

1 [Emergency Ordinance - COVID-Related Employment Protections]

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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

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

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

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

19

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

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

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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 considereded 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 has performed at least 16
3 hours of ~~performs~~ labor or services for the applicable Employer, which are provided personally
4 by the individual independent contractor or other person based on the intellectual or manual
5 efforts of the individual rather than the sale of a product.

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7 Section 4. Worker Protections.

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

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

21 (c) Taking any adverse action against a Worker within 90 days of the Worker's absence
22 from work or the Worker's request for time off work because the Worker tested positive for
23 COVID-19 or is isolating or quarantining due to COVID-19 symptoms or exposure shall raise a
24 rebuttable presumption that such adverse action was taken in violation of this emergency
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1 ordinance. An employer may rebut the presumption by establishing a basis for the adverse
2 action, including but not limited to the Worker's performance or misconduct.

3 (d) An Employer may require a Worker to identify the general basis for the Worker's
4 absence from or inability to work, or the Worker's request to take time off work, but may not
5 require the disclosure of health information or other documentation (including but not limited to
6 a doctor's note).

7 (e) It shall be unlawful for an Employer to take any adverse action against any Worker
8 because the Worker tested positive for COVID-19 or is perceived to have been infected with
9 COVID-19, without regard to whether such Worker takes paid or unpaid leave; provided,
10 however, that an Employer shall not allow a Worker who is experiencing any sign or symptom
11 of COVID-19, or who has confirmed or suspected COVID-19 infection, to return to work on-
12 site until the Worker may do so consistent with the Local Health Officer's return-to-work
13 guidance.

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15 Section 5. Applicant Protections.

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

20 (ab) It shall be unlawful for an Employer to rescind an offer to employ or contract with
21 an Applicant, or to ~~base~~make a decision to employ or contract with an Applicant, based in
22 whole or in part on whether an Applicant tested positive for COVID-19 or is isolating or
23 quarantining, or has previously isolated or quarantined, due to COVID-19 symptoms or
24 exposure.

1 (b) If an Applicant is unable to start work because the Applicant tested positive for
2 COVID-19 or is isolating or quarantining due to COVID-19 symptoms or exposure, an
3 Employer shall reasonably accommodate the Applicant by scheduling a later start date where
4 reasonably feasible.

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

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

10 (b) It shall be unlawful for an Employer to take any adverse action against any Worker
11 or Applicant in retaliation for exercising rights protected under this emergency ordinance,
12 including requesting or taking leave.

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

15
16 Section 7. Implementation and Enforcement.

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

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

21 (c) The Agency may investigate possible violations of this emergency ordinance.
22 Where the Agency has reason to believe that a violation has occurred, it may order any
23 appropriate temporary or interim relief to mitigate the violation or maintain the status quo
24 pending completion of a full investigation or hearing. Where the Agency determines that a
25 violation has occurred following an investigation, the Agency may issue a determination of

1 violation and order any appropriate relief, including the hiring of an Applicant, reinstatement of
2 a Worker, and payment of lost wages to a Worker or Applicant. Further, the Agency may order
3 the payment of an additional sum as an administrative penalty that does not exceed \$1,000
4 for the Employer's first violation, \$5,000 for the second violation, and \$10,000 for the third and
5 subsequent violations. For the purpose of this calculation, if multiple Workers or Applicants
6 are impacted by the same violation at the same time, the Agency shall treat the violation as a
7 single violation rather than multiple violations. To compensate the City for the costs of
8 investigating and remedying the violation, the Agency may also order the violating Employer
9 to pay to the City an amount that does not exceed the Agency's enforcement costs. Subject to
10 the budgetary and fiscal provisions of the Charter, such funds shall be allocated to the Agency
11 and used to offset the costs of implementing and enforcing this emergency ordinance and
12 other ordinances the Agency enforces.

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

17 (e) The determination of violation shall specify a reasonable time period for payment of
18 any relief ordered. The Agency may award interest on all amounts due and unpaid at the
19 expiration of such time period at the rate of interest specified in subdivision (b) of Section
20 3289 of the California Civil Code, as may be amended from time to time.

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

22 (g) The Agency may require that remedies and penalties due and owing to Workers or
23 Applicants be paid directly to the City for disbursement to the Workers or Applicants. The
24 Controller shall hold these funds in escrow for the Workers or Applicants. The Agency shall
25 make best efforts to distribute such funds to Workers or Applicants. In the event such funds

1 are unclaimed for a period of three years, the Controller may undertake administrative
2 procedures for escheat of unclaimed funds under California Government Code Section 50050,
3 et seq., as may be amended from time to time. Subject to the budgetary and fiscal provisions
4 of the Charter, such escheated funds shall be dedicated to the enforcement of this emergency
5 ordinance or other laws the Agency enforces.

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7 Section 8. Appeal Procedure.

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

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

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

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

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

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

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

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

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

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Section 9. Other Laws.

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

Section 10. Preemption.

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

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

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

1 Section 12. Severability.

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

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11 Section 13. Effective Date; Expiration.

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

1 Section 14. Supermajority Vote Required.

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

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

7 By: /s/ _____
8 LISA POWELL
9 Deputy City Attorney

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