying to re-emerge as community employers. Emergency Ordinance #200455 requires restaurants to offer reemployment to employees laid off as a result of the COVID-19 pandemic, provides 10 days for the offer to be accepted and has onerous recordkeeping and noticing requirements for restaurant employers.

Emergency Ordinance #200455 fails to take into account the manner in which restaurants operate, and the fact that restaurants that remained open on incredibly limited service models during the current crisis did so with many of the full-time, fixed costs and challenges. Compliance with the County Department of Public Health orders have forced restaurants to make unplanned, and unfortunate adjustments to operations and reduce staffing levels. Under the new mandate being proposed, restaurants would be forced to rehire staff (even though the restaurant has had its revenue cut by government closure) based on seniority rather than need, such as chefs and cooks.

Providing employees with between 2 and 10 days to respond depending on the manner in which a position is offered to them is unworkable for restaurant community employers. Especially, given that an employer will not

be able to offer other open positions to anyone else during this potential 2 to 10-day span due to the level of seniority of other employees. If there are 4 positions open, it can potentially take over a month just to hire those four individuals. At a time when restaurants are struggling to survive, this policy will further damage the ability to successfully operate.

Both of these examples illustrate how Emergency Ordinance #200455, unless amended, will undoubtedly delay the ability of restaurants to reopen, which furthers unemployment and leads to the loss of tax revenue to San Francisco.

Emergency Ordinance #200455 has detailed requirements for record keeping as well as providing notices to employees, former employers and the City regarding a lay off and reemployment offers. Restaurants are the quintessential small business and do not have the necessary in-house human resources personal to process all of the record keeping and noticing this emergency ordinance requires. At a time when restaurants are trying to reopen and struggling to survive the detailed record keeping and noticing requirements are overwhelming and onerous.

We are facing unprecedented levels of unemployment due to the COVID-19 crisis. Restaurants were forced to close their dining rooms and lay off valuable team members due to public health orders to combat the crisis. This unfortunate reality was not a choice we were given.

We are concerned the emergency ordinance will prolong unemployment in San Francisco by mandating a rigid structural rehiring process and lengthy waiting period for that team member to make a decision on whether they want to accept an offer of reemployment and will greatly stymie our ability to move forward once the "all clear" sign has been given for restaurants to re-open dining rooms across the City.

Please do not add any new requirements that will make it harder for restaurants to get back on their feet and get our restaurant family members back to work.

We urge you to oppose Emergency Ordinance #200455 as currently drafted, as it would have a detrimental impact on the entire restaurant community in San Francisco.

Sincerely,

Katie Hansen

Katie Hansen
Senior Legislative Director
California Restaurant Association

Cc: Mayor London Breed, San Francisco Board of Supervisors, City Clerk

From:	aeboken
To:	BOS-Supervisors; BOS-Legislative Aides
Subject:	SUPPORTING Government Audit and Oversight Committee Agenda Item #8 Emergency Ordinance - Temporary Right to Reemployment Following Layoff Due to COVID-19 Pandemic File #200455
Date:	Saturday, June 13, 2020 11:18:59 PM

TO: Board of Supervisors members

I am strongly supporting the right to reemployment for workers laid off by COVID-19.

Eileen Boken
Chair, Land Use and Transportation Committee
Coalition for San Francisco Neighborhoods*

* For identification purposes only.

From:	BOS Legislation, (BOS)
To:	Carroll, John (BOS)
Cc:	BOS Legislation, (BOS)
Subject:	FW: The Epicurean Trader"s response to "Emergency Ordinance - Temporary Right to Re-employment Following Layoff Due to COVID19 Pandemic"
Date:	Monday, June 1, 2020 8:16:16 AM

Good morning John,

For File No. 200455 [Emergency Ordinance - Temporary Right to Reemployment Following Layoff Due to COVID-19 Pandemic].

Thank you,
Jocelyn Wong
San Francisco Board of Supervisors
1 Dr. Carlton B. Goodlett Place, Room 244
San Francisco, CA 94102
T: 415.554.7702 | F: 415.554.5163
jocelyn.wong@sfgov.org | www.sfbos.org

From: Board of Supervisors, (BOS) <board.of.supervisors@sfgov.org>
Sent: Monday, June 1, 2020 5:56 AM
To: BOS-Supervisors <bos-supervisors@sfgov.org>; BOS Legislation, (BOS) <bos.legislation@sfgov.org>
Subject: FW: The Epicurean Trader's response to "Emergency Ordinance - Temporary Right to Re-employment Following Layoff Due to COVID19 Pandemic"

From: mat@theepicureantrader.com <mat@theepicureantrader.com>
Sent: Wednesday, May 27, 2020 10:23 AM
To: BOS-Legislative Aides <bos-legislative_aides@sfgov.org>; BOS-Supervisors <bos-supervisors@sfgov.org>; Dick-Endrizzi, Regina (ECN) <regina.dick-endrizzi@sfgov.org>; Torres, Joaquin (ECN) <joaquin.torres@sfgov.org>; SBC (ECN) <sbc@sfgov.org>
Subject: The Epicurean Trader's response to "Emergency Ordinance - Temporary Right to Re-employment Following Layoff Due to COVID19 Pandemic"

Dear Board of Supervisors, Legislative Aides and Small Business Commission,

Thank you for your continued efforts to protect and guide San Franciscans during the pandemic. Your leadership and focus on our health and well being has been extraordinary. And thank you as well for the efforts to being open to feedback as we build the infrastructure for rebuilding our economy.

We are writing with constructive feedback regarding the Emergency Ordinance - Temporary Right to Re-employment Following Layoff Due to COVID19 Pandemic.

We completely support the idea of re-employment of furloughed or laid off staff. It is smart business to bring back trained staff that have already been invested in. What we don't support, however, is an ordinance that places a significant administrative, bureaucratic and legal burden on businesses during a time when they are struggling to stay open. They should instead stay focused on keeping their staff safe and surviving the adverse economic impact that the pandemic has had on them.

Specifically, this ordinance leads with the importance of healthcare for displaced workers; however, it does not address the issues with healthcare access and cost. This ordinance instead puts the burden on businesses to be the safety net when they are struggling to maintain operations during the pandemic. Why doesn't this ordinance require health insurers to provide discounts or reduced premiums to impacted workers, especially since, at this time, only emergency services are being provided and most care is through telehealth? Why doesn't this ordinance make government funds available to workers for COBRA premiums? Why doesn't this ordinance expand access or reduced premiums to Healthy SF for impacted workers?

At The Epicurean Trader, have attempted to re-employed any furloughed staff and will continue our efforts to re-employ them. However, given the unemployment numbers currently, it is also important to remember that *anyone we hire is likely to have been laid off from their prior job*. The few outside hires we have made since March are former staff who lost their jobs due to the pandemic and/or were hires laid off from their prior companies.

