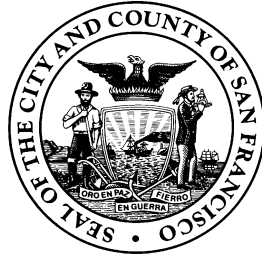


BOARD of SUPERVISORS



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: July 22, 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. 200765

Emergency ordinance to temporarily protect workers from adverse action 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 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.

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 [Emergency Ordinance - COVID-Related Employment Protections]

2

3 **Emergency ordinance to temporarily protect workers from adverse action if they test**
4 **positive for COVID-19, are isolating or quarantining, or have previously isolated or**
5 **quarantined, due to COVID-19 symptoms or exposure; and to protect applicants from**
6 **discrimination if they test positive for COVID-19, are isolating or quarantining, or have**
7 **previously isolated or quarantined, due to COVID-19 symptoms or exposure.**

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

12

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

13

14 Section 1. Declaration of Emergency Pursuant to Charter Section 2.107.

15 (a) Section 2.107 of the Charter authorizes passage of an emergency ordinance in
16 cases of public emergency affecting life, health, or property, or for the uninterrupted operation
17 of any City or County department or office required to comply with time limitations established
18 by law.

19 (b) On February 25, 2020, Mayor London Breed proclaimed a state of emergency (the
20 "Public Health Emergency") in response to the spread of the novel coronavirus COVID-19. On
21 March 3, 2020, the Board of Supervisors concurred in the February 25 Proclamation and in
22 the actions taken by the Mayor to meet the Public Health Emergency.

23 (c) The Board of Supervisors hereby finds and declares that an actual emergency
24 exists that requires the passage of this emergency ordinance to encourage testing for COVID-
25 19 and reduce the spread of the virus.

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Section 2. Findings and Purpose.

(a) The City has responded to the Public Health Emergency through a comprehensive, science-based approach to mitigate the spread of COVID-19, protect the most vulnerable, and gradually reopen as it is safe to do so. An essential pillar of this response is widespread COVID-19 testing, to allow early identification of COVID-19 positive individuals, contact tracing, and isolation and quarantine of those exposed and infected.

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

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

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

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

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

11
12 Section 3. Definitions.

13 For purposes of this emergency ordinance, the following definitions apply.

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

15 "Applicant" means a person who has or may apply or otherwise seek to provide labor
16 or services for remuneration as a Worker for an Employer, including an Employer's former
17 Workers being consider for employment or contracting following furlough, layoff, or other
18 separation.

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

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
22 other person, including through the services of a temporary services or staffing agency or
23 similar entity, employs, contracts with, or hires a Worker. "Employer" shall include the City.

24 "Worker" means any person providing labor or services for remuneration within the
25 geographic boundaries of the City who either (1) is an employee under California Labor Code

1 Section 2750.3, as may be amended from time to time, including a part-time, temporary
2 employee, or (2) is an independent contractor or other person who performs labor or services
3 provided personally by the individual based on the intellectual or manual efforts of the
4 individual rather than the sale of a product.

5
6 Section 4. Worker Protections.

7 (a) It shall be unlawful for an Employer to discharge, threaten to discharge, demote,
8 suspend, discipline, reduce employee benefits, or in any manner discriminate or take adverse
9 action against any Worker who is unable to work, or who requests time off work, because the
10 Worker tested positive for COVID-19 or is isolating or quarantining, or has previously isolated
11 or quarantined, due to COVID-19 symptoms or exposure, without regard to whether such
12 Worker would otherwise be eligible to take paid or unpaid leave.

13 (b) It shall be unlawful for an Employer to count a Worker's absence from or inability to
14 work because the Worker tested positive for COVID-19 or is isolating or quarantining, or has
15 previously isolated or quarantined, due to COVID-19 symptoms or exposure as an absence
16 that may lead to or result in discipline, discharge, demotion, suspension, or any other adverse
17 action, without regard to whether such Worker would otherwise be eligible to take paid or
18 unpaid leave.

19 (c) Taking any adverse action against a Worker within 90 days of the Worker's absence
20 from work or request for time off work because the Worker tested positive for COVID-19 or is
21 isolating or quarantining due to COVID-19 symptoms or exposure shall raise a rebuttable
22 presumption that such adverse action was taken in violation of this emergency ordinance.

23 (d) It shall be unlawful for an Employer to take any adverse action against any Worker
24 because the Worker tested positive for COVID-19 or is perceived to have been infected with
25 COVID-19, without regard to whether such Worker takes paid or unpaid leave; provided,

1 however, that an Employer shall not allow a Worker who is experiencing any sign or symptom
2 of COVID-19, or who has confirmed or suspected COVID-19 infection, to return to work on-
3 site until the Worker may do so consistent with the Local Health Officer's return-to-work
4 guidance.

5
6 Section 5. Applicant Protections.

7 (a) It shall be unlawful for an Employer to inquire about or require disclosure of whether
8 an Applicant has tested positive for COVID-19 or is isolating or quarantining, or has previously
9 isolated or quarantined, due to COVID-19 symptoms or exposure, or to require or recommend
10 COVID-19 testing, prior to extending an offer to employ or contract with the Applicant.

