

BOARD of SUPERVISORS



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MEMORANDUM

TO: Anne Pearson, Deputy City Attorney, Office of the City Attorney
Patrick Mulligan, Director, Office of Labor Standards Enforcement

FROM: Stephanie Cabrera, Assistant Clerk, Government Audit and Oversight
Committee, Board of Supervisors

DATE: February 27, 2023

SUBJECT: LEGISLATION INTRODUCED

The Board of Supervisors' Government Audit and Oversight Committee has received the following proposed legislation, introduced by Supervisor Safai on February 14, 2023:

File No. [230166]

Ordinance amending the Police Code to require an awarding authority, following the termination or end of a contract for janitorial, security, or building maintenance services in San Francisco, to provide information to facilitate the successor contractor's retention of the terminated or ending contractor's employees; to strengthen enforcement by permitting the City Attorney or an aggrieved employee to bring a civil action against the awarding authority for injunctive relief; to further strengthen enforcement by authorizing the Office of Labor Standards Enforcement (OLSE) to, among other things, promulgate rules, investigate possible violations, and order interim or final relief, including backpay, administrative penalties, costs of investigation, and interest; and to establish procedures for a person subject to an OLSE investigation to appeal the OLSE's determination of violation.

If you have any additional comments or reports to be included with the file, please forward them to me at the Board of Supervisors, City Hall, Room 244, 1 Dr. Carlton B. Goodlett Place, San Francisco, CA 94102 or by email at:
Stephanie.Cabrera@sfgov.org.

cc:

Pamela Cheeseborough, Office of the City Attorney
Angela Chiu, Office of Labor Standards Enforcement

1 [Police Code - Displaced Worker Protections Under Certain Service Contracts]

2
 3 **Ordinance amending the Police Code to require an awarding authority, following the**
 4 **termination or end of a contract for janitorial, security, or building maintenance**
 5 **services in San Francisco, to provide information to facilitate the successor**
 6 **contractor's retention of the terminated or ending contractor's employees; to**
 7 **strengthen enforcement by permitting the City Attorney or an aggrieved employee to**
 8 **bring a civil action against the awarding authority for injunctive relief; to further**
 9 **strengthen enforcement by authorizing the Office of Labor Standards Enforcement**
 10 **(OLSE) to, among other things, promulgate rules, investigate possible violations, and**
 11 **order interim or final relief, including backpay, administrative penalties, costs of**
 12 **investigation, and interest; and to establish procedures for a person subject to an**
 13 **OLSE investigation to appeal the OLSE's determination of violation.**

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

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

23 Section 1. Findings.

24 Ensuring consistent and reliable security, janitorial, and building maintenance services
 25 is of vital importance to the healthy and safe operations of commercial buildings in San
 Francisco. Over the years, the model of who contracts for building-related services has

1 evolved, so that in many instances individual building tenants are now responsible for these
2 services. This ordinance will ensure better enforcement of Police Code Article 33C and a
3 more just outcome for workers covered by that Article and their families when employers
4 change a contractor without providing adequate notice as required by law.

5
6 Section 2. Article 33C of the Police Code is hereby amended by revising Sections
7 3300C.1, 3300C.2, and 3300C.3, adding Section 3300C.4, and renumbering existing Sections
8 3300C.4, 3300C.5, and 3300C.6 as Sections 3300C.5, 3300C.6, and 3300C.7, respectively,
9 to read as follows:

10
11 **SEC. 3300C.1. DEFINITIONS.**

12 The following definitions shall apply throughout this Article 33C:

13 "Agency" means the Office of Labor Standards Enforcement or any successor department or
14 office.

15 ~~(a)~~—"Awarding authority" means any person that awards or otherwise enters into
16 contracts for security and janitorial or building maintenance services performed within the City
17 ~~and County of San Francisco~~, except that the City ~~and County of San Francisco~~ is not an "awarding
18 authority" under this ~~Section~~Article with respect to City contracts for janitorial services as
19 defined in Administrative Code Section 21C.2 or City contracts for security guard services as
20 defined in Administrative Code Section 21C.11, because the worker retention requirements
21 for those City contracts are governed by Section 21C.2 and 21C.7 of the Administrative Code.

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

23 ~~(b)~~—"Contractor" means any person that enters into a service contract with the
24 awarding authority and who employs 25 or more persons.

1 ~~(e)~~—"Employee" means any person employed as a service employee of a contractor or
2 subcontractor who works at least 15 hours per week and whose primary place of employment
3 is in the City ~~and County of San Francisco~~ under a contract to provide security services, janitorial
4 services, or building maintenance services for the awarding authority. "Employee" does not
5 include a person who is (1) a managerial, supervisory, or confidential employee, including
6 those employees who would be so defined under the Fair Labor Standards Act; or (2) does
7 not possess or has not maintained a required occupational license; or (3) is employed less
8 than 15 hours per week.

