2020 LABOR & EMPLOYMENT MID-YEAR BRIEFING

HansonBridgett

LIVE WEBINAR I JUNE 25, 2020
9 A.M. - 11:30 A.M. PST

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HANSON BRIDGETT LABOR & EMPLOYMENT MID-YEAR BRIEFING

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AGENDA

9:00 am – 9:05 am	Welcome Remarks & Introduction to **Session 1: Mid-Year Labor Updates**
9:05 am – 9:25 am	New and Pending Federal and California State Laws 2020
9:25 am – 9:40 am	2020 Employment Case Updates
9:40 am – 9:55 am	AB 5: Recent Developments
9:55 am – 10:00 am	New Electronic Disclosure Rules
10:00 am – 10:10 am	Session 1 Q&A
10:10 am – 10:15 am	Break
10:15 am	Introduction to **Session 2: Legal Aspects of COVID**
10:15 am –10:35 am	Reopening Your Workplace: Safety, Testing, Privacy and Pay
10:35 am –10:45 am	Employee Benefit Issues (including HIPAA) in COVID Response
10:45 am –11:10 am	Health, Safety and Environmental Considerations for Employers
11:10 am –11:20 am	COVID-19 Related Lawsuits
11:20 am –11:30 am	Session 2 Q&A

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SESSION 1:

2020 MID-YEAR LABOR UPDATES

Agenda

Session 1: Mid-Year Labor Updates

- New and Pending Federal and California State Laws
- 2020 Employment Case Updates
- AB 5: Recent Developments
- New Electronic Disclosure Rules

Session 2: Legal Aspects of COVID-19

- Reopening Your Workplace: Safety, Testing, Privacy, and Pay
- Employee Benefit Issues in COVID-19 Response
- Health, Safety and Environmental Considerations for Employers
- COVID-19 Related Lawsuits

Housekeeping Items

- All the widgets on your screen are resizable and moveable.
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NEW AND PENDING FEDERAL AND CALIFORNIA STATE LAWS 2020

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2020 LABOR & EMPLOYMENT MID-YEAR BRIEFING

Federal

- First Families Coronavirus Response Act
  - Effective, April 1, 2020
  - Emergency Sick Leave – 80 hours paid
    - Regular pay up to $511 for COVID-19 sick-related reasons, or 2/3 pay up to $200 for childcare/school closure
  - Available until December 31, 2020

Federal

- First Families Coronavirus Response Act
  - Effective, April 1, 2020
  - Expanded FMLA Leave – 12 weeks
    - 10 weeks paid (2/3 pay up to $200 per day) can use ESL for first two weeks
  - Available until December 31, 2020

Federal

- The Coronavirus Aid, Relief, and Economic Security (CARES) Act, effective March 27th, 2020 – Union protections

  - To receive a loan under the Act, a mid-size company must make a "good-faith certification" that it will comply with certain requirements listed in the CARES Act:
    - remain neutral in any union organizing effort for the term of the loan
    - will not abrogate existing collective bargaining agreements for the term of the loan [not to exceed 5 years] and 2 years after completing repayment of the loan.

Federal

- The Coronavirus Aid, Relief, and Economic Security (CARES) Act, effective March 27th, 2020 – Union protections
    - “Abrogate” is not defined – unclear what it means?
    - “Neutral” not defined – what does it mean?

State – Effective July 1, 2020

- **SB 83** – increases paid leave from six to eight weeks for people taking care of a seriously ill family member or to bond with a new child. Paid Family Leave is not a leave entitlement and does not provide job protection, only monetary benefits. **Takes effect July 1, 2020**.

State – Effective July 1, 2020

- Fair Employment and Housing Council promulgated new **California FEHA Regulations for Pre-Employment Practices, effective July 1, 2020**.
- Covers:
  - Pre-employment inquires (job applications)
  - Advertisements and recruiting
  - Presumption of age discrimination

State – Effective July 1, 2020

New Pre-Employment Practices, effective July 1, 2020:

- Age discrimination – employer can no longer ask: applicant's age, date of birth or graduation dates, and
- Employers can't include maximum experience limitations and may not use terms like "young," "recent college graduate," or "digital native," which implies the person grew up using technology.
- Religious creed/disability discrimination – employer cannot ask schedules.

State – Effective July 1, 2020

New Pre-Employment Practices, effective July 1, 2020.

- **Recruiting and Advertising** – limits the language that can be used in recruiting and advertising – prohibits anything that a "reasonable person would interpret as deterring or limiting employment of people age 40 and over" unless age is a bonafide occupational qualification for the position.

State – Effective July 1, 2020

- **Presumption of Age Discrimination** – practices that have an adverse impact on applicants and employees age 40 or over, even if the practice or policy looks neutral and does not specifically or expressly target older workers.

State – Effective July 1, 2020

Minimum Wage Increases

State-wide minimum wage remains at $13.00/hour for employers with 26+ employees and $12.00/hour for 25 and under employees	
Alameda	$15.00/hour
Berkeley	$16.07/hour
Emeryville	$16.84/hour
Fremont	$15.00/hour (26+) $13.50/hour (1-25))
Los Angeles (City and Unincorporated Areas of County)	$15.00/hour (26+) $14.25/hour (1-25) $16.63/hour (City of LA Hotels with more than 150 rooms)
Malibu	$15.00/hour (26+) $14.25/hour (1-25)
Milpitas	$15.40/hour
Novato	$15.00/hour (100+) $14.00/hour (26-99) $13.00/hour (1-25)
Pasadena	$15.00/hour (26+) $14.25/hour (1-25)
San Francisco	$16.07/hour
San Leandro	$15.00/hour
Santa Monica	$15.00/hour (26+) $14.25/hour (1-25) $16.63/hour (Hotels)
Santa Rosa	$15.00/hour (26+) $14.00/hour (1-25)

Workers' Compensation

- **Governor Newsom May 6, 2020 Executive Order – N-62-20**

1) Any COVID-19-related illness of an employee shall be presumed to arise out of and in the course of the employment for purposes of awarding workers' compensation benefits if all of the following requirements are satisfied:

Workers' Compensation

- **Governor Newsom May 6, 2020 Executive Order – N-62-20**

a. The employee tested positive for or was diagnosed with COVID-19 within 14 days after a day that the employee performed labor or services at the employee's place of employment at the employer's direction;

b. The day referenced in subparagraph (a) on which the employee performed labor or services at the employee's place of employment at the employer's direction was on or after March 19, 2020;

Workers' Compensation

- **Governor Newsom May 6, 2020 Executive Order – N-62-20**

c. The employee's place of employment referenced in subparagraphs (a) and (b) was not the employee's home or residence; and

d. Where subparagraph (a) is satisfied through a diagnosis of COVID-19, the diagnosis was done by a physician who holds a physician and surgeon license issued by the California Medical Board and that diagnosis is confirmed by further testing within 30 days of the date of the diagnosis.

Workers' Compensation

- **Governor Newsom May 6, 2020 Executive Order – N-62-20**

2) The presumption set forth in Paragraph 1 is disputable and may be controverted by other evidence, but unless so controverted, the Workers' Compensation Appeals Board is bound to find in accordance with it. This presumption shall only apply to dates of injury occurring through 60 days following the date of this Order.

Pending Bills

AB 2992 Expanded Leaves of Absence

- Expands the leaves for victims of sexual assault to include prohibiting an employer from discharging, or discriminating or retaliating against, an employee who is a **victim of crime or abuse** for taking time off from work to obtain or attempt to obtain relief, or for taking time off from work to provide assistance to an immediate family or household member seeking relief, to ensure the health, safety, or welfare of the victim's immediate family or household member.

Pending Bills

AB 2992

- "Crime" means a crime or public offense as set forth in Section 13951 of the Government Code, and regardless of whether any person is arrested for, prosecuted for, or convicted of, committing the crime.
  - b)(1) "Crime" means a crime or public offense, wherever it may take place, that would constitute a misdemeanor or a felony if the crime had been committed in California by a competent adult.
  - (2) "Crime" includes an act of terrorism, as defined in Section 2331 of Title 18 of the United States Code, committed against a resident of the state, whether or not the act occurs within the state.

Pending Bills

AB 196, SB 893, and AB 664 "Conclusive Presumption" of Injury. . .for workers' compensation purposes

- Addresses essential employees
- Health care providers
- Hospital workers

Pending Bills

AB 2999 Bereavement Leave Act of 2020

- Mandates that employers provide employees up to 10 days of bereavement leave upon the death of a spouse, child, parent, sibling, grandparent, grandchild, or domestic partner, regardless of how long the employee has worked for the employer.

Pending Bills

AB 2999 Bereavement Leave Act of 2020

- The days of bereavement leave need not be consecutive.
- The bereavement leave shall be completed within three months of the date of death of the person.
- The bereavement leave shall be taken pursuant to any existing bereavement leave policy. If there is no existing bereavement leave policy, the bereavement leave is to be unpaid, except that an employee may use vacation, personal leave, or compensatory time off that is otherwise available to the employee.

Pending Bills

AB 2999 Bereavement Leave Act of 2020

- The employee, if requested by the employer, shall, within 30 days of the first day of the leave, provide documentation of the death of the person.
- “Documentation” includes a death certificate, a published obituary, or written verification of death, burial, or memorial services from a mortuary, funeral home, burial society, crematorium, religious institution, or governmental agency.

Pending Bills

AB 2999 Bereavement Leave Act of 2020

- An employee who is discharged, disciplined, or otherwise discriminated against in the terms or conditions of employment by their employer because the employee has exercised or attempted to exercise their right to bereavement leave pursuant to this section is entitled to reinstatement and to recover actual damages.

(h) (1) An employee who believes they have been discharged, disciplined, or in any way discriminated against in violation of this section may take either of the following actions:

Pending Bills

AB 2999 Bereavement Leave Act of 2020

(A) The employee may file a complaint with the Division of Labor Standards Enforcement in accordance with Section 98.7.

(B) The employee may bring a civil action for the remedies provided in subdivision (i) directly in a court of competent jurisdiction without exhausting any administrative remedies.

(2) In any action brought pursuant to this section, the court may, in accordance with case law governing attorney's fees awarded pursuant to subdivision (b) of Section 12965 of the Government Code, award to the prevailing plaintiff reasonable attorney's fees and costs, including expert witness fees.

Pending Bills

AB 3075 - Declaration of No Outstanding Wage Judgments

- This bill would require the articles of incorporation to also contain a statement signed by the filers, under penalty of perjury, that the filer is not an owner, director, officer, managing agent, or any other person acting on behalf of an employer, as defined, that has an outstanding final judgment issued by the Division of Labor Standards Enforcement or a court of law for violation of any wage order or provision of the Labor Code.
- Allows local jurisdictions to enforce local labor standards that are at least as stringent as the state standards.

Pending Bills

AB 3216 Leave Mandate

- This bill would provide 12 work-weeks of unpaid protected family care and medical leave during any 12-month period due to a qualifying exigency related to public health emergency or state of emergency when the employee is responsible for providing care if the family member school or place of care has been closed, or the care provider of the family member is unavailable, due to a state of emergency, as defined. The bill would provide that the leave granted under these provisions would run concurrently with leave authorized under the federal Family Medical Leave Act (FMLA)

Pending Bills

SB 1399 Increased Costs and Liability for Garment Employers

- The bill provides that a person contracting to have garments made is liable for unpaid minimum wage and overtime pay to the workers who manufacture those garments regardless of how many layers of contracting that person may use.
- This bill also prohibits the practice of piece-rate compensation for garment manufacturing, except in the case of worksites covered by a valid collective bargaining agreement.

2020 EMPLOYMENT CASE UPDATES

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Federal Cases - *U.S. Supreme Court*

– Bostock v. Clayton County, Georgia (June 15, 2020)

- In a 6-3 majority interpreting Title VII's ban on sex discrimination in the workplace, the court rules that Title VII covers discrimination on the basis of sexual orientation and gender identity.
  - In an opinion written by Trump appointee Justice Gorsuch:

> "applying protective laws to groups that were politically unpopular at the time of the law's passage—whether prisoners in the 1990s or homosexual and transgender employees in the 1960s—often may be seen as unexpected. But to refuse enforcement just because of that, because the parties before us happened to be unpopular at the time of the law's passage, would not only require us to abandon our role as interpreters of statutes; it would tilt the scales of justice in favor of the strong or popular and neglect the promise that all persons are entitled to the benefit of the law's terms."

Federal Cases - **NLRB**

800 River Road Operating Company, LLC d/b/a Care One at New Milford and 1199 SEIU, United Healthcare Workers East. Case 22–CA–204545 (June 23, 2020)

Overturns Obama era *Total Security Management Illinois 1, LLC, 364 NLRB No. 106 (2016) and holds that:*

> *"Respondent did not have a duty to provide the Union with notice and an opportunity to bargain prior to suspending three employees and discharging a fourth."*

The parties were negotiating a CBA and the employer acted within its normal, then current, policies.

State of California Cases

- ***Frlekin v. Apple, Inc*., -- Cal. -- (2020)** – time spent on Apple's premises waiting for and undergoing mandatory exit search of personal belongings was compensable as "hours worked" under Wage Order 7.
- ***Grande v. Eisenhower Med*. Ctr., 44 Cal. App. 5th 1147 (2020)** – *Res judicata did not bar claims in a class action against a hospital where a staffing agency had previously entered into a class action settlement agreement that did not explicitly release the hospital from all related claims.*

State of California Cases

- ***Grande v. Eisenhower Med*. Ctr., 44 Cal. App. 5th 1147 (2020)** – *Res judicata did not bar claims in a class action against a hospital where a staffing agency had previously entered into a class action settlement agreement that did not explicitly release the hospital from all related claims.*
- FlexCare and Eisenhower defined their respective relationships to the temporary nurses in a contract called a staffing agreement. According to the agreement, nurses were employees of FlexCare and not employees of the hospital. The agreement gave FlexCare "exclusive and total legal responsibility as the employer of Staff.

State of California Cases

- ***Grande v. Eisenhower Med*. Ctr., 44 Cal. App. 5th 1147 (2020)** – *Res judicata did not bar claims in a class action against a hospital where a staffing agency had previously entered into a class action settlement agreement that did not explicitly release the hospital from all related claims.*
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State of California Cases

- ***Grande v. Eisenhower Med*. Ctr., 44 Cal. App. 5th 1147 (2020)** –
- FlexCare and Eisenhower argue we should follow the recent decision of *Castillo v. Glenair, Inc.* (2018) 23 Cal.App.5th 262 [232 Cal.Rptr.3d 844] (*Castillo*). There, the Second District, Division Two held a class of workers cannot "bring a lawsuit against a staffing company, settle that lawsuit, and then bring identical claims against the company where they had been placed to work." (*Id.* at p. 266.) The Second District concluded the staffing agency and the client were in privity with each other for purposes of the wage and hour claims. (*Ibid.*)

State of California Cases

- ***Grande v. Eisenhower Med*. Ctr., 44 Cal. App. 5th 1147 (2020)** –
- We are not bound by the decision of the Second District. (*The MEGA Life & Health Ins. Co. v. Superior Court* (2009) 172 Cal.App.4th 1522, 1529 [92 Cal.Rptr.3d 399]; 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, ¸ 498, pp. 558-559.) However, because stare decisis serves the important interests of stability in the law and predictability of decisions, we ordinarily follow the decisions of other districts, unless we have good reason to disagree. (*Ibid.*) In this case, departure from *Castillo* is justified because the court failed to apply the test for privity articulated in *DKN.* As a result, its conclusion that the staffing agency and its client were in privity is not supported.

Cases

***Colucci v. Mobile USA, Inc*. 2020 WL 2059849 (Cal. Ct. App. 2020)** – a case that reminds employers about training supervisors and managers

- Awarded $1,020,042 in total compensatory damages as follows: (A) $130,272 for past economic losses; (B) $189,770 for future economic losses;4 (C) $500,000 for past noneconomic damages and/or emotional distress; and (D) $200,000 for future noneconomic damages and/or emotional distress and **$4 million in punitive damages**.
- **Issue** – what is a "managing agent" for purposes of a Civil Code section 3294, subdivision (b) punitive damage award?

Cases

***Colucci v. Mobile USA, Inc*. 2020 WL 2059849 (Cal. Ct. App. 2020)**

- T-Mobile's primary argument is that Robson was not in a high enough position to determine official corporate policies, i.e., he was not a corporate policymaker. T-Mobile posits that managing agents must be corporate policymakers and "policies" in this context refers only to "formal policies that affect a substantial portion of the company and that are the type likely to come to the attention of corporate leadership."
- Court disagreed

Cases

***Colucci v. Mobile USA, Inc*. 2020 WL 2059849 (Cal. Ct. App. 2020)**

- "T-Mobile argues that Robson could not be considered a policy setting managing agent based solely on his deviations from T-Mobile's official company policy, such as discharging Colucci despite the company's progressive discipline policy or sending Colucci a termination letter even though managers were not supposed to communicate with employees who had requested medical leave. *However, based on our review of the record, Robson had substantial discretionary authority to override these general policies*."

Cases

***Colucci v. Mobile USA, Inc*. 2020 WL 2059849 (Cal. Ct. App. 2020) – ultimately, the court did reduce the award**

"We are satisfied that a $1,530,063 punitive damages award (1.5 times compensatory damages of $1,020,042) achieves an appropriate deterrent effect."

AB 5: RECENT DEVELOPMENTS

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Before *Dynamex* and AB 5, there was *Borello*

Borello Factors

- Primary factor Court considers in determining the classification of a worker is **whether the company has the right to control the manner and means of the performance of the work**
- In addition, the Court may consider any or all of an additional 11 factors. For example:
  - What are the skills required in the particular occupation?
  - Has the worker made financial investment in the equipment or materials required to perform the work?
  - Does the company supply the equipment, tools, or supplies?
  - How long are the services to be performed?
  - What is the payment method?

Dynamex ABC Test

(A) The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.

(B) The person performs work that is outside the usual course of the hiring entity's business.

(C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

September 18, 2019: Governor Newsom Signed **AB 5** Into Law

What is AB 5?

- Codifies *Dynamex*
- Expands ABC-test to apply to Labor Code and Unemployment Insurance Code *in addition to* wage orders of the Industrial Welfare Commission
- Outlines a number of exceptions for which *Borello* would apply
- Applies the law retroactively
- Redefines definition of “employee” for purposes of the unemployment insurance provisions
- Expanding definition of a crime for violating specific provisions of the Labor Code
- Empowers Attorney General to seek injunctive relief

Categories of Exceptions

- Certain members of the medical profession
  - Ex: doctor, surgeon, dentist, podiatrist, psychologist, vet
- Certain workers with professional licenses
  - Ex: lawyer, architect, engineer, private investigator, accountant
- Securities broker-dealers or investment advisors
- Direct sales salespersons
- Commercial fisherman working on an American vessel
- Professional Services
- Real Estate Licenses
- Business to Business
- Referral Agency

Recent Developments – Courts

- California Supreme Court taking up retroactivity of *Dynamex*
- LA Superior Court decision on January 8, 2020 in *State of California v. Cal Cartage Transportation Express* holding truckers are exempt from AB 5 under preemption by the Federal Aviation Administration Authorization Act (FAAAA)
- San Diego Superior Court ruled in February 2020 that Instacart shoppers have been misclassified as independent contractors, resulting in their being denied worker protections under state law. Instacart appealed this decision.
- In January 2020, federal judge denied a TRO exempting freelance journalists and photographers from AB 5.

Recent Developments – Legislature

- In February, author of AB 5, Assemblywoman Lorena Gonzalez (D-San Diego), introduced a *new* effort (AB 1850) to revise AB 5. Proposal would remove the law's limit on the number of projects that freelance writers or photographers could accept in a calendar year.
- SB1039, introduced by Sen. Cathleen Galgiani (D-Stockton) proposes a "third-classification of workers" in addition to employee and independent contractor
- Senate GOP Leader Shannon Grove (R-Bakersfield) introduced a bill (SB 806) to repeal AB 5 and replace it with a looser standard

Recent Developments – Ballot Initiative

- Uber, Lyft, and DoorDash launched a $100-million campaign after legislators refused to specifically exclude the companies' drivers from being classified as employees last summer
- Offers new protections to app-based rideshare and deliver network drivers
  - Guaranteed 120% of minimum wage, plus 30 cents/mile plus opportunity to earn more
  - Health care contributions equal to 100% of average employer payment toward Covered California Plan or $367/month
  - Occupational accident insurance to cover on-the-job injuries
  - Measures against discrimination and sexual harassment
- Will appear on November 2020 ballot

Recent Developments – Enforcement

- In May 2020, Attorney General Xavier Becerra along with city attorneys from LA, SD, and SF filed a lawsuit against Uber and Lyft
  - Assert that these companies have gained an unfair and unlawful competitive advantage by misclassifying workers as independent contractors.
  - Suit argues Uber and Lyft are depriving workers of the right to minimum wage, overtime, access to paid sick leave, disability insurance and unemployment insurance (and depriving the State of valuable tax revenues)
  - Filed in SF Superior Court, seeks $2,500 for each violation (per driver) and another $2,500 against senior citizens or people with disabilities

NEW ELECTRONIC DISCLOSURE RULES

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New Electronic Disclosure Rules

- Final rule issued by DOL in late May 2020
- Now two options for retirement plan required disclosures:
  - By posting on a website
  - By emailing to participants
- If post on website, must email or text notice of posting
- To use either option, must first send a one-time paper notice describing ability to opt out for future electronic delivery and receive paper
- Cannot be used by health plans

Live Q&A

- Submit a question using the Q&A engagement tool

- Please know we do capture every question and will get back to you personally if we do not have time to answer your questions live in our Q&A session.

