[Administrative Code - Labor Peace Agreements for Excursion Vessel Operations Under Lease with the Port]

Ordinance amending the Administrative Code to require Labor Peace Agreements between employers operating excursion vessels under a Port lease and labor organizations seeking to represent their employees, to protect the City's ongoing proprietary interest.

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

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

Section 1. Chapter 23 of the Administrative Code is hereby amended by adding Article VIII, consisting of Sections 23.70, 23.71, 23.72, 23.73, 23.74, 23.75, 23.76, and 23.77, to read as follows:

ARTICLE VIII: MINIMIZING LABOR/MANAGEMENT CONFLICT IN PORT LEASES INVOLVING EXCURSION VESSEL OPERATIONS

SEC. 23.70. FINDINGS AND PURPOSE.

(a) San Francisco is a world-class tourist destination, welcoming more than 24 million visitors annually. The City and County of San Francisco ("City"), acting through the Port Commission ("Port"), owns and operates property along the City's waterfront, a major tourist hub and destination. The City, acting through the Port, leases its real property along the waterfront and harbor facilities to

companies engaged in tourism, and in so doing faces the same risks and liabilities as private businesses participating in management of similar facilities. As a result, the City has an ongoing Proprietary Interest in the management and use of that Port real property and harbor facilities and must make prudent business decisions, as would any private business, to ensure efficient and cost-effective management of its business concerns, and to maximize benefit and minimize risk.

(b) This Article VIII is intended to maximize the returns and minimize the risk to the City's Proprietary Interest resulting from possible conflict between Employers leasing, and operating Excursion Vessels on, Port property, and Labor Organizations, arising out of union organizing campaigns, labor negotiations, and disruption that may be caused by such conflict. Experience of public entities and private employers demonstrates that union organizing drives and union efforts to secure representation rights and an initial collective bargaining agreement can deteriorate into protracted and acrimonious conflict. Such conflict threatens the City's Proprietary Interest when private employers enter into leases to use Port property, and labor conflict could jeopardize base rent payments or rent payments calculated on a percentage of sales. That threat is most acute during the period when a Labor Organization (1) seeks to gain recognition as the collective bargaining representative for Employees and (2) if recognized, seeks a First Contract with the Employer.

(c) The sole purpose of this Article VIII is to protect the City's Proprietary Interest in the Excursion Vessel Leases. This Article is not enacted to: favor any particular procedure for determining employee preference, or lack of preference, regarding Labor Organization representation, or the outcome of any such procedure; skew such procedures to favor or hinder any party; interfere with the negotiation, terms, or scope of a First Contract, if applicable; or express or implement any generally applicable policy regarding private sector labor/management relations, or regulate those relations in any way.

SEC. 23.71. DEFINITIONS.

For purposes of this Article VIII, the following definitions shall apply:

"Agency" means the Office of Labor Standards Enforcement.

"Demand for Recognition Period" means the period during which the Labor Organization seeks recognition as the collective bargaining representative of the Employees.

"Economic Action" means concerted action initiated or conducted by a Labor Organization, or Employees acting in concert with a Labor Organization, at the Employees' worksite, to bring economic pressure to bear on an Employer, as part of a campaign to organize Employees or prospective Employees of that Employer, or in attempting to secure a First Contract, if applicable. "Economic Action" includes such activities as striking, picketing, or boycotting. "Economic Action" does not include a lawsuit to enforce this Article VIII.

"Employee" means any pilot, master, engineer, journeyman, or deckhand performing work for an Employer for compensation on an Excursion Vessel or on leased Port property relating to Excursion Vessel Operations on a full-time, part-time, seasonal, or temporary basis, including those made available to work for the Employer through a temporary service, staffing agency, or similar agency.

"Employer" means any person or entity, including a subcontractor, with Employees engaged in Excursion Vessel Operations.

"Excursion Vessel" means a passenger vessel that is Coast-Guard certified for intra-coastal passengers for hire and used for transporting the public to or from Port property for sightseeing and similar activities, which may include dining and other services.

