San Francisco Small Business Employment Law Fact Sheet¹

Current City and County of San Francisco (the "City") Guidance and Mandates

The State of California and the City have declared a state of emergency, and in conjunction promulgated several new regulations and programs. This includes the City Order of the Health Officer No. C19-07 mandating businesses to cease non-essential operations at physical locations in the City. All businesses can continue Minimum Basic Operations. Essential Business are permitted to remain open. The City has also issued health guidance for Essential Businesses that are staying open.

Minimum Basic Operations includes:

- Minimum necessary activities to maintain the value of the business's inventory, ensure security, process payroll and employee benefits, or related functions.
- Minimum necessary activities to facilitate employees of the business being able to continue to work remotely from their residences.

Essential Business include:

- Healthcare Operations and Essential Infrastructure
- Grocery Stores
- Food Cultivation
- Businesses that provide necessities of life for economically disadvantaged individuals
- Media
- Gas Stations and auto-repair facilities
- Financial Institutions
- Hardware Stores
- Service Providers that provide services necessary to maintain the safety, sanitation, and essential operation of residences and essential businesses (i.e., plumbers).
- Businesses providing mailing services

- Educational Institutions for the purpose of facilitating distance learning or performing essential function
- Laundromats
- Restaurants (limited to delivery or carry out)
- Businesses that supply products needed for people to work from home
- Business that supply other essential businesses with the support or supplies necessary to operate
- Shipping concerns
- Private Transportation Services
- Home-Base care for seniors, adults, or children
- Residential Facilities
- Childcare Facilities (only for employees of Essential Services and subject to additional controls)

This handout is informational and does not constitute legal advice. Given the complexity and nuances of the law this information is general and may not apply in specific situations. Information specific to an individual case, or generally, may be omitted. Legal advice should always be sought before taking any legal action based on the information provided. This is a rapidly developing area and this handout may quickly become out of date, as such this handout should not be relied upon in place of the text of any particular law or regulation.

Guidance includes:

- Protect employee health by (i) only requiring those employees who need to be physically present to come to work, (ii) check symptoms before employees come to work and utilize non-contact thermometers when available and feasible², (iii) ensure that employees' desks or work areas are at least 6 feet apart, and (iv) clean break rooms, bathrooms, and other common areas frequently.
- Prevent large crowds from gathering by (i) limiting number of people in a store at any one time by having an employee at the entrance in order to regulate the number of patrons, (ii) place limits on certain goods that are in high demand, and (iii) set specific schedules in the morning to accommodate patrons over 60 and who are at risk in order to shop without pressure from crowds.
- Remind people to stay at least 6 feet apart by (i) having signs in check-out areas to stand at least 6 feet apart, (ii) placing tape marks 6 feet apart on the ground in the store surrounding the check-out areas and on sidewalks near the entrance, (iii) having separate order and delivery areas or windows in order to reduce the amount of customers and waiting period in confined areas, (iv) instructing staff to maintain at least 6 feet distance from customers, and (v) discouraging (but do not banning) the presence of kids or strollers into stores when possible.
- Prevent any unnecessary contact by (i) avoiding self-serving items that are food related (for example, lids should be provided by staff), (ii) discontinuing any bulk item food bins, (iii) not allowing the use of personal bags, mugs, etc., (iii) accepting credit card numbers by phone in advance, (iv) promoting the of use contactless pay options (or using a disinfectant wipe on the screen between customers), and (v) installing a clear plastic screen between a cashier and the customer at the check-out counters.
- Keeping it clean by (i) providing cleaning wipes near shopping carts, (ii) assigning an employee to disinfect carts and baskets regularly, and (ii) having hand sanitizer available at checkout counters and anywhere else inside the store or immediately outside where people have direct interactions.

Note, the Occupational Safety and Health Act and California health and safety laws and standards may make employers responsible for workplace safety violations.

Expanded Job Protection or Benefit Laws

All businesses in San Francisco must provide their employees paid sick leave. For businesses with fewer than 10 employees, the business must provide 1 hour of paid sick leave for every 30 hours worked and employees³ can accrue up to at least 48 hours. Employees that are re-hired within 1 year must have accrued paid sick leave hours re-instated. Accrued but unused paid sick leave is not required to be compensated upon separation of employment.

The City has temporarily revised its Paid Sick Leave Guidelines to (i) prohibit employers from requiring a doctor's note or other documentation for the use of paid sick leave during the duration of the current Local Health Emergency regarding Novel Coronavirus Disease 2019 ("COVID-19"), and (ii) expand the situations that permit an employee to use accrued sick leave, including taking time off work because

² Note, such information will be protected by privacy legislation and should be kept strictly confidential. No information should be shared with other employees except on a need to know basis to protect that employee's health. Even then only as much information as is needed to fulfill that health goal should be provided.

³ Includes full-time, part-time, temporary workers, but does not include independent contractors.

the employee needs to provide care for a family member whose school ceases operation in response to a public health official's recommendation.

The newly instituted Workers and Families First Program will provide City financial assistance to businesses and nonprofits to provide **additional** paid sick leave time to employees, over and above their existing policies once an employee has exhausted their currently available sick leave. All San Francisco businesses will be eligible, with up to 20% of funds are being reserved for small businesses with 50 or fewer employees. The Program permits the City to contribute up to 40 hours, at \$15.59 per hour (minimum wage) per employee (or \$623 per employee) up to a total of the equivalent to covering 499 full-time employees, above the Paid Sick Leave hours to which employees are currently entitled. If the employee is usually paid more than \$15.59 per hour, the business must contribute the remainder. Businesses with fewer than 50 employees only have to pay up to \$30 per hour. The Workers and Families First Program will cover any qualifying sick leave an employee has taken since March 16, 2020.

The recently passed federal Families First Coronavirus Response Act ("FFCRA") mandates all businesses (private and public) with fewer than 500 employees provide emergency paid sick leave and expanded family and medical leave on top of any other mandated leave. The FFCRA went into effect on April 1, 2020.

Under this act, covered businesses must provide the following minimum amount of paid sick leave:

- Up to 80 hours of paid sick leave at the employee's regular rate of pay where the employee is unable to work because the employee is quarantined (pursuant to Federal, State, or local government order or advice of health care provider), and/or experiencing COVID-19 symptoms and seeking medical diagnosis; or
- Up to 80 hours of **paid sick leave** at two-thirds the employee's regular rate of pay because the employee is unable to work because of a bona fide need to care for an individual subject to quarantine (pursuant to Federal, State, or local government order or advice of a health care provider), or care for a child (under 18 years of age) whose school or child care provider is closed or unavailable for reasons related to COVID-19, and/or the employee is experiencing a substantially similar condition as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of the Treasury and Labor.

Qualifying Reasons for Leave With Respective Duration and Pay Calculation:

Under the FFCRA, an employee qualifies for paid sick time if the employee is unable to work (**or unable to telework**) due to a need for leave because the employee:

1. is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;

Duration of leave: A full-time employee is eligible for up to 80 hours of leave, and a part-time employee is eligible for the number of hours of leave that the employee works on average over a two-week period.

Calculation of pay: Employees taking leave shall be paid at either their regular rate or the applicable minimum wage, whichever is higher, up to \$511 per day and \$5,110 in the aggregate (over a 2-week period).

2. has been advised by a health care provider to self-guarantine related to COVID-19;

Duration of leave: A full-time employee is eligible for up to 80 hours of leave, and a part-time employee is eligible for the number of hours of leave that the employee works on average over a two-week period.

Calculation of pay: Employees taking leave shall be paid at either their regular rate or the applicable minimum wage, whichever is higher, up to \$511 per day and \$5,110 in the aggregate (over a 2-week period).

3. is experiencing COVID-19 symptoms and is seeking a medical diagnosis;

Duration of leave: A full-time employee is eligible for up to 80 hours of leave, and a part-time employee is eligible for the number of hours of leave that the employee works on average over a two-week period.

Calculation of pay: Employees taking leave shall be paid at either their regular rate or the applicable minimum wage, whichever is higher, up to \$511 per day and \$5,110 in the aggregate (over a 2-week period).

4. is caring for an individual subject to an order described in (1) or self-quarantine as described in (2);

Duration of leave: A full-time employee is eligible for up to 80 hours of leave, and a part-time employee is eligible for the number of hours of leave that the employee works on average over a two-week period.

Calculation of pay: Employees taking leave shall be paid at 2/3 their regular rate or 2/3 the applicable minimum wage, whichever is higher, up to \$200 per day and \$2,000 in the aggregate (over a 2-week period).

5. is caring for a child whose school or place of care is closed (or child care provider is unavailable) for reasons related to COVID-19;

Duration of leave: A full-time employee is eligible for up to 12 weeks of leave at 40 hours a week, and a part-time employee is eligible for leave for the number of hours that the employee is normally scheduled to work over that period.

Calculation of pay: Employees taking leave shall be paid at 2/3 their regular rate or 2/3 the applicable minimum wage, whichever is higher, up to \$200 per day and \$12,000 in the aggregate (over a 12-week period—two weeks of paid sick leave followed by up to 10 weeks of paid expanded family and medical leave)

6. is experiencing any other substantially-similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

Duration of leave: A full-time employee is eligible for up to 80 hours of leave, and a part-time employee is eligible for the number of hours of leave that the employee works on average over a two-week period.

Calculation of pay: Employees taking leave shall be paid at 2/3 their regular rate or 2/3 the applicable minimum wage, whichever is higher, up to \$200 per day and \$2,000 in the aggregate (over a 2-week period).

The FFCRA exempts small businesses (with fewer than 50 employees) from providing expanded paid sick leave if an authorized officer of the business has determined that: (i) the provision of paid sick leave or expanded family and medical leave would result in the small business' expenses and financial

obligations exceeding available business revenues and would cause the small business to cease operating at a minimal capacity; (ii) the absence of the employees requesting paid sick leave, or expanded family and medical leave, would entail a substantial risk to the financial health or operational capabilities of the small business because of the employee's specialized skills, knowledge of the business, or responsibilities; or (iii) there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting paid sick leave, or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.

Covered employers qualify for dollar-for-dollar reimbursement through tax credits for all qualifying wages paid under the FFCRA. Qualifying wages are those paid to an employee who takes leave under the Act for a qualifying reason, up to the appropriate per diem and aggregate payment caps. Applicable tax credits also extend to amounts paid or incurred to maintain health insurance coverage. The credit is allowed against the tax imposed in section 3111(a) (the employer portion of Social Security taxes). If the credit exceeds the employer's total liability under section 3111(a) for all employees for any calendar quarter, the excess credit is refundable to the employer. Note that an employer's eligibility for tax credits for paid expanded family and medical leave is limited to a cap of \$200 per day or \$10,000 in the aggregate; and for the paid sick leave, an employer's eligibility for tax credit is limited to a cap of \$511 per day and \$5,110 in the aggregate.

Workers' Compensation Benefits

Employees are entitled to receive worker's compensation if they are unable to perform their usual job due to being exposed to and contracting COVID-19 during the regular course of work.

General California Labor and Employment Law

Difficult decisions may need to be undertaken during the ongoing crisis and small businesses should be familiar with various employment options. In California, the default employment rule is that each employee is 'at-will'. This means that either party can terminate their employment relationship at any time for any, or no, reason. This 'at-will' status does not exist where there are long-term employee protections built into employment contracts (which includes employee handbook or oral promise), or collective bargaining agreements (i.e., employee is a member of a union). Certain additional laws cabin the 'at-will' status of employees, including laws prohibiting discrimination, harassment, and retaliation.

Before deciding on a course of action in regard to employees, small businesses should first assess whether there is a contractual provision (written or oral) which converts the 'at-will' status of the employee to a contractual employment. If so, the terms of such agreement govern the employment relations.

Anti-Discrimination/Harassment/Retaliation Laws

Title VII of the Civil Rights Act of 1964 (Title VII) and other federal anti-discrimination and harassment laws, together with state anti-discrimination, and harassment laws, mainly under the California Fair Employment and Housing Act (FEHA), prohibit discrimination on the basis of protected classes including national origin, disability, genetic information, and age, all of which may be relevant. Although these laws typically apply only to employers with 5 or more employees, it is best practice to comply.

Note, the City has a detailed and expanded discrimination ordinance which applies to any entity with a goods, services, or property contract with the City of over \$5,000 per fiscal year (including subcontractors of the same entities).

While compliance with anti-discrimination laws is complex, in the current crisis a small business should make any reduction in pay/hours or employment on a neutral basis. In addition, while modifying behaviors to promote health and safety, employers must ensure that all decisions are made without regard to protected class status.

Employers are also prohibited from retaliation against employees. Retaliation occurs when an employer makes an adverse employment decision against an employee, or party closely associated with the employee, for: (i) exercising rights under a statute (e.g., filing a compensation claim), (ii) internal complaints against discriminatory or unlawful conduct, (iii) complaints to government agencies, (iv) lawsuits, or (v) opposing allegedly unlawful activity

California Wage and Hour Laws

Small businesses have several options to reduce workforce costs. These include (i) pay cuts and hour reductions, (ii) furloughing employees, and (iii) layoffs. Each option requires the following:

Pay Cuts and Hour Reductions

- Employer must provide written notice of any change in the rate of pay 7 days prior to the change.
- Employer must pay the San Francisco minimum wage for all hours worked.

Furloughing

- Employer must provide written notice of any change in the rate of pay 7 days prior to the change.
- If the employee is exempt (roughly meaning that they are paid salary and exempt from overtime laws) the employer must pay a full week's pay if the employee does any work in a furloughed week (such as checking an email) not in contravention of the Employer's policy to not work.
- Employers must provide a written change in employment status at time of furlough.
- Employers should provide the California Employment Development Department 'For Your Benefit' booklet at time of furlough notice.
- Furloughs of greater than 2 weeks could raise legal liabilities.

Layoffs

- Employers in California must provide all compensation (final wages, any accrued vacation time, etc.) immediately at the time of employment termination.
- Employers must provide a written change of employment status at time of termination.
- For layoffs of 50 or more employees:
 - Employers should provide as much written notice as practicable. See EDD website (https://www.edd.ca.gov/About_EDD/coronavirus-2019/faqs/Warn.htm) for guidance on the notice.

- Employers must provide the California Employment Development Department pamphlets about unemployment insurance, state disability insurance, and paid family leave at the time of termination.
- Employers must also provide a brief statement as to why the 60-day notification period under the WARN Act could not be met, and a statement that the employer is relying on the Governor's Executive Order temporarily suspending the WARN act

Alternatives to Layoffs

Layoffs are disruptive to ongoing business concern and may result in losing well-trained employees, preventing a quick turnaround when business conditions improve. In addition, layoffs may reduce the amount of payroll protection loan forgiveness a business is entitled to as a result of the recently passed federal Coronavirus Aid, Relief, and Economic Security Act ("Cares Act"), discussed below.

California Work Sharing Unemployment Insurance

California created the Work Sharing Program allowing employees whose hours and wages have been reduced to receive unemployment benefits. To participate, employers must, among other things, (i) reduce at least 10 percent of the employer's regular workforce, which must be a minimum of 2 employees; (ii) hours and wages must be reduced by at least 10 percent and not exceed 60 percent; (iii) health benefits must remain the same as before, or they must meet the same standards as other employees who are not participating in Work Sharing; (iv) retirement benefits must meet the same terms and conditions as before, or they must meet the same as other employees not participating in Work Sharing; (v) notify the employees in advance of the intent to participate in the Work Sharing program; (vi) identify the affected work units to be covered by the Work Sharing plan and identify each participating employee by their full name and Social Security number; (vii) identify how many layoffs will be avoided by participating in the Work Sharing program; and (viii) provide the Employment Development Department with any necessary reports or documents relating to the Work Sharing plan. To participate employers must apply to the California Employment Development Department via the promulgated application. Employees can also file partial claims and receive unemployment benefits for any reduced hours.

LOANS

Loans

San Francisco Hardship Emergency Loan Program (SF HELP)

The City's new program will rapidly deploy loans of up to \$50,000 at 0% interest to for-profit businesses located in SF and in good standing. Funds can be used to pay payroll, rent, utilities, inventory and more. The loan will have a flexible repayment schedule, with terms determined on a case-by-case basis, based on each borrower's ability to repay.

SBA Payment Protection Program (PPP)

The PPP provides small businesses with loans up to \$10M at 1% interest. Funds can be used to pay payroll costs (including benefits), interest on mortgages, rent, and utilities. The loan will be fully forgiven

as long as it is used to cover mainly payroll costs over an 8 week period after the loan is made. To be eligible, small businesses and nonprofits must have 500 or fewer employees. Sole-proprietors, independent contractors and certain self-employed people may also be eligible.

Economic Injury Disaster Loan (EIDL)

The EIDL is the federal SBA's disaster loan. It offers SF businesses, nonprofits, sole proprietors, and independent contractors loans up to \$2M with interest rates of 3.75% (2.75% for nonprofits). Loans may be used to pay fixed debts, payroll, accounts payable and other bills. No personal guarantee required for loans \$200,000 and under. The new federal CARES Act now provides an opportunity for \$10,000 loan advance on the EIDL which can be received within 3 days of application (through Dec. 31, 2020), and will not have to be repaid. To be eligible must be a business or nonprofit that has has suffered substantial economic impact. Sole proprietors and independent contractors are eligible.

Arts Loan Fund (ALF)

SF has added \$1 million to the Arts Loan Fund of Northern California Grantmakers for low interest loans to small to mid-sized arts organizations.

Grants are also available for up to \$2,000 for individual artists and between \$5,000 and \$25,000 for arts organizations to pay rent, salaries, and to help artists stay in San Francisco.

Payroll Protection Loan Forgiveness

The Paycheck Protection Program is part of the CARES Act and provides nearly \$350 Billion Dollars in loans to provide small businesses with 8 weeks' of cash-flow assistance. The Paycheck Protection Program permits loans of up to 2.5 times the average monthly payroll expenses. These loans may be used for payroll, rent/mortgage, and utility expenses. Under certain circumstances, the loans can be forgiven and essentially turned into a non-taxable grant.

In the 8 weeks following your loan signing date, all expenses related to payroll, mortgage interest, rent, and utilities can be forgiven. Although, the amount of forgiveness will be reduced (i) in proportion to any reduction in the number of employees retained and (ii) by any wage reductions greater than 25 percent. If, by June 30, 2020, a business rehires employees that were previously laid off at the beginning of the period, or if the business restores any decreases in wage or salary, the business is not penalized for having a reduction in employees or wages.

CARES Act Employee Retention Credit for Employers

The CARES Act includes a refundable payroll tax credit for 50 percent of wages by eligible employers to certain employees during the COVID-19 crisis. The credit is available to employers, including non-profits, whose operations have been fully or partially suspended as a result of a government order limited commerce, travel, or group meetings. The credit is also provided to employers who have experienced a greater than 50 percent reduction in quarterly receipts, measured on a year-over-year basis.

Wages of employees who are furloughed or face reduced hours as a result of their employer's closure or economic hardship are eligible for the credit. For employers with 100 or fewer full-time employees, all employee wages are eligible regardless of whether an employee is furloughed. The credit is provided for wages and compensation, including health benefits. The credit is also provided for the first \$10,000 in wages and compensation paid by the employer to an eligible employee. Wages do not include those

taken into account for purposes of the payroll credits for required paid sick leave or required paid family leave, nor for wages taken into account for the employer credit for paid family and medical leave.

Note, this program is not available to employers receiving assistance through the Paycheck Protection Programs.

Delay of Payment of Employer Payroll Taxes

This provision would allow taxpayers to defer paying the employer portion of certain payroll taxes through the end of 2020, with all 2020 deferred amounts due in 2 equal installments - at the end of 2021 and the end of 2022. Payroll taxes that can be deferred include the employer portion of FICA taxes, the employer and employee representative portion of Railroad Retirement taxes (that are attributable to the employer FICA rate), and half of SECA tax liability.

Note, this program is not available to employers receiving assistance through the Paycheck Protection Programs.

Counseling Services

City Office of Economic and Workforce Development

The City Office of Economic and Workforce Development ("OEWD") has a Rapid Response Program which will assist employers and employees undergoing layoffs. OEWD also maintains a website with resources for employees experiencing job loss or pay reductions.

CARES Act Expanded Small Business Counseling

Small Business Development Centers ("SBDC"), Women's Business Centers ("WBC"), or SCORE mentorship chapters, and the associations that represent each of them, will receive additional funds to expand the outreach and allow better support for small business owners with counseling and up-to-date information regarding COVID-19. A joint platform that consolidates information and resources related to COVID-19 in order to provide consistent, timely information to small businesses will be available soon.

Business can contact one of the below:

Renaissance Women's Business Center - (415) 541-8580 <u>https://www.rencenter.org/womens-business-center/</u>

San Francisco SBA District Office - (415) 937-7232 https://www.sba.gov/offices/district/ca/san-francisco

San Francisco SCORE - (415) 764-4964 https://sanfrancisco.score.org/

Resources

Employment

Center for Disease Control - COVID-19 Guidance for Businesses & Employers - cdc.gov/coronavirus/2019-ncov/community/guidance-business-response

Department of Labor Families First Coronavirus Response Act: Questions & Answers - https://www.dol.gov/agencies/whd/pandemic/ffcra-questions

CA Labor & Workforce Development Agency - COVID-19 Resources for Employers & Workers - https://www.labor.ca.gov/coronavirus2019/

State of California Employment Development Department resource page - https://www.edd.ca.gov/about_edd/coronavirus-2019.htm

State of California Employment Development Department Rapid Response Services for Businesses - https://edd.ca.gov/pdf_pub_ctr/de8714rrb.pdf

Cal/OSHA Guidance on Requirements to Protect Workers from Coronavirus - https://www.dir.ca.gov/dosh/coronavirus/Health-Care-General-Industry.html

City and County of San Francisco Office of Labor Standards Enforcement - https://sfgov.org/olse/

City's Office of Labor Standards Enforcement revised San Francisco Paid Sick Leave Ordinance Guidelines - https://sfgov.org/olse/san-francisco-paid-sick-leave-coronavirus-0

San Francisco Office of Economic and Workforce Development Small Business Resource Center - https://oewd.org/businesses-impacted-covid-19

General

City and County of San Francisco Emergency Operations Center Website - https://sf.gov/topics/coronavirus-covid-19

San Francisco Office of Small Business Helpline - (415) 554-6134

California Office of the Small Business Advocate - https://business.ca.gov/coronavirus-2019/

Text of Emergency Orders

- Proclamation of California State Emergency https://www.gov.ca.gov/wp-content/uploads/2020/03/3.4.20-Coronavirus-SOE-Proclamation.pdf
- Proclamation by the Mayor Declaring the Existence of a Local Emergency
 - Original Declaration https://sfmayor.org/sites/default/files/Proclamation%20of%20Local%20Emergency%20re.%20

 COVID-19%202.25.2020.pdf

- First Supplemental https://sfmayor.org/sites/default/files/SupplementalDeclaration_03112020.pdf
- Second Supplemental <u>https://sfmayor.org/sites/default/files/SupplementalDeclaration2_03132020_stamped.pdf</u>
- Third Supplemental https://sfmayor.org/sites/default/files/Supplement v3 03172020 stamped.pdf
- Fourth Supplemental https://sfmayor.org/sites/default/files/Supplement_v4_03182020_Stamped.pdf
- Fifth Supplemental https://sfmayor.org/sites/default/files/032320 FifthSupplement.pdf
- Declaration of Local Health Emergency Regarding Novel Coronavirus Disease 2019 (COVID-19) - https://www.sfdph.org/dph/alerts/files/HealthOfficerLocalEmergencyDeclaration-03062020.pdf