

## San Francisco Issues Guidance on "Back to Work" Layoff and Reemployment Notices

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On August 7, 2020, the San Francisco Office of Economic and Workforce Development (OEWD) released its [guidance](#) on the City of San Francisco's "Temporary Right to Reemployment Following Layoff Due to COVID-19 Pandemic Emergency Ordinance" (also known as the ["Back to Work" Ordinance](#)), which the Board of Supervisors passed on June 23, 2020. Importantly, the OEWD released template forms on its [website](#) that employers may use in reporting layoffs and reemployment offers to the OEWD as required under the Ordinance.

San Francisco employers who have laid off or are considering laying off 10 or more workers as a result of the COVID-19 pandemic should make sure they comply with the new ordinance while it remains in effect. The Ordinance requires employers operating in San Francisco to offer reemployment to "eligible workers" laid off as a result of the COVID-19 pandemic and the related shelter-in-place/stay-at-home orders in San Francisco when they are rehiring for the same or similar classifications. The Ordinance also requires that employers provide notice of the layoff and of reemployment offers to both laid off workers and the OEWD.

The Ordinance went into effect on July 3, 2020 and will remain in effect through September 1, 2020, unless the Board of Supervisors extends it.

### Definition of Layoff

A "Layoff" under the Ordinance is a separation (termination or end of employment) of 10 or more employees in San Francisco during any 30-day period, commencing on or after February 25, 2020, and which is caused by the employer's lack of funds or lack of work for its employees, resulting from the COVID-19 public health emergency and any San Francisco shelter-in-place/stay-at-home order. This definition also includes any Layoff conducted in conjunction with the closure or cessation of an employer's business operations in San Francisco.

### Covered Employers

The Ordinance applies to private employers operating in the City or County of San Francisco who employed or employ 100 or more employees (regardless of location) as of the earliest date that an employer separated or separates one or more employees that subsequently resulted or results in a layoff.

The Ordinance does not apply to any federal, state, or local or other public agency or an employer providing healthcare operations, including hospitals, clinics, COVID-19 testing

locations, dentists, pharmacies, blood banks and blood drives, pharmaceutical and biotechnology companies, other healthcare facilities, healthcare suppliers, home healthcare service providers, mental health providers, or any related and/or ancillary healthcare services, as well as veterinary care and all healthcare service providers to animals.

### **Covered Workers**

An “eligible worker” means a person: (1) employed at a worksite in San Francisco for at least 90 days of the calendar year preceding the date on which the employer provided or provides written notice to the employee of a Layoff; and (2) who was or is separated due to a Layoff.

### **Layoff Notices to Eligible Workers**

Covered employers must provide written notice of the Layoff to eligible workers, which includes the following information:

- Notice of the Layoff’s effective date;
- Summary of the right to reemployment provided in the Ordinance; and
- The telephone number to the OEWD hotline: (415) 701-4817.

The City does not have a template for this information, but the employer must include all required information. The written notice to each eligible worker needs to be in a language understood by the worker.

For Layoffs that occurred on or after February 25, 2020 and prior to August 7, 2020 (when the OEWD posted its guidance), covered employers must provide written notice no later than September 6, 2020.

For Layoffs after August 7, 2020, covered employers must provide written notice of the Layoff to eligible workers at or before the time when the Layoff becomes effective.

### **Layoff Notices to the OEWD**

Following a Layoff, covered employers must provide written notice of the Layoff to the OEWD at the following email address: [backtowork@sfgov.org](mailto:backtowork@sfgov.org). The notice of Layoff to the OEWD must contain the following information:

- Total number of employees located in San Francisco affected by the Layoff;
- Job classification at the time of separation for each eligible worker; and
- Original hire date for each eligible worker.

For Layoffs that occurred on or after February 25, 2020 and prior to August 7, 2020, employers must provide written notice to the OEWD by September 6, 2020.

For Layoffs after August 7, 2020, covered employers must provide written notice to the OEWD within 30 days from initiation of the Layoff.

In the event that an employer did not foresee that separation of eligible workers would result in a Layoff, the employer shall provide such written notice within 7 days of its separation of the tenth worker in a 30-day period as a result of the COVID-19 pandemic and any shelter-in-place order.

The OEWD has provided a [template form](#) that employers may use for the Notice of Layoff to the OEWD on the OEWD's website.

### **Retention of Records**

Where an employer initiates a Layoff after February 25, 2020, the employer must retain the following records for at least two years after giving notice to the worker regarding each eligible worker: (1) full legal name; (2) job classification at the time of separation; (3) date of hire; (4) last known address of residence; (5) last known email address; (6) last known telephone number; and (7) a copy of the written Layoff notice to the worker.

### **When Covered Employers Must Offer Reemployment**

If a covered employer seeks to rehire for the same position previously held by a laid-off eligible worker, the employer must first offer the opportunity to that laid-off eligible worker.