Would you prefer The Epicurean Trader focus on completing paperwork for the City or would you like us to focus on protecting the safety of our staff and guests so that we can continue to serve and feed our community? Do you fully understand the pressures we

are under? We would be happy to show you our operations and explain what our daily triage and crisis management looks like in order to stay in business and support our staff, suppliers and guests.

Again, we DO NOT support this ordinance. We are already doing the right thing and trying to bring our staff back. And it frankly is too much of a burden to be bogged down with additional administrative and bureaucratic paperwork to maintain compliance.

In the event you decide against our feedback, and do vote this through, we implore you to simplify the process:

1. City creates a "Required Notice" in multiple languages that must be included in notices from employers regarding layoff that simplifies the steps from the original draft. Remove the burden of the City's data collection efforts from the businesses and allow impacted staff to opt-in directly with the City. Provide impacted staff with the resources, links and information they need directly and in one clear place.

    a. The Required Notice would include information on right to re-employment, resources through OLSE and a link and phone number for the impacted individual to be added to the City's database of impacted workers.

    b. Include resources for job training programs and job boards through the City (e.g. SF OEWD).

    c. Include any privacy information/language.

2. Allow for email and text to be a method of delivery from employers without consent. Paper mail is time consuming to prepare, costly, slow and is difficult to track. Businesses already communicate with their staff via email, text and HR information systems; obtaining consent to email someone is unnecessary and burdensome.

3. Allow businesses to take exceptions with staff who have previously refused to work – Specifically, allow businesses to NOT have to offer re-employment to staff who were able and available to work but refused to do so for personal (non-medical or otherwise protected) reasons.

4. Remove the seniority rule – staff have varying skills, qualifications, language abilities, and interests that are not based on tenure. Allow the business to manage who is best fit for available positions to ensure success for everyone.

5. 10 days is too long to allow an offer of employment to sit. We need to run our operations and cannot burn out current staff while former staff take 10 days to consider their options. This should be no more than 2 days with email, text and phone calls made to ensure they receive the information. No extensions should be permitted. Again, we are running a business and cannot allow this to hinder our hiring.

6. Remove the 90-day entitlement once re-hired. California is an at-will state. Please do not create promises of employment that are in contradiction to at-will employment. No other staff member is guaranteed that when hired – it is inequitable and not in alignment with California employment laws.

7. Remove any reporting to OLSE.

8. Remove the remedies. If businesses can barely afford to operate under these circumstances, how can they afford to litigate and pay back wages for this ordinance? How will the businesses pay for this?

Thank you so much for our thoughtful consideration and continued leadership as we all work together to navigate out of this mess and into a successful period of recovery.

Kind regards,

Mat

Owner, The Epicurean Trader

From:	BOS Legislation, (BOS)
To:	Carroll, John (BOS)
Cc:	BOS Legislation, (BOS)
Subject:	FW: Comments on Draft Ordinance: Temporary Right to Re-employment
Date:	Wednesday, May 20, 2020 8:49:17 AM

For File No. 200455.

Lisa Lew
San Francisco Board of Supervisors
1 Dr. Carlton B. Goodlett Place, Room 244
San Francisco, CA 94102
T 415-554-7718 | F 415-554-5163
lisa.lew@sfgov.org | www.sfbos.org

From: Calvillo, Angela (BOS) <angela.calvillo@sfgov.org>
Sent: Tuesday, May 19, 2020 9:18 PM
To: BOS Legislation, (BOS) <bos.legislation@sfgov.org>
Subject: FW: Comments on Draft Ordinance: Temporary Right to Re-employment

From: Sam Mogannam <Sam@biritemarket.com>
Sent: Tuesday, May 19, 2020 12:59 PM
To: SBC (ECN) <sbc@sfgov.org>; BOS-Supervisors <bos-supervisors@sfgov.org>; BOS-Legislative Aides <bos-legislative_aides@sfgov.org>
Cc: Calvin Tsay <calvin@biritemarket.com>; Brianne Gagnon <brianne.gagnon@biritemarket.com>; Dick-Endrizzi, Regina (ECN) <regina.dick-endrizzi@sfgov.org>; Torres, Joaquin (ECN) <joaquin.torres@sfgov.org>; DPH-Sam-mff <SAM@BIRITEMARKET.COM>
Subject: Comments on Draft Ordinance: Temporary Right to Re-employment

Dear Board of Supervisors, Legislative Aides and Small Business Commission,

Thank you for your continued efforts to protect and guide San Franciscans during the pandemic. Your leadership and focus on our health and well being has been extraordinary. And thank you as well for the efforts to being open to feedback as we build the infrastructure for rebuilding our economy.

We are writing with constructive feedback regarding the Emergency Ordinance - Temporary Right to Re-employment Following Layoff Due to COVID19 Pandemic.

During the week of March 15, Bi-Rite furloughed 55 staff as the pandemic and shelter-in-place ordinance forced the closure of our Cafe and Creamery and our Catering business evaporated overnight. This was the hardest week of my career. Our staff are the most important thing at Bi-Rite, we are like a family. And, as an owner, you never want to be in a position where you have to take their jobs, their security, and their community away. The cost of living and pressures on families in the Bay Area are significant and we know how serious this situation is for them. We were forced to make that difficult decision, however, or we could have risked losing the entire company and the security of all 350 people working for us. Our owners and leadership team also took sizeable pay cuts to help cash flow and to prevent further furloughs. We opted to furlough as opposed to laying off in order to maintain health care benefits for our team.

In addition to the furloughs, due to closures and reduction in sales, staff at the Market locations began refusing to work and, in an effort to be compassionate during a scary time, we offered them the option to "self-furlough" (24 staff refused to work) because we did not want them to lose their health benefits at a time they needed them most.

During the furlough, Bi-Rite has continued to pay 100% of their health insurance premiums, provided a 40% discount (increased from 25% pre-Covid) at our Markets, and I have personally delivered grocery boxes (at Bi-Rite's cost) to support them and their families while they are on furlough. This is in addition to bi-weekly communications regarding available work, government programs and support resources in two languages. The cost of health insurance premiums for Bi-Rite per month for furloughed staff is approximately $23,000 per month. Bi-Rite has committed to paying premiums for four months of their furlough - April, May, June, and July – equal to approximately $92,000 of additional expenses. Beyond July, Bi-Rite cannot afford to continue incurring that expense at our current business levels.

Bi-Rite's current total furloughed staff is now 41 (17 furloughed staff and 24 self-furloughed staff). Bi-Rite has already re-employed 70% (38 staff) of the original 55 furloughed staff and continues to actively reach out to the remaining 30% in an attempt to re-employ them. The 24 self-furloughed staff continue to refuse to work.

As you can see by our practice, we completely support the idea of re-employment of furloughed or laid off staff. It is smart business to bring back trained staff that have already been invested in. What we don't support, however, is an ordinance that places a significant administrative, bureaucratic and legal burden on businesses during a time when they are struggling to stay open. They should instead stay focused on keeping their staff safe and surviving the adverse economic impact that the pandemic has had on them.