"Excursion Vessel Lease" means a lease, sublease, license, sublicense, berthing agreement, or other means of granting the right to an Excursion Vessel to use Port property, in which the City receives a percentage rent based on the number of tickets or passengers, a flat fee per ticket or passenger, or a charge for each landing. An "Excursion Vessel Lease" must be for a term of at least six months.

"Excursion Vessel Operations" means any work done by Employees on or relating to Excursion Vessels under an Excursion Vessel Lease.

"First Contract" means the first enforceable contract entered into between an Employer and a Labor Organization setting one or more terms or conditions of employment.

"First Contract Period" means, if a Labor Organization is recognized as the collective bargaining representative of Employees, the period between such recognition and execution of a First Contract.

"Labor Organization" means any organization of any kind, or any agency or employee representation committee, in which Employees participate and which exists for the purpose, in whole or part, of dealing with Employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other terms and conditions of employment.

"Labor Peace Agreement" means an enforceable written agreement between an Employer and a Labor Organization, as described more fully in Section 23.72(a)(2) .

"Parties" means an Employer and Labor Organization that has requested to be, or has been, recognized as the collective bargaining representative of Employees.

"Pre-existing Lease" means any Excursion Vessel Lease entered into before the effective date of this Article VIII.

"Proprietary Interest" means any nonregulatory arrangement or circumstance in which the City has a financial or other nonregulatory interest.

"Subcontract" means any agreement between the authorized tenant, licensee, or other user under an Excursion Vessel Lease and another person or entity that contemplates or permits that other person or entity to operate or manage all or a portion of the Excursion Vessel Operations.

"Subcontractor" means the person or entity that operates or manages all or a portion of Excursion Vessel Operations under a Subcontract.

"Substantial Amendment" means an amendment to, or the City's discretionary renewal or extension of:

(1) A lease of Port property entered into before the effective date of this Article VIII that did not include Excursion Vessel Operations but is expanded to include Excursion Vessel Operations; or

(2) A Pre-existing Lease that provides for, or permits, any of the following:

(A) A new term that extends the duration of the lease beyond that provided in the Pre-existing Lease;

(B) The right to construct improvements to support or serve Excursion Vessel Operations, if not previously allowed under the Pre-existing Lease;

(C) Rent credits or potential rent credits to a Port tenant that may be applied against 25% or more of the fixed rent under the Pre-existing Lease during the period in which the rent credits may be used; or

(D) Rent credits or potential rent credits to a Port tenant that may be applied against 50% or more of the remaining percentage or participation rent (not including any portion of the rent), if any, under the Pre-existing Lease during the period in which the rent credits may be used.

"Territorial Sea" means waters, three nautical miles wide, as measured seaward from the mean low water line on the coast of the United States or the boundary between an ocean or sea and any internal or inland body of water in the United States, including without limitation, the boundaries of any bays, rivers, or lakes.

"Vessel" means any ship, boat, or other watercraft that transports passengers for a fee.

SEC. 23.72. PROCEDURES TO MINIMIZE DISRUPTION CAUSED BY LABOR/MANAGEMENT CONFLICT.

(a) An Employer who receives a written request by a Labor Organization to enter into a Labor Peace Agreement shall:

(1) Inform the Agency, within five business days of receiving the request, that a Labor Organization seeking to represent its Employees has requested the Employer to enter into a Labor Peace Agreement required by this Article VIII;

(2) Enter into a Labor Peace Agreement, with the Labor Organization as to the Employees it seeks to represent, containing the following provisions:

(A) The Labor Organization agrees not to engage in Economic Action against the Employer during the Demand for Recognition Period, and should the Labor Organization be recognized, the First Contract Period;

(B) If the Parties are unable, should the Labor Organization be recognized, to voluntarily negotiate the terms of a First Contract within 90 days of such recognition, the Parties will submit the matter to a mutually-agreed mediator to assist the parties in agreeing on a First Contract; and, if the Parties are unable to agree on a First Contract through mediation within 30 days of beginning mediation, the Parties will submit the dispute to a mutually-agreed arbitrator, authorized to impose reasonable terms of a First Contract resolving the proposals and positions of the Parties; and

(C) The Parties agree to submit to binding arbitration all disputes relating to interpretation, application, and implementation of the Labor Peace Agreement.