If a covered employer seeks to rehire for a *substantially similar* position (comparable job duties, pay, benefits, and working conditions) to a position that a laid-off eligible worker had with the employer in the 12 months preceding the Layoff, and the laid-off eligible worker is qualified (with any training that would be offered to a new hire), then the employer must first offer the position to that laid-off eligible worker.

In the event a covered employer intends to offer reemployment to an eligible worker, and the employer separated more than one eligible worker from the same job classification, the employer shall make offers of reemployment to such eligible workers based on their former seniority with the employer. Seniority shall be based upon an eligible worker's earliest date of hire with the employer.

Covered employers can withhold a reemployment offer for the following reasons:

- Misconduct: If the employer learns after the Layoff that the eligible worker engaged in any act of dishonesty, violation of the law, violation of a policy or rule of the employer or other misconduct that occurred while the worker was employed.
- Severance Agreement: If the employer and worker executed a severance agreement due to a Layoff between February 25, 2020 and July 3, 2020.
- Rehiring: If the employer laid off an eligible worker between February 25, 2020 and July 3, 2020 (before the ordinance was effective) and hired another person for the laid-off worker's position.

**Note:** If the primary factor or reason for a separation is other than a COVID-19 related layoff (for example, "misconduct" or performance issues), employers should carefully consider the "reason for separation" as stated to the employee, in their Notice of Change in Relationship, and in EDD paperwork.

### Making A Reemployment Offer

If a covered employer has a record of an eligible worker's last known telephone number and email address, the employer must make a good faith effort to notify the worker of a reemployment offer by phone and email. If the employer is unable to make contact via phone or email, they should contact the worker by certified mail or courier delivery.

Telephone and email notice must contain the following information:

- The employer wishes to offer reemployment to the worker;
- The employer seeks the worker's consent to transmit a written reemployment offer via email; and
- If the worker consents, the worker must provide the employer with written confirmation of their consent by text message or email no later than 5:00 p.m. Pacific Standard Time on the business day immediately following the date on which the employer and worker communicated.

If the eligible worker consents to receiving the offer by email, the employer shall transmit such offer by no later than 5:00 p.m. Pacific Standard Time of the first business day following receipt of the worker's communication confirming such consent. If the eligible worker does not consent to receiving the offer by email within the prescribed timeframe, the employer shall transmit a written offer of reemployment to the eligible worker's last known address of residence by certified mail or courier delivery.

Regardless of how the employer delivers the reemployment offer to the eligible worker, the offer must remain open for at least 2 business days after delivery unless extended by both the

employer and the worker by mutual agreement. If the worker fails to respond within two business days, it will be considered a rejection of the offer. The employer is then permitted to offer the position to the next most senior eligible worker.

### **Acceptance of Reemployment Offers**

An eligible worker shall accept an offer of reemployment by providing a response to the employer in writing by reasonable means identified by the employer including, without limitation, returning a signed version of an offer letter by any reasonable method of delivery or, if authorized by the employer, by applying an electronic signature and transmitting acceptance of the offer to the employer by email or other reasonable electronic method.

### **Accommodations for Reemployed Workers**

Covered employers may not discriminate against a worker and must provide reasonable accommodation if the worker requests an accommodation due to a family care hardship such as the need to care for a child whose school is closed or childcare is unavailable or any other situation where a worker needs to provide care for someone else. Reasonable accommodation may include modifying a worker's schedule, modifying the number of hours worked, or permitting telework if feasible.

This duty to accommodate will expire upon expiration of the Ordinance.

### **Notice of Reemployment Offers to the OEWD**

Covered employers shall notify the OEWD in writing all reemployment offers, indicating acceptances or rejections, for all workers in San Francisco who were laid off due to the COVID emergency on or after February 25, 2020.

The OEWD has provided a [template form](#) for the Notice of Reemployment Offers on its website.

### **Regulations and Enforcement**

The Office of Labor Standards and Enforcement may issue regulations regarding the Ordinance.

Additionally, eligible workers may bring an action in California against an employer for violating the Ordinance, and may be awarded the following relief: (1) hiring and reinstatement rights; (2) back pay for each day of the violation and front pay for each day during which the violation will continue; and (3) the value of the benefits the eligible worker would have received under the employer's benefit plan had the violation not occurred.

If the eligible worker is the prevailing party in any legal action taken pursuant to the Ordinance, the court shall also award reasonable attorneys' fees and costs.

### **Guidance Going Forward**

The OEWD has created a [FAQs](#) page for the Back to Work Ordinance, which addresses the core questions regarding covered workers, covered employers, reemployment offer requirements, and the requirements for written notice to eligible workers and the OEWD. The FAQs are supposed to be updated on a weekly basis and the OEWD advises employers to check back for updated information.

As of the date of this blog, the FAQs were last updated on August 10, 2020.

Employers should consult employment counsel regarding whether and how the Ordinance may apply to their operations during the COVID-19 pandemic. For further information and assistance, please refer to Weintraub Tobin's [COVID-19 Resource Hub](#) and reach out to one of the many attorneys in Weintraub Tobin's [Labor and Employment Group](#).