Specifically, this ordinance leads with the importance of healthcare for displaced workers; however, it does not address the issues with healthcare access and cost. This ordinance instead puts the burden on businesses to be the safety net when they are struggling to maintain operations during the pandemic. Why doesn't this ordinance require health insurers to provide discounts or reduced premiums to impacted workers, especially since, at this time, only emergency services are being provided and most care is through telehealth? Why doesn't this ordinance make government funds available to workers for COBRA premiums? Why doesn't this ordinance expand access or reduced

premiums to Healthy SF for impacted workers?

We have already re-employed 70% of our furloughed staff and will continue our efforts to re-employ the remainder. Given the unemployment numbers currently, it is also important to remember that *anyone we hire is likely to have been laid off from their prior job*. The few outside hires we have made since March are former staff who lost their jobs due to the pandemic and/or were hires laid off from their prior companies.

Would you prefer Bi-Rite focus on completing paperwork for the City or would you like us to focus on protecting the safety of our staff and guests so that we can continue to serve and feed our community? Do you fully understand the pressures we are under? We would be happy to show you our operations and explain what our daily triage and crisis management looks like in order to stay in business and support our staff, suppliers and guests.

Again, we DO NOT support this ordinance. We are already doing the right thing and trying to bring our staff back. And it frankly is too much of a burden to be bogged down with additional administrative and bureaucratic paperwork to maintain compliance.

In the event you decide against our feedback, and do vote this through, we implore you to simplify the process:

1. City creates a "Required Notice" in multiple languages that must be included in notices from employers regarding layoff that simplifies the steps from the original draft. Remove the burden of the City's data collection efforts from the businesses and allow impacted staff to opt-in directly with the City. Provide impacted staff with the resources, links and information they need directly and in one clear place.

    a. The Required Notice would include information on right to re-employment, resources through OLSE and a link and phone number for the impacted individual to be added to the City's database of impacted workers.

    b. Include resources for job training programs and job boards through the City (e.g. SF OEWD).

    c. Include any privacy information/language.

2. Allow for email and text to be a method of delivery from employers without consent. Paper mail is time consuming to prepare, costly, slow and is difficult to track. Businesses already communicate with their staff via email, text and HR information systems; obtaining consent to email someone is unnecessary and burdensome.

3. Allow businesses to take exceptions with staff who have previously refused to work – Specifically, allow businesses to NOT have to offer re-employment to staff who were able and available to work but refused to do so for personal (non-medical or otherwise protected) reasons.

4. Remove the seniority rule – staff have varying skills, qualifications, language abilities, and

interests that are not based on tenure. Allow the business to manage who is best fit for available positions to ensure success for everyone.

5. 10 days is too long to allow an offer of employment to sit. We need to run our operations and cannot burn out current staff while former staff take 10 days to consider their options. This should be no more than 2 days with email, text and phone calls made to ensure they receive the information. No extensions should be permitted. Again, we are running a business and cannot allow this to hinder our hiring.

6. Remove the 90-day entitlement once re-hired. California is an at-will state. Please do not create promises of employment that are in contradiction to at-will employment. No other staff member is guaranteed that when hired – it is inequitable and not in alignment with California employment laws.

7. Remove any reporting to OLSE.

8. Remove the remedies. If businesses can barely afford to operate under these circumstances, how can they afford to litigate and pay back wages for this ordinance? How will the businesses pay for this?

Thank you so much for our thoughtful consideration and continued leadership as we all work together to navigate out of this mess and into a successful period of recovery.

With sincere appreciation
sam

Sam Mogannam
Founding Partner
he, him
Bi-Rite Family of Businesses
3505 20th St, San Francisco, CA 94110
sam@biritemarket.com
Office: 415-241-9760 x8601

Creating Community Through Food™

515 SO. FLOWER STREET, 25TH FL.
LOS ANGELES, CA 90071
(213) 683-5586
www.caemploymentlaw.org

May 19, 2020

San Francisco Board of Supervisors
1 Dr. Carlton B. Goodlett Place
City Hall, Room 244
San Francisco, CA 94102-4689

Re: **File No. 200455**—"Emergency Ordinance - Temporary Right to Reemployment Following Layoff Due to COVID-19 Pandemic"

Supervisors:

The California Employment Law Council ("CELC")[1] submits this letter opposing the San Francisco Board of Supervisor's proposal to create recall rights for workers within the city and county terminated due to the COVID-19 pandemic. The proposed ordinance violates core constitutional principles; runs counter to several federal and state laws; and is extremely vulnerable to abuse.[2]

The CELC recognizes these are unprecedented times, and that resolving the problems left in COVID-19's wake requires out-of-the-box thinking. However, the answer is not to further weaken San Francisco's employers—many of which already face an uncertain future—with this type of burdensome, novel, and largely untested law. A law that could drag the City into lengthy, prolonged litigation over the ordinance's enforceability at a time San Francisco should be focusing on recovery. And make no mistake—this law is ripe for legal challenge. Indeed, if passed, the CELC *will* challenge it; and, if successful, *will* seek recoverable attorneys' fees from the City.[3] *See* 42 U.S.C. § 1988; Cal. Code Civ. Proc. § 1021.5.

[1] The California Employment Law Council is a non-profit organization that works to promote a better legal climate for California employers. Our members include many of California's largest and most significant employers. Senior-level in-house counsel and human resources professionals from these companies participate in and guide CELC activities. A select number of leading law firms in the area of management-employment law also participate as associate members.

[2] The CELC wishes to note that the severability provision would not rescue the ordinances absent *proof* the Board would have passed it without the unconstitutional portions. *See Long Beach Lesbian & Gay Pride, Inc. v. City of Long Beach*, 14 Cal. App. 4th 312, 327 (1993).

[3] "An association" like the CELC "has standing to bring suit on behalf of its members when [1] its members would otherwise have standing to sue in their own right, [2] the interests at stake are germane to the organization's purpose, and [3] neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000).

I. THE PROPOSED ORDINANCE VIOLATES SAN FRANCISCO'S CHARTER.

While cities "may make and enforce all ordinances and regulations in respect to municipal affairs," that authority is still subject "to restrictions and limitations provided in their several charters." Cal. Const., Art. XI § 5. And, under San Francisco's charter, "[a]n ordinance shall deal with only one subject matter." S.F. Charter, § 2.105. Yet the Board hopes to not only impose novel recall rights on the City's employers—it is attempting to, in abrogation of the constitutional limits on its authority, create a separate "Duty to Reasonably Accommodate Eligible Workers Experiencing a Family Care Hardship." That subject is completely divorced from the rest of the emergency ordinance, which otherwise focuses entirely on creating a temporary right to reemployment. The Board cannot simply tack a reasonable accommodation law onto a different emergency ordinance without overstepping its legal authority.

II. THE PROPOSED ORDINANCE VIOLATES THE UNITED STATES CONSTITUTION.

A. The Proposed Ordinance Completely Upsets A Foundational Understanding That Underlies Nearly Every Employment Agreement In California, Thereby Violating The Contracts Clause.