Utilize Our Attorneys for In-Person and Virtual Trainings

Hanson Bridgett trains management and non-management employees about the most pressing issues of the day, including:

- Diversity & Inclusion
- Implicit Bias
- Politics at Work
- Sexual Harassment Prevention (required by law every two years for companies with 5+ employees)

Have an Attorney Conduct Your Most Sensitive Investigations

Improve the credibility and impartiality of your internal investigations by hiring an outside attorney for issues involving:

- Sexual Harassment
- Racial Discrimination
- Insider Training
- Trade Secrets Theft

We’re Here to Help

Contact us to discuss training offerings, customization, and scalability for your workforce.

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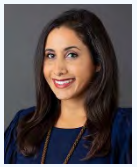

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TIME FOR A BREAK

We'll be back at 10:15 a.m.

SESSION 2:

LEGAL ASPECTS OF COVID-19

REOPENING YOUR WORKPLACE: SAFETY, TESTING, PRIVACY AND PAY

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2020 LABOR & EMPLOYMENT MID-YEAR BRIEFING

Safety Issues

To protect your employees, customers, visitors, clients, and your business from lawsuits –

- **Follow** state and federal guidelines: see for example – SF https://www.sfdph.org/dph/alerts/coronavirus-healthorders.asp
- **Follow** Centers for Disease Controls Workplace Decision Tool guidance (attached)
- **Follow** June 18, 2020 – State of California—Health and Human Services Agency California Department of Public Health: Guidance For The Use Of Face Coverings

Safety Issues

To protect your employees, customers, visitors, clients and your business from lawsuits –

- **Follow** state and federal guidelines: see for example – SF
  https://www.sfdph.org/dph/alerts/coronavirus-healthorders.asp
  lay offs and reemployment rights
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- **Follow** June 18, 2020 – State of California—Health and Human Services Agency California Department of Public Health: Guidance For The Use Of Face Coverings

Safety Issues

GUIDANCE FOR THE USE OF FACE COVERINGS

People in California must wear face coverings when they are in the high-risk situations listed below:

- Inside of, or in line to enter, any indoor public space;
- Obtaining services from the healthcare sector in settings including, a hospital, pharmacy, medical clinic, laboratory, physician or dental office, veterinary clinic, or blood bank;
- Waiting for or riding on public transportation or paratransit or while in a taxi, private car service, or ride-sharing vehicle;

Safety Issues

GUIDANCE FOR THE USE OF FACE COVERINGS

Engaged in work, whether at the workplace or performing work off-site, when:

- Interacting in-person with any member of the public;
- Working in any space visited by members of the public, regardless of whether anyone from the public is present at the time;

Safety Issues

GUIDANCE FOR THE USE OF FACE COVERINGS

- Working in any space where food is prepared or packaged for sale or distribution to others;
- Working in or walking through common areas, such as hallways, stairways, elevators, and parking facilities;
- In any room or enclosed area where other people (except for members of the person's own household or residence) are present when unable to physically distance.

Safety Issues

GUIDANCE FOR THE USE OF FACE COVERINGS

- Driving or operating any public transportation or paratransit vehicle, taxi, or private car service or ride-sharing vehicle when passengers are present. When no passengers are present, face coverings are strongly recommended.
- While outdoors in public spaces when maintaining a physical distance of 6 feet from persons who are not members of the same household or residence is not feasible.

Safety Issues

CDC Decision Tool Guidance

Ask:

- **Will reopening be inconsistent with state and local orders?**
- **Can you protect employees at higher risk for severe illness?**

Safety Issues

Ask: Are recommended health and safety actions in place?

- Healthy hygiene practices (handwashing, masks)
- Cleaning, disinfection, and ventilation
- Social distancing and enhanced spacing between employees, including through physical barriers, changing layout of workspaces, closing or limiting access to communal spaces, staggering shifts and breaks, and limiting large events.
- Canceling non-essential travel; promote telework, and
- Training all staff on health and safety protocols.

Safety Issues

Ask: Is ongoing monitoring in place?

- Encouraging employees who are sick to stay home;
- Establishing routine, daily employee health checks;
- Monitoring absenteeism and having flexible time off policies;
- Having an action plan if a staff member gets COVID-19;
- Creating and testing emergency communication channels for employees; and
- Establishing communication with state and local health authorities.

Safety Issues

The Decision Tool is attached and is available at:

https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/workplace-decision-tool.html

Other Resources

https://www.cdc.gov/coronavirus/2019-ncov/community/pdf/ReOpening_America_Cleaning_Disinfection_Decision_Tool.pdf

https://www.cdc.gov/coronavirus/2019-ncov/community/general-business-faq.html

Testing and Temperature Checks

Privacy

- Maintain confidentiality of testing information

Wage and Hour

- Pay for the time? Not quite settled – could be considered hours worked – the best practice would be to pay, especially if the employees are waiting in line for either of these activities

Testing and Temperature Checks

EEOC GUIDANCE

May an employer require antibody testing before permitting employees to re-enter the workplace?

No. An antibody test constitutes a medical examination under the ADA. In light of CDC's Interim Guidelines that antibody test results "should not be used to make decisions about returning persons to the workplace," an antibody test at this time does not meet the ADA's "job related and consistent with business necessity" standard for medical examinations or inquiries for current employees.

Testing and Temperature Checks

EEOC GUIDANCE

Therefore, requiring antibody testing before allowing employees to re-enter the workplace is not allowed under the ADA.

Please note that an antibody test is different from a test to determine if someone has an active case of COVID-19 (i.e., a viral test). The EEOC has already stated that COVID-19 viral tests are permissible under the ADA.

The EEOC will continue to closely monitor CDC's recommendations, and could update this discussion in response to changes in CDC's recommendations.

Employee Specific Issues

EEOC June 2020 Guidance:

- "The Age Discrimination in Employment Act (ADEA) prohibits employment discrimination against individuals age 40 and older. The ADEA would prohibit a covered employer from involuntarily excluding an individual from the workplace based on his or her being 65 or older, even if the employer acted for benevolent reasons such as protecting the employee due to higher risk of severe illness from COVID-19."
- Sex discrimination under Title VII of the Civil Rights Act includes discrimination based on pregnancy. Even if motivated by benevolent concern, an employer is not permitted to single out workers on the basis of pregnancy for adverse employment actions, including involuntary leave, layoff, or furlough.

Employee Specific Issues

San Francisco "Back to Work" emergency ordinance (06/23/20)

- Temporary Right to Reemployment Following Layoff Due to COVID-19 Pandemic Called Emergency Ordinance temporarily creating a right to reemployment for certain employees laid off due to the COVID-19 pandemic if their employer seeks to fill the same position previously held by a laid-off worker, or a substantially similar position, as defined.
  - Applies to businesses with 100 or more employees
  - Eligible Worker" means a person: (1) employed for at least 90 days of the calendar year preceding the date on which Employer provides written notice to the employee of a layoff caused by the Public Health Emergency

Employee Specific Issues

San Francisco – "Back to Work" emergency ordinance

- applies to those large businesses that laid off 10 or more employees due to COVID-19 since February 25, when San Francisco first declared a local emergency.
- rehire requirement remains in effect for 60 days
- Seniority/exceptions for misconduct/notice requirements, etc./collective bargaining exemption/severance agreement

- https://sfgov.legistar.com/View.ashx?M=F&ID=8623458&GUID=92C04AD0-0A0F-4C77-AB15-2D501B02D25D
- Check your localities for any similar ordinances.

EMPLOYEE BENEFIT ISSUES (INCLUDING HIPAA) IN COVID RESPONSE

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HIPAA Issue - Privacy Rules Not Suspended

- Office of Civil Rights ("OCR") has issued guidance about how HIPAA-covered entities, such as employer group health plans, can share protected health information ("PHI") related to COVID-19 for plan participants
  - HIPAA privacy rules are not suspended
  - Can disclose to CDC as needed to report prior and prospective cases of COVID-19
  - Must be minimum information necessary to accomplish the public health purpose
- Certain penalties can be waived for covered hospitals

HIPAA Issue - Telehealth

- OCR using enforcement discretion to allow good faith provision of telehealth during COVID-19 public health emergency
- OCR extended enforcement discretion to allow any telehealth, whether or not related to COVID-19, for non-public facing audio or video communication products
- Center for Medicare & Medicaid Services and California Departments of Managed Care and Insurance have encouraged health plans and insurance carriers to work with contracted providers to make mid-year contract changes to allow use telehealth services when medically appropriate to limit COVID-19 exposure

HIPAA Issue - Return to Work

- What if employer wants/needs to have employees tested and wants to know the results?
  - Covered entity (i.e. the plan, or a health care provider) needs to obtain individual's authorization, unless otherwise permitted by the privacy rule
  - Valid authorization has to meet the HIPAA privacy rules requirements
  - If employer receives information, must keep it in private medical file and not keep in employee's personnel file (see EEOC FAQs)
  - Covered entity can notify such persons as are necessary to prevent or control the spread of the disease or otherwise carry out public health interventions or investigations

HIPAA Issue - Return to Work

- What if employer offers testing on a voluntary basis?
  - CMS has said diagnosis and treatment of COVID is an "essential health benefit"
  - Providing testing on a voluntary basis may mean employer is offering employer-sponsored health benefits
  - If is an employer-sponsored health benefit, subject to COBRA, etc.
  - Can an employer "wrap" this benefit into its EAP or wellness program?

HIPAA Issue - Return to Work

- What if employer offers testing on a mandatory basis?
  - Maybe more like a required TB test---but is it being required by some government agency versus employer's own decision?
  - Shifts to more employment issues
  - See EEOC guidance-employers may take steps to determine if employees entering the workplace have COVID because individual poses a direct threat to health of others
    - CDC has said antibody tests should not be used to make decisions about returning to workplace, so cannot require that test

Employer-Provided Health-Return to Work

- What about employees going from full-time to part-time?
  - If not enough reduction to lose coverage, may need to cover during stability period
  - If lose coverage is lost under health plan because of reduced hours
    - Offer COBRA to avoid ACA Penalty A
    - May have Penalty B issue if not affordable and counted as full-time employee from prior year
    - May consider providing employees $$ for assistance with COBRA
    - May consider new ICHRA for part-time

HEALTH, SAFETY, AND ENVIRONMENTAL CONSIDERATIONS FOR EMPLOYERS

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What Standards Apply?

- Multiple local, state, and federal agencies including the California Department of Public Health, Cal/OSHA, Fed/OSHA, and the Center for Disease Control and Prevention (CDC) have issued guidance regarding COVID-19.
- Generally, much of the guidance provided is non-binding, creating confusion over which standards to follow.
- Cal/OSHA has traditionally maintained more restrictive and robust regulatory requirements than Fed/OSHA.
- Employers should also be aware of industry-specific guidance from Cal/OSHA and the CDC and follow those guidelines to the extent they are applicable to the workplace.

General Industry Guidance

- Note that certain employers, including those in the healthcare and mortuary industries, must also comply with California's Aerosol Transmissible Diseases ("ATD") Standard.
- For all other employers, general guidance from Cal and Fed/OSHA and the CDC includes incorporation of common sense protocols such as:
    - Promoting frequent handwashing
    - Discouraging sharing of materials and spaces
    - Employee training regarding cough and sneeze etiquette and hand hygiene
    - Provision of tissues, hand sanitizer and soap
    - Routine environmental cleaning of workplace equipment and furniture
- In addition to the measures above, Cal/OSHA's new guidelines identify industry-specific measures for employers in industries with significant public interaction, such as businesses in the retail and service industries.

Implementation and Revision of Health and Safety Policies to Address COVID-19

- All California employers, regardless of size, must develop and maintain an effective, written Injury and Illness Prevention Program ("IIPP") addressing, 1) workplace hazards; 2) a means of communicating hazards to employees; 3) ensuring employee compliance with the IIPP; 4) investigation of injuries and illnesses; and, 5) employee training.
- **Cal/OSHA has stated that employers must generally consider COVID-19 a workplace hazard such that it should be acknowledged in an employer's IIPP.**
- Notwithstanding workplace and industry variations, Cal/OSHA's guidance identifies an extensive list of specific infection prevention measures that employers should include in their written IIPP.

Employee Training

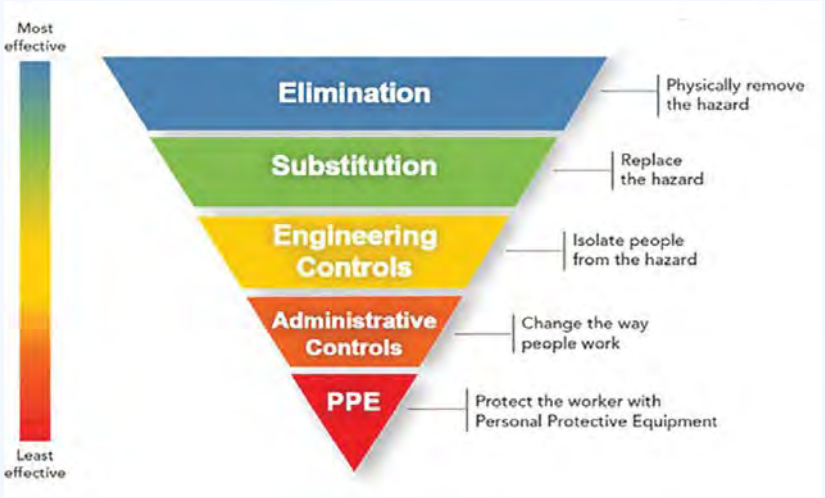
- Cal/OSHA's general guidance provides that employers must provide training to employees on the following topics:
  - General description of COVID-19, symptoms, when to seek medical attention, how to prevent its spread, and the employer's procedures for preventing its spread at the workplace.
  - How an infected person can spread COVID-19 to others even if they are not sick.
  - How to prevent the spread of COVID-19 by using cloth face covers.
  - Cough and sneeze etiquette.
  - Hand washing.
  - Avoiding touching eyes, nose, and mouth with unwashed hands.
  - Avoiding sharing personal items with co-workers (i.e., dishes, cups, utensils, towels).
  - Safely using cleaners and disinfectant

Hierarchy of Controls To Mitigate COVID-19

- In complying with duties under Cal/OSHA, employers should follow a “hierarchy of controls.”
- After analyzing the workplace to identify potential health and safety hazards (i.e, a “hazard analysis”), employers must first attempt to eliminate the hazard.
- Because employers cannot fully eliminate the COVID-19 hazard, they must identify measures to minimize risk including engineering, administrative, and work practice controls.

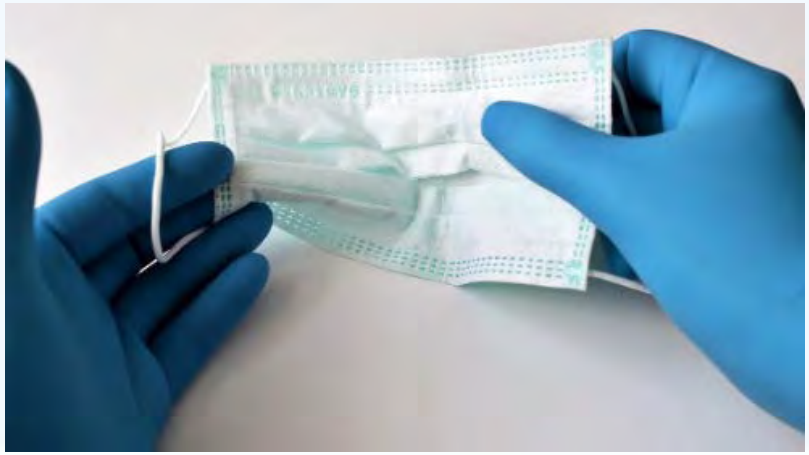
Hierarchy of Controls To Mitigate COVID-19

- **Engineering controls:** Implementing physical changes to the workplace to reduce or eliminate a hazard. These changes often take the longest to plan and execute, and thus, as a practical matter, employers should typically plan for these first.
- **Administrative controls:** Safety procedures, policies, rules, supervision, and training that seek to reduce exposure to hazards.



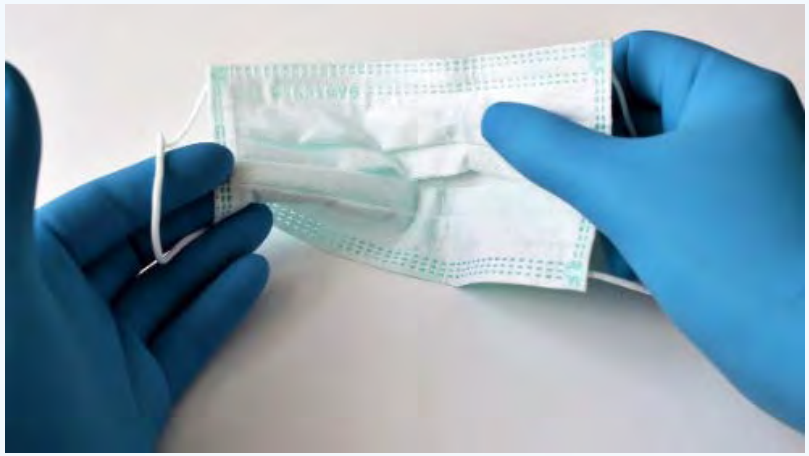
Personal Protective Equipment ("PPE")

- Current CDC and Cal/OSHA guidance do not require respiratory PPE for most non-health-care workers and emergency responders unless employees are regularly working in close proximity (six feet) and have prolonged contact with active COVID-19 cases or those who are suspected of having COVID-19.
- If employers do not require respirators but allow them to be worn voluntarily, they do not need a full respiratory protection program. Still, they must provide employees with Appendix D to the OSHA respiratory protection standard.



Personal Protective Equipment ("PPE")

- Employers also should consider whether they will provide or require gloves or eye protection. In some cases, providing PPE may make some job assignments more hazardous (e.g., wearing face coverings near certain equipment).
- If the employer or state or local order requires face coverings, it's is likely that the employer must pay for the cloth face covering.



Environmental Issues – Hazardous Waste

- Are you generating hazardous waste?

  Many commercial cleaning products contain hazardous chemical ingredients, generating waste that must be managed, stored, and disposed of as hazardous waste

  Examples include:
  - Bleach
  - Solvents
  - Aerosol cans

Environmental Issues – Hazardous Waste

Have you:

(1) Increased how frequently you are using cleaning products?

(2) Increased the concentration of the cleaning products you use?

(3) Changed the type of cleaning products you use in response to COVID-19?

Hazardous Waste Storage Time Limits

Scenario A: You generate less than 100 kg of hazardous waste, or less than 1 kg of acutely hazardous waste, or less than 1 kg of extremely hazardous waste during any calendar month

- 90-day storage time limit begins on the day when you reach any of those totals

Scenario B: You generate more than 100 kg of hazardous waste, or more than 1 kg of acutely hazardous waste, or more than 1 kg of extremely hazardous waste during any calendar month

- 90-day storage time limit begins on the first day when any of those types of wastes begins to accumulate

Hazardous Waste Storage Time Limits

- Requesting an extension on the hazardous waste storage time limit

  1) For federally-defined ("RCRA") hazardous waste, you may apply for a 30-day storage extension from the Cal. Dept. of Toxic Substances Control https://dtsc.ca.gov/30-day-storage-extension-application/

  2) For state-defined ("non-RCRA") hazardous waste, you may request an extension from your local Certified Unified Program Agency, aka CUPA http://cersapps.calepa.ca.gov/Public/Directory/

- DTSC has issued an advisory on the management of hazardous waste during COVID-19 https://dtsc.ca.gov/wp-content/uploads/sites/31/2020/04/DTSC-EERD-COVID-19-Guidance_4-06-20_a.pdf

Hazardous Waste Disposal

- There are third-party vendors that provide hazardous waste disposal services, as well as equipment and labeling for proper storage (e.g., SafetyKleen, Clean Harbors)
- If you contract out certain waste-generating functions, such as janitorial services, ask to review their procedures for handling waste generated through their work at your facility
- Consult an EHS professional or counsel to assess your program and identify compliance gaps

Hazardous Waste Training

- Personnel at a facility who are involved with hazardous waste management activities, including storage and disposal, are required to have function-specific job training
  - Within 180 days after the date of employment or assignment to a facility, or to a new position at a facility; and
  - Every 24 months

Are You Generating Medical Waste?

Medical waste is:

- Waste generated as a result of diagnosis, treatment, or immunization of human beings or animals, or research pertaining to any such activity; or the production or testing of biologicals (e.g., serums, vaccines, antigens, antitoxins, etc.); or the accumulation of properly contained home-generated sharps waste; or the removal of regulated waste from a trauma scene by a trauma scene waste management practitioner; and
- The waste is either biohazardous waste or sharps waste

PPE waste may be considered medical waste

Medical Waste Storage & Disposal

- Medical waste has different storage requirements than hazardous waste:
  - Storage time limits for biohazardous waste depend on how much is generated per month (+/- 20 lbs.), whether it is stored onsite or offsite, and at what temperature it is stored (+/- 32^{o} F)
  - Storage of pharmaceutical waste is subject to its own time limits, depending on whether the storage is onsite or offsite, and when the storage container becomes ready for disposal
- There are third party vendors who specialize in disposal of medical waste (e.g., Stericycle)

Enforcement of Hazardous Waste Laws

- Hazardous waste laws remain in effect in CA during the COVID-19 pandemic
  - CUPA inspection frequency may have slowed down in some areas, but it is important to communicate with your local CUPA to understand its approach to compliance during the pandemic
  - Hazardous waste violations can be very expensive (up to $70,000 per violation)

An Employee Has COVID-19: Now What?