9 ~~(d)~~—"Person" means any individual, proprietorship, partnership, joint venture,
10 corporation, limited liability company, trust, association, or other entity that may employ
11 individuals or enter into contracts.

12 ~~(e)~~—"Public sector contractor" means any person or persons, firm, partnership,
13 corporation, or combination thereof, who enters into a contract with officers or employees
14 empowered by law to enter into contracts for the City ~~and County of San Francisco~~ for the
15 services governed by this Article.

16 ~~(f)~~—"Service contract" means a contract let to a contractor by the awarding authority for
17 the furnishing of service (as opposed to the purchase of goods or other property) and that
18 involves an expenditure or receipt in excess of \$25,000 per contract and a contract term of at
19 least three months.

20 ~~(g)~~—"Subcontractor" means any person not an employee who enters into a contract
21 with the contractor to assist the contractor in performing a service contract and that employs
22 employees for such person.

23 ~~(h)~~—"Successor service contract" means a service contract with the awarding authority
24 where the services to be performed have previously been rendered to the awarding authority
25

1 as part of the same program or at the same facility under another substantially similar service
2 contract that recently has been terminated or has ended.

3
4 **SEC. 3300C.2. TRANSITION EMPLOYMENT PERIOD.**

5 All service contracts covered by this Article 33C shall impose the following obligations
6 on the contractor.

7 (a) Where the awarding authority has given notice that a service contract has been
8 terminated or ended, or where a service contractor has given notice of such termination, upon
9 giving or receiving such notice, as the case may be, the terminated or ending contractor shall,
10 within 10 days thereafter, provide to the successor contractor, the name, date of hire, and
11 employment occupation classification of each employee employed at the site or sites covered
12 by the prospective contractor at the time of contract termination. This provision shall also
13 apply to the subcontractors of the terminated contractor.

14 To facilitate the provision of this information, the awarding authority, following termination of
15 a service contract and within three days of the hiring of a successor contractor, shall provide the name
16 and address of the successor contractor to the terminated or ending contractor. ~~If the terminated~~
17 contractor has not learned the identity of the successor contractor, if any, by the time that notice was
18 given of the contract termination, the terminated contractor shall obtain such information from the
19 awarding authority. If a successor service contractor has not been awarded by the end of the
20 10-day period, the employment information referred to earlier in this subsection (a) shall be
21 provided to the awarding authority at such time. Within three days of the hiring of a successor
22 contractor, the awarding authority shall provide the employment information to the successor
23 contractor. Where a subcontractor of a service contractor has been terminated prior to the
24 termination of the service contract, the terminated subcontractor shall for purposes of this
25 Article 33C be deemed a terminated contractor.

1 (b) A successor contractor shall retain, for a 90-day transition employment period,
2 employees who have been employed by the terminated contractor or its subcontractors, if
3 any, for the preceding eight months or longer at the site or sites covered by the contract. This
4 requirement shall be stated by the City in all initial bid packages which are governed by this
5 Article 33C.

6 (c) If at any time a successor public sector contractor determines that fewer
7 employees are required to perform the new service contract than were required by the
8 terminated public sector contractor (and subcontractors, if any), the successor public sector
9 contractor shall retain employees by seniority within job classification.

10 (d) During such 90-day period, the successor contractor (or subcontractor, where
11 applicable) shall maintain a preferential hiring list of eligible covered employees not retained
12 by the successor contractor (or subcontractor) from which the successor contractor (or
13 subcontractor) shall hire additional employees.

14 (e) Except as provided in § subsection (c), during such 90-day period, the successor
15 contractor (or subcontractor, where applicable) shall not discharge without cause an
16 employee retained pursuant to this Article 33C. "Cause," for this purpose, shall include, but not
17 be limited to, the employee's conduct while in the employ of the terminated contractor or
18 subcontractor that contributed to any decision to terminate the contract or subcontract for
19 fraud or poor performance, excluding permissible union-related activity.

20 (f) At the end of such 90-day period, a successor public sector contractor (or
21 subcontractor, where applicable) shall perform a written performance evaluation for each
22 employee retained pursuant to this Article 33C. If the employee's performance during such
23 90-day period is satisfactory, the successor public sector contractor (or subcontractor) shall
24 offer the employee continued employment under the terms and conditions established by the
25 public sector successor contractor (or subcontractor) or as required by law.

1 (g) All contracts subject to this Article 33C shall include a provision in which the
2 contractor agrees to require subcontractors to comply with the obligations imposed by this
3 Article.

