

BOARD of SUPERVISORS



City Hall  
1 Dr. Carlton B. Goodlett Place, Room 244  
San Francisco 94102-4689  
Tel. No. 554-5184  
Fax No. 554-5163  
TDD/TTY No. 554-5227

## MEMORANDUM

TO: Regina Dick-Endrizzi, Director  
**Small Business Commission, City Hall, Room 448**

FROM: John Carroll, Assistant Clerk, Government Audit and Oversight Committee,  
Board of Supervisors

DATE: October 28, 2020

SUBJECT: REFERRAL FROM BOARD OF SUPERVISORS  
Government Audit and Oversight Committee

The Board of Supervisors' Government Audit and Oversight Committee has received the following legislation, which is being referred to the Small Business Commission for comment and recommendation. The Commission may provide any response it deems appropriate within 12 days from the date of this referral.

**File No. 201188**

**Ordinance amending the Police Code to protect employees from adverse employment actions if they test positive for COVID-19, are isolating or quarantining, or have previously isolated or quarantined, due to COVID-19 symptoms or exposure, or are perceived to have COVID-19; to protect applicants from discrimination if they test positive for COVID-19, are isolating or quarantining, or have previously isolated or quarantined, due to COVID-19 symptoms or exposure; and to sunset an emergency ordinance creating similar protections.**

Please return this cover sheet with the Commission's response to me at the Board of Supervisors, City Hall, Room 244, 1 Dr. Carlton B. Goodlett Place, San Francisco, California 94102.

\*\*\*\*\*

**RESPONSE FROM SMALL BUSINESS COMMISSION - Date:** \_\_\_\_\_

\_\_\_\_\_ **No Comment**

\_\_\_\_\_ **Recommendation Attached**

\_\_\_\_\_  
**Chairperson, Small Business Commission**

1 [Police Code - COVID-Related Employment Protections]

2  
3 **Ordinance amending the Police Code to protect employees from adverse employment**  
4 **actions if they test positive for COVID-19, are isolating or quarantining, or have**  
5 **previously isolated or quarantined, due to COVID-19 symptoms or exposure, or are**  
6 **perceived to have COVID-19; to protect applicants from discrimination if they test**  
7 **positive for COVID-19, are isolating or quarantining, or have previously isolated or**  
8 **quarantined, due to COVID-19 symptoms or exposure; and to sunset an emergency**  
9 **ordinance creating similar protections.**

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

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

18 Section 1. The Police Code is hereby amended by adding Article 33L, consisting of  
19 Sections 3300L.1 through 3300L.14, to read as follows:

20 **ARTICLE 33L: PROHIBITING EMPLOYMENT DISCRIMINATION ON THE BASIS OF**  
21 **COVID-19 STATUS**

22 **SEC. 3300L.1. FINDINGS AND PURPOSE.**

23 (a) In response to the novel coronavirus “COVID-19” global pandemic, it is necessary to  
24 prevent employment discrimination related to COVID-19 in order to protect employees, encourage  
25 COVID-19 testing, and contain the spread of the virus.

1           **(b) The City has responded to the COVID-19 public health emergency through a proactive,**  
2 **comprehensive, science-based approach to mitigate the spread of the virus within the community,**  
3 **protect the most vulnerable among us, and gradually reopen all sectors of the local economy as it is**  
4 **safe to do so. This response has contributed to the City’s low infection rate, and dramatically lower**  
5 **death rate, relative to comparable urban areas nationwide. An essential pillar of this response is**  
6 **widespread COVID-19 testing, to allow early identification of COVID-19-positive individuals, contact**  
7 **tracing, and isolation and quarantine of those exposed and infected.**

8           **(c) San Francisco workers, particularly low-wage workers, may be reluctant to take a COVID-**  
9 **19 test if they believe that a positive diagnosis and the need to isolate may result in an adverse**  
10 **employment action, jeopardizing their ability to provide for their families. Applicants for work in San**  
11 **Francisco may have similar concerns.**

