Emergency ordinance to temporarily require grocery store, drug store, restaurant, and on-demand delivery service employers to provide health and scheduling, and hours protections to employees during the public health emergency related to COVID-19.

NOTE: Unchanged Code text and uncodified text are in plain Arial font. Additions to Codes are in single-underline italics Times New Roman; Deletions to Codes are in strikethrough italics Times New Roman. 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. Declaration of Emergency Pursuant to Charter Section 2.107.

(a) Section 2.107 of the Charter authorizes passage of an emergency ordinance in cases of public emergency affecting life, health, or property, or for the uninterrupted operation of any City or County department or office required to comply with time limitations established by law. The Board of Supervisors hereby finds and declares that an actual emergency exists that requires the passage of this emergency ordinance.

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

(c) To mitigate the spread of COVID-19, on March 16, 2020, the Local Health Officer issued Health Order No. C19-07 directing San Franciscans to “shelter in place,” or stay at home, except as necessary to take care of essential needs. That order extended to April 7,
2020. On March 31, 2020, the Local Health Officer issued a replacement order, Health Order No. C19-07b, which tightens the restrictions and extends the stay-at-home order through May 3. These Orders have forced the closure of many businesses. Restaurants are prohibited from operating except for carry out and delivery service. Essential Businesses, including grocery stores, drug stores, and on-demand delivery services for food, medicines, and other essential items, may continue to operate under Health Order No. C19-07b, subject to certain social distancing and sanitation requirements.

(d) This emergency ordinance is necessary to reduce the likelihood of COVID-19 infection among employees of grocery stores, drug stores, restaurants, and on-demand delivery services and the members of the public with whom they interact.

Section 2. Findings and Purpose.

(a) Grocery stores, drug stores, restaurants, and on-demand delivery services, provide critical access to essential items during the Public Health Emergency. Many San Franciscans, especially residents who are particularly vulnerable to COVID-19 due to age or underlying health conditions, have turned to on-demand delivery services to receive food and other essential items while staying safe at home.

(b) Grocery store, drug store, and restaurant employees, and on-demand delivery drivers and shoppers are an essential population of workers who cannot perform their work remotely. These workers must be provided the necessary supplies, tools, and equipment to protect themselves from infection and to prevent the spread of COVID-19 to other employees or to the members of the public to whom they supply essential goods. All grocery stores, drug stores, restaurants, and on-demand delivery services must fully implement and follow Health Order No. C19-07b.
(c) This need is particularly pressing for on-demand delivery drivers and shoppers. Under California Labor Code Section 2750.3, a worker who provides services for a hiring entity is an employee unless the hiring entity demonstrates that the worker is an independent contractor. Many delivery services incorrectly classify their delivery shoppers and drivers as independent contractors. Independent contractors generally are not provided health insurance, sick leave, other paid leave, unemployment insurance, or workers compensation; they may not be provided or reimbursed for the necessary supplies, tools and equipment to protect themselves from COVID-19; and they may not be provided guidance on the social distancing and sanitation requirements of Order No. C19-07b. Existing City ordinances govern employee benefits, which are beyond the scope of this emergency ordinance. However, to prevent the spread of COVID-19 through essential on-demand delivery services, it is necessary to clarify and supplement Health Order No. C19-07b's requirements in the on-demand delivery service context. To do so, this emergency ordinance defines on-demand delivery drivers and shoppers as Employees, regardless of how the on-demand delivery service classifies them for any other purpose.

(d) Further, by providing additional scheduling flexibility and hours protections, this emergency ordinance provides grocery store, drug store, restaurant, and on-demand delivery employees additional tools to protect themselves and others from infection and thereby protect public health.

Section 3. Definitions.
For purposes of this emergency ordinance, the following definitions apply.

“Agency” means the Office of Labor Standards Enforcement.

“City” means the City and County of San Francisco.
“Covered Employer” means any person, as defined in Section 18 of the California Labor Code, including corporate officers or executives, who directly or indirectly or through an agent or any other person, including through the services of a temporary services or staffing agency or similar entity, employs, suffers or permits to work, or exercises control over the wages, hours, or working conditions of an Employee for any of the following: (a) a grocery store, supermarket, convenience store, restaurant, cafe, or other establishment primarily engaged in the retail sale of food; or (b) a drug store, pharmacy, or other establishment primarily engaged in the retail sale of medication, pharmaceuticals, or medical supplies; or (c) an On-Demand Delivery Service.

“Employee” means any person who in a particular week performs at least two hours of work for a Covered Employer within the geographical boundaries of the City, without regard to whether the Covered Employer classifies the person as an employee for any other purpose. “Employee” includes, without limitation, shoppers and drivers for an On-Demand Delivery Service.

“Essential Business” has the same meaning of “Essential Business” in Health Order No. C19-07b.

“On-Demand Delivery Service” means a third-party online or mobile application or other internet service that offers or arranges for the used delivery platform or network company that facilitates the consumer purchase and same-day or scheduled delivery of food products, medications, or other goods directly from no fewer than 20 restaurants, grocery stores, drug stores, and other Essential Businesses.

“Part-time” means fewer than 35 hours of work in each work week.

Section 4. Protections for Employees of On-Demand Delivery Services.
(a) As required by Health Order No. C19-07b (Section 13.h.iii) all Essential Businesses must provide employees hand sanitizer, soap and water, or effective disinfectant in the workplace. Additionally, under this emergency ordinance, Covered Employers that are On-Demand Delivery Services must provide to or reimburse Employees for the reasonable cost of purchasing necessary hand sanitizer, disinfecting cleaning supplies, and any needed personal protective equipment such as gloves and face masks.