- Cal/OSHA's most recent guidance provides the following guidance for cases where an employee contracts COVID-19:
  - Inform employees of their possible exposure to COVID-19 in the workplace but maintain confidentiality as required by the Americans with Disabilities Act and employee privacy laws.
  - Temporarily close the general area where the infected employee worked until cleaning is completed.
  - Conduct deep cleaning of the entire general area where the infected employee worked and may have been, including breakrooms, restrooms and travel areas, with a cleaning agent approved by the Environmental Protection Agency ("EPA") against COVID-19.
  - The cleaning should ideally be performed by a professional cleaning service.
  - Any person cleaning the area should be equipped with the proper personal protective equipment ("PPE") for COVID-19 disinfection (disposable gown, gloves, eye protection, mask, or respirator if required) in addition to PPE required for cleaning products.

Updated Cal/OSHA COVID-19 Recordkeeping Requirements

- **Record on Log 300** if a ***work-related*** COVID-19 case results in
  - death,
  - days away from work (time spent in quarantine is not considered “days away from work.”)
  - restricted work or job transfer,
  - medical treatment beyond first aid, loss consciousness,
  - or significant illness or injury as diagnosed by a healthcare professional.

- When is COVID-19 **“work related?”**

- A positive test is not required to trigger recordkeeping requirements.

Updated Cal/OSHA COVID-19 Reporting Requirements

- In California, employers must report to Cal/OSHA of any COVID-19 cases that result in an in-patient hospitalization or death of an employee if the illness either occurred in connection with work (i.e., the illness was caused by an exposure at work), or occurred in the place of employment (even if it is clearly not work-related).

- **Reportable illnesses are not limited to instances when the employee starts showing symptoms while at work**. Serious illnesses include illnesses contracted "in connection with any employment," which can include those contracted in connection with work but with symptoms that begin to appear outside of work.

- The updated Cal/OSHA guidance notes that reporting a serious illness is not an admission that the illness is work-related, nor is it an admission of responsibility. Accordingly, Employers should err on the side of reporting when in doubt.

Cal/OSHA Enforcement

- Violating Cal/OSHA standards can result in significant penalties and fines.
- Thus far, enforcement by Cal/OSHA has been driven by employee complaints of a lack of PPE and/or training as opposed to site visits.
- Cal/OSHA has not issued any guidance modifying its standard inspection or enforcement procedures based on COVID-19.

Resources for California Employers

- https://www.dir.ca.gov/dosh/coronavirus/General-Industry.html
- https://www.dir.ca.gov/dosh/coronavirus/Health-Care-General-Industry.html
- https://www.labor.ca.gov/coronavirus2019/
- https://www.dir.ca.gov/dosh/dosh_publications/iipp.html
- https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fspecific-groups%2Fguidance-business-response.html
- https://covid19.ca.gov/industry-guidance/
- https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Workplace-Outbreak-Employer-Guidance.aspx

COVID-19 RELATED LAWSUITS

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COVID-19 Lawsuit Claims

- ***McGee v. Postmates and Corbin v. DoorDash*** (SFSC) – Labor Code Section 2802 – failure to pay for PPE and the time spent in securing PPE; public nuisance claims.
- ***Manning v. The LA LGBT Center*** (LASC) – disability discrimination (HIV) failure to accommodate forced on two-week medical leave;
- ***Noh v. Fraud Fighters, Inc.*** (LASC) – wrongful termination for plaintiff's failure to work due to SIP orders; Labor Code 6301 violations for retaliating after making health complaints.

Claims

- ***Verhines v. Uber Technologies, Inc.* and *Rogers v. Lyft, Inc. CGC-20-583685* (SF Sup Ct).** Plaintiffs allege that the companies misclassified the plaintiffs as independent contractors in violation of Cal. Labor Code ¸ 2750. Due to this misclassification, they were not provided paid sick days that they otherwise could take to deal with COVID-19 issues.

Claims

- ***Kristy v. Costco* (S Clara Sup Ct)** (defamation, invasion of privacy, wrongful termination, negligent and intentional infliction of emotional distress and associational discrimination) – after his wife returned from South Carolina with a cough, Plaintiff chose to self-quarantine out of caution. Employees called Plaintiff "Coronavirus boy," spread rumors that Plaintiff was COVID-19 positive, and his employer terminated him based on that association with his possibly infected wife.

Claims

- ***Klein v. Paradigm Talent Agency, LLC* (LA Sup Ct).** The plaintiff, a 23-year-old employee, claimed the company used the "national emergency" to effectuate long-term job cuts, referring the layoffs to "March Massacre." She also claims she had an oral employment contract through December 2021 that the company breached when it terminated her. She seeks an accounting for commissions owed and damages for a whistleblower retaliation claim.

Live Q&A

- Submit a question using the Q&A engagement tool
- Share your comments about the webinar using the survey link in your menu docket
- The webinar recording will be sent to you via email within one day of the broadcast

Thank you for joining us!

ATTACHMENT D

Fair Employment & Housing Council
Proposed Final Text of Employment Regulations
Regarding Religious Creed and Age Discrimination

CALIFORNIA CODE OF REGULATIONS
Title 2. Administration
Div. 4.1. Department of Fair Employment & Housing
Chapter 5. Fair Employment & Housing Council
Subchapter 2. Discrimination in Employment
Article 2. Particular Employment Practices; Article 8. Religious Creed Discrimination; Article 10. Age Discrimination

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Article 2. Particular Employment Practices

§ 11016. Pre-employment Practices

(a) Recruitment.

(1) Duty Not to Discriminate. Any employer or other covered entity engaged in recruitment activity shall recruit in a non-discriminatory manner. However, nothing in these regulations shall preclude affirmative efforts to utilize recruitment practices to attract minorities, individuals of any~~one~~ sex ~~or the other~~, individuals with disabilities, individuals at least~~over~~ 40 years of age, and any other individual protected~~covered~~ by the Act.

(2) Prohibited Recruitment Practices. An employer or other covered entity shall not, unless pursuant to a permissible defense, engage in any recruitment activity that:

(A) Restricts, excludes, or classifies individuals on a basis enumerated in the Act;

(B) Expresses a preference for individuals on a basis enumerated in the Act; or

(C) Communicates or uses advertising methods to communicate the availability of employment benefits in a manner intended to discriminate on a basis enumerated in the Act.

(b) Pre-~~E~~employment Inquiries.

(1) Limited Permissible Inquiries. An employer or other covered entity may make any pre-employment inquiries that do not discriminate on a basis enumerated in the Act. Inquiries that directly or indirectly identify an individual on a basis enumerated in the Act

are unlawful unless made pursuant to a permissible defense. ~~Except as provided in the Americans with Disabilities Act of 1990 (Public Law 101-336) (42 U.S.C.A. §12101 et seq.) and the regulations adopted pursuant thereto, nothing in Government Code section 12940(d) or in this subdivision, shall prohibit any employer from making, in connection with prospective employment, an inquiry as to, or a request for information regarding, the physical fitness, medical condition, physical condition, or medical history of applicants if that inquiry or request for information is directly related and pertinent to the position the applicant is applying for or directly related to a determination of whether the applicant would endanger his or her health or safety or the health or safety of others.~~

(A) An employer may make, in connection with prospective employment, an inquiry as to, or request information, regarding the physical fitness, medical condition, physical condition, or medical history of applicants if the inquiry or request for information complies with the provisions of sections 11067, 11070 and 11071 of these regulations~~is directly pertinent to the position the applicant is applying for or directly related to a determination of whether the applicant would endanger their health or safety or the health or safety of others, except as provided by the Americans with Disabilities Act of 1990 (Public Law 101-336) (42 U.S.C.A. § 12101 et seq.) and the regulations pursuant thereto~~.

(B) Pre-employment inquiries regarding an applicant's availability for work on certain days and times shall not be used to ascertain the applicant's religious creed, disability, or medical condition. ~~In general, s~~Such inquiries must clearly communicate that an employee need not disclose any scheduling restrictions based on legally protected grounds, in language such as: "Other than time off for reasons related to your religion, a disability, or medical condition, are there any days or times when you are unavailable to work?" or "Other than time off for reasons related to your religion, a disability, or medical condition, are you available to work the proposed schedule?"

(2) Applicant Flow and Other Statistical Recordkeeping. Notwithstanding any prohibition in these regulations on pre-employment inquiries, it is not unlawful for an employer or other covered entity to collect applicant-flow and other recordkeeping data for statistical purposes as provided in section 11013(b) of these regulations or in other provisions of state and federal law.

(c) Applications.

(1) Application Forms. When employers or other covered entities provide, accept, and consider application forms in the normal course of business, in so doing they shall not discriminate on a basis enumerated in the Act.

(2) Photographs. Photographs shall not be required as part of an application unless pursuant to a permissible defense.

(3) Schedule Information. An application's request for information related to schedule and availability for work, shall not be used to ascertain the applicant's religious creed, disability, or medical condition. Such requests must clearly communicate that an

employee need not disclose any scheduling restrictions based on legally protected grounds in language such as: “Other than time off for reasons related to your religion, a disability, or medical condition, are there any days or times when you are unavailable to work?” or “Other than time off for reasons related to your religion, a disability, or medical condition, are you available to work the proposed schedule?”~~in some instances, may deter applicants due to their religious creed, disability, or medical condition. Employment applications that request such information will be scrutinized to assure the request is for a permissible purpose and not for an unlawful purpose.~~

(A) The use of online application technology that limits or screens out applicants based on their schedule may have a disparate impact on applicants based on their religious creed, disability, or medical condition. Such a practice is unlawful unless pursuant to a business necessity and the online application technology includes a mechanism for the applicant to request an accommodation.

(4~~3~~) Separation or Coding. Application forms shall not be separated or coded, manually or electronically, or otherwise treated so as to identify individuals on a basis enumerated in the Act unless pursuant to a permissible defense or for recordkeeping or statistical purposes.

(d) Interviews. Personal interviews shall be free of discrimination. Notwithstanding any internal safeguards taken to secure a discrimination-free atmosphere in interviews, the entire interview process is subject to review for adverse impact on individuals on a basis enumerated in the Act.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12940, 12941 and 12942, Government Code.

Article 8. Religious Creed Discrimination

§ 11063. Pre-employment practices

Pre-employment inquiries regarding an applicant's availability for work on weekends or evenings shall not be used ~~as a pretext for~~to ascertain~~ing~~ their ~~his or her~~ religious creed, nor shall such inquiry be used to evade the requirement of reasonable accommodation. However, inquiries as to the availability for work on weekends or evenings are permissible where reasonably related to the normal business requirements of the job in question, and comply with section 11016 of these regulations.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921 and 12940, Government Code.

Article 10. Age Discrimination

§ 11075. Definitions.

As used in this article the following definitions of terms apply, unless the context in which they are used indicates otherwise:

(a) “Age-based stereotype” refers to generalized opinions about matters including the qualifications, job performance, health, work habits, and productivity of individuals over forty.

(b) “Basis of age” ~~or “ground of age”~~ refers to age ~~over~~ 40 or older.

(c) “Collective bargaining agreement” refers to any collective bargaining agreement between an employer and a labor organization that is in writing.

(d) “Employer” refers to all employers, public and private, as defined in Government Code Section 12926.

(e) “Employment benefit” refers to employment benefit as defined in section 11008(g). It also includes a workplace free of harassment as defined in section 11019(b) of Subchapter 2.

(f) “Normal retirement date or NRD” refers to one of the following dates:

(1) for employees participating in a private employee pension plan regulated under the federal Employee Retirement Income Security Act of 1974, the NRD refers to the time a plan participant reaches normal retirement age under the plan or refers to the later of either the time a plan participant reaches 65 or the 10th anniversary of the time a plan participant commenced participation in the plan;

(2) for employees not described under (1) whose employers have a written retirement policy or whose employers are parties to a collective bargaining agreement that specifies retirement practices, the NRD refers to the normal retirement time or age specified in such a policy or agreement; or

(3) for employees not described under either (1) or (2) the NRD refers to the last calendar day of the month in which an employee reaches his or her 70th birthday.

~~(g) “Over 40” refers to the chronological age of an individual who has reached or passed theirhis or her 40th birthday.~~

(~~h~~g) “Private employer” refers to all employers not defined in subsection (~~i~~d) below~~above~~.

(~~i~~h) “Public employer” refers to public agencies as defined in Government Code Section 31204.

(~~j~~i) “Retirement ~~or Pension~~ Program” refers to any plan, program or policy of an employer that is in writing and has been communicated to eligible or affected employees, which is intended to provide an employee with income upon retirement (this may include pension plans, profit-sharing plans, money-purchase plans, tax-sheltered annuities, employer sponsored Individual Retirement Accounts, employee stock ownership plans, matching thrift plans, or stock bonus plans or other forms of defined benefit or defined contribution plans).

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12926, 12940, 12941(a) and 12942, Government Code.

§ 11076. Establishing Age Discrimination.

(a) Employers. Discrimination on the basis of age may be established by showing that a job applicant's or employee's age of~~over~~ 40 or older was considered in the denial of employment or an employment benefit. A presumption of discrimination is~~may be~~ established by showing that a facially neutral practice has an adverse impact on applicant(s) or employee(s) age 40 and older~~over the age of 40~~, unless the practice is justified by business necessity as defined in section 11010(b). In the context of layoffs or salary reduction efforts that have an adverse impact on employee(s) age 40 and older~~over the age of 40~~, an employer's preference to retain lower paid worker(s), alone, is insufficient to negate the presumption. The practice may still be impermissible, even where a legitimate business necessity exists, where it is shown that an alternative practice could accomplish the business purpose equally well with a lesser discriminatory impact.

(b) Employment Agencies, Labor Organizations, and Apprenticeship Training Programs in Which the State Participates. Discrimination on the basis of age may be established against employment agencies, labor organizations, and apprenticeship training programs in which the state participates upon a showing that they have engaged in recruitment, screening, advertising, training, job referral, placement or similar activities that discriminate against an individual or individuals age 40 and older~~over 40~~.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12926~~(c), (d) and (e)~~, and 12941, Government Code.

§ 11077. Defenses.

[No change to text.]

§ 11078. Pre-~~E~~employment Practices.

(a) Recruitment and Advertising.

(1) Recruitment. The provisions of section 11016(a) are applicable and are incorporated by reference herein. Generally, during recruitment it is unlawful for employers to refuse to consider applicants because they are at least~~over~~ 40 years of age. Examples of unlawful requirements include: a maximum experience limitation; a requirement that candidates be "digital natives" (an individual who grew up using technology from an early age); or a requirement that candidates maintain a college-affiliated email address. However, it is lawful for an employer to participate in established recruitment programs with high schools, colleges, universities and trade schools. It is also lawful for employers to utilize temporary hiring programs directed at youth, even though such programs traditionally provide disproportionately few applicants who are age 40 and older~~over 40~~.

However, exclusive screening and hiring of applicants provided through the above recruitment or temporary programs will constitute discrimination on the basis of age if the programs are used to evade the Act's prohibition against age discrimination.

(2) Advertising. It is unlawful for an employer to either express a preference for individuals under 40 or to express a limitation against individuals at least 40 years of ageover 40 when advertising employment opportunities by any means such as the media, employment agencies, and job announcements.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12941 and 12942, Government Code.

§ 11079. Advertisements, Pre-Eemployment Inquiries, Interviews and Applications.

(a) Advertisements. Unless age is a bona fide occupational qualification for the position at issue, advertisements for employment that a reasonable person would interpret as deterring or limitingan attempt to deter or limit employment of people age 40 and over are unlawful. (See section 11010(a) for the definition of bona fide occupational qualification.) Where there is no bona fide occupational qualification, Eexamples of prohibited advertisements include those that designate a preferred applicant age range or that include terms such as young, college student, recent college graduate, boy, girl, or others terms that imply a preference for employees under the age of 40.

(ab) Pre-Eemployment Inquiries. Unless age is a bona fide occupational qualification for the position at issue, Ppre-employment inquiries that would result in the direct or indirect identification of persons on the basis of age are unlawful. Examples of prohibited inquiries are requests for age, date of birth, or graduation dates, excepting where age is bona fide occupational qualification. This provision applies to oral and written inquiries and interviews. (See section 11016(b), which is applicable and incorporated by reference herein.) Pre-employment inquiries that result in the identification of persons on the basis of age shall not be unlawful when made for purposes of applicable reporting requirements or to maintain applicant flow data provided that the inquiries are made in a manner consistent with Section 11013 (and particularly subsection (b)) of Article 1.

(cb) Applications. Unless age is a bona fide occupational qualification for the position at issue, iIt is discrimination on the basis of age for an employer or other covered entity to reject or refuse to seriously and fairlyprovide equal consideration of the application form, pre-employment questionnaire, oral application, or the oral or written inquiry of an individual because such individual is age 40 or olderover 40. (See section 11016(c), which is applicable and incorporated by reference herein.)

(1) An application's request for information that could lead to the disclosure of the applicant's date of birth or age (such as graduation date) is not, in itself, unlawful. However, the application's request for such information may tend to deter older applicants or otherwise indicate discrimination against applicants who are over 40.

~~Employment applications that request such information will be scrutinized to assure the request is for a permissible purpose and not for an unlawful purpose.~~

~~(2)~~ This section prohibits the use of online job applications that require entry of age in order to access or complete an application, or the use of drop-down menus that contain age-based cut-off dates or utilize automated selection criteria or algorithms that have the effect of screening out applicants that are age 40 and over. Use of online application technology that limits or screens out older applicants is discriminatory unless pursuant to a bona fide occupational qualification. (See section 11010(a).)

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12940 and 12941, Government Code.

800 River Road Operating Company, LLC d/b/a Care One at New Milford *and* 1199 SEIU, United Healthcare Workers East. Case 22–CA–204545

June 23, 2020

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

The principal question presented in the case is whether to adhere to the holding of *Total Security Management Illinois 1, LLC*, 364 NLRB No. 106 (2016) (*Total Security*), and, accordingly, to affirm the judge's finding that the Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act by disciplining four employees without first providing the Union with notice and an opportunity to bargain.[1] In *Total Security*, a Board majority, with then-Member Miscimarra dissenting, purported to clarify extant law by imposing a new statutory obligation on employers upon commencement of a collective-bargaining relationship. The decision required an employer, with limited exceptions, to provide a union with notice and opportunity to bargain about discretionary elements of an existing disciplinary policy before imposing serious discipline on any individual union-represented employees who are not yet covered by a collective-bargaining agreement. An employer's failure to engage in such bargaining would violate Section 8(a)(5) of the Act even when the employer did not alter a preexisting disciplinary policy or practice but, instead, merely continued to exercise discretion consistent with that policy or practice when determining whether and how to discipline individuals. Further, the customary remedy for this violation would include reinstatement and backpay for a disciplined employee, unless the employer could prove that the discipline was imposed "for cause" within the meaning of Section 10(c) of the Act.

For the reasons that follow, we overrule *Total Security* and reinstate the law as it existed for 80 years, from the Act's inception until issuance of that decision. During that time, the Board did not recognize a predisciplinary bargaining obligation under the Act.[2] In fact, in *Fresno Bee*, 337 NLRB 1161 (2002), the Board affirmed an administrative law judge's rejection of the General Counsel's theory that such an obligation existed. Dismissively overruling that controlling precedent as "demonstrably incorrect,"[3] the *Total Security* majority claimed that the prediscipline bargaining obligation was allegedly consistent with general Board precedent governing an employer's bargaining obligations prior to making material changes in bargaining-unit employees' terms and conditions of employment. To the contrary, *Total Security*'s imposition of a prediscipline bargaining obligation (1) conflicts with a specific Board precedent and the rationale of the Supreme Court's *Weingarten*[4] decision relevant to this issue; (2) misconstrues the general unilateral-change doctrine announced in the Court's *Katz*[5] decision with respect to what constitutes a material change in working conditions; and (3) imposes a complicated and burdensome bargaining scheme that is irreconcilable with the general body of law governing statutory bargaining practices. For these reasons, *Total Security* must be overruled.

We further find that it is appropriate to apply our decision retroactively "'to all pending cases in whatever stage,'" including in the instant case.[6] Therefore, applying the appropriate standard, we conclude that the Respondent did not have a duty to provide the Union with notice and

[1] On November 20, 2018, Administrative Law Judge Benjamin W. Green issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party each filed an answering brief, and the Respondent filed a reply brief. On October 17, 2019, the Board granted the motion by the American Federation of Labor and Congress of Industrial Organizations (AFL–CIO) for leave to file an amicus brief and, thereafter, accepted its filed brief.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge found, and we agree, that the Respondent violated Sec. 8(a)(5) and (1) by unilaterally changing employees' payroll hours from 40 hours per week to 37.5 hours per week. In adopting this finding, we clarify that the correct evidentiary standard is whether the General Counsel has shown by a preponderance of the evidence that the Respondent made a material change to the employees' terms and conditions of employment, and we find that burden satisfied. See *Columbia Memorial Hospital*, 362 NLRB 1256, 1270 (2015).

We shall modify the judge's recommended Order to conform to the Board's standard remedial language and our findings, and in accordance with our recent decision in *Danbury Ambulance Service, Inc.*, 369 NLRB No. 68 (2020); and we shall substitute a new notice to conform to the Order as modified.