12           **(d) A study of individuals living in the Mission District conducted by the University of**  
13 **California, San Francisco, in partnership with the Latino Task Force on COVID-19 and Supervisor**  
14 **Hillary Ronen’s office, found that 82% of COVID-19-positive individuals in the study had been**  
15 **financially harmed by the pandemic, and only 10% were able to work from home. In sharp contrast,**  
16 **among individuals who tested negative, 53% reported no impact on their work or financial stability.**  
17 **The study also found that 95% of the COVID-19-positive individuals were Latinx. Nationally, people**  
18 **who are at highest risk for infection with COVID-19 are those who cannot easily shelter in place due to**  
19 **economic vulnerability, job loss, or because they are providing essential services.**

20           **(e) Essential employees have kept the City running during the pandemic, at the risk and**  
21 **sometimes the expense of their own health. It is critical that workers, especially essential employees**  
22 **and those who cannot work remotely, be able to isolate or quarantine when needed to contain the**  
23 **spread of COVID-19 and allow safe reopening of additional businesses.**

1           (f) There is a patchwork of City, State, and Federal laws that provide partial employment  
2 protection to workers who cannot work because they test positive for COVID-19 or must isolate or  
3 quarantine due to COVID-19 symptoms or exposure, but the protection is fragmented and incomplete.

4           (g) The purpose of this Article 33L is to remove a barrier to COVID-19 testing by addressing  
5 workers' fear of losing employment, and job applicants' fear of not being able to obtain employment,  
6 due to a COVID-19 diagnosis or the need to isolate or quarantine. This in turn will protect these  
7 individuals, their coworkers, their families, and the members of the public with whom they interact;  
8 contain the spread of the virus; and facilitate the gradual reopening of the economy.

9  
10 **SEC. 3300L.2. DEFINITIONS.**

11           For purposes of this Article 33L, the following definitions apply.

12           "Agency" means the Office of Labor Standards Enforcement.

13           "Applicant" means a person who has applied or may apply or otherwise seek to provide labor  
14 or services for remuneration as an Employee for an Employer, including an Employer's former  
15 Employee being considered for employment following furlough, layoff, or other separation.

16           "City" means the City and County of San Francisco.

17           "Employee" means any person providing labor or services for remuneration within the  
18 geographic boundaries of the City who is an employee under California Labor Code Section 2750.3, as  
19 may be amended from time to time, including a part-time or temporary employee.

20           "Employer" means any person, as defined in Section 18 of the California Labor Code,  
21 including corporate officers or executives, who directly or indirectly or through an agent or any other  
22 person, including through the services of a temporary services or staffing agency or similar entity,  
23 employs, contracts with, or hires an Employee. "Employer" shall include the City.

1 **SEC. 3300L.3. EMPLOYEE PROTECTIONS.**

2 (a) It shall be unlawful for an Employer to discharge, threaten to discharge, demote, suspend,  
3 discipline, reduce employee benefits, or in any manner discriminate or take adverse action against any  
4 Employee who is absent from or unable to work, or who requests time off work, because the Employee  
5 tested positive for COVID-19 or is isolating or quarantining, or has previously isolated or quarantined,  
6 due to COVID-19 symptoms or exposure, until such time as the Employee may return to work  
7 consistent with the Local Health Officer's return-to-work guidance and without regard to whether such  
8 Employee would otherwise be eligible to take paid or unpaid leave under any Employer benefit  
9 program or any other local, state, or federal protection.

10 (b) It shall be unlawful for an Employer to count an Employee's absence from or inability to  
11 work, or request for time off work, protected under subsection (a), as an absence that may lead to or  
12 result in discipline, discharge, demotion, suspension, or any other adverse action.

13 (c) An Employer may take only reasonable measures to verify that an Employee's absence from  
14 or inability to work, or request for time off work, is protected under subsection (a).

15 (1) A measure is not reasonable if the Employer requires the Employee to disclose more  
16 information than necessary for such verification.

17 (2) Employers shall treat all information obtained from Employees for such verification  
18 in a manner that is consistent with applicable federal, state, and local privacy laws.

19 (3) Policies or practices that require documentation for the Employee's absence from  
20 work or the Employee's request for time off work of three or fewer consecutive work days shall be  
21 presumed unreasonable.