Any law that—like this ordinance—substantially impairs pre-existing, contractual obligations violates the contract clauses of both the federal and California constitutions. *Teachers' Ret. Bd. v. Genest*, 154 Cal. App. 4th 1012, 1026 (2007); *Local 101 of Am. Fed'n & Mun. Emples. v. Brown*, 2017 U.S. Dist. LEXIS 130988, at *21 (N.D. Cal. Aug. 16, 2017) ("[T]he party asserting a Contract Clause claim must establish" (1) "that a change in law impairs the contractual relationship" and (2) "that the impairment is substantial.").[4]

The proposed ordinance creates a novel, potentially long-lasting, retroactive right. Neither state nor local law recognizes such a broad statutory right of recall, or a cause of action for violating that right. Indeed, it is extraordinarily rare for *any* government to pass this type of legislation. And, when they do, it is often struck down as violating the contracts clause.

In *Garris v. Hanover Ins. Co.*, for example, the Fourth Circuit Court of Appeals struck down a South Carolina statute restricting the reasons why an insurance company can terminate an agent. 630 F.2d 1001 (4th Cir. 1980). The agent and insurance company previously agreed that either party could unilaterally terminate their contract with sixty days' notice. *Id.*, at 1003. But, when the insurance company exercised that right, the agent sued, alleging he was terminated for a statutorily-barred reason. *Id.* The Fourth Circuit concluded the contract clause preempted the agent's claim, explaining "the right of unilateral termination upon sixty days notice for which [the company] bargained must be accounted a critical feature of its total contractual relationships with its agents." *Id.*, at 1006. The statute "severely modified" that right, making "every

[4] The California Supreme Court never considered whether the successorship ordinance at-issue in *Cal. Grocers* violated the contracts clause. *Cal. Grocers Ass'n v. City of L.A.*, 52 Cal. 4th 177 (2011). This is likely because the Grocery Worker Retention law only briefly extended pre-existing agreements between a predecessor employer and the worker; and thus it did not "substantially impair" any contracts. However, as this section discusses, the proposed COVID-19 ordinance is far broader.

termination subject to costly and disruptive legal challenges with no guarantee that even 'rightful' terminations would be so adjudged in the always chancey litigation process." *Id.*

The Fourth Circuit does not stand-alone. When West Virginia made it illegal for insurance companies to terminate agents absent good cause, the state's Supreme Court struck the law down for violating the contracts clause. *Shell v. Metro. Life Ins. Co.*, 181 W. Va. 16 (1989). Noting that, as there "was never any attempt to regulate" a "right to hire and fire" workers in that industry, the court concluded "it [could] hardly be said that the parties here could reasonably have foreseen the creation of a 'good cause' prerequisite to termination . . . at the time the contract was executed." *Id.*, at 23; *see also Birkenwald Distrib. Co. v. Heublein, Inc.*, 55 Wash. App. 1, 6 (1989) (finding a statewide ordinance requiring wine suppliers notify wholesale distributors sixty-days before terminating a contract did not apply to any contracts entered into prior to the law's enactment as, prior to it, suppliers had "an *express*, albeit unwritten, right to terminate [a contract] at will").

The Board's proposed ordinance is just as burdensome and violative as the statutes struck down in *Garris* and *Shell*. Prior to this ordinance, there was no statutory right to recall; nor were there any laws barring companies from terminating workers without case. Quite the opposite—under California law, and absent an agreement otherwise, all "employment may be terminated at the will of either party on notice to the other." Cal. Lab. Code § 2922. California employers thus have a statutory right to terminate an employee for any non-protected reason. And "the declared public policy of this state" favors that right, as evinced by the plain language of the statute. *Hejmadi v. AMFAC, Inc.*, 202 Cal. App. 3d 525, 544-45 (1988).

Accordingly, this is not a minor impairment—it shifts a foundational understanding of the nature of employment in this state. *See Ross v. Berkeley*, 655 F. Supp. 820, 828 (N.D. Cal. 1987) ("[s]ignificant among" the factors bearing on the impairment's substantiality "is whether the state has restricted plaintiffs 'to gains [they] reasonably expected from the contract'") (*quoting Energy Reserves Grp. v. Kan. Power & Light Co.*, 459 U.S. 400, 411 (1983)). Nearly every employment agreement in California either impliedly or expressly recognizes the at-will nature of the relationship.[5] Employers hired assuming that, if the viability of their business was threatened, they could lay off those workers *without* granting them a possible cause of action. But, as in *Garris*, this ordinance severely modifies that contractual right, making "every termination subject to costly and disruptive legal challenges with no guarantee that even 'rightful' terminations would be so adjudged." 630 F.2d at 1006. It is, accordingly, unconstitutional.

[5] This is, of course, not the only contract impaired by the proposed reemployment rights. Unions fought to include specific seniority and recall rights in the agreements they negotiated with companies because no such rights existed—rights that may be expressly at-odds with the bumping, recall, and notice rules in the Ordinance. And, more recently, several businesses have offered severance packages to employees impacted by the pandemic with the understanding they would not be re-hired.

B. The Proposed Ordinance Abrogates A Fundamental Right Of Displaced Workers Outside Of San Francisco In Favor Of Those Within The City, Violating The Equal Protection Clause.

The Board's proposed right of recall does not "simply preserve[], temporarily, the status quo" by returning displaced workers to their prior positions. *Cal. Grocers Ass'n.*, 52 Cal. 4th at 206. Any laid off employee unlucky enough to work outside of San Francisco must take a back seat to all workers subject to recall who are arguably qualified for any job that opens at their prior employer. And that prohibition potentially lasts for *years*—not just the duration of the pandemic. Those who fall outside the City thus have their fundamental right to pursue work abrogated in favor of those inside of San Francisco. *See Lucchesi v. City of San Jose*, 104 Cal. App. 3d 323, 333 n.9 (1980) ("[T]he courts of this state have characterized employment as a fundamental interest under the California Constitution," and as such "the state may not arbitrarily foreclose any person's right to pursue an otherwise lawful occupation."); *see also* Cal. Bus. & Prof. Code § 16600 (voiding any "contract by which anyone is restrained from engaging in a lawful profession").

Since the Board designed this ordinance to benefit workers within San Francisco to the detriment of those outside of the City, it will violate the constitutional guarantee of equal protection under the law unless it survives strict scrutiny.[6] United States Const. Amend. 14; Cal. Const., Art. I § 7; *see also Sanchez v. City of Modesto*, 145 Cal. App. 4th 660, 686 (2006) ("[S]trict scrutiny under the equal protection clause can be triggered by a classification used to burden a fundamental right.").[7]

"Strict scrutiny requires the Government to prove that the restriction on a constitutional right furthers a compelling interest and is narrowly tailored to achieve that interest." *Duncan v. Becerra*, 366 F. Supp. 3d 1131, 1159 (S.D. Cal. 2019). "A restriction is not narrowly tailored if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve." *In re Nat'l Sec. Letter v. Sessions*, 863 F.3d 1110, 1124 (9th Cir. 2017) (internal quotation omitted).