[2] We recognize that the Board first announced this new bargaining obligation four years earlier in *Alan Ritchey, Inc.*, 359 NLRB 396 (2012). However, that decision was invalidated by the Supreme Court's decision in *NLRB v. Noel Canning*, 573 U.S. 513 (2014).

[3] 364 NLRB No. 106, slip op. at 7.

[4] *NLRB v. Weingarten, Inc.*, 420 U.S. 251 (1975).

[5] *NLRB v. Katz*, 369 U.S. 736 (1962).

[6] *SNE Enterprises*, 344 NLRB 673, 673 (2005) (quoting *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1006–1007 (1958)).

an opportunity to bargain prior to suspending three employees and discharging a fourth. As a result, we dismiss the complaint allegation that those disciplinary actions were unlawful.

Background

The parties stipulated to the relevant facts. In 2012, the Union was certified as the exclusive collective-bargaining representative of certain nonprofessional employees at the Respondent's rehabilitation and nursing care facility. The Respondent tested the certification, which the District of Columbia Circuit ultimately upheld on January 24, 2017.[7]

During this time, the Respondent maintained a disciplinary policy in its employee handbook. The relevant portion states:

> Disciplinary Action
>
> If your conduct is unsatisfactory, your Supervisor may provide guidance and support to help you make the necessary corrections. The Center has developed a disciplinary action process that focuses upon early correction of misconduct, with the total responsibility for resolving the issues and concerns in your hands. Your Supervisor is there to provide support and coaching.
>
> The following highlights a list of actions that the Center may use while administering discipline. Please note that these are guidelines only, and are not intended to imply a series of "steps" that will be followed in all instances. Any of the disciplinary actions described below, including termination, may be initiated at any stage of the process depending on the nature of the specific inappropriate behavior, conduct, or performance and other relevant factors.
>
> √ Verbal or Written Warning
> √ Suspension or Suspension Pending Further Investigation
> √ Final Written Warning
> √ Termination of Employment

Between October 2016 and March 2017, the Respondent suspended employees Jasmine Gordon, Linda Rhoads, and Jesus Mendez, and discharged employee Shantai Bills, pursuant to its disciplinary policy. The Respondent did not provide the Union with notice or an opportunity to bargain prior to disciplining the employees. On June 2, 2017, during negotiations for an initial collective-bargaining agreement, the Respondent informed the Union of the suspensions and discharge. The Union did not request bargaining over any of the suspensions or the discharge.

The judge found that the suspensions and discharge met the definition of serious discipline under *Total Security*[8] and that the Respondent was required to provide notice and an opportunity to bargain to the Union before it disciplined the employees. Accordingly, the judge found that the Respondent violated Section 8(a)(5) and (1) of the Act when it failed to engage in prediscipline bargaining with the Union. In their briefs to the Board, both the General Counsel and the Respondent argue that *Total Security* should be overruled. The Charging Party and AFL–CIO, however, argue that *Total Security* was correctly decided and should be maintained.[9]

Discussion

The Act had been in effect for 76 years when the Board first identified a substantive predisciplinary bargaining obligation in *Alan Ritchey*, and for 80 years when it reinstated and expanded the vacated holding of that case in *Total Security*. To be sure, "[t]he responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board." *Weingarten*, supra, 420 U.S. at 968. Indeed, the Supreme Court recognized in *Weingarten* that the Board reasonably made such an adaptation when it recognized for the first time a right, implicit in Section 7 of the Act, for a bargaining-unit employee to refuse to submit to an interview that the employee reasonably fears may result in discipline without having a union representative present. But the imposition of the bargaining obligation in *Total Security* did not result from any changing pattern of industrial life. To the contrary, as dissenting Member Miscimarra recognized, "[e]mployee discipline is hardly a new development in our statute's 80-year history." 364 NLRB No. 106, slip op. at 18. And as we shall discuss, the *Weingarten* Court itself clearly considered and approved the law governing bargaining obligations for employee discipline that had existed during that period.

The *Total Security* Board nevertheless portrayed its holding as a clarification of existing Board precedents applying the unilateral-change doctrine announced by the Supreme Court in its seminal *Katz* decision. This doctrine

[7] *800 River Rd. Operating Co., LLC v. NLRB*, 846 F.3d 378 (D.C. Cir. 2017), enfg. 362 NLRB 967 (2015).

[8] As further discussed below, serious discipline was defined in *Total Security* as discipline that has an "inevitable and immediate impact on an employee's tenure, status, or earnings," such as suspension, demotion, or discharge. 364 NLRB No. 106, slip op. at 3–4. The Board distinguished this from "lesser" discipline, to which different bargaining rules apply. Id., slip op. at 4.

[9] While exceptions were pending before the Board, the Charging Party filed a motion for partial withdrawal, seeking to withdraw the allegation that the Respondent's unilateral imposition of discretionary disciplines violated the Act. On August 29, 2019, the Board issued an order denying the motion. *800 River Road Operating Co., LLC d/b/a Care One at New Milford*, 368 NLRB No. 60 (2019).

holds that, upon commencement of a bargaining relationship, employers of union-represented employees are required to refrain from making a material change regarding any term or condition of their employees' employment that constitutes a mandatory subject of bargaining unless notice and an opportunity to bargain is provided to the union.

In *Total Security*, the Board cited several Board cases applying *Katz* in support of its position. Of those cases, however, only one was even arguably on point with respect to the specific issue of a prediscipline bargaining obligation under the Act. In contrast, the *Total Security* decision simply dismissed the one Board decision directly on point: *Fresno Bee*. In that case, the Board reached the same conclusion that we reach today when it affirmed without further comment the judge's conclusion, and supporting analysis, that no such obligation exists when an employer exercises discretion within the framework of an established disciplinary policy.

The General Counsel in *Fresno Bee* specifically argued that the employer violated Section 8(a)(5) of the Act by failing to notify the union and bargain to impasse prior to disciplining several bargaining-unit employees. Each disciplinary action was undisputedly taken in accord with an established disciplinary policy and while the parties were still negotiating a first bargaining agreement. The General Counsel maintained that even though the disciplinary actions taken did not involve a unilateral change in the established policy, they were nevertheless unilateral changes within the meaning of *Katz* because each action involved the exercise of discretion inherent in the overall policy.

In support of this theory of violation, the General Counsel relied on two Board cases, *Eugene Iovine* and *Adair Standish*.[10] The judge distinguished both cases, neither of which involved disciplinary actions. *Iovine* involved a decision to reduce employee hours, and *Adair* involved a decision about the selection of employees for occasional economic layoffs. Both cases involved the exercise of management discretion, but unlike in *Fresno Bee*, the employer actions were not consistent with any established practice. As the judge correctly noted, "[i]n *Iovine*, there was a demonstrable change from preceding practices and in *Adair* there was no established method for determining when layoffs would occur or which employees would be selected." 337 NLRB at 1186. Accordingly, under *Katz*, the employers in both cases had an obligation to bargain with the respective unions prior to taking actions that constituted material changes in working conditions.

The judge then rejected the General Counsel's contention that the exercise of any discretion, even if consistent with an established disciplinary policy, necessarily meant that each individual disciplinary action involved a material change requiring bargaining under *Katz*. She reasoned that

> [e]mployee discipline, regardless of how exhaustively codified or systematized, requires some managerial discretion. The variables in workplace situations and employee behaviors are too great to obviate all discretion in discipline. Here, however, Respondent maintains detailed and thorough written discipline policies and procedures that long antedate the Union's advent. The fact that the procedures reserve to Respondent a degree of discretion or that every conceivable disciplinary event is not specified does not alone vitiate the system as a past practice and policy . . . . There is no evidence that Respondent did not apply its preexisting employment rules or disciplinary system in determining discipline herein. Therefore, Respondent made no unilateral change in lawful terms or conditions of employment when it applied discipline.

Id. at 1186–1187 (footnotes omitted).

In spite of the fact that the Board's decision in *Fresno Bee* was an unqualified affirmation of the judge's thorough analysis and resulting conclusion that the respondent in that case had not made a unilateral change, the *Total Security* majority claimed that "the Board has never clearly and adequately explained how (and to what extent) the [*Katz* unilateral-change] doctrine requiring employers to bargain over discretionary aspects of unilateral changes applies to the discipline of individual employees." 364 NLRB No. 106, slip op. at 1.[11] In general, the majority relied on precedent applying *Katz* in other contexts, including the *Iovine* and *Adair Standish* cases distinguished by the judge in *Fresno Bee* as well as *Oneita Knitting Mills*, 205 NLRB 500 (1973), which is similarly distinguishable.[12]

[10] *Eugene Iovine, Inc.*, 328 NLRB 294 (1999); *Adair Standish Corp.*, 292 NLRB 890 (1989), enfd. in relevant part 912 F.2d 854 (6th Cir. 1990).

[11] In a sense, that was true: the Board had never explained how the *Katz* unilateral-change doctrine *applies* to the discipline of individual employees because it had explained, in *Fresno Bee*, that *Katz* does *not* apply to the discipline of individual employees pursuant to unchanged disciplinary policies. This, the *Total Security* majority disregarded.

[12] The judge in *Oneita*, whose decision was affirmed in relevant part without comment by the Board, found that the employer exercised unfettered discretion in determining the amount of individual merit wage increases. The judge therefore correctly found that advance notice and bargaining was required under *Katz*. However, as dissenting Board members have observed, the Board has incorrectly interpreted *Oneita* in subsequent cases, including *Total Security*, as support for the proposition that *any* discretionary action taken, even if consistent with an established practice or policy, is a material change requiring bargaining under *Katz*.

The majority also claimed to find strong support in *Washoe Medical Center*, 337 NLRB 202 (2001), which it described as the Board's "only substantive discussion of the obligation to bargain over discretionary discipline prior to *Fresno Bee.*" 364 NLRB No. 106, slip op. at 1. The three-member panel in *Washoe* affirmed on other grounds the judge's dismissal of an allegation that the employer violated Section 8(a)(5) by failing to give the union notice and opportunity to bargain prior to taking disciplinary actions that involved the exercise of discretion consistent with an established disciplinary practice. It is true that a footnote in the panel decision stated, without elaboration, that in light of *Oneita*, the panel rejected the judge's comment that the General Counsel had to do more than "show only some exercise of discretion to prove the alleged violation." 337 NLRB at 202 fn. 1. However, the *Total Security* majority failed to mention that the judge in *Washoe* was also the judge in the subsequent *Fresno Bee* case and made essentially the same analysis with respect to the General Counsel's failure to prove the same alleged violation. Notably, the Board panel that unanimously affirmed the judge's analysis in *Fresno Bee* included two members of the *Washoe* panel. In these circumstances, we find that *Fresno Bee* implicitly overruled *Washoe* in relevant part. The *Total Security* majority at least tacitly acknowledged this when finding it necessary to overrule *Fresno Bee*.[13]

Apart from the holding in *Fresno Bee*, language in the Supreme Court's *Weingarten* decision also generally supports the conclusion that employers do not have a statutory prediscipline bargaining obligation. In *Weingarten*, the Court agreed with the Board that a bargaining-unit employee has the right to request that a union representative be present when the employee reasonably believes that an investigatory interview could result in discipline. In doing so, the Court quoted with approval language from two Board cases, *Quality Mfg. Co.*, 195 NLRB 197 (1972), and *Mobil Oil Corp.*, 196 NLRB 1052 (1972), that not only established this right to representation but also "shaped the contours and limits of that statutory right."[14] Specifically, the Court endorsed the Board's statements in those cases that the exercise of the right to representation during an investigatory interview "may not interfere with legitimate employer prerogatives," 420 U.S. at 258, and that, should an employee decline to participate in an investigatory interview, "'[t]he employer would then be *free to act* on the basis of information obtained from other sources,'" id. at 259 (quoting *Mobil Oil Corp.*, 196 NLRB at 1052) (emphasis added); accord *Quality Mfg. Co.*, 195 NLRB 197. Most significantly, the Court also emphasized that "the employer has no duty to bargain with any union representative," 420 U.S. at 259, and quoted approvingly the Board's statement in *Mobil Oil* that "'we are not giving the Union any particular rights with respect to pre-disciplinary discussions which it otherwise was not able to secure during collective-bargaining negotiations,'" id. (quoting *Mobil Oil Corp.*, 196 NLRB at 1052 fn. 3).[15]

The *Total Security* majority emphasized that the specific issue decided in *Weingarten*—whether represented employees have the Section 7 right to request that a union representative be present at investigatory interviews—is different from the question of whether an employer has any Section 8(d) obligation to bargain with a union before imposing discipline. It also attempted to cabin the above-quoted statements in *Weingarten* as dicta applicable only to prediscipline investigations, with no relevance to whether an employer must bargain with a union prior to imposing discipline. No one disputes that *Weingarten* ultimately answered a different question than the question presented here. But the *Total Security* decision fails to come to grips with the fact that the Supreme Court's approval of the Board's answer to the question of limited union representation during a prediscipline investigatory interview was based in substantial part on the view that the result would not interfere with extant bargaining obligations and employer prerogatives. We must assume that the Court was fully aware that Board law at that time did not impose any obligation on an employer to bargain with a union prior to imposing discipline on individual employees. Accordingly, there is no other reasonable interpretation of the Court's unqualified statements about an employer's bargaining duty and a union's bargaining rights than to conclude that the Court implicitly approved the state of law as it then existed.[16]

See, e.g., *Washoe Medical Center, Inc.*, 337 NLRB 202, 203 (2001) (Member Hurtgen, dissenting), and *Washoe Medical Center, Inc.*, 337 NLRB 944, 945–946 (2002) (Member Cowen, dissenting). As discussed below, that incorrect view of general bargaining obligations under *Katz* was inconsistent with other Board precedents and was expressly rejected in *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017).

[13] Should there be any doubt about *Washoe*'s continuing validity, we overrule it to the extent inconsistent with our decision today.

[14] *Weingarten*, 420 U.S. at 256.

[15] In upholding the Board's recognition of the statutory right to representation prescribed in *Weingarten*, the Court also noted that the right was "in full harmony with actual industrial practice. Many important collective-bargaining agreements have provisions that accord employees rights of union representation at investigatory interviews." 420 U.S. at 267 (citations omitted). It is telling that the new right created in *Total Security* is, in fact, contrary to industry practice, where most collective-bargaining agreements do not require such predisciplinary bargaining.

[16] The *Total Security* majority opined that even if the Supreme Court's dicta in *Weingarten* was applicable to the issue presented here, its holding was defensible because of the Board's right to "change its position as long as it explains the rationale for the change." *Total Security*, 364 NLRB No. 106, slip op. at 7 fn. 17. We seriously question

As stated above, *Total Security* cannot be reconciled with precedent specifically supporting the view that there is no statutory prediscipline bargaining obligation, giving due consideration to the unique characteristics of disciplinary decision making, which necessarily involves some managerial discretion. However, the greatest failing of *Total Security* is the majority's fundamentally mistaken interpretation of the *Katz* unilateral-change doctrine regarding when a material change has occurred in employees' terms and conditions of employment. Sections 8(a)(5) and (d) of the Act require an employer to bargain in good faith, upon request, with the collective-bargaining representative of unit employees with respect to wages, hours, and other terms and conditions of employment. In *Katz*, the Supreme Court held that, upon commencement of a bargaining relationship, employers of union-represented employees are required to maintain the status quo, i.e., refrain from making a material change regarding any term or condition of its employees' employment that constitutes a mandatory subject of bargaining, unless notice and an opportunity to bargain regarding a contemplated change to the status quo is provided to the union. *NLRB v. Katz*, 369 U.S. 736 (1962).[17]

In some circumstances, maintaining the status quo actually requires an employer to make changes. See id. at 746; see also *Post-Tribune Co.*, 337 NLRB 1279, 1280 (2002). This often occurs when an employer's practice or policy itself has become a term and condition of employment. For instance, when an employer has an established practice of granting raises every year, *Katz* prohibits the employer from materially deviating from that practice without affording the union notice and an opportunity to bargain.[18] This principle is often referred to as the "dynamic status quo" and was described by Professors Gorman and Finkin in their well-known labor law treatise as follows:

> [T]he case law (including the *Katz* decision itself) makes clear that conditions of employment are to be viewed dynamically and that the status quo against which the employer's "change" is considered must take account of any regular and consistent past pattern of change. An employer modification consistent with such a pattern is not a "change" in working conditions at all.[19]

In *Raytheon*, supra, 365 NLRB No. 161, the Board acknowledged this principle and held that an employer's "change" following the expiration of a collective-bargaining agreement, based on and preserving the status quo of the employer's past practice, does not violate Section 8(a)(5) of the Act notwithstanding that it involves the exercise of discretion. See id., slip op. at 13. In doing so, the Board specifically rejected the idea that "every action constitutes a change within the meaning of *Katz*, regardless of what an employer has done in the past, if the employer's actions involve any discretion." Id. *Raytheon* thus recognized that discretionary aspects of a policy or practice are as much a part of the status quo as the nondiscretionary aspects.

Katz itself addressed employer actions taken after commencement of a bargaining relationship but before the parties have bargained to agreement or impasse, and the same bargaining principles apply as defined in *Raytheon*. In this critical respect, the *Total Security* majority erred by looking only at whether the application of an employer's preexisting disciplinary policy or practice to discipline an individual employee included the use of *any* discretion and holding that the exercise of that discretion always means a "change" occurred within the meaning of *Katz* requiring advance notice and bargaining. Furthermore, the majority in *Total Security* so held even when acknowledging that it is impossible for an employer to craft a disciplinary policy that would cover every conceivable scenario such that the exercise of discretion would never be required. 364 NLRB No. 106, slip op. at 11 (observing that "discretion is inherent—in fact, unavoidable—in most kinds of discipline"). As a result, under *Total Security Management* almost every serious individual disciplinary action would constitute a material change in terms and conditions of employment requiring prior notice and an opportunity to bargain under *Katz*. This is precisely the rationale that the Board rejected in *Raytheon* as "incompatible with established law as reflected in *NLRB v. Katz* as well as fundamental purposes of the Act." 365 NLRB No. 161, slip op. at 10.

Instead, we find that the correct analysis under *Katz* must focus on whether an employer's individual disciplinary action is similar in kind and degree to what the employer did in the past within the structure of established

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whether the quoted language from the Court's opinion was dicta, inasmuch as the Court treated the reasoning reflected there as necessary to the result it reached. Even if properly characterized as dicta, the meaning of the Court's language is clear, and we have serious doubts whether the Board has the authority to "change its mind" in contravention of the Court's own mindset.

[17] The same principles apply upon expiration of a collective-bargaining agreement. See *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198 (1991).

[18] See, e.g., *Arc Bridges, Inc.*, 355 NLRB 1222 (2010), enf. denied 662 F.3d 1235 (D.C. Cir. 2011); *Daily News of Los Angeles*, 315 NLRB 1236 (1994), enfd. 73 F.3d 406 (D.C. Cir. 1996); *Central Maine Morning Sentinel*, 295 NLRB 376 (1989).

[19] Robert A. Gorman, Matthew W. Finkin, *Labor Law Analysis and Advocacy*, at 720 (Juris 2013).

policy or practice. See id., slip op. at 16. "The fact that [policies or practices] reserve to [the employer] a degree of discretion or that every conceivable disciplinary event is not specified does not alone vitiate the system as a past practice and policy." *Fresno Bee*, above at 1188. As such, in order to maintain the status quo, an employer must continue to make decisions materially consistent with its established policy or practice, including its use of discretion, after the certification or recognition of a union. To do otherwise would constitute a change from its preexisting policy or practice, prohibited by *Katz*.

Finally, not only is the *Total Security* prediscipline bargaining obligation contrary to the fundamental principles set forth in *Katz*, *Weingarten*, and Board precedent discussed above, it also cannot be reconciled with other aspects of the law governing collective-bargaining practices under the Act. Recognizing the obvious fact that requiring employers to bargain in advance over the discretionary aspects of all decisions involving serious individual disciplinary actions would invariably "interfere with legitimate employer prerogatives"[20] by delaying those actions, the *Total Security* majority purported to "minimize the burden on employers"[21] by creating a hybrid bargaining scheme without parallel in Board precedent and bereft of statutory support. Under this scheme, the duty to engage in prediscipline bargaining only applies when "serious discipline" is contemplated, not lesser discipline, although both are material aspects of the same mandatory bargaining subject. Next, this duty to bargain arises after the decision has been made to impose serious discipline but before the discipline is imposed, and it requires bargaining about the decision itself. Finally, the prediscipline bargaining obligation does not require the parties to bargain to agreement or impasse before the employer is permitted to impose discipline, as long as bargaining continues thereafter. 364 NLRB No. 106, slip op. at 9. It is unclear exactly when discipline could be lawfully imposed after bargaining has commenced.

In sum, *Total Security* shredded longstanding principles governing the duty to bargain. It announced separate bargaining obligations for a single mandatory bargaining subject, mandating a bifurcated bargaining process for serious discipline and a single, unified post-discipline process for what might be deemed lesser discipline. There is no basis in Section 8(d) of the Act or its application in precedent governing collective-bargaining practice for making those distinctions with respect to the duty to bargain. In determining whether a statutory bargaining obligation exists, the Board only considers whether the employer contemplates an action that will effect a material change in a mandatory subject of bargaining. The Board does not further evaluate the severity of that material change, in terms of its impact on an employee or employees, in determining when the employer must furnish notice and opportunity to bargain. Further, prior to *Total Security*, the statutory obligation to engage in decision bargaining was understood to require notice and opportunity to bargain *before* a decision is made,[22] while effects bargaining (addressing the impact of the decision) arises *after* the decision has been made but before it is implemented.[23] Finally, once the duty to bargain attaches, an employer is typically not allowed to implement its decision until the parties have reached agreement or good-faith impasse.[24] These settled principles, familiar to every practitioner of traditional labor law, the *Total Security* majority simply pushed aside.

