



# Memorandum

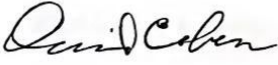

TO: RULES AND OPEN GOVERNMENT  
COMMITTEE

FROM: Councilmember Raul Peralez  
Councilmember Sergio Jimenez  
Councilmember David Cohen

**SUBJECT: Return Together**

**DATE: March 18, 2021**

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Approved by:   




Date: 3/18/2021

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## **RECOMMENDATION**

Direct Staff to develop a “Return Together” Ordinance to be agendized at the April 6, 2021 Council Meeting for Council consideration.

## **BACKGROUND**

There is no doubt that COVID-19 and this pandemic has ravaged our communities physically, mentally, and economically. However, as we start to see some glimmer of hope through vaccination, it is time we start to look ahead on how to support workers who have been the hardest hit within our hospitality industries.

In 2020, cities across California, such as San Diego<sup>1</sup>, Oakland<sup>2</sup> and San Francisco<sup>3</sup> passed Right of Recall ordinances to ensure that hospitality workers and workers associated with the hospitality industries, such as janitors, airport workers, and/or similar, laid off due to the pandemic are called back for rehire in order of seniority. Hospitality workers in San Jose are predominantly from communities of color that have been most burdened by the economic and health impacts of

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<sup>1</sup> [https://docs.sandiego.gov/council\\_reso\\_ordinance/rao2020/O-21231.pdf](https://docs.sandiego.gov/council_reso_ordinance/rao2020/O-21231.pdf)  
<sup>2</sup> [https://library.municode.com/ca/oakland/ordinances/code\\_of\\_ordinances?nodeId=1037951](https://library.municode.com/ca/oakland/ordinances/code_of_ordinances?nodeId=1037951)  
<sup>3</sup> <https://www.californiaworkplacelawblog.com/2020/06/articles/california/san-francisco-passes-reemployment-ordinance/>

COVID-19. It is crucial that we provide them the right to return to work and rebuild their livelihoods. A “Return Together” ordinance is vital to equitable job recovery.

Additionally, ensuring laid-off workers have a right to return to their former positions will help economic recovery. According to CBRE, as vaccine distribution increases, hotels are expected to hit close to a 55% capacity rate by the end of 2021<sup>4</sup>. This means workers who are the backbone of our airport, Convention Center and hotel industries will be needed. They have the experience and skills to get the industry up and running seamlessly.

A “Return Together” ordinance within our city can provide assurances to not only our workforce but to families who are looking to us to ensure their livelihoods. Having similar examples to draw from within the State of California under the “Right to Recall” ordinances, our offices have included similar draft language (see attachment A) which will allow staff language to draw from and come back to Council within the allotted time frame with a similar ordinance, so that our hospitality workers and industry can return together and thrive once again.

*The signers of this memorandum have not had, and will not have, any private conversation with any other member of the City council, or that member’s staff, concerning any action discussed in the memorandum, and that each signer’s staff members have not had, and have been instructed not to have, any such conversation with any other member of the City Council or that member’s staff.*

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<sup>4</sup> <https://www.hotelmanagement.net/operate/cbre-adjusts-us-hotel-industry-forecast>

Attachment A

**ORDINANCE NO. \_\_\_\_\_**

**TRAVEL AND HOSPITALITY WORKER RETURN TOGETHER ORDINANCE**

WHEREAS, COVID-19 (also known as the “Coronavirus Disease”) is a respiratory disease that now spread across the globe, with over 3.5 million confirmed cases and over 51,000 deaths in California, and more than 28 million confirmed cases and over 500,000 deaths nationally; and

WHEREAS, on January 31, 2020, the United States Secretary of Health and Human Services declared a public health emergency based on the threat caused by COVID-19, and the President of the United States issued a Proclamation Declaring a National Emergency Concerning COVID-19 beginning March 1, 2020; and

WHEREAS, on March 4, 2020, Governor Gavin Newsom proclaimed a State of Emergency to exist in California because of the threat of COVID-19; and

WHEREAS, on March 16, 2020, the Health Officer of the County of Santa Clara issued a shelter-in-place order, which, among other things, required non-essential businesses with a facility in the County to cease all activities except for minimum basic operations; and

WHEREAS, the World Health Organization announced on March 11, 2020, that it has characterized COVID-19 as a pandemic; and

WHEREAS, on March 12, 2020, Governor Newsom issued Executive Order N-25-20, which ordered all residents to heed any orders or guidance of state and public health officials, including the imposition of social distancing measures, to control the spread of COVID-19; and

WHEREAS, since that time, the Governor and state and county public health officials have issued various directives and guidance to state and local residents, including stay-at-home directives and restrictions on certain business activities; and

WHEREAS, since the declaration of a national public health emergency on January 31, 2020, the COVID-19 pandemic has caused hospitality and travel-related employers to discharge, layoff and furlough workers at a massive scale; and

WHEREAS, many thousands of hospitality and travel-related workers have been separated from their jobs already during the pandemic and continue to be laid off, and many thousands more are expected to face separation in the coming months; and