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[6] While the California Supreme Court in *Cal. Grocers* held the Grocery Worker Retention Ordinance did not violate the equal protection clause, it only examined claims that the ordinance invalidly discriminated based on the *employer's* use of customer memberships, overall size, industry, and the terms of its collective bargaining agreement. 52 Cal. 4th at 209. It never considered an equal protection argument forwarded by *workers* displaced by the ordinance.

[7] Normally, "[r]ational basis review . . . applies to [an] Equal Protection Clause claim based on non-resident status." *Spencer v. Lunada Bay Boys*, 2020 U.S. App. LEXIS 9609, at *7 (9th Cir. Mar. 27, 2020). However, the ordinance does not discriminate based on residence—it turns on where an employee actually performed their work. But, even if rational basis was the appropriate standard, the ordinance would still fail. Rational basis review, while deferential, "is not [] toothless." *Mathews v. Lucas*, 427 U.S. 495, 510 (1976). The challenged "classification must bear some fair relationship to a legitimate public purpose." *Griffiths v. Superior Court*, 96 Cal. App. 4th 757, 776 (2002). And that relationship must "find some footing in the realities of the subject addressed by the legislation." *Heller v. Doe*, 509 U.S. 312, 321 (1993). The right of recall does not meet the ordinance's two goals—to (1) "ensure fair employment practices during the economic upheaval" created by the pandemic and (2) "reduce the demand on government-funded social services." Instead, it effectively forces employers to discriminate against workers outside of the city in favor of workers inside of it, thereby harming the statewide economy and putting pressure on its social welfare system.

The ordinance forwards three goals—reduce the economic upheaval caused by the pandemic, decrease the number of people "without employer-sponsored health insurance," and "alleviate the burden that layoffs of employees working in the City place on the City's public health system." There are a myriad of ways to serve those goals *without* creating a discriminatory right of recall. San Francisco could mimic Congress and create a loan program to help businesses keep workers on payroll. Or it could create a job training and placement program to help workers impacted by the pandemic. But what it cannot do is pass an overly broad, discriminatory ordinance that forces workers outside of San Francisco to forgo gainful employment for the benefit of workers inside the City based on little else but unspecified "anecdotal evidence being shared with the City." *Cf. Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1166 (10th Cir. 2000) ("Both statistical and anecdotal evidence are appropriate in the strict scrutiny calculus, although anecdotal evidence by itself is not."); *Associated Gen. Contractors of Am. v. Cal. DOT*, 713 F.3d 1187, 1196 (9th Cir. 2013) (noting "anecdotal evidence" is "generally not sufficient" for a regulation to survive strict scrutiny, unless it is accompanied by "statistical evidence").

C. The Proposed Ordinance Violates The Constitutional Protections For Intimate, Familial Relationships Enjoyed By All Family-Run Companies In San Francisco By Barring Business Owners From Hiring Members Of Their Own Family.

"Private citizens have a right . . . [to] associate with one another on mutually negotiated terms and conditions." *Hill v. Nat'l Collegiate Athletic Ass'n*, 7 Cal. 4th 1, 39 (1994). A right that is not only "protected by the First Amendment;" but that "extends to all legitimate organizations, whether popular or unpopular." *Id.* This "constitutionally protected 'freedom of association'" protects a person's "choices to enter into and maintain certain intimate human relationships." *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984).

Though employment relationships will not typically fall within the realm of "intimate human relationships," familial relationships do. *Copp v. Unified Sch. Dist.*, 882 F.2d 1547, 1551 (10th Cir. 1989) ("The right to associate protects an individual's decision to enter into and maintain certain intimate human relationships. In general, those protected relationships have involved familial settings, not employment settings."). Indeed, "some of the most important personal bonds necessary for the protection of individual freedom 'are those that attend the creation and sustenance of a family.'" *Johnson v. City of Cincinnati*, 310 F.3d 484, 499 (6th Cir. 2002) (*quoting Roberts*, 468 U.S. at 619) (invalidating a municipal ordinance that infringed on the right to familial association).

According to the US Census Bureau, one in every three businesses in the country is family owned or controlled.[8] For these companies, a hiring restriction undoubtedly comes closer to infringing on the type of relationships "that attend the creation and sustenance of a family" than on the standard employer/employee relationship seen in a "large business enterprise . . . remote from [such] concerns." *Roberts*, 468 U.S. at 619.

[8] In 2016, the United States Census Bureau surveyed of 3,431,558 nonfarm businesses that filed taxes as individual proprietorships, partnerships, or any type of corporation, and with receipts of $1,000 or more. 1,035,549—roughly 30.2%—reported they were family-owned. *See* U.S. CENSUS BUREAU, ANNUAL SURVEY OF ENTREPRENEURS (ASE) - CHARACTERISTICS OF BUSINESSES (2016), available at https://www.census.gov/data/tables/2016/econ/ase/2016-ase-characteristics-of-businesses.html.

After all, it is axiomatic that a family-owned company would normally rely on familial help to get back up-and-running. But under the emergency ordinance, proprietors of family-run businesses in San Francisco cannot even hire *their own family members* for any role that was once filled by a terminated worker. Thus, as the emergency ordinance violates the constitution's protection of intimate familial relationships, it cannot stand.

D. The Proposed Ordinance Violates The Right To Free Speech Of Every Company In The City Engaged In Artistic Or Creative Pursuits By Mandating Whom Those Companies Can, And Cannot, Hire.

San Francisco is a well-known creative hub—countless television studios, film companies, theaters, publications, and other artistic businesses call the City home. These organizations have the constitutionally protected "autonomy to choose the content of [their] own message" free from government interference. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 573 (1995). Such autonomy extends to the hiring and firing of personnel who could affect the content or delivery of its message. *Citizens United v. FEC*, 558 U.S. 310, 342 (2010) ("First Amendment protection extends to corporations.").

Indeed, the Ninth Circuit Court of Appeals in *McDermott* recognized the "rights of employees to organize and engage in collective bargaining" under the National Labor Relations Act yielded a the newspaper's First Amendment rights, as "[t]elling the newspaper that it must hire specified persons, namely the discharged employees, as editors and reporters . . . is bound to affect what gets published." *McDermott ex rel. NLRB v. Ampersand Publ'g, LLC*, 593 F.3d 950, 961–62 (9th Cir. 2010). The Court therefore refused to order reinstatement, as "[t]o the extent [a] publisher's choice of writers affects the expressive content of its newspaper, the First Amendment protects that choice." *Id.* at 962.