Total Security also nominally provided an exception to the prediscipline bargaining obligation. First, it allowed an employer to avoid this obligation when an employee's "continued presence on the job presents a serious, imminent danger to the employer's business or personnel." 364 NLRB No. 106, slip op. at 9. Only then could an employer act unilaterally, i.e., without providing the union notice and an opportunity to bargain. Presumably, in the likely event of Board litigation over an alleged bargaining violation, the burden of proving this exigent danger would be on the employer, as is the case for other exigent circumstances limiting or excusing the bargaining obligation.[25] Employers confronted with a potentially dangerous employee would have to act at risk of violating the Act and incurring remedial liability. This is particularly so inasmuch as *Total Security* provided no guidance as to when this exception would apply, stating only that the "scope of such exigent circumstances is best defined going forward, case by case." Id., slip op. at 9. In other words, the message of the *Total Security* majority to employers torn between erring on the side of safety and avoiding liability was, "the correct choice is for us to know and for you to find out."

[20] *Weingarten*, 420 U.S. at 258.

[21] 364 NLRB No. 106, slip op. at 8.

[22] See, e.g., *National Family Opinion, Inc.*, 246 NLRB 521, 530 (1979) (finding unlawful employer's decision to subcontract because union was only told of "a completed decision rather than a decision yet to be finalized").

[23] See, e.g., *Willamette Tug & Barge Co.*, 300 NLRB 282, 282–283 (1990) ("[T]he employer's duty [is] to give preimplementation notice to the union to allow time for effects bargaining.")

[24] See, e.g., *Triple A Fire Protection*, 315 NLRB 409, 414 (1994), enfd. 136 F.3d 727 (11th Cir. 1998), cert. denied 525 U.S. 1067 (1999); *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), enfd. mem. sub nom. *Master Window Cleaning, Inc. v. NLRB*, 15 F.3d 1087 (9th Cir. 1994).

[25] See, e.g., *RBE Electronics of S.D.*, 320 NLRB 80 (1995); *Bottom Line Enterprises*, supra.

The *Total Security* decision also purported to provide employers a safe harbor alternative, permitting parties to negotiate and implement an interim grievance-arbitration procedure to address disciplinary decisions before reaching a final collective-bargaining agreement. 364 NLRB No. 106, slip op. at 9 fn. 22. Only in this manner could an employer elude the cumbersome and confusing pre-discipline bargaining obligations. Yet the establishment of this interim safe harbor grievance-arbitration policy would require separate bargaining over a single issue while the parties are still engaged in overall negotiations. Section 8(d) and its interpretation in judicial and Board precedent strongly disfavor such piecemeal bargaining. First-contract bargaining is difficult enough without the prospect of separate bargaining over the creation of an interim disciplinary system which would itself then continue to be the subject of further bargaining in the parties' negotiations for an overall contract. Moreover, any such bargaining over an interim safe harbor agreement would have to be consensual. It is clear that the Act would preclude forcing either party to agree to an interim arrangement, and no party would violate the Act if it refused to bargain for such. Indeed, it is difficult to understand why a union intent on maximizing its advantage in collective bargaining would ever consent to negotiate an interim disciplinary agreement, when it could just as well use the employer's desire to be free of pre-disciplinary bargaining as leverage in negotiations for an overall agreement. In reality, the supposed safe harbor offered by *Total Security* is illusory.

All in all, the lengths to which the *Total Security* majority went to devise a contorted bargaining scheme at odds with traditional bargaining practices only underscore the error of the decision to impose *any* pre-discipline bargaining obligation. Both the rationale for that decision and the scheme for its enforcement are insupportable as a matter of law and logic.

For all of the reasons stated above, we overrule the new bargaining requirements imposed by the *Total Security* majority and return to long-standing law establishing that, upon commencement of a collective-bargaining relationship, employers do not have an obligation under Section 8(d) and 8(a)(5) of the Act to bargain prior to disciplining unit employees in accordance with an established disciplinary policy or practice. As dissenting Member Miscimarra cogently observed in *Total Security*, "it is not plausible to believe these new requirements have support in our statute but somehow escaped the attention of Congress, the Supreme Court, other courts, and previous Boards for the past 80 years."[26] Today's decision restores the state of the law governing pre-discipline bargaining to what it was during that long period of experience under the Act and from which *Total Security* impermissibly diverged.

Retroactive Application of the Correct Standard

"The Board's usual practice is to apply new policies and standards retroactively 'to all pending cases in whatever stage.'" *SNE Enterprises*, 344 NLRB 673, 673 (2005) (quoting *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1006–1007 (1958)). Under Supreme Court precedent, "the propriety of retroactive application is determined by balancing any ill effects of retroactivity against 'the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles.'" Id. (quoting *Securities & Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 203 (1947)).

We do not envision that any ill effects will result from applying the standard we announce here to this case and to all pending cases. No party that has acted in reliance on *Total Security Management* will be found to have violated the Act as a result of our decision today. In reliance on *Total Security Management*, parties may have engaged in bargaining that our decision today renders unnecessary, but such bargaining is merely rendered superfluous by our decision, not unlawful. True, parties will have been put to unnecessary time and expense, but those were consequences of the decision we overrule, not of applying our decision retroactively. The four individuals whose discipline is at issue in this case will apparently also suffer no manifest injustice from retroactive application, inasmuch as the Charging Party noted in its Motion for Partial Withdrawal that it had determined those employees engaged in misconduct and were disciplined "for cause." On the other hand, failing to apply the new standard retroactively would "produc[e] a result which is contrary to a statutory design or to legal and equitable principles." *SEC v. Chenery Corp.*, above. As we have explained, *Total Security Management* was contrary to decades-old Board and Court precedent, and it was ill-advised on policy

[26] Our decision today falls in line with other judicial and Board decisions rejecting recent efforts to identify and enforce new rights and obligations under the Act that had somehow managed to escape notice for decades. In *Epic Systems v. Lewis*, 138 S. Ct. 1612 (2018), the Supreme Court resoundingly rejected the Board's attempt to read into Sec. 7 of the Act a new substantive employee right to engage in class actions. It noted that "[t]his Court has never read a right to class actions into the NLRA—and for three quarters of a century neither did the National Labor Relations Board." Id. at 1619. In *Chamber of Commerce v. NLRB*, 721 F.3d 152 (4th Cir. 2013), the court rejected the attempt "to create a new ULP based on the failure to post notices educating employees about their Section 7 rights." Id. at 163. And in *Velox Express, Inc.*, 368 NLRB No. 61 (2019), the Board rejected an argument advocating the establishment of an unprecedented unfair labor practice that would require finding that an employer's misclassification of its employees as independent contractors, standing alone, is a per se violation of Sec. 8(a)(1).

grounds. Accordingly, we find that application of our new standard in this and all pending cases will not work a "manifest injustice." *SNE Enterprises*, above. We shall do so now.

Thus, applying the principles set forth above and in *Fresno Bee*, we reverse the judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act. The Respondent applied its preexisting disciplinary policy, which included the use of discretion, in disciplining the four employees, which it is lawfully permitted to do. We therefore dismiss the corresponding complaint allegation that the Respondent unlawfully failed to provide notice and an opportunity to bargain before imposing discipline.

ORDER

The National Labor Relations Board orders that the Respondent, 800 River Road Operating Company, LLC d/b/a Care One at New Milford, New Milford, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Changing the terms and conditions of employment of its unit employees, including reducing payroll hours, without first notifying the Union and giving it an opportunity to bargain.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the change in the terms and conditions of employment for its unit employees that were unilaterally implemented.

(b) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

> All full time and regular part time nonprofessional employees including licensed practical nurses, certified nursing aides, dietary aides, housekeepers, laundry 10 aides, porters, recreation aides, restorative aides, rehabilitation techs, central supply clerks, unit secretaries, receptionists, and building maintenance workers employed by the Employer at its New Milford, New Jersey facility, but excluding all office clerical employees, cooks, registered nurses, dieticians, physical therapists, physical therapy assistants, occupational therapists, 15 occupational therapy assistants, speech therapists, social workers, staffing coordinators/schedulers, payroll/benefits coordinators, MDS specialists, MDS data clerks, account payable clerks, account receivable clerks, all other professional employees, guards, and supervisors as defined in the Act.

(c) Make affected employees whole for any loss of earnings and other benefits suffered as a result of the reduction in their payroll hours, in the manner set forth in the remedy section of the decision.

(d) Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 22, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amounts of backpay due under the terms of this Order.

(f) Post at its New Milford, New Jersey facility copies of the attached notice marked "Appendix."[27] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the

[27] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 1, 2014.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. June 23, 2020

_____

John F. Ring, Chairman

_____

Marvin E. Kaplan, Member

_____

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT change your terms and conditions of employment, including reducing payroll hours, without first notifying the Union and giving it an opportunity to bargain.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the changes in the terms and conditions of employment for our unit employees that were unilaterally implemented.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following bargaining unit:

> All full time and regular part time nonprofessional employees including licensed practical nurses, certified nursing aides, dietary aides, housekeepers, laundry 10 aides, porters, recreation aides, restorative aides, rehabilitation techs, central supply clerks, unit secretaries, receptionists, and building maintenance workers employed by the Employer at its New Milford, New Jersey facility, but excluding all office clerical employees, cooks, registered nurses, dieticians, physical therapists, physical therapy assistants, occupational therapists, 15 occupational therapy assistants, speech therapists, social workers, staffing coordinators/schedulers, payroll/benefits coordinators, MDS specialists, MDS data clerks, account payable clerks, account receivable clerks, all other professional employees, guards, and supervisors as defined in the Act.

WE WILL make affected employees whole for any loss of earnings and other benefits suffered as a result of our unlawful reduction in payroll hours, plus interest.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 22, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

800 RIVER ROAD OPERATING COMPANY, LLC D/B/A
CARE ONE AT NEW MILFORD

The Board's decision can be found at https://www.nlrb.gov/case/22-CA-204545 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Sharon Chau, Esq., for the General Counsel.
Stephen C. Mitchell, Esq., Seth Kaufman, and *Brian Gershengorn (Fisher & Phillips, LLP),* for the Respondent.
William S. Massey, Esq. and *Jessica E. Harris, Esq. (Gladstein, Reif & Meginniss, LLP),* for the Charging Party Union.

DECISION

STATEMENT OF THE CASE

BENJAMIN W. GREEN, Administrative Law Judge. A trial was conducted in this matter on July 10, 2018 in Newark, New Jersey. The complaint, as amended at trial, alleges that the Respondent unilaterally, without notifying and offering to bargain with the Union, (1) reduced the work hours of 20-unit employees and (2) discharged one and suspended three-unit employees. The Respondent has denied these allegations. Additional complaint allegations were resolved by the parties and/or withdrawn by the General Counsel prior to trial. As discussed at length below, I find merit to the allegations which were litigated.

Posthearing briefs were filed by the General Counsel, the Respondent, and the Union.

On the entire record, I make the following findings, conclusions of law, and recommendations.

JURISDICTION

The Respondent is a New Jersey Limited Liability Company with an office and place of business in New Milford, New Jersey and has been engaged in the business of providing long-term and posthospital rehabilitation care. During the 12-month period before the complaint issued, the respondent derived gross revenues in excess of $100,000. During the same time period, the Respondent purchased and received at its New Milford, New Jersey facility goods and supplies valued in excess of $5000 directly from suppliers located outside the State of New Jersey.

At all material times, the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Union has been a labor organization within the meaning of Section 2(5) of the Act. Based on the foregoing, I find that this dispute affects commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

UNFAIR LABOR PRACTICES

Findings of Fact

Procedural history

Pursuant to a representation petition filed January 23, 2012 and a stipulated election agreement approved on February 7, 2012, an election was conducted on March 9, 2012, in case 22–RC–073078 among the following unit of employees:

> All full time and regular part time nonprofessional employees including licensed practical nurses, certified nursing aides, dietary aides, housekeepers, laundry aides, porters, recreation aides, restorative aides, rehabilitation techs, central supply clerks, unit secretaries, receptionists and building maintenance workers employed by the [Respondent] at its New Milford, New Jersey facility, but excluding all office clerical employees, cooks, registered nurses, dieticians, physical therapists, physical therapy assistants, occupational therapists, occupational therapy assistants, speech therapists, social workers, staffing coordinators/schedulers, payroll/benefits coordinators, MDS specialists, MDS data clerks, account payable clerks, account receivable clerks, all other professional employees, guards and supervisors as defined in the Act.

A majority of the unit employees voted in favor of representation.

The Respondent filed objections to the election, but those objections were overruled by the Board in decisions dated July 2, 2012, and January 9, 2013. In its January 9, 2013 decision, the Board certified the Union as the bargaining representative of unit employees. *800 River Road Operating Co.*, 359 NLRB 522 (2013). The Respondent tested this certification by refusing to bargain. Upon additional developments, including the Supreme Court's decision in *NLRB v. Noel Canning*, 573 U.S. 513 (2014), on November 26, 2014, the Board conducted a de novo review of the Respondent's election objections, rejected those objections, and issued a new Certification of Representative. On June 15, 2015, the Board found that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union. On January 24, 2017, the United States Court of Appeals for the District of Columbia Circuit enforced the Board's order. On March 21, 2017, the same Court of Appeals issued a formal mandate in accordance with its judgment of January 24, 2017.

Change in hours

The General Counsel contends that the following employees had their hours reduced during the payroll period ending on the dates listed below (third column):

Name	**Title**	**Hours Change in Payroll Period Ending**
Abraham, Mariamma	Recreation Assistant	2/1/2014
Boby, Rosilin	Recreation Assistant	2/1/2014
Jiminez, Sara	Recreation Assistant	2/1/2014
Timms, Donna	Recreation Assistant	2/1/2014
Tom, Shiril	Recreation Assistant	2/1/2014
Bustos, Benjamin	Dietary Aide	7/19/2014
Coronado, Evelyn	Dietary Aide	7/19/2014
Farr, Elaine	Dietary Aide	7/19/2014
Fontanez, Enrique	Dietary Aide	7/19/2014
Ricarze, Vicente	Dietary Aide	7/19/2014
Tolentino, Allan	Dietary Aide	7/19/2014
Varhese, George	Dietary Aide	7/19/2014
Bazile, Desinette	Housekeeper	7/19/2014
Benoit, Julienne	Housekeeper	7/19/2014
Murray, Paulette	Housekeeper	7/19/2014
Abouzeid, Charles	Laundry Aide	7/19/2014
Ramkhalawan, Jean	Laundry Aide	7/19/2014
Irabon, Edgardo	Porter	7/19/2014
Hegarty, Andrew	Maintenance Worker	9/16/2014
Sormani, Dawn-Marie	Receptionist	3/28/2015

The Respondent introduced into evidence a wage and benefit

summary which indicates that it was "revised 5/1/2019." The wage and benefit summary includes a provision on paid leave which states, in part, as follows:

> **3) VACATION/HOLIDAY /SICK TIME**
>
> **General Provisions/Eligibility and Waiting Periods:**
>
> Employees actively employed on a full-time basis (regularly work 37.5 hours or more per week) are eligible for vacation, holiday pay, and sick time. Employees actively employed on a part-time basis (regularly work 24 to less than 37.5 hours per week) are eligible for pro-rated vacation, holiday pay, and sick time.
>
> . . . .
>
> 4. Depending on your position and work schedule, hourly and salaried employees generally work either 7.5 hour /day up to 37.5 hours /week or they may work 8 hours /day up to 40 hours /week.
>
> . . . .
>
> **Vacation Provisions:**
>
> 6. Employees may use their accrued vacation hours in a minimum of 30-minute increments. To schedule vacation, employees must give their supervisor a written request at least four weeks in advance, or Center practice, whichever is greater. Approval of vacation requests is based on the needs of the Center and made in the discretion of the Supervisor. Consideration of vacation requests is given on a first come, first served basis. When vacation requests are received at the same time, tenure with the Center will also be considered.
>
> . . . .
>
> 13. Vacation hours may be taken based upon an employee's regularly scheduled work day up to a maximum of twelve (12) hours. For example, an employee who is regularly scheduled to work a seven and one-half (7 5) hour day may take seven and one-half (7.5) hours of vacation time.
>
> **Sick Time Provisions:**
>
> . . . .
>
> 10. Employees may use their accrued sick time hours in a minimum of 30-minute increments.
>
> 11. Sick time hours may be used based upon an employee's regularly scheduled work day up to a maximum of twelve (12) hours. For example, an employee who is regularly scheduled to work a seven and one-half (7.5) hour day may use seven and one-half (7.5) sick time hours.
>
> . . . .
>
> **Holiday Provisions:**
>
> . . . .
>
> 3. Eligible-time and part-time hourly and salaried employees will receive holiday pay based on the average number of hours paid in each pay period in the most recent three (3) full calendar months up to a maximum of seven and one-half (7.5) hours for each holiday (8 hours of pay for employees who work an 8 hour daily schedule).

Attached to this decision as Appendix B are tables reflecting the hours of each employee in question by payroll period and week, including regular time, overtime, retro hours, sick leave used, vacation leave used, and holiday hours.

The parties stipulated that the Respondent did not give the Union notice and an opportunity to bargain in advance of any alleged reduction of hours.

The General Counsel relies exclusively on documents (particularly payroll records) and stipulations to establish a unilateral change in hours.[1] The payroll records introduced by the General Counsel indicate that employees largely accumulated (including time worked and leave) 40 hours per week before the payroll period in which their hours were allegedly reduced and 37.50 hours per week during and after the payroll period in which their hours were allegedly reduced. However, this pattern was not entirely consistent. Thus, it was not uncommon for employees to accumulate 39 to 39.75 hours per week before the alleged change and it was not uncommon for employees to accumulate up to 38.75 hours after the alleged change. It was far more rare for an employee to accumulate less than 39 hours in a week before the alleged change or more than 38.75 hour after the alleged change.[2]

Payroll leave deductions were also cited as a basis for evaluating a change in employee work weeks from 40 hours to 37.5 hours. Thus, for example, paystubs of Coronado, Farr, Tolentino and Hegarty reflect the use of sick and vacation time in 8-hour increments (corresponding to a 40-hour work week) before the alleged change in hours and increments of 7.5 hours (corresponding to a 37.5-hour work week) during or after the alleged changed.[3] More broadly, a review of the payroll records of all the employees in question reflect that sick/vacation was largely taken in 8-hour increments before the alleged change and 7.5-hour increments were largely taken after the alleged change. However, the payroll records are not entirely consistent in this regard either.

Maureen Montegari was called by the Respondent and the only witness to testify at trial. Montegari is employed by Care One Management LLC (Care One). She was a Care One Regional Director of Human Resources from 2010 to 2012, when she was promoted to Vice President of Human Resources (her

[1] The General Counsel did not call any witnesses at trial. The Respondent contends that the General Counsel "cherry picked" payroll records (immediately before and after the alleged change) which were favorable to its case. The Respondent's counsel indicated at trial an intention to introduce the "full" payroll records for a larger time period. However, the Respondent only introduced additional payroll records (beyond the General Counsel's submission) for one employee (Hegarty).

[2] These instances are highlighted in Appendix B.

[3] I consider increments of 8 and 7.5 hours to include multiples of those numbers, respectively. Thus, 16 or 24 hours of leave reflects 8-hour increments while 15 and 22.5 hours of leave reflects 7.5-hour increments. The payroll records also contain certain limited increments of leave that were not 8 hours or 7.5 hours (i.e., during the June 7, 2014 payroll period, Fontanez took 9 hours of sick leave the first week and Coronado took 10.5 hours of sick leave the second week).

current position). She has had responsibilities for the Respondent's facility in Milford, New Jersey in both positions.

Montegari testified that, since at least 2009 (when the wage and benefit summary was revised), full time employees have regularly been scheduled to work 37.5 hours per week but may work additional hours if they pick up an extra shift (for example, if someone calls in sick). According to Montegari, the shortest shifts are the 4-hour shifts worked by certain part time employees. Montegari testified that a facility administrator may sometimes hire full time employees (particularly rehab techs and rehabilitation assistants) to work 40-hour weeks as an "exception" in light of the needs of the facility. However, Montegari is not involved in these decisions.

With regard to particular employees at issue in this case, Montegari testified that Sormani was transferred from unit secretary to receptionist and speculated that the facility administrator changed Sormani's hours from 40 hours to 37.5 hours as a result. However, Montegari admitted that she "was not part of [Sormani's] transfer to a new position." Montegari also identified a master schedule for the period December 2015 to April 2017, which shows that Hegarty was largely scheduled to work 40-hour weeks throughout this time period.[4] However, Montegari testified that "the schedule does not capture whether or not the hours were worked[,][i]t captures what they were scheduled to work."

Suspensions and discharge

The Respondent took the following adverse employment actions against the employees named below:

Employee	**Adverse Employment Action**	**Date of Action**
Jasmine Gordon	Suspended	October 10, 2016
Shantai Bills	Discharged	January 4, 2017
Linda Rhoads	Suspended	February 1, 2017
Jesus Mendez	Suspended	March 23, 2017

The parties stipulated that the Respondent administered these suspensions and the discharge without notifying and offering to bargain with the Union before doing so. The parties also stipulated that the Union never demanded bargaining regarding these particular adverse employment actions.