(3) Upon the Agency's request, promptly provide to the Agency a report attesting to the status of the Employer's compliance with the requirements of this Section 23.72, including a statement by any Labor Organization that has requested that the Employer enter into a Labor Peace Agreement certifying the accuracy of the Employer's report; and

(4) Include as a material term in any Subcontract a provision requiring the Subcontractor(s) to comply with this Article VIII. This provision shall be a material and mandatory term of such Subcontract, and shall state: "San Francisco Administrative Code Chapter 23, Article VIII, commencing at Section 23.70, which applies to [Subcontractor], incorporated herein by reference. To the extent [Subcontractor] employs Employees in Excursion Vessel Operations within the scope of Administrative Code Chapter 23, Article VIII, [Subcontractor] hereby agrees as a material condition of this subcontract to enter into and abide by a Labor Peace Agreement with a Labor Organization or Organizations that represents, or seeks to represent, [Subcontractor's] Employees, if and as required by Article VIII, and to otherwise fully comply with the requirements of that Article."

(b) If the Parties are unable to agree on the terms of a Labor Peace Agreement within 60 days of a request for a Labor Peace Agreement, or, if the Employer requests an exemption, within 60 days of the Agency's rejection of the request for an exemption, the Parties shall submit the matter to a mutually-agreed mediator to assist the Parties in reaching a Labor Peace Agreement; and, if the Parties are unable to reach a Labor Peace Agreement through mediation within 30 days of beginning mediation, the Parties shall submit the dispute to a mutually agreed arbitrator, who is authorized to impose a reasonable Labor Peace Agreement, permissible under federal law, under terms that effectuate the purposes of this Article VIII.

(c) Any Employer that has in good faith fully complied with the requirements in subsection (a) will be excused from further compliance as to a Labor Organization that has violated a Labor Peace Agreement.

(d) The Port shall include in every Excursion Vessel Lease a provision requiring the tenant, and any Employers operating under the Excursion Vessel Lease, to comply with the requirements of this Article VIII and all other applicable laws.

SEC. 23.73. EXEMPTIONS.

(a) This Article VIII shall not apply to any Employer with respect to any employee who does not work in Excursion Vessel Operations.

(b) This Article VIII shall not apply to an Employer if:

(1) The Employer employs fewer than 40 Employees.

(A) The number of Employees shall be determined by calculating the average number of Employees in the June, July, and August immediately preceding the request for a Labor Peace Agreement;

(B) Where the Employer is a Subcontractor, the number of Employees shall be determined by calculating the average number of Employees of the tenant and all Subcontractors operating under a single Excursion Vessel Lease in the June, July, and August immediately preceding the request for a Labor Peace Agreement;

(2) The City has no Proprietary Interest in the Excursion Vessel Lease under which the Employer operates;

(3) The Employer operates under a Pre-existing Lease. This exemption applies to an Employer for the duration of such Pre-existing Lease unless it is amended during its term resulting in a Substantial Amendment;

(4) The Employer is a signatory to valid and binding collective bargaining agreement(s) covering all of its Employees;

(5) The Employer is a governmental agency, and the law would prohibit application of this Article VIII;

(6) The Employer's Excursion Vessel Operations are between States, or are seaward of the seaward boundary of the Territorial Sea of the United States; or

(7) The Employer is a party to a grant, subvention, or agreement with a governmental agency related to Excursion Vessel Operations, and applying the requirements of this Article VIII would violate the terms or conditions of such agreement or any related rules or regulations.

(b) The Agency shall determine the applicability of an exemption under subsection (a) on a case-by-case basis. Any Employer claiming an exemption must submit a written request, including the evidentiary basis for the exemption, to the Agency within five business days of receiving a request to enter into a Labor Peace Agreement. The Employer shall have the burden of proving that an exemption is applicable.

SEC. 23.74. IMPLEMENTATION AND ENFORCEMENT.