WHEREAS, while federal, state, and local programs, and efforts by some of the City's non-profits, have provided a modicum of support to the City's hospitality and travel-related workers in the short-term, these workers need most is the promise of a return to their previous jobs as the pandemic recedes and business returns; and

WHEREAS, ensuring that the City of San Jose's hospitality and travel-related employers honor their former employees' right to return will speed the transition back to a functioning labor market and will lessen the damage to the City's economy;

**NOW, THEREFORE, THE SAN JOSE CITY COUNCIL DOES ORDAIN AS FOLLOWS:**

**SECTION 1.** A new Chapter 4.102 is added to the City of San Jose Municipal Code as follows:

**4.102.010. Title.**

This Chapter shall be known as the "Hospitality and Travel Worker Return Together" Ordinance.

**4.102.020. Definitions.**

The definitions set forth in this section shall govern the construction and meaning of the terms used in this chapter:

- A. "Airport" means the Norman Y. Mineta San Jose International Airport.
- B. "Airport Hospitality Operation" means a business that provides food and beverage, retail, or other consumer goods or services to the public at the Airport. The term Airport Hospitality Operation does not include an air carrier certificated by the Federal Aviation Administration.
- C. "Airport Service Provider" means a Person that performs, under contract with a passenger air carrier: (i) food and beverage catering functions; or (ii) functions on the property of the Airport that are directly related to the air transportation of persons, property, or mail, including but not limited to the loading and unloading of property on aircraft; assistance to passengers under the federal regulation at 14 C.F.R. Part 382; security; airport ticketing and check-in functions; ground-handling of aircraft; or aircraft cleaning and sanitization functions and waste removal. The term "Airport Service

Provider” does not include an air carrier certificated by the Federal Aviation Administration.

D. “Business facility” means any commercial, industrial, institutional or mixed-use business facility in the City in a single building or in contiguous buildings under common ownership or management.

E. “Card Room” has the same meaning as under section 16.02.270.

F. “Covered Enterprise” means an Airport Hospitality Operation, an Airport Service Provider, a Card Room, an Event Center, a Food Service Contractor, or a Hotel.

G. “Employee” has the same meaning as under 4.100.030(B).

H. “Employer” means any Person, including a corporate officer or executive, who directly or indirectly or through an agent or any other Person, including through the services of a temporary service or staffing agency or similar entity, owns or operates a Covered Enterprise within the City of San Jose and employs or exercises control over the wages, hours or working conditions of any Employee.

I. “Event Center” means a publicly or privately owned structure of more than 50,000 square feet or 5,000 seats that is used for the purposes of public performances, sporting events, business meetings, or similar events, and includes concert halls, stadiums, sports arenas, racetracks, coliseums, and convention centers. The term “Event Center” also includes any contracted, leased, or sublet premises connected to or operated in conjunction with the Event Center’s purpose, including food preparation facilities, concessions, retail stores, bars, and structured parking facilities.

J. “Food-service Contract” means a contract for the furnishing of on-site food services for a term of three months or longer at a business facility, and includes any subcontracts for such services in excess of twenty-five thousand dollars (\$25,000.00) and for a term of three months or longer.

K. “Food-service Contractor” means any person who hires or retains employees who provide provide on-site food services at a business facility pursuant to a food service contract, including any subcontractor.

L. “Hotel” means a residential building that is designated or used for lodging and other related services for the public, including but not limited to food and beverage preparation and service and meetings, tradeshow and conventions, and containing 50 or more guest rooms, or suites of rooms (adjoining rooms do not constitute a suite of rooms). “Hotel” also includes any contracted, leased or sublet premises connected to or operated in conjunction with the building’s purpose, or providing services at the building.

M. “Laid-off Employee” means any Employee who was employed by the employer for six months or more in the 12 months preceding January 31, 2020, and whose most recent separation from active service occurred after January 31, 2020, and was due to a

government order, lack of business, a reduction in force or other, economic, non-disciplinary reasons.

N. “Length of Service” means 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.

O. “Person” means an individual, corporation, partnership, limited partnership, limited liability partnership, limited liability company, business trust, estate, trust, association, joint venture, agency, instrumentality, or any other legal or commercial entity, whether domestic or foreign.

**4.102.030. Right to Recall.**

A. An Employer shall offer its Laid-Off Employees in writing, by registered mail to their last known physical address, and by email and text message to the extent the Employer possesses such information, all job positions which become available after this Chapter’s effective date for which the Laid-Off Employees are qualified. A Laid-Off Employee is qualified for a position if the Laid-Off Employee:

1. held the same or similar position at the Covered Enterprise at the time of the Laid-Off Employee’s most recent separation from active service with the Employer; or
2. is or can be qualified for the position with the same training that would be provided to a new employee hired into that position.

The Employer shall offer positions to Laid-Off employees in an order of preference corresponding to categories (1) and then (2) in the preceding sentence. Where more than one Employee is entitled to preference for a position, the Employer shall offer the position to the Laid-Off Employee with the greatest length of service for the Covered Enterprise.