ANALYSIS AND CONCLUSIONS

8(a)(1) Allegations

Reduction of hours

The General Counsel contends, and I agree, that the Respondent violated Section 8(a)(1) and (5) of the Act by reducing the hours of 20 unit employees.[5] The Board recently addressed "what constitutes a 'change' requiring notice to the union and the opportunity for bargaining prior to implementation." *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017). In *Raytheon*, the Board found "that the [employer's] modifications in unit employee healthcare benefits in 2013 were a continuation of its past practice of making similar changes at the same time every year from 2001 through 2012."[6] Id. Since ongoing healthcare benefit modifications did "not materially vary in kind or degree from the changes made in prior years," they did not constitute a "change" and could be made unilaterally.

Here, the employees in question largely accrued 40 hours per week before and 37.5 hours per week during or after the payroll period identified by the General Counsel as the period when the change occurred. However, the employees did not always work exactly 40 or 37.5 hour per week. Accordingly, a question arises whether there was a material change in employees' hours or the mere continuation of minor deviations in hours insufficient to establish a "change."

Preliminarily, I note that the changes in hours cannot be attributed to employees working overtime since Montegari testified that employees only worked overtime hours when they picked up additional shifts. Montegari identified the shortest shifts as four hours and the weekly differences in hours at issue here are less than four hours. Therefore, the differences in hours were not the result of employees working additional overtime shifts.

Further, I place no significance on Montegari's testimony or the wage and benefit summary to the extent they indicate that employees were generally scheduled to work 37.5 hours per week.[7] The undisputed evidence demonstrates that some employees worked 40-hour weeks and Montegari was not involved in specific scheduling decisions which were made by administrators at the facility level. The best evidence is payroll records reflecting the hours employees actually accumulated each week. See *Electronic Data Systems International Corp.*, 278 NLRB 125 (1986). The Respondent had the opportunity to present additional payroll records to the extent those introduced by the General Counsel may have been isolated or somehow taken of context, and largely failed to do so.

[4] According to Montegari, the schedule was produced for this period of time because the Respondent began using computerized scheduling software Smartlinx Solutions LLC in December 2015. Before then, much of the schedules were handwritten and are no longer available.

[5] "The Board has long held that an employer 'acts at its peril in making changes in terms and conditions of employment during the period that objections to an election are pending' because if the union is ultimately certified, the employer will have violated Sec. 8(a)(5) by making those changes." *The Ardit Co.*, 364 NLRB No. 130 (2016) quoting *Mike O'Connor Chevrolet*, 209 NLRB 701, 703 (1974), enf. denied on other grounds 512 F.2d 684 (8th Cir. 1975). Here, the Respondent does not contend it was entitled to act unilaterally because the final certification did not issue until November 26, 2014.

[6] *Raytheon* addressed the significance of changes made during the term of a collective bargaining agreement pursuant to a management rights clause, but that is not an issue here.

[7] Likewise, I do not find the master schedules relevant to the extent it shows that Hegarty was scheduled to work 40-hour weeks beginning December 2015. These schedules do not address the payroll periods at the time of the alleged change and do not reflect the hours that Hegarty actually worked.

In this case, the alleged reductions in hours did reflect a material variation in kind and degree as to constitute a "change" which required bargaining. Employees who generally accrued 40 hours per week and rarely if ever accrued less than 39 hours per week experienced a reduction in hours to 37.5-hour weeks and rarely if ever accrued more than 38.75 hours per week after the change.[8] Thus, unlike in *Raytheon*, the Respondent did not effect changes at the same time and in the same manner as it had in the past.

The Respondent contends that the General Counsel did not establish a prima facie case because it "cherry picked" payroll records and did not call any witnesses at trial. However, in my opinion, the General Counsel did establish a prima facie case (and nothing more). The General Counsel introduced sufficient evidence to indicate that, on its face, a change occurred which was different than prior changes. As noted above, the Respondent failed to rebut the General Counsel's evidence or the pattern it demonstrated.

Turning to individual employees specifically addressed by the Respondent in its brief, I do not rely on Montegari's testimony that Sormani's hours were reduced because she (Sormani) changed positions. Montegari admitted that she "was not part of [Sormani's] transfer to a new position." Such testimony without personal knowledge of relevant events and the dates thereof is not helpful.[9]

However, Sormani's hours were more sporadic before the alleged reduction in hours (payroll period ending March 28, 2015) than other employees and this requires a closer look. Five out of 10 weeks prior to the payroll period ending March 28, 2015, Sormani accrued less than 39 hours of pay (as reflected in Appendix B and below):

Payroll Ending	Week 1 - Hours	Week 2 - Hours
1/17/2015	40 + 5.75 OT	34.75
1/31/2015	24 + 16 sick	40 vacation
2/14/2015	40 + 0.25 OT	37.5
2/28/2015	37.75 + 7.5 holiday	30.25 + 8 vacation
3/14/2015	40 + 1.5 OT	38
3/28/2015	37.75	36.50 + 1.33 vacation
4/11/2015	37.5	37.5
4/25/2015	38	37.75
5/9/2015	37.75	37.5
5/23/2015	37.75	38.25
6/6/2015	30 + 7.5 holiday	37.5

Nevertheless, Sormani accumulated 40 hours five out of 10 weeks prior to the payroll period during which the alleged change occurred and did not accrue more than 38.25 hours after the alleged change occurred. Montegari did not actually deny that Sormani's schedule was switched from a 40-hour week to a 37.5-hour week (although, as noted above, she did not evince any personal knowledge of the same). While, in Sormani's case, there is some overlap in the range of hours before and after the alleged unlawful change, I find the evidence sufficient to establish that she experienced a material variation in her hours.[10]

Turning to Hegarty, the one employee for whom the Respondent produced additional payroll records, the additional records did show more discrepancies before and after his alleged change in his hours. Thus, if holiday pay is excluded, records for the payroll periods from January 5, 2013, to August 2, 2014 (before the alleged change in hours during the payroll period ending August 16, 2014) showed that Hegarty accumulated less than 39 hours in 15 weeks. However, this is still a relatively small percentage (18 percent) in the context of 42 payroll periods covering 84 weeks. Far more often, Hegarty accumulated 40 hours per week during this time period. Accordingly, the expanded payroll records prior to the alleged change do not, in my opinion, defeat the General Counsel's case that a change in hours occurred.

The more significant evidence from the Respondent's submission is Hegarty's accumulation of over 40 hours during the first week of the payroll period ending September 27, 2014, and the first weeks of the payroll periods ending October 25 and November 8, 2014. Hegarty also worked 39.75 hours the week ending December 6, 2014. Thus, unlike the other employees, Hegarty went back to working certain 40-hour weeks fairly quickly after the alleged change. On the other hand, from the payroll period ending August 16, 2014 (when the change allegedly occurred) to the end of the year, Hegarty accumulated less than 39 hours 18 of 22 weeks. By contrast, Hegarty accrued at least 40 hours 18 of 22 weeks immediately prior to the payroll period ending August 16, 2014. While the allege change is most ambiguous with regard to Hegarty, I find the evidence sufficient to establish that a change of his hours did occur.

Hegarty's payroll records further show that, beginning the payroll period ending February 28, 2015, his hours returned, more regularly, to 40-hour weeks.[11] While this suggests that Hegarty's 40-hour week may have been reinstated in 2015, it does not change my finding that a unilateral change occurred in the first place. The Respondent argues in its brief that, to the extent the General Counsel established any violation, it must be limited to the pay registers the General Counsel entered into evidence. I do not limit my finding in this regard and any backpay associated with the changes in hours can be fleshed out and determined, if necessary, during a compliance proceeding. However, to the extent it is shown in such a proceeding that unilateral changes were

[8] An employer does not violate Sec. 8(a)(5) of the Act when it unilaterally implements a change that is not "material, substantial and significant." *Pepsi-Cola Bottling Co. of Fayetteville, Inc.*, 330 NLRB 900, 902 (2000). However, the Board has held that a change in hours, even on a limited basis, will be considered significant. *Id.* See also *Beverly Health and Rehabilitation Services, Inc.*, 346 NLRB 1319, 1355 (2006).

[9] The Respondent asserted in its brief that a change in the department code on Sormani's payroll registers for the pay period ending May 9, 2015 reflects a change in her position. However, the record evidence does not indicate what the change in code actually means and, regardless, the change in code occurred after the alleged change in hours (three payroll periods earlier).

[10] Although not specifically addressed by the Respondent, I find that Abraham and Ricarze experienced a change in hours upon the same rational. Like Sormani, Abraham and Ricarze accumulated less than 39 hours in weeks prior to the alleged change in hours. However, more often, they accumulated at least 39 hours in advance of the alleged change and did not accumulate 39 hours after the alleged change.

[11] The Respondent produced Hegarty's payroll records for the period 2013 to 2016. Appendix B only includes the hours from 2013 to 2015. However, Hegarty continued to accrue 40-hour weeks in 2016.

ultimately reversed, the Respondent's liability would be limited on that basis.

Based on the foregoing, I find that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally reducing the hours of employees without notifying the Union and offering to bargain.

Unilateral suspensions and discharge

The General Counsel contends that the Respondent unilaterally suspended three employees and discharged another employee without notifying and offering to bargain with the Union. I agree.

The Board has held that "discretionary discipline is a mandatory subject of bargaining and that employers may not unilaterally impose serious discipline . . . ." *Total Security Management Illinois 1, LLC*, 364 NLRB No. 106 (2016). Serious discipline includes suspension and discharge as those actions "have an inevitable and immediate impact on employees' tenure, status, or earnings." Id. "It is well established that where the manner of the respondent's presentation of a change in terms and conditions of employment to the union precludes a meaningful opportunity for the union to bargain, the change is a fait accompli and a failure by the union to request bargaining will not constitute a waiver. *United States Postal Service*, 366 NLRB No. 168 (2018) citing *Aggregate Industries*, 359 NLRB 1419, 1422 (2013) and *Pontiac Osteopathic Hospital*, 336 NLRB 1021, 1023 (2001). Here, the facts are not in dispute and the Respondent simply asserts that extant precedent should be overruled.

The adverse employment actions taken against the four employees in question were "serious" as the Board defines it and the Respondent admits that it did not give the Union notice and an opportunity to bargain. Further, the Union's subsequent failure to request bargaining over discipline which already issued does not constitute a waiver or a defense. Since I am bound by extant Board precedent, I find that the Respondent violated Section 8(a)(5) and (1) by disciplining employees as alleged in the complaint.

CONCLUSIONS OF LAW

1. The Respondent, 800 River Road Operating Company, LLC d/b/a Care One at Milford, is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent engaged in the following unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act:

(a) Unilaterally reduced the hours of Charles Abouzeid, Mariamma Abraham, Desinette Bazile, Julienne Benoit, Rosilin Boby, Benjamin Bustos, Evelyn Coronado, Elaine Farr, Enrique Fontanez, Andrew Hegarty, Edgardo Irabon, Sara Jiminez, Paulette Murray, Jean Ramkhalawan, Vicente Ricarze, Dawn-Marie Sormani, Donna Timms, Allan Tolentino, Shiril Tom, and George Varhese without notifying and offering to bargain with the Union, 1199 SEIU United Healthcare Workers East.

(b) Unilaterally administered adverse employment actions as follows to the employees listed below without notifying and offering to bargain with the Union:

Employee	***Adverse Employment Action***	**Date of Action**
Jasmine Gordon	Suspended	October 10, 2016
Shantai Bills	Discharge	January 4, 2017
Linda Rhoads	Suspended	February 1, 2017
Jesus Mendez	Suspended	March 23, 2017

3. The unfair labor practices committed by the Respondent affect Commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondents has engaged in certain unfair labor practices, I find that they must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having refused to notify and offer to bargain with the Union regarding a reduction in the hours of certain employees and certain adverse employment actions, I will order Respondent to rescind those unilateral changes. With the exception of Shantai Bills, who was discharged, the Respondent shall make whole any employee whose hours were reduced or who were suspended for any loss of earnings and other benefits suffered as a result of its unlawful actions as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), plus interest as computed in *New Horizons*, 283 NLRB 1173 (1987). See *Community Health Services, Inc.*, 361 NLRB 333 (2014) aff'g. 356 NLRB 744 (2011) and 342 NLRB 398 (2004) after remand.

The Respondent, having unlawfully discharged Bills, must offer her reinstatement to her former job or if her job no longer exists, to a substantially equivalent position without prejudice to her seniority or any other rights or privileges enjoyed. The Respondent shall make Bills whole for any loss of earnings and other benefits suffered as a result of her unilateral discharge. The make whole remedy shall be computed in accordance with *F.W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with *King Scoopers, Inc*., 364 NLRB No. 93 (2016), the Respondent shall compensate Bills for his search-for-work and interim employment expenses regardless of whether those expenses exceed his interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, and compounded daily as prescribed in *Kentucky River Medical Center*, supra. In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), the Respondent shall compensate Hess for the adverse tax consequences, if any, of receiving a lump sum backpay award, and, in accordance with *AdvoServ of New Jersey, Inc*., 363 NLRB No. 143 (2016), the Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, file with the Regional Director for Region 22 a report allocating Bills' backpay to the appropriate calendar year. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner.

The Respondent will be required to remove from its files any reference to the unlawful suspension/discharge of Bills, Jasmine

Gordon, Linda Rhoads, and Jesus Mendez and notify them in writing that their unlawful suspension or discharge will not be used against them in any way.

The Respondent shall be ordered to post the notice attached hereto as "Appendix A."

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

The Respondent, 800 River Road Operating Company, LLC d/b/a Care One at New Milford, New Milford, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally, without notifying and offering to bargain with the Union, 1199 SEIU United Healthcare Workers East, changing the terms and conditions of employment of employees, including the reduction of employees' hours, discharge of employees, and/or suspension of employees.

(b) In any like or related manner interfering, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Shantai Bills reinstatement to her former position or, if her position no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Bills, Jasmine Gordon, Linda Rhoads, and Jesus Mendez whole for any loss of earnings and other benefits suffered as a result of the unilateral adverse employment actions taken against them in the manner set forth in the remedy section of this decision.

(c) Make Charles Abouzeid, Mariamma Abraham, Desinette Bazile, Julienne Benoit, Rosilin Boby, Benjamin Bustos, Evelyn Coronado, Elaine Farr, Enrique Fontanez, Andrew Hegarty, Edgardo Irabon, Sara Jiminez, Paulette Murray, Jean Ramkhalawan, Vicente Ricarze, Dawn-Marie Sormani, Donna Timms, Allan Tolentino, Shiril Tom, and George Varhese whole for any loss of earnings and other benefits suffered as a result of the unilateral reduction of their hours in the manner set forth in the remedy section of this decision.

(d) Compensate Bills for search-for-work and interim employment expenses regardless of whether those expenses exceed her interim earnings.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge and suspension of Bills, Gordon, Rhoads, and Mendez, and within three days thereafter, notify them in writing that this has been done and that the discharge and suspensions will not be used against them in any way.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its Milford, New Jersey facility copies of the attached notice marked "Appendix A."[13] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed, or are otherwise prevented from posting the notice at the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 1, 2014.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 22 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. November 20, 2018

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[13] If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT unilaterally, without notifying and offering to bargain with the Union, 1199 SEIU United Healthcare Workers East, change your terms and conditions of employment, including the reduction of your hours, termination of your employment, and/or suspension of your employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Shanti Bills full reinstatement to her former job or, if her job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Bills whole for any loss of earnings and other benefits resulting from her unilateral discharge, less any net interim earnings, plus interest compounded daily.

WE WILL make Jasmine Gordon, Linda Rhoads, and Jesus Mendez whole for any loss of earnings or other benefits resulting from their unilateral suspensions plus interest compounded daily.

WE WILL make Charles Abouzeid, Mariamma Abraham, Desinette Bazile, Julienne Benoit, Rosilin Boby, Benjamin Bustos, Evelyn Coronado, Elaine Farr, Enrique Fontanez, Andrew Hegarty, Edgardo Irabon, Sara Jiminez, Paulette Murray, Jean Ramkhalawan, Vicente Ricarze, Dawn-Marie Sormani, Donna Timms, Allan Tolentino, Shiril Tom, and George Varhese whole for any loss of earnings or other benefits resulting from the unilateral reduction of their hours plus interest compounded daily.

WE WILL compensate all the employees named above for the adverse tax consequences, if any, of receiving a lump-sum backpay award and WE WILL file with the Regional Director for Region 22 within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Bills and unlawful suspensions of Gordon, Rhoads, and Mendez, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that their discharge or suspension will not be used against them in any way.

800 RIVER ROAD OPERATING COMPANY, LLC D/B/A CARE ONE AT NEW MILFORD

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/22-CA-204545 by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

APPENDIX B

The payroll periods of each alleged hour reduction are highlighted.
Weeks before the alleged change when employees accumulated less than 39 hours (excluding holidays) are highlighted.
Weeks after the allged change when employees accumulated 39 hours (excluding holidays) or more are highlighted.

Charles Abouzeid: Alleged Reduction in Hours During Payroll Period Ending July 19, 2014

	Week 1				Week 2				
Payroll Period Ending	Regular	Vacation	Sick	Holiday	Regular	OT	Vacation	Sick	Holiday
May 10, 2014	40				40				
May 24, 2014	40				40				
June 7, 2014	40			8	40				
June 21, 2014	40.25				40				
July 5, 2014	40				40	6.25			8
July 19, 2014	40				37.5				
August 2, 2014	30		7.5		37.5				
August 16, 2014	37.5				30	7.5			
August 30, 2014	37.5				22.5	15			
September 13, 2014	37.25			8	37.75				
September 27, 2014	37.5				37.5				

Mariamma Abraham: Alleged Reduction in Hours During Payroll Period Ending February 1, 2014

	Week 1				Week 2			
Payroll Period Ending	Regular	Vacation	Sick	Holiday	Regular	Vacation	Sick	Holiday
October 26, 2013	40				40			
November 9, 2013	38.5				40			
November 23, 2013	40				4		8	
December 7, 2013	24			7.5	40			
December 21, 2013	40				38.75			
January 4, 2014	36			7.07	31.75			7
January 18, 2014	40				40			
February 1, 2014	35.5				37.5			
February 15, 2014	21.25	15			37.25			
March 1, 2014	37.5			7.27	37.5			
March 15, 2014	37.5				30		7.5	

Desinette Bazile: Alleged Reduction in Hours During Payroll Period Ending July 19, 2014

	Week 1				Week 2			
Payroll Period Ending	Regular	Vacation	Sick	Holiday	Regular	Vacation	Sick	Holiday
May 10, 2014	0	40			39.25			
May 24, 2014	40				39.5			
June 7, 2014	40			7.83	40			
June 21, 2014	40				40			
July 5, 2014	40				40			8
July 19, 2014	32		7.5		30		7.5	
August 2, 2014	37.5				37.5		7.5	
August 16,2 014	22.5							
August 30, 2014	7.5				37.25			
September 13, 2014	37			7.17	37.5			
September 27, 2014	37.5				36.75			

Julienne Benoit: Alleged Reduction in Hours During Payroll Period Ending July 19 , 2014

	Week 1				Week 2			
Payroll Period Ending	Regular	Vacation	Sick	Holiday	Regular	Vacation	Sick	Holiday
May 10, 2014	39.5				40			
May 24, 2014	32				40			
June 7, 2014	40			8	40			
June 21, 2014	40				40			
July 5, 2014	40				40			7.98
July 19, 2014	40				37.5			
August 2, 2014	37.25				0	37.5		
August 16,2 014	7.5		30		0	22.5	15	
August 30, 2014	30		7.5		37.5			
September 13, 2014	37			8	36.75			
September 27, 2014	29.75		7.5		36.75			

Rosilin Boby: Alleged Reduction in Hours During Payroll Period Ending February 1, 2014

	Week 1				Week 2			
Payroll Period Ending	Regular	Vacation	Sick	Holiday	Regular	Vacation	Sick	Holiday
November 9, 2013	40				40			
November 23, 2013	40				40			
December 7, 2013	40			7.5	40			
December 21, 2013	40				40			
January 4, 2014	24	16		7.5	40			7.5
January 18, 2014	40				40			7.5
February 1, 2014	38				37.5			
February 15, 2014	29.75		7.5		37.5			
March 1, 2014	37.5			7.5	37.5			
March 15, 2014	37.5				37.5			
March 29, 2014	37.5				37.5			

Benjamin Bustos: Alleged Reduction in Hours During Payroll Period Ending July 19, 2014

	Week 1				Week 2			
Payroll Period Ending	Regular	Vacation	Sick	Holiday	Regular	Vacation	Sick	Holiday
May 10, 2014	40				40			
May 24, 2014	31.75		8		40			
June 7, 2014	40			8	40			
June 21, 2014	31.5		8		39.75			
July 5, 2014	40				40			
July 19, 2014	40				31.25		8	
August 2, 2014	34.25				38.5			
August 16,2 014	38.75				38			
August 30, 2014	38				0		22.5	
September 13, 2014	30		8		37.5			
September 27, 2014	37.5				37.5			
October 11, 2014	37.5				37.5			

Evelyn Coronado: Alleged Reduction in Hours During Payroll Period Ending July 19, 2014

	Week 1				Week 2			
Payroll Period Ending	Regular	Vacation	Sick	Holiday	Regular	Vacation	Sick	Holiday
May 10, 2014	32		8		32	8		
May 24, 2014	40				32		8	
June 7, 2014	40				28.5	10.5		
June 21, 2014	40				40			
July 5, 2014	24	16			32	8		8
July 19, 2014	40				37.5			
August 2, 2014	36		7.5		22.5	15		
August 16,2 014	37.5				30	7.5		
August 30, 2014	37.5				37.5			
September 13, 2014	37.5		8		22.5	15		
September 27, 2014	37.5				37.75			
October 11, 2014	37.5				22	15		

