



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Nora Frimann
City Attorney

SUBJECT: Proposed Travel and Hospitality
Worker Return Together
Ordinance

DATE: April 9, 2021

COUNCIL DISTRICT: Citywide

OVERVIEW

- A. The City Council can take the following action by the required vote of eight (8) City Council members:
1. Adopt an uncodified urgency ordinance requiring certain specified employers to offer reemployment to a worker laid off due to the COVID-19 pandemic if the employer is hiring for the same or a substantial similar job formerly held by the laid off worker, and setting forth the facts constituting the urgency; and
 2. Approve an uncodified ordinance requiring certain specified employers to offer reemployment to a worker laid off due to the COVID-19 pandemic if the employer is hiring for the same or a substantial similar job formerly held by the laid off worker.
- B. If the City Council is unable to take the action in part “A” by the required vote of eight (8) City Council members, approve an uncodified ordinance requiring certain specified employers to offer reemployment to a worker laid off due to the COVID-19 pandemic if the employer is hiring for the same or a substantial similar job formerly held by the laid off worker.

BACKGROUND

On March 21, 2021 the Rules Committee directed staff to develop a “Travel and Hospitality Worker Return Together” ordinance for the City Council’s consideration. The Rules Committee directed staff “to draw” from the draft ordinance attached to the Rules Committee memorandum.

The Rules Committee memorandum notes that other public entities adopting “right to recall” ordinances include San Diego (adopted September 2020), Oakland (adopted

July 2020) and San Francisco (adopted June 2020). Other public entities adopting similar “right to recall” ordinances include:

Public Entity	Adoption Date
City of Santa Clara	November 2020
City of Long Beach	May 2020
Los Angeles (County)	May 2020
Los Angeles (City)	April 2020
City of Santa Monica (response to 9/11)	2001

In September 2020, Governor Newsom vetoed State “right to recall” legislation (AB 3216). Governor Newsom’s veto message focused on the legislation being “too onerous a burden on employers navigating these tough challenges.”

ANALYSIS

A. Urgency and Non-Urgency Ordinances.

Council can adopt an urgency ordinance and approve the same ordinance as a non-urgency ordinance. If adopted by a vote of eight (8) members of the City Council, the urgency ordinance would become effective immediately. The simultaneous approval of a non-urgency ordinance protects the City in the event someone challenges the “urgency” findings made as part of the urgency ordinance. This non-urgency ordinance would become effective 38 to 45 days after approval, depending on when the second reading occurs.

B. Statement of Urgency.

The World Health Organization classified the new coronavirus 19 disease (“COVID-19”) as a worldwide pandemic. As of January 26, 2021, the World Health Organization reported a global total of 98,925,221 cases of COVID-19, including 2,127,294 deaths. As of February 3, 2021, the State of California reported 3,294,447 cases of COVID-19, including 42,466 deaths. The City reported 68,097 cases of COVID-19 as of February 3, 2021.

The United States Secretary of Health and Human Services first declared a public health emergency based on the threat caused by COVID-19 on January 31, 2020. On March 1, 2020, the President of the United States issued a Proclamation Declaring a National Emergency Concerning COVID-19. Shortly thereafter, on March 4, 2020, Governor Gavin Newsom proclaimed a State of Emergency to exist in California based on the COVID-19 threat.

To limit the spread of COVID-19, the State of California and the County of Santa Clara took numerous steps that have severely restricted a significant portion of economic

activity. For example, on March 16, 2020, the Health Officer of the County of Santa Clara issued a shelter-in-place order that included a requirement that non-essential businesses cease all activities except for minimum basic operations. Three (3) days later, Governor Gavin Newsom issued a “Stay Home – Stay Healthy” proclamation requiring people to stay home except to participate in essential activities or to provide essential business services. Since March, the Governor and Santa Clara County public health officials have issued various COVID-19 related directives and guidance to state and local residents, including stay-at-home directives and restrictions on business activities.

Since the United States Secretary of Health and Human Services first declared a public health emergency, the COVID-19 pandemic and the government’s response to it have caused significant job losses across many employment sectors. The hospitality and leisure sector is reported to have a large number of job losses. The State of California Employment Development Department reported on March 26, 2021 that between February 2020 and February 2021 the hospitality and leisure sector lost 698,300 jobs (<https://www.edd.ca.gov/Newsroom/unemployment-february-2021.htm>). For comparison purposes, this is more than 3 times the 216,300 jobs lost by the government sector, which is the sector that has experienced the second highest number of job losses.

During the same period of February 2020 to February 2021, the Federal Bureau of Labor Statistics indicates that jobs in the hospitality and leisure sector for the San Jose – Sunnyvale – Santa Clara metro area declined by 43.4 percent (https://www.bls.gov/eag/eag.ca_sanjose_msa.htm).