22 (d) It shall be unlawful for an Employer to take any adverse action against any Employee  
23 because the Employee tested positive for COVID-19 or is perceived to have been infected with COVID-  
24 19, without regard to whether such Employee takes paid or unpaid leave; provided, however, that an  
25 Employer shall not allow an Employee who is experiencing any sign or symptom of COVID-19, or who

1 has confirmed or suspected COVID-19 infection, to return to work on-site until the Employee may do  
2 so consistent with the Local Health Officer's return-to-work guidance.

3  
4 **SEC. 3300L.4. APPLICANT PROTECTIONS.**

5 (a) It shall be unlawful for an Employer to rescind an offer to employ or contract with an  
6 Applicant, or to decide not to employ or contract with an Applicant, based in whole or in part on  
7 whether an Applicant tested positive for COVID-19 or is isolating or quarantining, or has previously  
8 isolated or quarantined, due to COVID-19 symptoms or exposure.

9 (b) If an Applicant is unable to start work because the Applicant tested positive for COVID-19  
10 or is isolating or quarantining due to COVID-19 symptoms or exposure, an Employer shall reasonably  
11 accommodate the Applicant by scheduling a later start date, such that the Employee may begin work  
12 consistent with the Local Health Officer's return-to-work guidance.

13  
14 **SEC. 3300L.5. NOTICE TO EMPLOYEES.**

15 (a) The Agency shall, within seven days of the effective date of this Article 33L, publish and  
16 make available on its website and through electronic communication to Employers a notice suitable for  
17 Employers to inform Employees of their rights under this Article 33L.

18 (b) Every Employer shall, within seven days after the Agency has published and made available  
19 the notice described in subsection (a), provide the notice to Employees in a manner calculated to reach  
20 all of them: by posting in a conspicuous place at the workplace, via electronic communication, and/or  
21 by posting in a conspicuous place in an Employer's web-based or app-based platform. Every Employer  
22 shall provide the notice in English, Spanish, Chinese, and any language spoken by at least 5% of the  
23 Employees who are at the workplace or job site.

1 **SEC. 3300L.6. EXERCISE OF RIGHTS PROTECTED; RETALIATION PROHIBITED.**

2 (a) It shall be unlawful for an Employer or any other person to interfere with, restrain, or deny  
3 the exercise of, or the attempt to exercise, any right protected under this Article 33L.

4 (b) It shall be unlawful for an Employer to take any adverse action against any Employee or  
5 Applicant in retaliation for exercising rights protected under this Article 33L, including the right to  
6 request or take time off work under Section 3300L.3(a); the right to file a complaint or inform any  
7 person about any Employer's alleged violation of this Article; the right to cooperate with the Agency in  
8 its investigations of alleged violations of this Article; and the right to inform any person of that  
9 person's possible rights under this Article.

10 (c) Protections of this Article 33L shall apply to any person who mistakenly but in good faith  
11 alleges violations of this Article.

12 (d) Taking adverse action against a person within 90 days of the person's filing a complaint  
13 with the Agency or a court alleging a violation of any provision of this Article 33L; of informing any  
14 person about an Employer's alleged violation of this Article; of cooperating with the Agency or other  
15 persons in the investigation or prosecution of any alleged violation of this Article; of opposing any  
16 policy, practice, or act that is unlawful under this Article; or of informing any person of that person's  
17 rights under this Article, shall raise a rebuttable presumption that such adverse action was taken in  
18 retaliation for the exercise of one or more of the aforementioned rights. Unless the Employer rebuts the  
19 presumption with clear and convincing evidence that the adverse action was solely for a reason other  
20 than retaliation, the Employer shall be deemed to have violated this Section 3300L.7.

21  
22 **SEC. 3300L.7. IMPLEMENTATION AND ENFORCEMENT.**

23 (a) The Agency shall be authorized to implement and enforce this Article 33L and may  
24 promulgate guidelines or rules for such purposes.

1           (b) An Employee, Applicant, or any other person who has reason to believe that a violation of  
2 this Article 33L has occurred may report the suspected violation to the Agency.