Elaine Farr: Alleged Reduction in Hours During Payroll Period Ending July 19, 2014

	Week 1				Week 2			
Payroll Period Ending	Regular	Vacation	Sick	Holiday	Regular	Vacation	Sick	Holiday
May 10, 2014	32		8		40			
May 24, 2014	40				32	8		
June 7, 2014	39.75			8	40			
June 21, 2014	24	16			40			
July 5, 2014	32	8			40			8
July 19, 2014	40				30		7.5	
August 2, 2014	7.5	30			30	7.5		
August 16,2 014	37.5				38.25			
August 30, 2014	38				37.5		22.5	
September 13, 2014	30.5		7.5	8	38			
September 27, 2014	37.5				38			

Enrique Fontanez: Alleged Reduction in Hours During Payroll Period Ending July 19, 2014

	Week 1				Week 2			
Payroll Period Ending	Regular	Vacation	Sick	Holiday	Regular	Vacation	Sick	Holiday
May 10, 2014	39.5				40			
May 24, 2014	40				40			
June 7, 2014	31		9	8	40			
June 21, 2014	39.5				39.5			
July 5, 2014	40				40			8
July 19, 2014	31.75	7.5			37			
August 2, 2014	7.5	30			0	37.5		
August 16,2 014	30	7.5			37.5			
August 30, 2014	37.5				37.5			
September 13, 2014	37.75			8	30	7.5		
September 27, 2014	30	7.5			22.5	15		

Andrew Hagerty: Alleged Reduction in Hours During Payroll Period Ending Augsut 16, 2014

	Week 1						Week 2				
Payroll Period Ending	Regular	OT	Retro	Vacation	Sick	Holiday	Regular	OT	Vacation	Sick	Holiday
January 5, 2013	29.25						8				
January 19, 2013	39	3					40				
February 2, 2013	32						40				
February 16, 2013	40	20.75					40	1			
March 2, 2013	40	1					40				
March 16, 2013	40	11.75					40	2.75			
March 30, 2013	22.25						39.25				
April 13, 2013	37.25						40	14			
April 27, 2013	34.25						40				
May 11, 2013	40	5.5					13.5		8	8	
May 26, 2013	40	3.5					40	3			
June 8, 2013	40	3				5.08	40	3			
June 22, 2013	35				8		40	6			
July 6, 2013	40						40				8
July 20, 2013	27				13		37.5		3		
August 3, 2013	40	1.5					40				
August 17, 2013	40						40	1.25			
August 31, 2013	32.5			8			41				
September 14, 2013	33			8		8	40	0.75			
September 28, 2013	40						40	1.5			
October 12, 2013	32				8		40				
October 26, 2013	40						40	2.5			
November 9, 2013	40	0.75					40				
November 23, 2013	32		1	8			40				
December 7, 2013	32					8	32			8	
December 21, 2013	32			8			40	3.25			
January 4, 2014	32					8	36.75		8		8
January 18, 2014	24			16			32		8		
February 1, 2014	20						37				
February 15, 2014	40	4.25					37.25				
March 1, 2014	41					8	40				
March 15, 2014	40						40				
March 29, 2014	37						40				

Andrew Hagerty: Alleged Reduction in Hours During Payroll Period Ending Augsut 16, 2014 (continued)

	Week 1						Week 2				
Payroll Period Ending	Regular	OT	Retro	Vacation	Sick	Holiday	Regular	OT	Vacation	Sick	Holiday
April 12, 2014	40						39				
April 26, 2014	40						40				
May 10, 2014	40.25						40				
May 24, 2014	40	0.75					32				
June 7, 2014	29.75				8	5.08	40				
June 21, 2014	40						32.25		8		
July 5, 2014	40						40	3.5			5.08
July 19, 2014	40						40				
August 2, 2014	40						40	1.5			
August 16, 2014	7.5			15	7.5		37.75				
August 30, 2014	38						37.5				
September 13, 2014	23.25				15	7.5	18.25		15		
September 27, 2014	40	1.75	5				38				
October 11, 2014	37.5						37.5				
October 25, 2014	40	1.25					37.5				
November 8, 2014	40	0.5					30		7.5		
November 22, 2014	37.5						30			7.5	
November 22, 2014	36.5						38.5				
December 6, 2014	38.75						39.75				
December 20, 2014	27			7.5			37.75				
January 3, 2014	15					7.5	15				7.5
January 17, 2015	15.25						22.5				
January 31, 2015	17						15.5				
February 14, 2015	15.5						38.75				
February 28, 2015	40	5.75				5.47	37.75				
March 14, 2015	26		8	8			40	3.25			
March 28, 2015	40	4.25					40	1.5			
April 11, 2015	40	0.5					40				
April 25, 2015	16			16			40	22.75			
May 9, 2015	24						33.25			15	
May 23, 2015	40	5.5					40	1.75			
June 6, 2015	40	3					40	1.5			
June 20, 2015	40	4.25					40	2			

Andrew Hagerty: Alleged Reduction in Hours During Payroll Period Ending Augsut 16, 2014 (continued)

	Week 1						Week 2				
Payroll Period Ending	Regular	OT	Retro	Vacation	Sick	Holiday	Regular	OT	Vacation	Sick	Holiday
July 4, 2015	40	2.75					40	1.75			
July 18, 2015	40	1.75					16		22.5		
August 1, 2015	15.75		22.5				24.25				
August 15, 2015	24.25						24				
August 29, 2015	25						24				
September 12, 2015	16						32				7.4
September 26, 2015	27.25						40				
October 10, 2015	40	0.75					40				
October 24, 2015	40	0.5					32.5				
November 7, 2015	40	0.5					40	0.25			
November 21, 2015	40						40	2.75			
December 5, 2015	39.25					6.73	33.5				
December 19, 2015	40						32.25				

Edgardo Irabon: Alleged Reduction in Hours During Payroll Period Ending July 19, 2014

	Week 1					Week 2			
Payroll Period Ending	Regular	OT	Vacation	Sick	Holiday	Regular	Vacation	Sick	Holiday
May 10, 2014	39.5					40			
May 24, 2014	40					40			
June 7, 2014	39.75				8	40			
June 21, 2014	40					32.25		8	
July 5, 2014	40	0.25				40	0.25		
July 19, 2014	40					37.5			
August 2, 2014	37.75			7.5		0	37.5		
August 16, 2014	0		30			38.5			
August 30, 2014	38.5					38.5			
September 13, 2014	38.25				7.95	38.25			
September 27, 2014	38.25					38.75			

Sara Jiminez: Alleged Reduction in Hours During Payroll Period Ending July 19, 2014

	Week 1				Week 2			
Payroll Period Ending	Regular	Vacation	Sick	Holiday	Regular	Vacation	Sick	Holiday
November 23, 2013	40				40			
December 7, 2013	40			6.7	40			
December 21, 2013	40				40			
January 4, 2014	39.5			8	39.5			8
January 18, 2014	40				16		24	
February 1, 2014	38				37.5			
March 1, 2014	37.5			8	37.5			
March 15, 2014	37.5				37.5			
March 29, 2014	37.5				37.5			
April 12, 2014	37.5				37.25			

Paulette Murray: Alleged Reduction in Hours During Payroll Period Ending July 19, 2014

	Week 1				Week 2			
Payroll Period Ending	Regular	Vacation	Sick	Holiday	Regular	Vacation	Sick	Holiday
April 12, 2014	40				40			
April 26, 2014	32	8			40			
May 10, 2014	32	8			40			
May 24, 2014	32				40			
June 7, 2014	40			8	32			
June 21, 2014	32	8	8		32	8		
July 5, 2014	40				40			8
July 19, 2014	40				37.5			
August 2, 2014	37.5				37.5			
August 16,2 014	30				30		7.5	
August 30, 2014	30	7.5			30		8	
September 13, 2014	37.5			7.92	22.5	15		
September 27, 2014	0	37.5			0	37.5		

Jean Ramkhalawan: Alleged Reduction in Hours During Payroll Period Ending July 19, 2014

	Week 1					Week 2			
Payroll Period Ending	Regular	OT	Vacation	Sick	Holiday	Regular	Vacation	Sick	Holiday
May 10, 2014	40					40			
May 24, 2014	39.5					40			
June 7, 2014	39.75				7.03	40			
June 21, 2014	40					32		8	
July 5, 2014	40	1.5				40			7.03
July 19, 2014	40	0.25				37.5			
August 2, 2014	30			7.5		7.5	30		
August 16,2 014	37.5					37.5			
August 30, 2014	37.25					30			
September 13, 2014	37.5				8	30		8	
September 27, 2014	37.5			7.5		37.5			

Vicente Ricarze: Alleged Reduction in Hours During Payroll Period Ending July 19, 2014

	Week 1				Week 2			
Payroll Period Ending	Regular	Vacation	Sick	Holiday	Regular	Vacation	Sick	Holiday
May 10, 2014	39.5				37.5			
May 24, 2014	31	8			39.25			
June 7, 2014	39.25			7.98	23	16		
June 21, 2014	31.75	8			36			
July 5, 2014	39.25				38			7.92
July 19, 2014	39.5				25.75	7.5		
August 2, 2014	37.5				36.75			
August 16,2 014	37.5				0	37.5		
August 30, 2014	22.25	15			37.5			
September 13, 2014	37.25			7.82	37.5			
September 27, 2014	37.5				25.5		8	
October 11, 2014	37				37.5			
October 25, 2014	37.5				36.75			

Dawn-Marie Sormani: Alleged Reduction in Hours During Payroll Period Ending March 28, 2015

	Week 1					Week 2			
Payroll Period Ending	Regular	OT	Vacation	Sick	Holiday	Regular	Vacation	Sick	Holiday
January 17, 2015	40	5.75				34.75			
January 31, 2015	24			16		0	40		
February 14, 2015	40	0.25				37.5			
February 28, 2015	37.75				7.5	30.25	8		
March 14, 2015	40	1.5				38			
March 28, 2015	37.75					36.5	1.33		
April 11, 2015	37.5					37.5			
April 25, 2015	38					37.75			
May 9, 2015	37.75					37.5			
May 23, 2015	37.75					38.25			
June 6, 2015	30				7.5	37.5			

Donna Timms: Alleged Reduction in Hours During Payroll Period Ending February 1, 2014

	Week 1				Week 2			
Payroll Period Ending	Regular	Vacation	Sick	Holiday	Regular	Vacation	Sick	Holiday
November 9, 2013	40				40			
November 23, 2013	0	40			0	40		
December 7, 2013	40			8	40			
December 21, 2013	40				38	2		
January 4, 2014	40	0.5		8	40			8
January 18, 2014	40				30	8		
February 1, 2014	38				37.5			
February 15, 2014	37.5				30		7.5	
March 1, 2014	37.5			8	37.5			
March 15, 2014	34.5		3		37.5			
March 29, 2014	37.5				37.5			

Allan Tolentino: Alleged Reduction in Hours During Payroll Period Ending July 19, 2014

	Week 1				Week 2			
Payroll Period Ending	Regular	Vacation	Sick	Holiday	Regular	Vacation	Sick	Holiday
April 12, 2014	39.75				38.25			
April 26, 2014	39.25				32		8	
May 10, 2014	39.5				39.75			
May 24, 2014	38.25				32.5	8		
June 7, 2014	31.5			8	15.75			
June 21, 2014	39.5				40			
July 5, 2014	31.25	8			39.5			7.5
July 19, 2014	39.25				29.5		7.5	
August 2, 2014	37.5				37.5			
August 16,2 014	37				37.25			
August 30, 2014	29.75		7.5		39			
September 13, 2014	37.75			7.43	38.75			
September 27, 2014	38.75				29.75	7.5		

Shiril Tom: Alleged Reduction in Hours During Payroll Period Ending February 1, 2014

	Week 1				Week 2			
Payroll Period Ending	Regular	Vacation	Sick	Holiday	Regular	Vacation	Sick	Holiday
November 9, 2013	40				40			
November 23, 2013	40				40			
December 7, 2013	40			7.5	39.75			
December 21, 2013	40				40			
January 4, 2014	40			7.5	39.75			7.5
January 18, 2014	40				40			
February 1, 2014	38				37.5			
February 15, 2014	37.5				30	8		
March 1, 2014	37.5			7.5	37.5			
March 15, 2014	37.5				37.5			
March 29, 2014	23				23			

George Varghese: Alleged Reduction in Hours During Payroll Period Ending July 19, 2014

	Week 1				Week 2			
Payroll Period Ending	Regular	Vacation	Sick	Holiday	Regular	Vacation	Sick	Holiday
April 12, 2014	40				40			
April 26, 2014	32		8		24	8	8	
May 10, 2014	40				40			
May 24, 2014	40				40			
June 7, 2014	32	8		8	40			
June 21, 2014	40				40			
July 5, 2014	40				27.5	8		8
July 19, 2014	32	7.5			38			
August 2, 2014	37.5				37.5			
August 16,2 014	37.5				0	37.5		
August 30, 2014	37.5				30	7.5		
September 13, 2014	37.5			7.98	37.5			
September 27, 2014	37.5				25.5		8	

State of California—Health and Human Services Agency
California Department of Public Health

SONIA Y. ANGELL, MD, MPH
State Public Health Officer & Director

GAVIN NEWSOM
Governor

June 18, 2020

GUIDANCE FOR THE USE OF FACE COVERINGS

Because of our collective actions, California has limited the spread of COVID-19 and associated hospitalizations and deaths in our state. Still, the risk for COVID-19 remains and the increasing number of Californians who are leaving their homes for work and other needs, increases the risk for COVID-19 exposure and infection.

Over the last four months, we have learned a lot about COVID-19 transmission, most notably that people who are infected but are asymptomatic or pre-symptomatic play an important part in community spread. The use of face coverings by everyone can limit the release of infected droplets when talking, coughing, and/or sneezing, as well as reinforce physical distancing.

This document updates existing CDPH guidance for the use of cloth face coverings by the general public when outside the home. It mandates that face coverings be worn state-wide in the circumstances and with the exceptions outlined below. It does not substitute for existing guidance about social distancing and handwashing.

Guidance

People in California must wear face coverings when they are in the high-risk situations listed below:

- Inside of, or in line to enter, any indoor public space;[1]
- Obtaining services from the healthcare sector in settings including, but not limited to, a hospital, pharmacy, medical clinic, laboratory, physician or dental office, veterinary clinic, or blood bank;[2]
- Waiting for or riding on public transportation or paratransit or while in a taxi, private car service, or ride-sharing vehicle;
- Engaged in work, whether at the workplace or performing work off-site, when:
    - Interacting in-person with any member of the public;
    - Working in any space visited by members of the public, regardless of whether anyone from the public is present at the time;

[1] Unless exempted by state guidelines for specific public settings (e.g., school or childcare center)
[2] Unless directed otherwise by an employee or healthcare provider

    - Working in any space where food is prepared or packaged for sale or distribution to others;
    - Working in or walking through common areas, such as hallways, stairways, elevators, and parking facilities;
    - In any room or enclosed area where other people (except for members of the person's own household or residence) are present when unable to physically distance.
- Driving or operating any public transportation or paratransit vehicle, taxi, or private car service or ride-sharing vehicle when passengers are present. When no passengers are present, face coverings are strongly recommended.
- While outdoors in public spaces when maintaining a physical distance of 6 feet from persons who are not members of the same household or residence is not feasible.

The following individuals are exempt from wearing a face covering:

- Persons age two years or under. These very young children must not wear a face covering because of the risk of suffocation.
- Persons with a medical condition, mental health condition, or disability that prevents wearing a face covering. This includes persons with a medical condition for whom wearing a face covering could obstruct breathing or who are unconscious, incapacitated, or otherwise unable to remove a face covering without assistance.
- Persons who are hearing impaired, or communicating with a person who is hearing impaired, where the ability to see the mouth is essential for communication.
- Persons for whom wearing a face covering would create a risk to the person related to their work, as determined by local, state, or federal regulators or workplace safety guidelines.
- Persons who are obtaining a service involving the nose or face for which temporary removal of the face covering is necessary to perform the service.
- Persons who are seated at a restaurant or other establishment that offers food or beverage service, while they are eating or drinking, provided that they are able to maintain a distance of at least six feet away from persons who are not members of the same household or residence.
- Persons who are engaged in outdoor work or recreation such as swimming, walking, hiking, bicycling, or running, when alone or with household members, and when they are able to maintain a distance of at least six feet from others.

- Persons who are incarcerated. Prisons and jails, as part of their mitigation plans, will have specific guidance on the wearing of face coverings or masks for both inmates and staff.

Note: Persons exempted from wearing a face covering due to a medical condition who are employed in a job involving regular contact with others should wear a non-restrictive alternative, such as a face shield with a drape on the bottom edge, as long as their condition permits it.

Background

What is a cloth face covering?

A cloth face covering is a material that covers the nose and mouth. It can be secured to the head with ties or straps or simply wrapped around the lower face. It can be made of a variety of materials, such as cotton, silk, or linen. A cloth face covering may be factory-made or sewn by hand or can be improvised from household items such as scarfs, T-shirts, sweatshirts, or towels.

How well do cloth face coverings work to prevent spread of COVID-19?

There is scientific evidence to suggest that use of cloth face coverings by the public during a pandemic could help reduce disease transmission. Their primary role is to reduce the release of infectious particles into the air when someone speaks, coughs, or sneezes, including someone who has COVID-19 but feels well. Cloth face coverings are not a substitute for physical distancing, washing hands, and staying home when ill, but they may be helpful when combined with these primary interventions.

When should I wear a cloth face covering?

You should wear face coverings when in public places, particularly when those locations are indoors or in other areas where physical distancing is not possible

How should I care for a cloth face covering?

It's a good idea to wash your cloth face covering frequently, ideally after each use, or at least daily. Have a bag or bin to keep cloth face coverings in until they can be laundered with detergent and hot water and dried on a hot cycle. If you must re-wear your cloth face covering before washing, wash your hands immediately after putting it back on and avoid touching your face. Discard cloth face coverings that:

- No longer cover the nose and mouth
- Have stretched out or damaged ties or straps
- Cannot stay on the face
- Have holes or tears in the fabric

###

AMENDED IN COMMITTEE
6/18/2020

FILE NO. 200455 ORDINANCE NO.

[Emergency Ordinance - Temporary Right to Reemployment Following Layoff Due to COVID-19 Pandemic]

Emergency Ordinance temporarily creating a right to reemployment for certain employees laid off due to the COVID-19 pandemic if their employer seeks to fill the same position previously held by a laid-off worker, or a substantially similar position, as defined.

NOTE: **Unchanged Code text and uncodified text** are in plain Arial font.
Additions to Codes are in *single-underline italics Times New Roman font*.
Deletions to Codes are in ~~*strikethrough italics Times New Roman font*~~.
Board amendment additions are in double-underlined Arial font.
Board amendment deletions are in ~~strikethrough Arial font~~.
Asterisks (* * * *) indicate the omission of unchanged Code subsections or parts of tables.

Be it ordained by the People of the City and County of San Francisco:

Section 1. Name of Ordinance.

This emergency ordinance shall be known as the “Back to Work” emergency ordinance.

Section 2. Declaration of Emergency Pursuant to Charter Section 2.107.

~~(a)~~ Section 2.107 of the Charter authorizes passage of an emergency ordinance in cases of public emergency affecting life, health, or property, or for the uninterrupted operation of any City or County department or office required to comply with time limitations established by law. The Board of Supervisors hereby finds and declares that an actual emergency exists that requires the passage of this emergency ordinance.

~~(b) On February 25, 2020, Mayor London Breed proclaimed a state of emergency in response to the spread of the novel coronavirus COVID-19. On March 3, 2020, the Board of~~

~~Supervisors concurred with the February 25 Proclamation and the actions taken by the Mayor to meet the emergency.~~

~~(c) On March 16, 2020, to mitigate the spread of COVID-19, the Local Health Officer issued Order No. C19-07, subsequently replaced by Order No. C19-07b on March 31, 2020, directing San Franciscans to "shelter in place." These Orders generally require individuals to stay in their homes through May 3, and require businesses to cease all non-essential operations at physical locations in the City. On April 27, 2020, the Public Health Officers for the Counties of Alameda, Contra Costa, Marin, San Francisco, San Mateo, Santa Clara, and the City of Berkeley advised that they will issue a revised shelter-in-place orders that largely keep the current restrictions in place and extend them through May. On May 1, 2020, the Public Health Officers for the same above-referenced counties issued Order No. C19-07c, thereby replacing Order Nos. C19-07 and C19-07b. The most recent Order generally extends the prior Orders' requirements that individuals generally stay in their homes and that businesses cease all non-essential operations at physical locations in the City, with some limited additional exceptions, including that: certain outdoor businesses may resume operations if they can do so safely; individuals may engaged in additional forms of recreation; and construction may resume, provided it can be done safely. The most recent Order is effective until May 31, 2020.~~

~~(d) Due to the public health emergency related to COVID-19 and the actions required to respond to the emergency, a growing number of employees across the City are unable to work (including telework) due to illness, exposure to others with the coronavirus, business closures or reductions in force, and family caregiving obligations related to the closure of schools and care facilities including an inability to secure alternate caregiving assistance. These conditions pose a severe and imminent threat to the health, safety, and economic well-being of San Franciscans and those who work in San Francisco.~~

~~(e)~~ This emergency ordinance is necessary to mitigate the severe economic harm for individuals unable to work due to the public health emergency.

