

SAN FRANCISCO COVID-RELATED EMPLOYMENT PROTECTIONS ORDINANCE

March 10, 2021

Purpose of the law

Effective March 7, 2021, the San Francisco COVID-Related Employment Protections Ordinance (“Ordinance”) prohibits employment discrimination and retaliation by San Francisco employers on the basis of COVID-19 status. This Ordinance amends the San Francisco Police Code by adding Article 33L, consisting of Sections 3300L.1 through 3300L.14.

The objective of this Ordinance is to encourage testing (and therefore allow early identification of COVID-19 positive individuals), particularly amongst low-wage workers who may be reluctant to get tested in the event a positive diagnosis would result in an adverse employment action. The City has determined it is critical that workers, especially essential employees 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.

The Ordinance will be administered by the San Francisco Office of Labor Standards Enforcement (“OLSE”) and will be in effect until March 6, 2023.

Who is Covered ?

The Ordinance applies to all Employers¹ and Employees² within the boundaries of the City and County of San Francisco. The Ordinance also applies to job applicants. Independent Contractors are not covered by the Ordinance.

¹“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, contracts with, or hires an Employee. “Employer” shall include the City. Per Section 18 of the Labor Code, “Person” means any person, association, organization, partnership, business trust, limited liability company, or corporation.

²“Employee” means any person providing labor or services for remuneration within the geographic boundaries of the City who is an employee under California Labor Code Section 2750.3, as may be amended from time to time, including a part-time or temporary employee. California Labor Code Section 2750.3 was amended in 2019 to codify

Key Protections

Discrimination Protections: Employers are prohibited from discriminating or taking adverse action against an Employee who (a) contracts COVID-19, (b) is suspected of contracting COVID-19, or (c) misses work or requests time off because they tested positive for COVID-19 or quarantined due to COVID-19 symptoms or exposure. The Ordinance also protects Employees who previously isolated or quarantined due to COVID-19 symptoms or exposure.

Verification of Absences: The Ordinance states that an Employer may only take “reasonable measures” to verify that an Employee’s absence is protected. A measure is not “reasonable” if the Employer requires the Employee to disclose more information than necessary for such verification. Additionally, policies or practices that require documentation for the Employee’s absence from work or the Employee’s request for time off work of three or fewer consecutive work days are presumed unreasonable.

Applicant Protections: Employers may not rescind an offer, or decide not to employ, an applicant who has tested positive for COVID-19 or is isolating or quarantining due to COVID-19 symptoms or exposure. The Ordinance also protects applicants who previously isolated or quarantined due to COVID-19 symptoms or exposure. The Ordinance’s protections include accommodating a delayed start date if an applicant contracts COVID-19 or needs to isolate/quarantine.

Anti-Retaliation Protections: The Ordinance includes an anti-retaliation provision for any Employees or applicants who exercise rights protected under Article 33L, including the right to request or take time off work; the right to file a complaint or inform any person about any Employer’s alleged violation of Article 33L; the right to cooperate with the OLSE in its investigations of alleged violations of Article 33L; and the right to inform any person of that person’s possible rights under Article 33L. If an Employer takes an adverse action within 90 days of a person’s exercise of rights pursuant to Article 33L, a rebuttable presumption of retaliation arises. The Employer must rebut the presumption with clear and convincing evidence that the adverse action was solely for a reason other than retaliation.

the California Supreme Court’s decision in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles* (2018) 4 Cal.5th 903, setting forth the test for an independent contractor versus an employee.

Penalties for Violations

The OLSE is tasked with investigating potential violations of the Ordinance. If the OLSE determines that a violation has occurred following an investigation, the OLSE has the authority to:

- Order an Employer to hire an applicant or reinstate an Employee;
- Pay lost wages to an Employee or applicant;
- Issue administrative penalties of up \$1,000 for the first violation, \$5,000 for the second violation and \$10,000 for each subsequent violation;
- Order the Employer to pay the City the cost of investigating and remedying the violation; and
- Award interest on all amounts unpaid after the date specified for payment.

Section 3300L.8 sets forth an appeal procedure should an Employer want to contest a violation finding. Employers would have 15 days to appeal a determination of violation after receiving notice of their right to do so. If the Employer fails to appeal the determination within 15 days, the determination becomes a final administrative decision enforceable as a judgment by the Superior Court

Action Items for Employers

Employers must post a notice about the ordinance at each workplace or jobsite. The required notice is attached and can also be found at:

<https://sfgov.org/olse//sites/default/files/CEPO%20Poster%20-%20March%202021.pdf>

The notice requirement can be met by posting in a conspicuous place at the workplace, via electronic communication, and/or by posting in a conspicuous place in an Employer's web-based or app-based platform. Every Employer shall provide the notice in English, Spanish, Chinese, and any language spoken by at least 5% of the Employees who are at the workplace or job site.