B. A Laid-Off Employee who is offered a position pursuant to this Chapter shall be given no less than ten (10) days from the date of receipt of the mailed offer in which to accept or decline the offer. An Employer may make simultaneous, conditional offers of employment to Laid-Off Employees, with final offer of employment conditioned on application of the priority system set forth in subsection (A).

B. An Employer that declines to recall a Laid-Off Employee on the grounds of lack of qualifications and instead hires someone other than a Laid-Off Employee shall provide the Laid-Off Employee a written notice thereof within thirty (30) days identifying all reasons for such decision.

C. The requirements of this Chapter also apply in the following circumstances:

1. The ownership of the Employer changed after the separation from employment of a Laid-Off Employee, but the Covered Enterprise is conducting the same or similar operations as before January 31, 2020;
2. The form of organization of the Employer changed after January 31, 2020;
3. Substantially all of the assets of the Employer were acquired by another entity which conducts the same or similar operations using substantially the same assets;
4. The employer relocates the operations at which a Laid-Off Employee was employed before January 31, 2020 to a different location within the City; or
5. Any combination of the circumstances described in paragraphs (1) through (4).

#### **4.102.040. Retaliatory Action Prohibited.**

No Employer shall refuse to employ, terminate, reduce in compensation, or otherwise take any adverse action against any person for seeking to enforce his or her rights under this Chapter by any lawful means, for participating in proceedings related to this Chapter, for opposing any practice proscribed by this Chapter, or for otherwise asserting rights under this chapter. This Section shall also apply to any employee who mistakenly, but in good faith, alleges noncompliance with this Chapter.

#### **4.102.050. Enforcement.**

- A. This chapter may be enforced in a civil action in Superior Court brought by the City Attorney or by one or more employees for and in behalf of oneself or themselves and other employees similarly situated, or the employee or employees may designate an agent or representative to maintain action for and in behalf of all employees similarly situated.
- B. If the court finds that the employer has violated this chapter, the court may enjoin the employer from engaging in such violation, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay including fringe benefits, or any other equitable relief as the court deems appropriate. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. Before interim earnings are deducted from lost wages, there shall be deducted from the interim earnings any reasonable amounts expended by the employee in searching for, obtaining, or relocating to new employment. The court may also order compensatory and punitive damages if the court finds that the employer engaged in the violation with malice or with reckless indifference to the requirements of this chapter, and treble damages on behalf of an employee terminated in violation of 4.102.040.
- C. If it is established that a laid-off employee exercised rights under this chapter or alleged in good faith that the employer was not complying with this chapter, and the employer thereafter refused to employ, terminated, demoted or otherwise took adverse action against the employee, and that action took place within sixty (60) days after such exercise, then a rebuttable presumption shall arise that the employer's action was taken in violation of 4.102.040. The employer must prove that the true and entire reason for the action was a legitimate business reason. The plaintiff may rebut the employer's asserted legitimate business reason by showing that it was, in fact, a pretext.
- D. If the plaintiff prevails in any legal action taken pursuant to this chapter, the court shall award reasonable attorney's fees, expert witness fees and costs as part of the costs recoverable.

**4.102.060. Regulations.**

The City Attorney may promulgate and enforce rules and regulations, and issue determinations and interpretations, consistent with and necessary for the implementation of this Chapter. Such rules and regulations, determinations, and interpretations shall have the force of law and may be relied upon by employers, employees, and other persons to determine their rights and responsibilities under this Chapter.

**4.102.070. Relationship to employment contracts and agreements.**

This Chapter applies to all employees as defined herein regardless whether they are represented for purposes of collective bargaining or are covered by a collective bargaining agreement. Nothing in this Ordinance shall be construed to invalidate or limit the rights, remedies and procedures of any contract or agreement that provides greater or equal protection for employees than are afforded by this Ordinance.

**4.102.080. No Preemption of Higher Standards.**

The purpose of this Chapter is to ensure minimum labor standards. This Chapter does not preempt or prevent the establishment of superior employment standards (including higher wages) or the expansion of coverage by ordinance, resolution, contract, or any other action of the City of San Jose. This Chapter shall not be construed to limit a discharged Employee's right to bring a common law cause of action for wrongful termination.

**4.102.090. Severability.**

If any subsection, sentence, clause or phrase of this Chapter is for any reason held to be invalid or unconstitutional by a court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this Chapter, which shall remain in full force and effect. The San Jose City Council hereby declares that it would have adopted this Chapter and each and every subsection, sentence, clause and phrase thereof not declared invalid or unconstitutional, without regard to whether any portion of the article would be subsequently declared invalid or unconstitutional. The courts are hereby authorized to reform the provisions of this Chapter in order to preserve the maximum permissible effect of each subsection herein.

**4.102.100. Report.** On or before December 31, 2021, the City Attorney shall report to the San Jose City Council on the effectiveness of this Chapter in promoting employment stability and shall advise the San Jose City Council on the need for further action.