(a) The requirement that Employers enter into, and comply with, Labor Peace Agreements with Labor Organizations when required under this Article VIII, and the requirement that Excursion Vessel Operators contractually obligate subcontractors to be bound by that requirement, are essential considerations for the Port's agreement to an Excursion Vessel Lease covered by this Article.

(b) The Agency shall be authorized to coordinate implementation and enforcement of this Article VIII and may promulgate appropriate guidelines or rules for such purposes. Any guidelines or rules promulgated by the Agency shall have the force and effect of law and may be relied on by Employers, Employees, and other persons to determine their rights and responsibilities under this Article. Any guidelines or rules may establish procedures for ensuring fair, efficient, and cost-effective implementation of this Article, including supplementary procedures for helping to inform Employees of their rights under this Article, for monitoring Employer compliance with this Article, and for providing administrative hearings to determine whether an Employer or other person has violated the requirements of this Article.

The Agency is authorized to investigate any possible violations of this Article VIII. An Employee or other person may report to the Agency any suspected violation of this Article. The Agency

shall encourage reporting pursuant to this subsection by keeping confidential, to the maximum extent permitted by applicable laws, the name and other identifying information of the Employee or person reporting the violation. Provided, however, that with the authorization of such person, the Agency may disclose his or her name and identifying information as necessary to enforce this Article or for other appropriate purposes.

After investigating a possible violation of this Article, and providing the Employer with the opportunity to respond to the allegations, if the Agency determines that a violation has occurred, it may issue a Determination of Violation. The Determination of Violation shall identify the violation and the factual basis for the determination. The Agency shall serve the Determination of Violation on the Employer by United States mail and the date of service shall be the date of mailing. In the Determination of Violation, the Agency may order any appropriate relief including, but not limited to, requiring the Employer to enter into a Labor Peace Agreement, and the payment of an additional sum as an administrative penalty in the amount of $100 for each day that the violation occurred or continued. To compensate the City for the costs of investigating and remedying the violation, the Agency may also order the violating Employer to pay to the City an amount that does not exceed its enforcement costs.

(c) An Employer may appeal from a Determination of Violation in accordance with the following procedures:

(1) Any appeal from a Determination of Violation (referred to in this subsection (c) as "Appeal") shall be filed in writing by the party filing the Appeal (referred to as "Appellant") within 15 days of the date of service of the Determination of Violation. Appellant shall file the Appeal with the City Controller and serve a copy on the Agency. Failure by the Appellant to file a timely, written Appeal shall constitute concession to the violation, and the violation shall be deemed final upon expiration of the 15-day period.

(2) Following the filing of the Appeal and service of a copy on the Agency, the Agency shall promptly afford Appellant an opportunity to meet and confer in good faith regarding possible resolution of the Determination of Violation in advance of further proceedings under this subsection (c), with the intention that such meeting occur, if feasible, within 30 days of the date the Appeal is filed.

(3) After the expiration of 30 days following the date the Appeal is filed, any party may request in writing, with concurrent notice to all other parties, that the Controller appoint a hearing officer to hear and decide the appeal. If no party requests appointment of a hearing officer, the Notice of Violation shall be deemed final on the 60th day after the date the Appeal is filed.

(4) Within 15 days of receiving a written request for appointment of a hearing officer, the Controller shall appoint an impartial hearing officer who is not part of the Agency and immediately notify the Agency and Appellant, and their respective counsel or authorized representative if any, of the appointment. The appointed hearing officer shall be an Administrative Law Judge with not fewer than two years of experience in labor or employment law, or an attorney with not fewer than five years' experience in labor or employment law.

(5) The hearing officer shall promptly set a date for a hearing. The hearing must commence within 45 days of the date of the Controller's notice of appointment of the hearing officer, and conclude within 75 days of such notice. The hearing officer shall conduct a fair and impartial evidentiary hearing in conformance with the time limitations set forth in this subsection (c)(5) and in any applicable rules and regulations, so as to avoid undue delay in the resolution of any Appeal. The hearing officer shall have the discretion to extend the times under this subsection (c)(5), and any time requirements under any applicable rules and regulations, only upon a determination of good cause.