4
5 **SEC. 3300C.3. ENFORCEMENT.**

6 (a) Implementation. The Agency shall be authorized to coordinate implementation and
7 enforcement of this Article 33C and may promulgate appropriate rules for such purposes. Any rules
8 promulgated by the Agency shall have the force and effect of law and may be relied on by employers,
9 employees, and other persons to determine their rights and responsibilities under this Article. Any
10 rules may establish procedures for ensuring fair, efficient, and cost-effective implementation of this
11 Article, including supplementary procedures for helping to inform employees of their rights under this
12 Article, for monitoring employer compliance with this Article, and for providing administrative
13 hearings to determine whether an employer or other person has violated the requirements of this
14 Article.

15 (b) Administrative Enforcement.

16 (1) The Agency is authorized to take appropriate steps to enforce this Article 33C. The
17 Agency may investigate any possible violations of this Article by an awarding authority, a successor
18 contractor, or a successor contractor's subcontractor. Where the Agency has reason to believe that a
19 violation has occurred, it may order any appropriate temporary or interim relief to mitigate the
20 violation or maintain the status quo pending completion of a full investigation or hearing.

21 (2) Where the Agency determines that a violation has occurred, it may issue a
22 determination of violation and order any appropriate relief including, but not limited to, back pay,
23 including the value of benefits, for each day during which the violation continues, which shall be
24 calculated at a rate of compensation not less than the higher of:

1 (i) The average regular rate of pay received by the employee during the last
2 three years of the employee's employment in the same occupation classification; or

3 (ii) The final regular rate received by the employee.

4 (3) Where the Agency determines that a violation has occurred, it may also authorize the
5 payment of an additional sum as an administrative penalty to each employee or person whose rights
6 under this Article 33C were violated. If any backpay is ordered, the dollar amount of the backpay
7 multiplied by three, or \$250, whichever amount is greater, shall be included in the administrative
8 penalty paid to the employee. In addition, if a violation of this Article 33C resulted in other harm to the
9 employee or any other person, or otherwise violated the rights of employees or other persons, this
10 administrative penalty shall also include \$50 to each employee or person whose rights under this
11 Article were violated for each day or portion thereof that the violation occurred or continued.

12 (4) Where prompt compliance is not forthcoming, the Agency may take any appropriate
13 enforcement action to secure compliance, including initiating a civil action pursuant to Section
14 3300C.3(c) and/or, except where prohibited by State or Federal law, requesting that City agencies or
15 departments revoke or suspend any registration certificates, permits, or licenses held or requested by
16 the violator until such time as the violation is remedied. In order to compensate the City for the costs
17 of investigating and remedying the violation, the Agency may also order the violator to pay to the City
18 a sum of not more than \$50 for each day or portion thereof and for each employee or person as to
19 whom the violation occurred or continued. Such funds shall be allocated to the Agency and used to
20 offset the costs of implementing and enforcing this ordinance.

21 (5) An employee or other person may report to the Agency any suspected violation of
22 this Article 33C. The Agency shall encourage reporting pursuant to this subsection (b)(5) by keeping
23 confidential, to the maximum extent permitted by applicable laws, the name and other identifying
24 information of the employee or person reporting the violation; provided, however, that with the
25

1 authorization of such person, the Agency may disclose their name and identifying information as
2 necessary to enforce this Article or for other appropriate purposes.

3 (6) The remedies and penalties provided under subsections (b)(2) through (b)(4) are
4 cumulative.

5 (7) The determination of violation shall provide notice of the right to appeal the
6 determination to the Controller, and that failure to do so within 15 days shall result in the
7 determination becoming a final administrative decision.

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

12 (9) The Agency may require that remedies and penalties due and owing to a person
13 whose rights under this Article 33C were violated to be paid directly to the City for disbursement to the
14 person. The Controller shall hold these funds in escrow for the person. The Agency shall make best
15 efforts to distribute such funds. In the event such funds are unclaimed for a period of three years, the
16 Controller may undertake administrative procedures for escheat of unclaimed funds under California
17 Government Code Sections 50050 et seq., as may be amended from time to time. Subject to the
18 budgetary and fiscal provisions of the Charter, such escheated funds shall be dedicated to the
19 enforcement of this Article 33C or other laws the Agency enforces.

20 (#c) Civil Enforcement.

21 (1) The City Attorney or an A# employee who has been discharged in violation of
22 this Article 33C by a successor contractor or its subcontractor may bring an action in the
23 Municipal Court or Superior Court of the State of California, as appropriate, against the
24 successor contractor and, where applicable, #’s the successor contractor’s subcontractor, and
25 an employee may be awarded back pay, including the value of benefits, for each day during

1 which the violation continues, which shall be calculated at a rate of compensation not less
2 than the higher of:

3 ~~(1A)~~ The average regular rate of pay received by the employee during
4 the last three years of the employee's employment in the same occupation classification; or

5 ~~(2B)~~ The final regular rate received by the employee.