(b) As required by Health Order No. C19-07b (Section 13.h), all Essential Businesses must provide a Social Distancing Protocol to each employee who works at a facility and must post the Social Distancing Protocol in each facility. Additionally, under this emergency ordinance, Covered Employers that are On-Demand Delivery Services must provide the Social Distancing Protocol to Employees in a manner calculated to reach all such Employees via electronic communication, and/or by posting conspicuously on the Employer's web-based or app-based platform.

(c) As required by Health Order No. C19-07b (Sections 13.h.i, 13.k.i), individuals are to maintain at least six feet of physical distance from people who are not part of the same household. Additionally, under this emergency ordinance, Covered Employers that are On-Demand Delivery Services must offer Employees who make deliveries the option of a “no-contact” delivery method where feasible with detailed guidance on how to safely make both in-person and no-contact deliveries.

(d) As required by Health Order No. C19-07b (Section 13.h.v), essential businesses must regularly disinfect high-touch surfaces. Additionally, under this emergency ordinance, Covered Employers that are On-Demand Delivery Services must require delivery drivers to regularly disinfect high-touch surfaces in their vehicles and compensate them for doing so.

Section 5. Right to Schedule Changes.
A Covered Employer shall where reasonably feasible approve an Employee’s request to cancel scheduled work for any reason for which an Employee may otherwise use leave under the City’s Paid Sick Leave Ordinance (Administrative Code Sections 12W.2(e) and 12W.4(a)), and the Agency’s rules and guidance implementing those provisions, or emergency paid sick leave under the Families First Coronavirus Response Act, H.R. 6201, Public Law No. 116-127, Section 5102(a) and implementing regulations. The Employer shall allow the Employee to use any available accrued paid sick leave or emergency paid sick leave, or to reschedule the work.

Section 6. Offering Additional Work to Part-Time Employees.

(a) Subject to the limitations in this Section 6, before a Covered Employer may hire new Employees or use contractors or a temporary services or staffing agency to perform work for the Covered Employer, the Covered Employer shall first offer the additional work to existing Part-time Employee(s) if (1) the Part-time Employee(s) are qualified to do the additional work, as reasonably determined by the Covered Employer, and (2) the additional work is the same or similar to work the Employee(s) have performed for the Covered Employer. This Section 6 requires Covered Employers to offer to Part-time Employees only the number of hours required to give the Employee 35 hours of work in a week.

(b) A Covered Employer has discretion to divide the additional work hours among Part-time Employees consistent with this Section 6.

(c) A Part-time Employee may, but is not required to, accept the Covered Employer’s offer of additional work hours under this Section 6. The Part-Time Employee shall have 72 hours to accept the additional hours, after which time the Covered Employer may hire new Employees to work the additional hours. The 72 hours referenced in the previous sentence begins either when the Part-Time Employee receives the written offer of additional hours or
whenever the Covered Employer posts the offer of additional hours described in subsection (d), whichever is later. A Part-Time Employee who wishes to accept the additional hours must do so in writing.

(d) When this Section 6 requires a Covered Employer to offer additional work hours to existing Part-time Employees, the Covered Employer shall make the offer either in writing directly to an Employee or by providing notice to Employees in a manner calculated to reach all such Employees by posting the offer in a conspicuous location in the workplace where notices to Employees are customarily posted, providing it via electronic communication, and/or by posting conspicuously on the Employer’s web-based or app-based platform.

Section 67. Exercise of Rights Protected; Retaliation Prohibited.

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

(b) It shall be unlawful for a Covered Employer or any other person to discharge, threaten to discharge, demote, suspend, or in any manner discriminate or take adverse action against any person in retaliation for exercising rights protected under this emergency ordinance.

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

Section 78. Implementation and Enforcement.

(a) An individual may report a potential violation of this emergency ordinance by calling 311. The Agency may investigate potential violations and may coordinate investigation by other City officials as appropriate.
(b) The Agency is authorized to implement and enforce this emergency ordinance and may promulgate regulations and guidelines for such purposes. Except as otherwise provided by Agency regulations or guidelines, the investigation and administrative enforcement provisions of Police Code Section 3300F.10 and the civil enforcement provisions of Police Code Section 3300F.12 apply to this emergency ordinance.

Section 89. Other City Laws.

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 Employee shall take precedence.

Section 940. 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 1044. 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.
Section 1142. Severability.

If any section, subsection, sentence, clause, phrase, or word of this emergency ordinance, 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 this emergency ordinance. The Board of Supervisors hereby declares that it would have passed this emergency ordinance and every section, subsection, sentence, clause, phrase, and word not declared invalid and unconstitutional without regard to whether any other portion of this emergency ordinance or application thereof would be subsequently declared invalid or unconstitutional.

Section 1243. Effective Date; Expiration.

Consistent with Charter Section 2.107, this emergency ordinance shall become effective immediately upon enactment, and shall expire on the 61st day following enactment unless reenacted as provided by Section 2.107, or upon the termination of the Public Health Emergency, whichever occurs first. 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.

Section 1344. Supermajority Vote Required.

In accordance with Charter Section 2.107, passage of this emergency ordinance by the Board of Supervisors requires an affirmative vote of two-thirds of the Board of Supervisors.
APPROVED AS TO FORM:
DENNIS J. HERRERA, City Attorney

By: /s/ ______________________
    LISA POWELL
    Deputy City Attorney

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