And, in *Claybrooks*, the District Court for the Middle District of Tennessee ruled the First Amendment barred the claims of two African-American men who alleged the producers of a reality show refused to cast them on the basis of their race, violating laws banning racial discrimination in contracts. *Claybrooks v. ABC, Inc.*, 898 F. Supp. 2d 986, 990-91 (M.D. Tenn. 2012). Reasoning "the First Amendment protects the right of the producers of . . . [s]hows to craft and control [their] messages, based on whatever considerations the producers wish to take into account," it effectively "prevents [] plaintiffs from effectuating [their own] goals by forcing the defendants to employ race-neutral criteria in their casting decisions." *Id.* at 1000. Thus, regardless of whether race-neutral criteria "would frustrate, enhance, or be entirely consistent with the message that [the show] conveys, the First Amendment protects the producers' right unilaterally to control their own creative content." *Id.*; *see also Hunter v. CBS Broad. Inc.*, 221 Cal. App. 4th 1510, 1521 (2013) ("[C]asting decisions regarding who was to report the news on a local television newscast, 'helped advance or assist' . . . *First Amendment* expression. . . . [and] therefore qualifies as a form of protected activity.").

San Francisco's creative business community—just like *Hurley's* parade organizer, *McDermott's* newspaper, and *Claybrooks's* producers—have a unilateral right to choose the content and speaker of their messages. This emergency ordinance unconstitutionally violates that right by mandating whom these businesses can, and cannot, hire.

E. The Proposed Ordinance Interferes With The Hiring And Firing Decisions Of Religious Organizations Within The City, Violating The Free Exercise Clause.

The emergency ordinance has just one, narrow exemption—companies with fewer than nine employees. Thus, even religious organizations and places of worship—groups whose "selection of its own clergy is . . . [a] core matter of ecclesiastical self-governance with which the state may not constitutionally interfere"—are impacted. *Bollard v. Cal. Province of the Soc'y of Jesus*, 196 F.3d 940, 946 (9th Cir. 1999); *see also Smith v. Raleigh Dist. of the N.C. Conference of the United Methodist Church*, 63 F. Supp. 2d 694, 703 (E.D.N.C. 1999) ("[S]uits in which ministers or those individuals performing ministerial functions challenge the selection, failure to hire, assignment, and/or discharge decisions of religious institutions are barred by the First Amendment.").

The ordinance not only limits these organizations from terminating rehired, ministerial staff outside of one of three enumerated scenarios—as drafted, it arguably requires that these groups offer terminated, lay employees any newly-opened ministerial job for which that lay worker could become qualified with training. That is, facially, an abridgment of the organization's right to freely exercise its religion. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1133 (10th Cir. 2013) ("[A]ssociations—not just individuals—have Free Exercise rights.").

III. STATE AND FEDERAL LAWS PREEMPT SEVERAL OF THE ORDINANCE'S PROVISIONS.

A. California Labor Code Section 2922 Creates "At-Will" Rights That Preempt The Proposed Ordinance.[9]

California Labor Code section 2922 states "employment, [with] no specified term, may be terminated at the will of either party on notice to the other." California employers thus have a statutory right to terminate an employee for any non-protected reason. And, as noted above, "the declared public policy of this state" favors that right. *Hejmadi*, 202 Cal. App. 3d at 544-45. This ordinance cannot co-exist with section 2922. The pandemic has simply made it economically infeasible to keep workers on payroll. Yet the ordinance forbids businesses from permanently

[9] While the application is slightly limited, the Board's proposed ordinance also directly conflicts with the Uniformed Services Employment and Reemployment Rights Act and National Banking Act. USERRA obligates employers to return service members to a position they would have been in had they not been deployed. An obligation that "supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter . . . including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit." 38 U.S.C. § 4302. The Ordinance creates a potential conflict between laid off workers and service members—both of whom would be entitled to reinstatement—because it requires employers offer every laid-off worker *any* position that becomes available for which that worker is qualified, and gives preferential treatment based on seniority. It would thus limit the right to reinstatement created by USERRA for any role that would have gone to a returning service-member but for the ordinance. As for federal banking law, it empowers banks to employ and "dismiss at pleasure" its "officers, employees and agents." *Inglis v. Feinerman*, 701 F.2d 97, 98 (9th Cir. 1983). Employing and dismissing workers "at pleasure" is akin to "at will" employment. *See Mueller v. First Nat'l Bank*, 797 F. Supp. 656, 663 (C.D. Ill. 1992) ("Congress intended the 'at pleasure' language to mean 'at will' as applied in the common law."). This ordinance violates that principle by forcing banks to rehire anyone it terminated because of the economic pressure created by the COVID-19 pandemic.

laying those workers off—which is, otherwise, perfectly legal. And, since cities cannot pass laws that duplicate, contradict, or enter into an area fully occupied by state law, the ordinance is preempted. *Sherwin-Williams Co. v. City of L.A.*, 4 Cal. 4th 893, 898 (1993).

B. The California Consumer Privacy Protection Act Expressly Preempts The Emergency Ordinance's Record Collection, Production, And Retention Provisions.

The California Consumer Privacy Act preempts all laws "adopted by a city, county, city and county, municipality, or local agency regarding the collection . . . [of] personal information by a business." Cal. Civ. Code § 1798.180. And the CCPA includes "employment-related information" in its definition of "personal information." Cal. Civ. Code § 1798.140. Yet the Board wants Companies to collect and retain records of the job classifications, original hire dates, and dates of separation for any worker laid off due to the pandemic—all of which, on their face, constitute "employment-related information"—and then to hand that information over to the City without the employee's consent. But, in making these demands, the emergency ordinance has "enter[ed] an area that is 'fully occupied' by general law;" and is thus, at least partially, preempted. *Sherwin-Williams*, 4 Cal. 4th at 898.

Indeed, if the CCPA *did not* preempt the ordinance's record collection, production, and retention provisions, companies would have to choose with which law to comply. No businesses could have countenanced something like this proposed law when it collected that type of information. Thus, it is extremely likely that *no one* listed complying with an emergency ordinance as one of "the purposes for which . . . personal information shall be used" in the legally required notice "at or before the point of collection." Cal. Civ. Code § 1798.100. Nor could a company feasibly provide terminated employees a supplemental notice listing the "additional purposes . . . consistent with this section" within the tight timeframes the emergency ordinance allots. *Id.*

C. The Ordinance Invalidly Shifts The Burden Of Proving An Essential Fact To The Employer, And Is Thus Preempted By California Evidence Code § 500.

Under California Evidence Code § 500, "a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." As noted above, the ordinance creates a 90-day "safety period" wherein a business cannot terminate a rehired worker without cause. Normally, that means an Eligible Worker must prove that, though (1) they were rehired pursuant to the ordinance and thus (2) protected for 90-days, their employer nevertheless (3) terminated them (4) without "clear and convincing" evidence of misconduct. The worker—not the employer—must bear the burden of proof for each of the four essential facts.