6 (2) The City Attorney or an employee may bring an action in Superior Court of the State
7 of California against the awarding authority, for an injunction requiring the awarding authority to
8 satisfy its obligations under this Article 33C.

9 ~~(b3)~~ If the City Attorney or the employee is the prevailing party in any such legal
10 action, the Court shall award reasonable attorneys' fees and costs as part of the costs
11 recoverable.

12 ~~(c) This Article is not intended to create a private right of action against the awarding~~
13 ~~authority.~~

14 (d) Interest. In any administrative or civil action brought under this Article 33C, the Agency or
15 court, as the case may be, shall award interest on all amounts due and unpaid at the rate of interest
16 specified in subdivision (b) of Section 3289 of the California Civil Code, as amended from time to time.

18 **SEC. 3300C.4. APPEAL PROCEDURE.**

19 (a) A person subject to a determination of violation of this Article 33C may file an appeal
20 ("Appeal") in accordance with the following procedures:

21 (1) The person ("Appellant") shall file the Appeal with the Controller and serve a copy
22 on the Agency. The Appeal shall be filed in writing within 15 days of the date of service of the
23 determination of violation, and shall specify the basis for the Appeal and shall request that the
24 Controller appoint a hearing officer to hear and decide the Appeal. Failure to submit a timely written
25 Appeal shall constitute concession, and the determination of violation shall be deemed the final

1 administrative decision upon expiration of the 15-day period. Further, failure to submit a timely,
2 written Appeal shall constitute a failure to exhaust administrative remedies, which shall serve as a
3 complete defense to any petition or claim brought against the City regarding the determination of
4 violation.

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

8 (3) Within 30 days of receiving an Appeal, the Controller shall appoint an impartial
9 hearing officer who is not part of the Agency and immediately notify the Agency and Appellant of the
10 appointment.

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

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

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

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

4 (b) Where an Appellant fails to comply with a final administrative decision within the time
5 period required therein, the Agency may take any appropriate enforcement action to secure
6 compliance, including referring the action to the City Attorney to seek enforcement of the final
7 administrative decision in Superior Court and, except where prohibited by State or Federal law,
8 requesting that City agencies or departments revoke or suspend any registration certificates, permits,
9 or licenses held or requested by the Appellant until such time as the violation is remedied.

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11 **SEC. 3300C.45. SUCCESSOR'S PRIOR EMPLOYEES.**

12 * * * *

13
14 **SEC. 3300C.56. APPLICABILITY TO EXISTING CONTRACTS.**

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16
17 **SEC. 3300C.67. SEVERABILITY.**

18 * * * *

19
20 Section 3. Effective Date. This ordinance shall become effective 30 days after
21 enactment. Enactment occurs when the Mayor signs the ordinance, the Mayor returns the
22 ordinance unsigned or does not sign the ordinance within ten days of receiving it, or the Board
23 of Supervisors overrides the Mayor's veto of the ordinance.

24 Section 4. Scope of Ordinance. In enacting this ordinance, the Board of Supervisors
25 intends to amend only those words, phrases, paragraphs, subsections, sections, articles,

1 numbers, punctuation marks, charts, diagrams, or any other constituent parts of the Municipal
2 Code that are explicitly shown in this ordinance as additions, deletions, Board amendment
3 additions, and Board amendment deletions in accordance with the “Note” that appears under
4 the official title of the ordinance.

5

6 APPROVED AS TO FORM:
7 DAVID CHIU, City Attorney

8 By: /s/ Matthew D. Goldberg
9 MATTHEW D. GOLDBERG
Deputy City Attorney

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Introduction Form

(by a Member of the Board of Supervisors or the Mayor)

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

- 1. For reference to Committee (Ordinance, Resolution, Motion or Charter Amendment)
- 2. Request for next printed agenda (For Adoption Without Committee Reference)
(Routine, non-controversial and/or commendatory matters only)
- 3. Request for Hearing on a subject matter at Committee
- 4. Request for Letter beginning with "Supervisor [] inquires..."
- 5. City Attorney Request
- 6. Call File No. [] from Committee.
- 7. Budget and Legislative Analyst Request (attached written Motion)
- 8. Substitute Legislation File No. []
- 9. Reactivate File No. []
- 10. Topic submitted for Mayoral Appearance before the Board on []

The proposed legislation should be forwarded to the following (please check all appropriate boxes):

- Small Business Commission Youth Commission Ethics Commission
- Planning Commission Building Inspection Commission Human Resources Department

General Plan Referral sent to the Planning Department (proposed legislation subject to Charter 4.105 & Admin 2A.53):

- Yes No

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

Sponsor(s):

Safai

Subject:

Displaced Worker Ordinance - Amending Police Code Chapter 33C

Long Title or text listed:

Please see attached.

Signature of Sponsoring Supervisor:

