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San Francisco Enacts 'Right to Reemployment' Ordinance

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In response to unprecedented unemployment levels caused by the COVID-19 pandemic, the San Francisco Board of Supervisors passed an emergency ordinance on June 23, 2020, that imposes rehiring, notice and reporting obligations onto San Francisco employers who have recently conducted, or who plan on conducting, layoffs related to COVID-19. The essence of the ordinance is that it requires large employers to offer laid-off workers their old jobs back, before offering employment to new applicants, under certain circumstances. As explained in greater detail below, there are a few situations in which employers may withhold an offer of reemployment, including if the employee signed a valid severance agreement. The ordinance also requires that employers who have recently conducted, or who plan on conducting, layoffs related to COVID-19 provide notice of their right to reemployment.

On July 3, 2020, Mayor London Breed returned the ordinance to the Board of Supervisors "unsigned," which effectively enacted the ordinance. The ordinance will stay in effect for 60 days (through September 1, 2020), unless it is extended further by the Board of Supervisors.

The ordinance covers for-profit and nonprofit employers operating in San Francisco that employ (or have employed) 100 or more employees on or after February 25, 2020. Government entities and employers that provide services qualified as "healthcare operations" (as defined by the San Francisco Order of the Health Officer No. C19-07e, which includes pharmaceutical and biotechnology companies) are exempt from the ordinance's requirements.

The ordinance applies to layoffs that: (a) affected 10 or more employees during the period from February 25, 2020, through the date that the ordinance expires; and (b) were caused by the employer's lack of funds or a lack of available work due to the emergency declarations passed by the State of California or City of San Francisco, or any San Francisco shelter-in-place order.

San Francisco reemployment offer requirements

While the ordinance is in effect, employers seeking to fill the same, or "substantially similar," positions previously held by workers who were laid off must first reoffer employment to those workers before offering employment to new applicants. The ordinance defines "substantially similar" job positions quite broadly, including: (a) positions with comparable duties, pay, benefits and working conditions; (b) any position the former employee held in the year prior to the layoff; and (c) any position for which the former employee would be "qualified." Employers must make offers of reemployment in accordance with certain rules outlined in the ordinance. For example, if there is more than one eligible employee with the same job classification, offers of reemployment must be made in order of seniority.

Furthermore, the ordinance sets out precise rules on how the employer must make the offer of reemployment and how the employee must consent to receiving the offer. Employers must notify the former employee of the offer by telephone and email, and ask for their consent to send a written offer of reemployment by email. If the employee does not respond, the employer must send an offer via certified mail or courier to the employee's last known address. If the employee does not respond within two business days of delivery of the offer, the employee is deemed to have rejected the offer.

Specifically, if the employer is able to reach the former employee by telephone, the employer must ask for the employee's consent to transmit a written offer of reemployment by email. If the employee consents, the employee must provide a written confirmation of their consent by text or email no later than 5:00 pm PT on the business day immediately following the telephone call. The employer must transmit the offer by no later than 5:00 pm PT on the business day immediately following the employee's consent. If the employee does not consent to receiving an offer by email (or if the employee does not respond), the employer must mail a written

offer of reemployment to the employee's last known address by certified mail or courier. The offer must remain open for at least two business days following delivery by certified mail or courier.

If the employer is not able to reach the former employee by telephone, the employer must notify the employee by email that they seek to offer the employee reemployment and ask for the employee's consent to email them an offer. If, by 5:00 pm PT the next business day, the employee consents (via text or email) to receiving an offer by email, the employer must provide the employee with the offer no later than 5:00 pm PT the first business day following receipt of the employee's consent. If the employee does not consent to receiving the offer via email (or does not respond), the employer must send a written offer of reemployment to the employee's last known address by certified mail or courier. The offer must remain open for at least two business days following delivery by certified mail or courier.

If the employer is not able to reach the former employee by telephone or email, the employer must still send an offer to the employee's last known address by certified mail or courier. The offer must remain open for at least two business days following the delivery. Under such circumstances, the courier is authorized to deliver the offer without obtaining proof of receipt by the employee.

The employer must also provide written notice to the Office of Economic and Workforce Development (OEWD) of all offers of reemployment, all acceptances and all rejections.

There are three situations in which employers can withhold an offer of reemployment from a laid-off employee: (a) if the employer learns that the employee committed an act of misconduct while employed; (b) if the employee and employer signed a valid severance agreement prior to July 3, 2020; or (c) if the employer already hired a new employee for the relevant position prior to July 3, 2020. Since many employers provide severance pursuant to a severance agreement, this second exception may prove to be very broad.

Layoff + reemployment notice requirements

Employers planning to conduct layoffs while the ordinance is in effect must provide written notice, at or before the time of the layoff, to each affected employee who has worked for the employer for at least 90 days. The notice must be in a language the employee understands and must include: (a) the effective date of the layoff; (b) a summary of the right to reemployment under the ordinance; and (c) the telephone number for a hotline operated by the OEWD.

Importantly, employers that conducted a qualifying layoff after February 25, 2020, must also provide the notice to each former employee who had worked for the employer for at least 90 days. The notice must contain the above-mentioned provisions and must be sent within 30 days of the ordinance's effective date (i.e., by August 2, 2020).

In addition to notifying employees, employers planning to conduct a layoff must notify the OEWD within 30 days of the layoff, stating: (a) the total number of San Francisco employees affected by the layoff; (b) the employees' job classifications; (c) the employees' hire date; and (d) the dates of the employees' separations.

Record retention requirements after layoffs

The ordinance requires employers to retain certain records regarding each laid-off employee for at least two years after the layoff. Employers must retain records of each employee's full name, job classification, hire date, address, email address, phone number and copy of the layoff notice.

Non-discrimination and duty to accommodate family care hardship

In addition to the right to reemployment, the ordinance prohibits employers from discriminating against or taking adverse action against an employee with a family care hardship; defined broadly by the ordinance as a need to care for a child because the child's school is closed, or any other family caregiving obligation described in San Francisco's paid sick leave ordinance.

Employers must also provide reasonable accommodations to workers with such family care hardships if the employee requests. A reasonable accommodation may include modifying the employee's work schedule, modifying the number of hours to be worked or permitting the employee to work from home (to the extent operationally feasible). The duty to reasonably accommodate employees for their family care hardships expires upon the expiration of the ordinance.

Remedies for violations

The ordinance allows employees to bring an action against the employer for any violations in San Francisco Superior Court. The employee may seek reinstatement, back pay, front pay and attorneys' fees.

Conclusion

The ordinance imposes significant obligations upon San Francisco employers who have already conducted and employers planning to conduct layoffs caused by COVID-19.

Because the deadlines to comply with the ordinance are fast approaching, San Francisco employers will need to act quickly. Employers with questions about whether and how these new laws will apply to their business should consult counsel to ensure compliance.

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