However, as drafted, the ordinance requires the *employer* prove it terminated a worker for a permissible reason—effectively creating a presumption that any worker terminated during the 90-day reemployment period was fired without cause. Thus, it does not simply shift the burden of producing evidence. *See Rental Hous. Ass'n of N. Alameda Cnty. v. City of Oakland*, 171 Cal. App. 4th 741, 758 (2009) (burden-shifting ordinances are only preempted where there is an "invalid presumption affecting the burden of proof rather than a presumption affecting the burden of producing evidence."). It requires the employer prove by "clear and convincing

evidence" that the presumed fact it fired a worker without cause is erroneous; and thus that the fact does not exist. Cal. Evid. Code § 606 ("The effect of a presumption affecting the burden of proof is to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact."). *Fisher v. City of Berkeley*, 37 Cal. 3d 644, 698 (1984) (noting that, while California Evidence Code § 500 does not apply where "otherwise provided by law . . . the Legislature deliberately excluded [local] ordinances from those sources of law that may change the traditional allocation of the burden of proof."). And "municipal governments have no authority to depart from the common law of evidence." *Fisher v. City of Berkeley*, 37 Cal. 3d 644, 698 (1984).

D. The Labor Management Relations Act Would Preempt Many Claims Brought Under This Ordinance As Proving Cause For Separation During The 90-Day Reemployment Period Could Require Courts To Interpret A Collective Bargaining Agreement.

The emergency ordinance bars employers from terminating rehired workers without cause for 90-days following their reemployment. However, there are exceptions; employers can "based on clear and convincing evidence" terminate a worker during that period for "violations of a policy or rule of the Employer," "acts of dishonesty," and "other misconduct." But the emergency ordinance never defines these phrases. And they are terms-of-art in many collective bargaining agreements because they are inherently vague and amorphous. After all, not everyone agrees as to what constitutes misconduct, or what act violates a company rule. As a result, employers hoping to satisfy the emergency ordinance's "clear and convincing" burden must effectively prove for-cause termination under the collective bargaining agreement—particularly when there are multiple reasons for terminating a worker. That, in turn, requires courts to interpret the collective bargaining agreement. And federal labor law preempts any claim that "is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985); *Jones v. Bayer Healthcare LLC*, 2008 U.S. Dist. LEXIS 61737, at *11 (N.D. Cal. Aug. 12, 2008) (dismissing a claim that "require[d] the Court to interpret provisions of the CBA, such as those regarding termination for cause" as "preempted by the LMRA.").

IV. THE PROPOSED ORDINANCE CANNOT BE RESCUED BY *CALIFORNIA GROCERS ASSOCIATION V. CITY OF LOS ANGELES.*

In *Cal. Grocers Ass'n v. City of L.A.*, the California Supreme Court upheld the Grocery Worker Retention Ordinance—a Los Angeles ordinance that similarly impinged an employer's right to hire-and-fire workers at will. But that law never spawned the problems that will inevitably flow from the proposed COVID-19 ordinance.

The Grocery Worker ordinance limited the hiring and firing rights of any company that bought a grocery store over 15,000 square-feet for just ninety-days—not two years. *Cal. Grocers,* 52 Cal. 4th at 187. During that time, the new owner could only hire from a list of workers who had at least six-months of employment with the prior owner; and could only discharge those workers for cause. *Id.* At the end of the 90-days, it had to evaluate each employee's performance and "consider" offering them continued employment. *Id.* But it did "not require that anyone be retained." *Id.* Nor did it continue operating after the initial, three-month transitionary period.

Id. As the Court explained, "it simply preserves, temporarily, the status quo, whatever that might be." *Id.*, at 206.

Because the ordinance was fairly narrow, the Court's review was limited to just three arguments: whether the ordinance (1) was preempted by a statewide food-safety law; (2) violated the equal protection clause by discriminating based on a grocery store's use of customer memberships, overall size, industry, and the terms of its collective bargaining agreement; and (3) "impermissibly intrude[s] on successorship determinations that Congress intended to leave free of local regulation," which would trigger preemption under the National Labor Relations Act. *Id.*, at 188–208. And its answer to each of those questions was "no."

The emergency ordinance, in contrast, does not "simply preserve" the status quo for ninety days. It imposes obligations that will last as long as there are Eligible Workers that the Employer has not re-hired. As noted above, it upends an understanding of at-will employment that forms the foundation of nearly every pre-existing employment agreement in California. And it does much more than require employers re-hire laid-off workers—they get preferential treatment, to the detriment of workers outside of San Francisco, for *any* job that opens up for which they could become qualified with training.

Moreover, it forwards an enforcement provision that is unlike anything the Grocery Worker Retention Ordinance put forth. It does not just recognize a private enforcement right. It creates a yet-untested—and, in the CELC's opinion, invalid—procedure that will likely force courts to interpret the for-cause termination provisions in collective bargaining agreements and improperly shifts the burden of proving essential facts onto the employer. *Cal. Grocers* would thus stand inapposite in any litigation challenging the emergency ordinance.

V. THE PROPOSED ORDINANCE VIOLATES PUBLIC POLICY.

A. The Ordinance Unnecessarily Complicates Company Operations At A Time When Employers Should Be Trying To Return To Normal.

The ordinance covers every employer within the City with ten or more employees. And its provisions are incredibly onerous, requiring companies review entire personnel files and determine whether any worker laid-off during the pandemic could fill an open-role before it hires a single person. A primary purpose behind this ordinance is, supposedly, to smooth the economic turmoil this pandemic created. Yet much of it does the opposite—complicating operations while San Francisco employers try to get back to business-as-normal. Worse yet, it does so indiscriminately, without any concern as to the employer's size, industry, or profitability.

B. There Is No Need To "Protect" The Jobs Of Essential Workers—They Are Still Working During The Pandemic.

The Board wrote this ordinance to protect workers impacted by the pandemic. However, "essential" workers are typically not impacted—they are, in fact, still working. Thus, there is no reason to include businesses offering essential services. Those companies are not laying-off workers. But they would still have to fight and defend against baseless lawsuits anytime they lay-off an employee during the pandemic until they can prove that layoff was not caused by the

pandemic, SIP orders, or "conducted in conjunction with the closure or cessation of . . . operations in the City."

C. The Ordinance Would Clog A Court System That Is Already Expecting An Onslaught Of New Cases.

San Francisco's court system already faces a heavy backlog of cases. And that caseload is only set to worsen, as COVID-19 forced many courts to postpone hearings, conferences, and trials. This ordinance only adds to the problem by incentivizing attorneys and laid-off workers to sue nearly ever San Francisco employer anytime an open position comes up. A better approach to private enforcement is to grant the City Attorney power to take complaints, investigate violations, and levy fines. Companies would then be able to take corrective action. If they refuse to comply, the City Attorney can bring an action to enforce the fines assessed.

D. The Ordinance Violates California's Strong Public Policy Favoring Settlement.

California recognizes a strong public policy favoring settlements, and thus a "settlement agreement is considered presumptively valid." *Vill. Northridge Homeowners Ass'n v. State Farm Fire & Cas. Co.*, 50 Cal. 4th 913, 930, (2010). However, the ordinance only allows workers to waive the ordinance's protections through a collective bargaining agreement. It is not clear whether this provision impliedly bars a waiver of claims through settlement, which is otherwise presumptively valid. If it did, though, it would violate California policy favoring settlement.