3           (c) The Agency may investigate possible violations of this Article 33L. Where the Agency has  
4 reason to believe that a violation has occurred, it may order any appropriate temporary or interim  
5 relief to mitigate the violation or maintain the status quo pending completion of a full investigation or  
6 hearing. Where the Agency determines that a violation has occurred following an investigation, the  
7 Agency may issue a determination of violation and order any appropriate relief, including the hiring of  
8 an Applicant, reinstatement of an Employee, and payment of lost wages to an Employee or Applicant.  
9 Further, the Agency may order the payment of an additional sum as an administrative penalty that does  
10 not exceed \$1,000 for the Employer's first violation, \$5,000 for the second violation, and \$10,000 for  
11 the third and subsequent violations. For the purpose of this calculation, if multiple Employees or  
12 Applicants are impacted by the same violation at the same time, the Agency shall treat the violation as  
13 a single violation rather than multiple violations. To compensate the City for the costs of investigating  
14 and remedying the violation, the Agency may also order the violating Employer to pay to the City an  
15 amount that does not exceed the Agency's enforcement costs. Subject to the budgetary and fiscal  
16 provisions of the Charter, such funds shall be allocated to the Agency and used to offset the costs of  
17 implementing and enforcing this Article 33L and other ordinances the Agency enforces.

18           (d) The determination of violation shall provide notice to the Employer of the right to appeal the  
19 determination to the Controller and that failure to do so within 15 days shall result in the determination  
20 becoming a final administrative decision enforceable as a judgment by the Superior Court.

21           (e) The determination of violation shall specify a reasonable time period for payment of any  
22 relief ordered. The Agency may award interest on all amounts due and unpaid at the expiration of such  
23 time period at the rate of interest specified in subdivision (b) of Section 3289 of the California Civil  
24 Code, as may be amended from time to time.

25           (f) The remedies and penalties provided under subsection (c) are cumulative.



1           (g) The Agency may require that remedies and penalties due and owing to Employees or  
2 Applicants be paid directly to the City for disbursement to the Employees or Applicants. The Controller  
3 shall hold these funds in escrow for the Employees or Applicants. The Agency shall make best efforts to  
4 distribute such funds to Employees or Applicants. In the event such funds are unclaimed for a period of  
5 three years, the Controller may undertake administrative procedures for escheat of unclaimed funds  
6 under California Government Code Sections 50050 et seq., as may be amended from time to time.  
7 Subject to the budgetary and fiscal provisions of the Charter, such escheated funds shall be dedicated  
8 to the enforcement of this Article 33L or other laws the Agency enforces.

9  
10 **SEC. 3300L.8. APPEAL PROCEDURE.**

11           (a) An Employer may file an appeal from a determination of violation (“Appeal”) in  
12 accordance with the following procedures:

13           (1) The Employer shall file the Appeal with the Controller and serve a copy on the  
14 Agency. The Appeal shall be filed in writing within 15 days of the date of service of the determination  
15 of violation, and shall specify the basis for the Appeal and shall request that the Controller appoint a  
16 hearing officer to hear and decide the Appeal. Failure to submit a timely, written Appeal shall  
17 constitute concession to the violation, and the determination of violation shall be deemed the final  
18 administrative decision upon expiration of the 15-day period. Further, failure to submit a timely,  
19 written Appeal shall constitute a failure to exhaust administrative remedies, which shall serve as a  
20 complete defense to any petition or claim brought against the City regarding the determination of  
21 violation.

22           (2) Following the filing of the Appeal and service of a copy on the Agency, the Agency  
23 shall promptly afford the Employer an opportunity to meet and confer in good faith regarding possible  
24 resolution of the determination of violation.

1           (3) Within 30 days of receiving an Appeal, the Controller shall appoint an impartial  
2 hearing officer who is not part of the Agency and immediately notify the Agency and Employer.

3           (4) The hearing officer shall promptly set a date for a hearing. The hearing must  
4 commence within 45 days of the date of the Controller's notice of appointment of the hearing officer,  
5 and conclude within 75 days of such notice, provided, however, that the hearing officer may extend  
6 these time limits for good cause.

7           (5) The hearing officer shall conduct a fair and impartial evidentiary hearing. The  
8 Employer shall have the burden of proving by a preponderance of the evidence that the Agency erred in  
9 its determination of violation, and/or the relief ordered therein.

10           (6) Within 30 days of the conclusion of the hearing, the hearing officer shall issue a  
11 written decision affirming, modifying, or dismissing the determination of violation. The hearing  
12 officer's decision shall be the final administrative decision. The decision shall consist of findings, a  
13 determination, any relief ordered, a reasonable time period for payment of any relief ordered, and  
14 notice to the Employer of the right to appeal by filing a petition for a writ of mandate as described in  
15 subsection (a)(7), and that failure to file a timely appeal shall result in the final administrative decision  
16 becoming enforceable as a judgment by the Superior Court.

17           (7) The Employer may appeal the final administrative decision only by filing in San  
18 Francisco Superior Court a petition for a writ of mandate under California Code of Civil Procedure,  
19 Section 1094.5 et seq., as applicable, and as may be amended from time to time.

20           (b) The final administrative decision is enforceable as a judgment in Superior Court. Where an  
21 Employer fails to comply with a final administrative decision within the time period required therein,  
22 the Agency may take any appropriate enforcement action to secure compliance, including referring the  
23 action to the City Attorney to enforce the final administrative decision as a judgment and, except where  
24 prohibited by State or Federal law, requesting that City agencies or departments revoke or suspend any  
25

1 registration certificates, permits, or licenses held or requested by the Employer until such time as the  
2 violation is remedied.

3  
4 **SEC. 3300L.9. SUNSET OF EMERGENCY ORDINANCE.**

5 If the emergency ordinance (Ordinance No. 162-20) is reenacted and thereby remains in effect  
6 as of the effective date of this Article 33L, that emergency ordinance shall sunset on the effective date of  
7 this Article; provided, however, that any alleged violations of that emergency ordinance remain subject  
8 to investigation, resolution, and remedy under this Article, regardless of whether a complaint of  
9 violation of the emergency ordinance was filed before or after the sunset of the emergency ordinance,  
10 or an Agency investigation was commenced before or after that sunset date, or an appeal or other  
11 process regarding the complaint was commenced before or after that sunset date.

12  
13 **SEC. 3300L.10. OTHER LAWS.**

14 The protections provided by this Article 33L are separate from and in addition to other  
15 employment, non-discrimination, and disability protections in City, State, and Federal law. This Article  
16 is not intended to limit the operation of any other City law. Should there be any overlap in application  
17 between this Article and another City law, both laws shall be followed, except if there is a conflict  
18 between the two that cannot be reconciled, the City law providing greater protection to the Employee  
19 shall take precedence.

20  
21 **SEC. 3300L.11. PREEMPTION.**

22 Nothing in this Article 33L shall be interpreted or applied so as to create any right,  
23 requirement, power, or duty in conflict with Federal or State law. The term “conflict,” as used in this  
24 Section 3300L.11 means a conflict that is preemptive under Federal or State law.

1 **SEC. 3300L.12. UNDERTAKING FOR THE GENERAL WELFARE.**

2 *In undertaking the adoption and enforcement of this Article 33L, the City is undertaking only to*  
3 *promote the general welfare. The City is not assuming, nor is it imposing on its officers and employees,*  
4 *an obligation for breach of which it is liable in money damages to any person who claims that such*  
5 *breach proximately caused injury. This Article does not create a legally enforceable right by any*  
6 *member of the public against the City.*

7  
8 **SEC. 3300L.13. SEVERABILITY.**

9 *If any section, subsection, sentence, clause, phrase, or word of this Article 33L, or any*  
10 *application thereof to any person or circumstance, is held to be invalid or unconstitutional by a*  
11 *decision of a court of competent jurisdiction, such decision shall not affect the validity of the remaining*  
12 *portions or applications of this Article. The Board of Supervisors hereby declares that it would have*  
13 *passed this Article and every section, subsection, sentence, clause, phrase, and word not declared*  
14 *invalid and unconstitutional without regard to whether any other portion of this Article or application*  
15 *thereof would be subsequently declared invalid or unconstitutional.*

16  
17 **SEC. 3300L.14. SUNSET DATE.**

18 *This Article 33L shall expire by operation of law two years from its effective date. Upon*  
19 *expiration of this Article, the City Attorney shall cause the Article to be removed from the Police Code.*

20  
21  
22 **Section 2. Effective Date.**

23 This ordinance shall become effective 30 days after enactment. Enactment occurs  
24 when the Mayor signs the ordinance, the Mayor returns the ordinance unsigned or does not  
25

1 sign the ordinance within ten days of receiving it, or the Board of Supervisors overrides the  
2 Mayor's veto of the ordinance.

3

4 APPROVED AS TO FORM:  
5 DENNIS J. HERRERA, City Attorney

6 By: /s/ \_\_\_\_\_  
7 LISA POWELL  
8 Deputy City Attorney

8

9 n:\legana\as2020\2100010\01487592.docx

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

**LEGISLATIVE DIGEST**

[Police Code - COVID-Related Employment Protections]

**Ordinance amending the Police Code to protect employees from adverse employment actions if they test positive for COVID-19, are isolating or quarantining, or have previously isolated or quarantined, due to COVID-19 symptoms or exposure, or are perceived to have COVID-19; to protect applicants from discrimination if they test positive for COVID-19, are isolating or quarantining, or have previously isolated or quarantined, due to COVID-19 symptoms or exposure; and to sunset an emergency ordinance creating similar protections.**

Existing Law

An emergency ordinance, Ordinance No. 162-20, temporarily protects employees and independent contractors (collectively, “workers”) from adverse employment action if they miss work or request time off work because they test positive for COVID-19 or are isolating or quarantining, or have previously isolated or quarantined, due to COVID-19 symptoms or exposure, without regard to whether the workers would otherwise be eligible to take paid or unpaid leave. Employers may not count such time off as an absence that may result in an adverse action. Taking any adverse action against a worker within 90 days of the worker’s absence from work or request for time off work for these reasons raises a rebuttable presumption that the adverse action violates the emergency ordinance. An employer may require a worker to identify the general basis for the worker’s absence from or inability to work, or request to take time off work, but may not require the disclosure of health information or other documentation.

The emergency ordinance additionally prohibits employers from taking an adverse action against any worker who tests positive for COVID-19 or is perceived to have been infected with COVID-19, without regard to whether the worker takes any time off work. However, employers must follow the Local Health Officer’s guidance to require a worker to stay home if experiencing any sign or symptom of COVID-19, until the worker may return to work consistent with the Local Health Officer’s guidance.

Employers may not rescind an employment or contract offer or base a decision not to employ or contract with an applicant in whole or in part on whether an applicant tested positive for COVID-19 or is isolating or quarantining, or has previously isolated or quarantined, due to COVID-19 symptoms or exposure. Additionally, employers must reasonably accommodate an applicant who is unable to start work because the applicant tested positive for COVID-19 or is isolating or quarantining due to COVID-19 symptoms or exposure by scheduling a later start date.

The emergency ordinance prohibits retaliation for exercising the rights protected under the emergency ordinance.

The Office of Labor Standards Enforcement (OLSE) has implemented and is enforcing the emergency ordinance, which provides for an enforcement process, remedies, and an administrative appeal process.

#### Amendments to Existing Law

This ordinance codifies the emergency ordinance with minor changes. First, the ordinance protects employees only, rather than employees and independent contractors, to address concerns with the administrability of protections for independent contractors. Second, the ordinance clarifies the duration of the protections for employees who take time off work—the protections last until the employees may safely return to work consistent with the Local Health Officer's guidance. Third, the ordinance allows for employers to require documentation for certain absences, under standards modeled on the Rule 2 of the City's Paid Sick Leave Ordinance. Fourth, the ordinance requires OLSE to issue and employers to provide employees notice of its protections.

The ordinance sunsets the emergency ordinance if it remains in effect upon the ordinance's effective date, and the ordinance sunsets two years from its effective date.