11 (b) It shall be unlawful for an Employer to rescind an offer to employ or contract with an
12 Applicant, or to base a decision to employ or contract with an Applicant, in whole or in part on
13 whether an Applicant tested positive for COVID-19 or is isolating or quarantining, or has
14 previously isolated or quarantined, due to COVID-19 symptoms or exposure.

15 (c) If an Applicant is unable to start work because the Applicant tested positive for
16 COVID-19 or is isolating or quarantining due to COVID-19 symptoms or exposure, an
17 Employer shall reasonably accommodate the Applicant by scheduling a later start date where
18 reasonably feasible.

19
20 Section 6. Exercise of Rights Protected; Retaliation Prohibited.

21 (a) It shall be unlawful for an Employer or any other person to interfere with, restrain, or
22 deny the exercise of, or the attempt to exercise, any right protected under this emergency
23 ordinance.

24 (b) It shall be unlawful for an Employer to take any adverse action against any Worker
25 or Applicant in retaliation for exercising rights protected under this emergency ordinance.

1 (c) Protections of this emergency ordinance shall apply to any person who mistakenly
2 but in good faith alleges violations of this emergency ordinance.

3
4 Section 7. Implementation and Enforcement.

5 (a) The Agency shall be authorized to implement and enforce this emergency
6 ordinance and may promulgate guidelines or rules for such purposes.

7 (b) A Worker, Applicant, or any other person who has reason to believe that a violation
8 of this emergency ordinance has occurred may report the suspected violation to the Agency.

9 (c) The Agency may investigate possible violations of this emergency ordinance.
10 Where the Agency determines that a violation has occurred, the Agency may issue a
11 determination of violation and order any appropriate relief, including the hiring of an Applicant,
12 reinstatement of a Worker, and payment of lost wages to a Worker or Applicant. Further, the
13 Agency may order the payment of an additional sum as an administrative penalty that does
14 not exceed \$1,000 for the Employer's first violation, \$5,000 for the second violation, and
15 \$10,000 for the third and subsequent violations. To compensate the City for the costs of
16 investigating and remedying the violation, the Agency may also order the violating Employer
17 to pay to the City an amount that does not exceed the Agency's enforcement costs. Subject to
18 the budgetary and fiscal provisions of the Charter, such funds shall be allocated to the Agency
19 and used to offset the costs of implementing and enforcing this emergency ordinance.

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

24 (e) The determination of violation shall specify a reasonable time period for payment of
25 any relief ordered. The Agency may award interest on all amounts due and unpaid at the

1 expiration of such time period at the rate of interest specified in subdivision (b) of Section
2 3289 of the California Civil Code, as may be amended from time to time.

3 (f) The remedies and penalties provided under Section 7(c) above are cumulative.

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

13
14 Section 8. Appeal Procedure.

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

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

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

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

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

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

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

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

24 (b) The final administrative decision is enforceable as a judgment in Superior Court.
25 Where an Employer fails to comply with a final administrative decision within the time period

1 required therein, the Agency may take any appropriate enforcement action to secure
2 compliance, including referring the action to the City Attorney to enforce the final
3 administrative decision as a judgment and, except where prohibited by State or Federal law,
4 requesting that City agencies or departments revoke or suspend any registration certificates,
5 permits, or licenses held or requested by the Employer until such time as the violation is
6 remedied.

7

8 Section 9. Other Laws.

9 The protections provided by this emergency ordinance are separate from and in
10 addition to other employment, non-discrimination, and disability protections in City, State, and
11 Federal law. This emergency ordinance is not intended to limit the operation of any other City
12 law. Should there be any overlap in application between this emergency ordinance and
13 another City law, both laws shall be followed, except if there is a conflict between the two that
14 cannot be reconciled, the City law providing greater protection to the Worker shall take
15 precedence.

16

17 Section 10. Preemption.

18 Nothing in this emergency ordinance shall be interpreted or applied so as to create any
19 right, requirement, power, or duty in conflict with Federal or State law. The term "conflict," as
20 used in this Section 9 means a conflict that is preemptive under Federal or State law.

21

22 Section 11. City Undertaking Limited to Promotion of the General Welfare.

23 In undertaking the adoption and enforcement of this emergency ordinance, the City is
24 undertaking only to promote the general welfare. The City is not assuming, nor is it imposing
25 on its officers and employees, an obligation for breach of which it is liable in money damages

1 to any person who claims that such breach proximately caused injury. This emergency
2 ordinance does not create a legally enforceable right by any member of the public against the
3 City.

4
5 Section 12. Severability.

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

14
15 Section 13. Effective Date; Expiration.

16 Consistent with Charter Section 2.107, this emergency ordinance shall become
17 effective immediately upon enactment, and shall expire on the 61st day following enactment
18 unless reenacted as provided by Section 2.107. Enactment occurs when the Mayor signs the
19 ordinance, the Mayor returns the ordinance unsigned or does not sign the ordinance within
20 ten days of receiving it, or the Board of Supervisors overrides the Mayor's veto of the
21 ordinance.