Since the early part of 2021, the number of COVID-19 cases has begun a downward trend, and vaccination rates have been increasing. As a result, Santa Clara County public health officials are allowing more business activity. For example, effective March 24, 2021, Santa Clara County met State requirements for allowing significantly greater business activity. (<https://publichealth.sccgov.org/news/news-release/santa-clara-county-moving-orange-tier-states-blueprint-safer-economy>). And, California has the goal of lifting most COVID-19 related business restriction by the middle of June 2021. (<https://www.sfchronicle.com/health/article/California-to-eliminate-tier-system-fully-reopen-16080761.php>). The Rules Committee memorandum indicates that hotels are expected to hit close to a 55% capacity rate by the end of 2021.

The Rules Committee memorandum states that, given the increasing business activity and the critical need to speed the transition back to a functioning labor market in order to reduce damage to the City’s economy, the proposed ordinance is needed so that the City’s hospitality and travel-related workers who were laid off due to COVID-19 impacts are provided with an opportunity to return to their former jobs or substantially similar jobs. The Rules Committee memorandum further states these laid off workers have the experience and skills to get the industry up and running seamlessly.

The Rules Committee memorandum also states the proposed ordinance is crucial because it gives these laid off workers the opportunity to rebuild their livelihoods and provides for equitable job recovery.

C. Proposed Ordinance.

The proposed ordinance tracks the requirements of the ordinance attached to the Rules Committee memorandum with the following notable differences.

Sunset Provision. A provision was added stating that the Ordinance sunsets one year after its effective date. See, Section 4 of the proposed ordinance.

Card Rooms: Card Rooms were eliminated from being covered by the proposed ordinance.

Definition of Hotel and Event Center: The definition was modified to apply to a person or entity that operates a hotel or event center. The reference to a person or entity that “owns” a hotel or event center was deleted. See, Sections 5.C.3 and 5.C.5 of the proposed ordinance.

Supervisors, Managers, Confidential Employee. A provision was added expressly stating the ordinance wouldn’t apply to supervisors, managers and confidential employees. See, Section 5.D.2 of the proposed ordinance. This addition is consistent with many of the “right to recall” ordinances adopted by other public entities.

Offer and Acceptance of Reemployment. Based on our review of other ordinances, significant detail and requirements have been added to the procedures for offering and accepting reemployment. See, Section 6.A of the proposed ordinance.

Substantially Similar Position. The proposed ordinance adds language stating what constitutes a “substantially similar position.” See, Section 6.C of the proposed ordinance. The language is based on San Francisco’s ordinance.

Determining Seniority. The proposed ordinance changes the bases for determining seniority. The Rules Committee memorandum defined seniority by “length of service,” defined as “the total of all periods of time during which an Employee has been in active service, including periods of time when the Employee was on leave or on vacation.” The proposed ordinance simplifies this requirement by basing seniority on the earliest date of hire. See Section 6.D of the proposed ordinance. The language is based on San Francisco’s ordinance.

Family Hardship: Provisions were added prohibiting discrimination against, and requiring the reasonable accommodation of, an Eligible Worker experiencing a family care hardship. See, Sections 5.D and 6.F of the proposed ordinance.

Grounds for Not Offering Reemployment. The proposed ordinance adds a provision expressly stating that a Covered Employer is not required to make an offer of employment if: (1) the employee engaged in misconduct, (2) the employee and employer entered into a severance agreement, or (3) the employer hired someone before the ordinance's effective date. See, Section 7 of the proposed ordinance. This provision is based on San Francisco's ordinance.

Sale of Assets: Adds language for when the proposed ordinance does not apply to the sale of assets. See, Section 8.C of proposed ordinance.

Notice Before Lawsuit: The proposed ordinance adds provisions requiring an Eligible Worker to provide notice to a Covered Employer of an alleged violation before filing a lawsuit. See, Section 9.A of the proposed ordinance. The language is consistent with other "right of recall" ordinances.

Remedies: The proposed ordinance provides for minimum damages to \$1,000. Also, adds provisions for calculating actual damages based on San Francisco's ordinance and deletes punitive damages. See, Section 9.C of the proposed ordinance.

Waiver in Collective Bargaining Agreement. The proposed ordinance adds a provision allowing a collective bargaining agreement negotiated after the effective date of the Ordinance to expressly waive the requirements of the ordinance. This provision would only apply after the ordinance's effective date. See, Section 12 of the proposed ordinance. This language is consistent with language in other "right to recall" ordinances.

CEQA

Pursuant to the provisions and requirements of the California Environmental Quality Act of 1970, together with related State CEQA Guidelines and Title 21 of the San José Municipal Code, the Director of Planning, Building and Code Enforcement has determined that the provisions of this Ordinance do not constitute a project, under File No. PP17-008 (General Procedure and Policy Making resulting in no changes to the physical environment).

NORA FRIMANN, City Attorney

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cc: Dave Sykes