(6) Appellant shall have the burden of proving by a preponderance of the evidence that the basis for the Determination of Violation, and/or the amount of penalty payments at issue in the Appeal, is incorrect.

(7) Within 30 days of the conclusion of the hearing, the hearing officer shall issue a written decision affirming, modifying, or dismissing the Determination of Violation. The decision of the hearing officer shall consist of findings and a determination. The hearing officer's findings and determination shall be the final administrative determination.

(8) Appellant may appeal a final administrative determination only by filing in San Francisco Superior Court a petition for a writ of mandate under California Code of Civil Procedure, section 1094.5, et seq., as applicable and as may be amended from time to time.

(9) Failure to appeal a Determination of Violation shall constitute a failure to exhaust administrative remedies, which shall serve as a complete defense to any petition or claim brought by the Employer against the City regarding the Agency's Determination of Violation.

(d) The City Attorney may bring a civil action in a court of competent jurisdiction against an Employer for violating any requirement of this Article, and, upon prevailing, shall be entitled to such legal or equitable relief as may be appropriate to remedy the violation, including a civil penalty, and shall be awarded reasonable attorneys' fees and costs. In any administrative or civil action brought under this Article, the Agency or court, as the case may be, shall award interest on all amounts due and unpaid at the rate of interest specified in subdivision (b) of Section 3289 of the California Civil Code.

(e) An Employer seeking to challenge the applicability of this Article VIII by civil action must first seek an exemption under Section 23.73, as an administrative prerequisite to suit. The Employer must file any civil action within 60 days from the date of the Agency's denial of the application for an exemption.

(f) The remedies, penalties, and procedures provided under this Chapter are cumulative.

(g) Notwithstanding anything contained in this Article VIII, the remedy for violation of the terms of this Article VIII shall not include termination of any Excursion Vessel Lease, nor shall any such violation defeat or render invalid or affect in any manner the status or priority of the lien of any mortgage, deed of trust, or other security interest made for value and encumbering any real property

affected by an Excursion Vessel Lease, including, without limitation, any leasehold estate or other interest in such real property or improvements on such real property.

SEC. 23.75. PROSPECTIVE EFFECT.

This Article VIII is intended to have prospective effect only. This Article shall be interpreted to avoid violating any laws that prevent the City from impairing obligations under any Pre-existing Lease.

SEC. 23.76. PREEMPTION.

Nothing in this Article VIII shall be interpreted or applied so as to create any right, power, or duty in conflict with any Federal or State law.

SEC. 23.77. SEVERABILITY.

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

Section 2. Effective Date. This ordinance shall become effective 30 days after enactment. Enactment occurs when the Mayor signs the ordinance, the Mayor returns the

ordinance unsigned or does not sign the ordinance within ten days of receiving it, or the Board of Supervisors overrides the Mayor's veto of the ordinance.

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

By: _____
LEILA K. MONGAN
Deputy City Attorney

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City and County of San Francisco
Tails
Ordinance

City Hall
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102-4689

File Number: 180802 **Date Passed:** September 25, 2018

Ordinance amending the Administrative Code to require Labor Peace Agreements between employers operating excursion vessels under a Port lease and labor organizations seeking to represent their employees to protect the City's ongoing proprietary interest.

September 12, 2018 Rules Committee - RECOMMENDED

September 18, 2018 Board of Supervisors - PASSED ON FIRST READING

Ayes: 11 - Brown, Cohen, Fewer, Kim, Mandelman, Peskin, Ronen, Safai, Stefani, Tang and Yee

September 25, 2018 Board of Supervisors - FINALLY PASSED

Ayes: 10 - Brown, Cohen, Fewer, Kim, Mandelman, Peskin, Ronen, Safai, Stefani and Tang
Excused: 1 - Yee

File No. 180802

I hereby certify that the foregoing Ordinance was FINALLY PASSED on 9/25/2018 by the Board of Supervisors of the City and County of San Francisco.

Angela Calvillo
Clerk of the Board

London N. Breed
Mayor

10/5/18
Date Approved