22
23 Section 14. Supermajority Vote Required.

24 In accordance with Charter Section 2.107, passage of this emergency ordinance by the
25 Board of Supervisors requires an affirmative vote of two-thirds of the Board of Supervisors.

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

By: /s/ _____
LISA POWELL
Deputy City Attorney

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LEGISLATIVE DIGEST

[Emergency Ordinance - COVID-Related Employment Protections]

Emergency ordinance to temporarily protect workers from adverse action 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 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.

Existing Law

Various laws and local health orders provide some protection for workers who test positive for COVID-19 or who miss work to isolate or quarantine due to COVID-19 symptoms or exposure. These include:

- Several City local health orders and directives, most comprehensively Health Order No. C19-07f, at 5.f & Appx. A at 2.4, require employees and independent contractors, as well as various other individuals who may work at a jobsite, such as vendors, contractors, and volunteers (“personnel”), to stay home if they have symptoms associated with COVID-19; require businesses to prohibit personnel from coming to work with symptoms; and prohibit businesses from taking adverse action against personnel who stay home to comply.
- The City’s Paid Sick Leave Ordinance protects employees from retaliation for using paid sick leave, including for COVID-19-related reasons. Admin. Code § 12W.7.
- Employees are protected from retaliation if they use emergency paid sick leave related to the COVID-19 pandemic under the Families First Coronavirus Response Act (FFCRA), Pub. Law No. 116-127, §§ 1504-1505, or similar public health emergency leave under the City’s Public Health Emergency Leave Act, Ord. No. 59-20, § 7.
- Employees are protected from retaliation for taking up to 12 weeks of job-protected leave for a “serious health condition,” which “involves either inpatient care or continuing treatment” under the California Family Rights Act (CFRA). Cal. Gov. Code, § 12945.22; Cal. Code Regs. § 11087(r). Similar leave under the federal Family and Medical Leave Act is protected. 29 U.S.C. § 2612(a)(1)(D); 29 C.F.R. § 825.113(a).
- The California Fair Employment and Housing Act (FEHA) generally protects an employee with COVID-19 from harassment, discrimination, and retaliation if, because of the virus, the employee is disabled or perceived by the employer as disabled. Cal. Gov. Code § 12940(a). The Americans with Disabilities Act provides similar protections at the federal level. 42 U.S.C. § 12112.

Amendments to Current Law

This emergency ordinance does not amend current law, but it supplements current protections for employees and independent contractors (collectively, “workers”) who miss work because

they test positive for COVID-19 or to isolate or quarantine due to COVID-19 symptoms or exposure; provides new protections for applicants; and provides for enforcement mechanisms and remedies for any violations of these protections.

Background Information

This emergency ordinance protects workers from any 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. Further, employers may not count a worker's absence or inability to work for the same reasons 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 will raise a rebuttable presumption that the adverse action violates the emergency ordinance.

The emergency ordinance additionally prohibits employers from taking any adverse action against any worker because the worker tested positive for COVID-19 or is perceived to have been infected with COVID-19, without regard to whether such worker takes paid or unpaid leave. However, employers must follow the Local Health Officer's orders and 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.

The emergency ordinance prohibits employers from asking an applicant if the applicant has tested positive for COVID-19 or is isolating or quarantining, or has previously isolated or quarantined, due to COVID-19 symptoms or exposure, or to require or recommend COVID-19 testing, prior to extending an offer to employ or contract with the applicant. Employers may not rescind an employment or contract offer, or base a decision to employ or contract with an applicant, in whole or in part on these factors. 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 where reasonably feasible.

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

The Office of Labor Standards Enforcement will implement and enforce the emergency ordinance. The emergency ordinance provides for an enforcement process, remedies, and an administrative appeal process.

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Introduction Form

By a Member of the Board of Supervisors or Mayor

Time stamp
or meeting date

I hereby submit the following item for introduction (select only one):

- 1. For reference to Committee. (An Ordinance, Resolution, Motion or Charter Amendment).
- 2. Request for next printed agenda Without Reference to Committee.
- 3. Request for hearing on a subject matter at Committee.
- 4. Request for letter beginning : "Supervisor [] inquiries"
- 5. City Attorney Request.
- 6. Call File No. [] from Committee.
- 7. Budget Analyst request (attached written motion).
- 8. Substitute Legislation File No. []
- 9. Reactivate File No. []
- 10. Topic submitted for Mayoral Appearance before the BOS on []

Please check the appropriate boxes. The proposed legislation should be forwarded to the following:

- Small Business Commission Youth Commission Ethics Commission
- Planning Commission Building Inspection Commission

Note: For the Imperative Agenda (a resolution not on the printed agenda), use the Imperative Form.

Sponsor(s):

Ronen; Mar, Yee

Subject:

Emergency Ordinance - COVID-Related Employment Protections

The text is listed:

Emergency ordinance to temporarily protect workers from adverse action 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 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.

Signature of Sponsoring Supervisor: /s/ Hillary Ronen