VI. CONCLUSION

While well-meaning, this emergency ordinance does more harm than good. San Francisco's employers are already reeling from losses caused by a pandemic. Many companies are wondering if they will ever open again. And, if they disappear, so too will thousands of jobs. The answer to the City's problems is not to make matters worse with an overly broad, burdensome ordinance that violates core constitutional protections, conflicts with federal and state law, and contravenes public policy. An ordinance that, if passed, the CELC—and other industry groups—will unquestionably challenge. The CELC thus urges you to vote against the emergency ordinance.

Thank you for your time and consideration.

/s/ Raymond W. Bertrand
Raymond W. Bertrand
PAUL HASTINGS LLP
On Behalf of the California Employment Law Council

/s/ James P. de Haan
James P. de Haan
PAUL HASTINGS LLP
On Behalf of the California Employment Law Council

From: Nicole Krasinski
To: BOS-Supervisors
Subject: Don"t Let This Pass!!! Temporary Right to Reemployment Following Layoff Due to COVID19 Pandemic
Date: Thursday, May 14, 2020 10:58:38 AM

To Whom It May Concern,

As a restaurant owner of two formerly very busy restaurants, and one more slated to open this summer, in the Western Addition, we would like nothing more than to bring back our amazing team of employees that we worked side by side with before the SIP. But we cannot do this due to the new restrictions put on us through social distancing & SIP laws. We will certainly have to close permanently if **Temporary Right to Reemployment Following Layoff Due to COVID19 Pandemic** passes and then instead of relief our staff will be left unemployed. Restaurants are a vital part of what brings people to San Francisco & not just the local workforce, but the local economy as a whole will suffer if the hospitality industry breaks under this ruling. Please Please Please help us all get back to what we love to do when it is safe, but our business model is no where near what it was when we closed & forcing us to employ people in similar positions is an unreasonable ruling.

Thank you for your time & consideration,

Nicole Krasinski
Pastry Chef/Owner
State Bird Provisions/The Progress/The Anchovy Bar

--
Nicole Krasinski
Pastry Chef | Owner
painperdu.nicole@gmail.com

From: valenciacyclery@aol.com
To: BOS-Supervisors
Subject: re: Supervisor Mar"s Proposed Emergency Ordanance
Date: Thursday, May 14, 2020 10:58:54 AM

The the SF Supervisors:

Please do not enact Supervisor Mar's Emergency Ordinance "Temporary Right to Reemployment Following Layoff due to the Covid-19 Pandemic. I shudder to think of the bureaucratic nightmare it would impose on small businesses such as mine, Valencia Cyclery. We are a legacy business, having been here in SF for 35 years under the same ownership.

The labor shortage for low and mid level jobs in SF is acute. I find it impossible to find even semi-qualified employees. Of course I want all employees back as soon as it is possible. If i were not to recall someone (not the case now) they would have to be a terrible employee, deserving of not being reinstated. Your ordinance greatly adds to the burden of being in business in San Francisco. Like so many attempts to protect the public, the conscientious employers will be the ones to suffer and the unscrupulous ones will ignore it.

Sincerely,

Paul Olszewski
Owner of Valencia Cyclery
415-722-7408

From: Nicole Krasinski
To: BOS-Legislative Aides
Subject: Don"t Let This Pass - Temporary Right to Reemployment Following Layoff Due to COVID19 Pandemic
Date: Thursday, May 14, 2020 10:59:10 AM

To Whom It May Concern,

As a restaurant owner of two formerly very busy restaurants, and one more slated to open this summer, in the Western Addition, we would like nothing more than to bring back our amazing team of employees that we worked side by side with before the SIP. But we cannot do this due to the new restrictions put on us through social distancing & SIP laws. We will certainly have to close permanently if **Temporary Right to Reemployment Following Layoff Due to COVID19 Pandemic** passes and then instead of relief our staff will be left unemployed. Restaurants are a vital part of what brings people to San Francisco & not just the local workforce, but the local economy as a whole will suffer if the hospitality industry breaks under this ruling. Please Please Please help us all get back to what we love to do when it is safe, but our business model is no where near what it was when we closed & forcing us to employ people in similar positions is an unreasonable ruling.

Thank you for your time & consideration,

Nicole Krasinski
Pastry Chef/Owner
State Bird Provisions/The Progress/The Anchovy Bar

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Nicole Krasinski
Pastry Chef | Owner
painperdu.nicole@gmail.com

From: Alissa Anderson
To: Fewer, Sandra (BOS); BOS-Supervisors
Subject: Sup. Mar Emergency Re-Employment Ordinance
Date: Tuesday, May 12, 2020 9:31:11 PM

Dear Supervisors,

I am disturbed and disappointed by the legislation recently proposed by Supervisor Mar.
As a small retail business owner in the Richmond District whose business was forced to close to the public due to COVID-19 SIP, I had to lay off more than half of my beloved part-time employees. Most of them have moved on - literally. Either moving back in with their parents to save money, deciding that caring for their family is more important than risking their health, or having physical and mental health setbacks that prevent them from working. All of these are reasons not to come back to my business that I respect and understand, especially while my business remains closed.
Legislation that forces small businesses to offer jobs back to former employees in a specified way is time-consuming, costly, and unfair. Making multiple job offers and city notifications alone is an immense amount of work! We value our employees a lot. Being "pro-worker" does not have to be anti-small business. This legislation would undoubtedly make it harder for small businesses to get back to business and contribute to the growth of our local economy, which continues to suffer immensely.
I am a VERY small business with not even half of the 10-employee minimum suggested in this legislation, and I am concerned for ALL local businesses that would be impacted by this. I believe this legislation would absolutely prevent some businesses from reopening.
Thank you for allowing me to contribute my feedback.

Alissa Anderson
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From: Laurine Wickett
To: BOS-Supervisors; BOS-Legislative Aides
Subject: Temporary Right to Reemployment Following Layoff Due to COVID19
Date: Monday, May 11, 2020 10:34:42 PM

Dear City Supervisors,
Please reconsider this order, it is not a one size fits all solution for all businesses affected by Covid 19. I understand the need to protect the employee, but this does not serve small businesses as they look to reorganize and create a new plan for the future.

My catering business was one of the first industries affected in early March and I quickly saw all of our events cancel before the Shelter in Place went into effect. I have pivoted my business and changed our model. I am uncertain when we will be able to gather people for events and cater again. While I would like to bring some of my former employee's back, not all of them are suited for this new business model. It's also an opportunity to clean house. Given the lack of business, those that remain on my team will need to have a certain skill set and be willing to take on new roles and jobs in order to stay lean so that we can survive as a business. This is not the time for the government to get involved in the restructuring and create mandates around bringing former employee's back.

Regards,
Laurine
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Laurine Wickett
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