Section 3. Findings and Purpose.

~~(a) On March 4, 2020, the Governor for the State of California issued a proclamation, declaring a State of Emergency to exist in California as a result of the threat posed by COVID-19. On March 6, 2020, the Health Officer for the San Francisco Department of Public Health issued a similar declaration of local health emergency regarding the novel coronavirus disease COVID-19.~~

~~(b) On March 16, 2020, the Health Officer for the San Francisco Department of Public Health issued Order No. C19-07, directing in part that all individuals living in the City to shelter in their place of residences until April 7, 2020. The order also directed businesses with a facility in the City, except essential businesses as defined in the order, to cease all activities at facilities located within the City except minimum basic operations, as defined in the order. As a result of the order, a substantial number of businesses operating in the City have been required to temporarily or permanently close their physical locations in the City or to permanently close their businesses entirely, or have had to temporarily or permanently lay off employees. On March 31, 2020, the City issued Order No. C19-07b, superseding the March 16, 2020 order and extending the new order until May 3, 2020. On May 1, 2020, the City issued Order No. C19-07c, superseding the March 31, 2020 order and extending the new order until May 31, 2020.~~

~~(c) On March 19, 2020, the Governor issued Executive Order N-33-20 to preserve public health and safety and ensure the healthcare delivery system is capable of serving all, and prioritizing those at the highest risk and vulnerability, ordering in part that all residents heed the order from the State Public Health Officer ordering all individuals living in the State of~~

~~California to stay home or at their place of residence for an indefinite period of time except, among other terms, to maintain continuity of operations of identified federal critical infrastructure sectors.~~

~~(d) As a consequence of the local and State shelter in place shelter-in-place and stay at home stay-at-home orders, many employees working in the City have been or likely will be laid off from their jobs. The City has received notice of some of those layoffs, as required under the federal Worker Adjustment and Retraining Notification ("WARN") Act, 29 U.S.C. §§ 2101-2109, and the California Worker Adjustment and Retraining Notification ("Cal-WARN") Act, Cal. Labor Code §§ 1400-1408. The WARN Act requires employers to provide 60 days' notice in advance of a plant closing or mass layoff. The WARN Act applies to employers with 100 or more employees, to the extent such employees have been employed for at least six of the last 12 months and have, on average, worked more than 20 hours per week. The WARN Act defines a mass layoff as a layoff of 50 or more employees at a single site of employment. The Cal-WARN Act requires employers to provide 60 days' notice in advance of a mass layoff, relocation, or termination at a covered establishment. The Cal-WARN Act applies to employers that employ, or have employed in the preceding 12 months, 75 or more full-time or part-time employees, to the extent such employees have been employed for at least six months of the 12 months preceding the date of the required notice. The Cal-WARN Act defines a mass layoff as a layoff during any 30-day period of 50 or more employees at a covered establishment.~~

~~(e) Between March 1, 2020 and May 1, 2020, the City has received 293 layoff notices from private employers operating in San Francisco pursuant to the WARN Act and the Cal-WARN Act. The federal WARN Act and the Cal-WARN Act notices, however, only reflect mass layoffs or business closures implemented by employers that are subject these statutes and thus significantly underestimate the actual number of employees in the City experiencing~~

~~layoffs as a result of the COVID-19 pandemic. Indeed, an untold number of employees employed by businesses with less than 100 employees or 75 employees at their business facility in San Francisco have been affected by a layoff due to COVID-19. Based on anecdotal evidence being shared with the City, it appears that many City employers have laid-off at least 10 employees during a 30-day period since Mayor Breed declared the public health emergency as a result of COVID-19 on February 25, 2020; as such, it is intent of this emergency ordinance to provide the protections set forth herein to eligible employees affected by a layoff of this size.~~

~~(f) The layoffs now occurring in large numbers in San Francisco are quickly pushing unemployment in our community to uncommonly high numbers. Between February 25, 2020 and April 18, 2020, over 83,000 San Franciscans filed claims for unemployment insurance with the State of California. The City anticipates that many more in the San Francisco workforce will seek unemployment insurance in the coming weeks and months as result of a separation from employment, including due to a mass layoff or location closure caused by the COVID-19 pandemic. It is entirely possible—even likely, according to some economists—that the unemployment rate in San Francisco and surrounding areas will reach levels higher than at any time since the Great Depression of the 1930s. Unemployment statistics, even when documenting a massive surge, do not adequately convey the human suffering that attends joblessness on such a large scale. The loss of employment for individuals laid off as a result of the COVID-19 pandemic typically places them and their families in economic peril.~~

~~(g) Layoffs caused by the COVID-19 pandemic also pose a substantial risk to public health because layoffs can cause a loss of private health insurance benefits for affected employees and their families. The loss of private health insurance during normal times—let alone in the midst of a pandemic—can put seemingly or actually insurmountable pressure on a family's fiscal, physical, and mental health. While an employee may be entitled to extend~~

their health insurance benefits temporarily pursuant to the Consolidated Omnibus Budget Reconciliation Act ("COBRA"), 29 U.S.C. §§ 1161-68 (1994), COBRA continuation coverage is often more expensive than the amount that active employees are required to pay for group health coverage. If an employer offers health insurance benefits to its employees, the cost of such benefits are typically shared by the employer and employee. A separated employee, however, typically must pay both the employee's and the employer's share of health insurance benefits in order to receive continuation coverage pursuant to COBRA. As such, COBRA continuation coverage is typically much more expensive than the cost of an employee's health insurance premiums while the employee was employed. In the direst circumstances, a loss of one's job and the related employment benefits can force a family to choose between paying for COBRA continuation coverage, paying rent, or putting food on the table. This emergency ordinance, therefore, is intended to decrease the number of laid-off employees who will be without employer-sponsored health insurance as a result of the COVID-19 pandemic by requiring employers subject to the emergency ordinance to rehire eligible employees if rehiring begins, thereby resuming such employees' access to their prior health insurance benefits.

(h) Layoffs caused by the COVID-19 emergency also pose a substantial risk to public health in the City by potentially forcing laid off employees to seek out the City's public health resources, in event that they are not eligible for COBRA or COBRA continuation benefits are too costly for their family to secure. This emergency ordinance, therefore, is intended to alleviate the burden that layoffs of employees working in the City place on the City's public health system.

(i) The loss of employment for individuals laid off as a result of the COVID-19 pandemic poses a substantial threat to the City's economy and the economic livelihood of affected employees and their families. The COVID-19 pandemic has created a substantial

~~financial crisis for the City collectively and for individuals living and working in the City, likely causing an economic recession or depression in the City, and likely lasting well after the State and City stay at home and shelter in place orders are lifted. After the emergency ceases, the City will endeavor to support the reemergence of all non-essential businesses operating in the City to the extent it is financially feasible for such business to resume operations. Reemployment of laid off employees also provides economic relief directly to the affected employees and their families, giving them the opportunity for reemployment as soon as practicable, aiding their own personal economic recovery following their previous separation from employment, and strengthening and providing continuity for the communities in which they live. With the benefit of resumed income, such employees will likely frequent local businesses, thereby aiding in the revitalization of the City economy and the greater local economy.~~

~~(j) The COVID-19 pandemic has created unique challenges on caretakers, including working parents whose children are no longer able to attend school or childcare facilities, or whose regular care givers are not available as well as those responsible to care for a child, parent, legal guardian or ward, sibling, grandparent, grandchild, spouse, or registered domestic partner when such person is ill, injured, or receiving medical care. Employees who are responsible for the care of children or the others mentioned above may have even more difficulty obtaining reemployment following a layoff.~~

(a) Intent. The novel coronavirus and the resulting disease COVID-19 (collectively "COVID-19") has had unprecedented detrimental effects on employees in the City and County of San Francisco ("the City"), nationwide, and worldwide. To ameliorate the local effects of this global pandemic, this emergency ordinance creates a right to reemployment for eligible laid-off workers if their prior employers resume business operations and seek to rehire staff. As defined more specifically in this emergency ordinance, eligible workers generally include

qualified employees who were previously employed by an employer with 100 or more employees and who suffered a layoff, as defined, after Mayor London Breed declared a state of emergency on February 25, 2020. By facilitating reemployment, the emergency ordinance aims to curb the long-term, adverse effects that job loss can cause on the financial, physical, and mental health of employees and their families and thus our greater community.

(b) Declaration of Emergency in the City and Resulting Health Orders in the City and Other Bay Area Counties. On February 25, 2020, Mayor London Breed proclaimed a state of emergency in response to the spread and threat of further spread of COVID-19. On March 3, 2020, the Board of Supervisors concurred with the February 25 Proclamation and the actions taken by the Mayor to meet the emergency.

Thereafter, the Health Officer of the City and County of San Francisco ("Health Officer"), acting in coordination with the health officers in other counties in the San Francisco Bay Area, issued a series of orders consistent with the Mayor's proclamation in order to protect public health. On March 6, 2020, the Health Officer issued a declaration of local health emergency regarding COVID-19. On March 16, 2020, to mitigate the spread of COVID-19, the Health Officer issued Order No. C-19-07, directing in part that all individuals living in the City shelter in their places of residence until April 7, 2020. The order also directed businesses with a facility in the City, except essential businesses as defined in the order, to cease all activities at facilities located within the City except minimum basic operations, as defined in the order. On March 31, April 29, May 18, and May 22, 2020, the Health Officer issued further orders to extend the shelter in place directive and to authorize certain, select businesses to resume operations. The May 22 order, subject to certain updates, remains in effect and has no expiration date. As a result of these orders, a substantial number of businesses operating in the City have had to temporarily or permanently close their physical

locations in the City, to permanently close their businesses entirely, or have had to temporarily or permanently lay off employees.

(c) Declaration of Emergency in the State of California and Resulting State Health Orders. Similar to the City, the State of California declared a state of emergency and issued health orders requiring citizens to stay at home and requiring a cessation of business operations. On March 4, 2020, the Governor issued a proclamation, declararing a state of emergency to exist in California as a result of the threat to public health posed by COVID-19. On March 19, 2020, the Governor issued Executive Order N-33-20 to preserve public health and safety and to ensure that the healthcare delivery system is capable of serving all, and prioritizing those at the highest risk of vulnerability, ordering in part that all residents heed the order from the State Public Health Officer that all individuals living in the State of California stay home or at their place of residence for an indefinite period except, among other terms, to maintain continuity of operations of identified federal critical infrastructure sectors. The Governor subsequently published a "pandemic roadmap," outlining a four-stage plan to administer phased reopenings of California's government, businesses, and society overall. The four stages include: safety and preparation (Stage 1), reopening of lower-risk workplaces and other spaces (Stage 2), reopening of higher-risk workplaces and other spaces (Stage 3), and finally easing of final restrictions to the end of the stay at home order (Stage 4). The Governor has since issued subsequent orders, authorizing localities to ease certain restrictions or to seek variances from the order to authorize certain activities. The statewide stay at home order, however, remains in place.

(d) Immediate Impact on Ability to Work. Due to the public health emergency related to COVID-19 and the actions required to respond to the emergency, an unprecedented number of individuals who work for employers operating in the City are unable to work (including telework) due to illness, exposure to others with the coronavirus, business closures

or reductions in force, and family caregiving obligations related to the closure of schools and childcare facilities, including an inability to secure alternative caregiving assistance. These conditions pose a severe and imminent threat to the health, safety, and economic well-being of San Franciscans and those who work in San Francisco. The emergency ordinance is necessary to mitigate the severe, long-term economic harm for individuals unable to work due to the public health emergency.

(e) Layoffs Caused by COVID-19 Pandemic. As a consequence of the local and State shelter in place and stay at home orders, tens of thousands of employees working in the City have been or likely will be laid off from their jobs. The City has received notice of some of those layoffs, as required under the federal Worker Adjustment and Retraining Notification ("WARN") Act, 29 U.S.C. §§ 2101-2109, and the California Worker Adjustment and Retraining Notification ("Cal-WARN") Act, Cal. Labor Code §§ 1400-1408. The WARN Act applies to employers with 100 or more employees, employed for six of the preceding 12 months and who work more than 20 hours per week. The Cal-WARN Act applies to employers that currently employ or have employed in the last 12 months, 75 or more full-time or part-time employees for six of the last 12 months. In the span of less than three months, between March 16, 2020 and June 5, 2020, pursuant to the WARN Act and Cal-WARN Act, the City has received 352 notices of layoffs that have occurred during that period by San Francisco employers and which have affected 38,994 employees. An untold number of employees of San Francisco businesses that are not subject to the WARN Act of the Cal-WARN Act have also been affected by layoffs due to COVID-19.

(f) Unemployment Rates. The COVID-19 pandemic has already caused an unprecedented spike in unemployment at national, state, and local levels, the likes of which the country has not seen since the Great Depression of the 1930s. Nationally, in April 2020, the unemployment rate rose to 14.7%, as compared to a rate of approximately 4.0% during

the prior quarter. In May 2020, the rate declined, but remained at a staggering 13.3% nationally. In April 2020, the country lost an estimated 20.5 million nonfarm payroll jobs. That figure rose by 2.5 million in May 2020. As of June 11, 2020, workers nationwide have filed over 36 million claims for unemployment insurance during the prior two months.

In California, the impact of the COVID-19 pandemic has been especially acute, particularly compared to other states. Statewide, in April 2020, the unemployment rate rose to 15.5% as a result of the loss of over 2.3 million nonfarm jobs. The April 2020 unemployment rate constituted a 10% increase from just the month prior. As of the week ending April 25, 2020, Californians had filed almost 4.9 million claims for unemployment insurance (not seasonally adjusted), accounting for 27% of all unemployment insurance claims filed nationwide during this same period—more than any other state in the union. As a result, over $26.6 billion in unemployment benefits have been paid to California workers since mid-March 2020 through June 11, 2020.

The City is similarly experiencing dramatic rates of unemployment. For April 2020, the State of California preliminarily estimated that 69,400 San Franciscans were unemployed, resulting in a county-wide unemployment rate of 12.6%. Between February 25, 2020 and May 30, 2020, approximately 141,000 San Franciscans filed claims for unemployment insurance with the State of California. As of May 15, 2020, the San Francisco Bay Area had lost almost 2.7% of its 4.1 million jobs over the prior two-and-a-half months, resulting in more than 136,000 layoffs through the region.

These numbers—while staggering—unfortunately fail to reflect the total impact of the COVID-19 pandemic on the labor market. Traditional unemployment estimates have long been critiqued for applying overly restrictive criteria to track unemployment, including the requirement that the unemployed person be actively seeking work. According to the U.S. Department of Labor, individuals are classified as unemployed if they do not have a job, have

actively looked for work in the prior four weeks, and are currently available for work. Estimates, therefore, do not account for a large pool of "missing workers,", also known as "marginally attached" workers, defined as potential workers who, because of weak job opportunities, are neither employed nor actively seeking a job. Traditional unemployment metrics also fail to account for the underemployed—those who may prefer to work full-time, but can only acquire part-time work. Accounting for those marginally attached and the underemployed, the U.S. Department of Labor estimates the unemployment rate to be 21.2% (seasonally adjusted) for May 2020. Accordingly, the COVID-19 pandemic is likely having an even more detrimental effect on the job market in San Francisco than estimated under traditional metrics.

Moreover, unemployment statistics, even when documenting a massive surge in joblessness, do not adequately convey the human suffering that attends joblessness on such a large scale. The loss of employment for individuals laid off as a result of the COVID-19 pandemic typically places them and their families in great economic peril.

(g) Impact of Layoffs on Public Health. Layoffs caused by the COVID-19 pandemic also pose a substantial risk to public health because layoffs can cause a loss of private health insurance benefits for affected employees and their families. The loss of private health insurance during normal times—let alone during a pandemic—can put insurmountable pressure on a family's fiscal, physical, and mental health. While an employee may be entitled to extend health insurance benefits temporarily under the Consolidated Omnibus Budget Reconciliation Act ("COBRA"), 29 U.S.C. §§ 1161-68 (1994), COBRA continuation coverage is often more expensive than what the employee paid for group health coverage while employed. A loss of one's job and the related employment benefits can force a family to choose between paying for COBRA continuation coverage, paying rent, or putting food on the table. This emergency ordinance, therefore, is intended to decrease the number of laid-off

employees who will be without employer sponsored health insurance as a result of the COVID-19 pandemic by requiring employers subject to the emergency ordinance to rehire eligible employees if rehiring begins, thereby resuming such employees' access to their prior health insurance benefits.

Layoffs caused by the COVID-19 emergency also pose a substantial risk to public health in the City by potentially forcing laid-off employees to seek out the City's public health resources, if they are not eligible for COBRA or if COBRA continuation benefits are too costly for them to secure. This emergency ordinance, therefore, is intended to alleviate the burden that layoffs of employees covered by this emergency ordinance may have on the City's public health system.

(h) Short-Term Impact on Caretakers. The COVID-19 pandemic has created unique challenges for caretakers, including working parents whose children are unable to attend school, summer camp, or childcare facilities, or whose regular caregivers are not available. The pandemic is also putting substantial pressure on workers who must care for a family member who becomes ill due to the novel coronavirus. These workers will have even more difficulty obtaining reemployment following a layoff.

(i) Potential Long-Term Adverse Impacts on Workers Who Experience Layoffs. The COVID-19 pandemic has created a substantial financial crisis for the City collectively and for individuals living or working in the City. The pandemic has already caused a severe nationwide recession, which may evolve into an economic depression; but regardless, the pandemic's economic effects are likely to last well after the State and City stay at home and shelter in place orders are lifted. The loss of employment for individuals laid off as a result of the COVID-19 pandemic poses a substantial threat to the City's economy and the economic livelihood of affected employees and their families. The loss of a job results not only in lost wages in the short term, but can permanently suppress an employee's wages and earning

potential for the duration of their working life. For comparison's sake, excess unemployment during the Great Recession of 2008-2009 is projected to lead to long term wage losses for displaced high tenure workers (i.e., those who had the same job for more than three years), totaling more than $1 trillion over a 20-year period (or roughly $50 billion annually).

Job loss can also increase an individual's risk of physical and mental health problems and can correlate with higher mortality rates. Workers who lose their jobs involuntarily experience worse health outcomes and, during severe economic downturns, these effects can lead to life expectancy reductions of 1 to 1.5 years. Finally, job loss for a parent has been shown to hamper the educational progress of the parent's children and, as a result, to suppress the future wages of those children.

These consequences from prolonged job loss are amplified by growing evidence that employers may discriminate against applicants during the hiring process for having been previously laid off, despite the absence of evidence that a prolonged period of unemployment diminishes a worker's productivity upon reemployment.

(j) Importance of Rehiring Upon Resumption of Business Operations. The City will endeavor to support the reemergence of all non-essential businesses operating in the City. Reemployment of laid-off employees will provide economic relief directly to the affected employees and their families, giving them the opportunity to start working again as soon as practicable. Reemployment aids not only their own personal economic recovery, but also strengthens and provides continuity for the communities in which they live because the employee's resumed income will likely flow back into local businesses that the employee can once again frequent. Such economic activity will aid in the revitalization of the City's economy and the greater local economy.

Section 4. Definitions.

For purposes of this emergency ordinance, the following terms shall have the following meanings:

"Beginning of the Public Health Emergency" means ~~Mayor London Breed's February 25, 2020, proclamation of a state of emergency in response to the spread of the novel coronavirus COVID-19.~~ February 25, 2020, the date on which Mayor London Breed proclaimed a state of emergency in response to the spread of the novel coronavirus COVID-19.

"City" means the City and County of San Francisco.

~~"Conclusion of the Public Health Emergency" means: (1) the date on which the Governor for the State of California terminates or rescinds, without replacement, Emergency Order N-33-20; or (2) the date on which the City terminates or rescinds, without replacement, Order No. C19-07c, or takes similar action to end the current shelter in place and the prohibition on operation of the business activities as set forth in Order No. C19-07c, whichever date is later.~~

"Employer" means any person who directly or indirectly owns or operates a for-profit business or non-profit in the City and, commencing on or after February 25, 2020, ~~that~~ employed or employs ~~10~~100 or more employees as of the earliest date that an employer Separated or Separates one or more employees that subsequently resulted or results in a Layoff. "Employer" does not include any federal, state, or local or other public agency or an employer that provided or provides services that qualified or qualify as healthcare operations, as defined in Order of the Health Officer No. C19-07e to include 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.

"Eligible Worker" means a person: (1) employed by ~~the~~their Employer for at least 90 days of the calendar year preceding the date on which ~~an~~their Employer provided or provides written notice to the employee of a ~~layoff caused by the Public Health Emergency~~Layoff; and (2) who was or is ~~separated from employment~~ Separated due to a ~~layoff caused by the Public Health Emergency or the SIP Orders~~ Layoff.

"Family Care Hardship" means an Eligible Worker who is unable to work due to either: (1) a need to care for their child whose school or place of care has been closed, or whose childcare provider is unavailable, as a result of the Public Health Emergency, and no other suitable person is available to care for the child during the period of such leave; (2) or any grounds stated in Administrative Code § 12W.4(a) for which a person may use paid sick leave to provide care for someone other than themselves. For the purpose of this definition, "child" means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis*, who is under 18 years of age, or a child 18 years of age or older who is incapable of self-care because of a mental or physical disability.

"Layoff" means a ~~separation~~Separation of 10 or more employees during any 30-day period, commencing on or after February 25, 2020, by an Employer, as defined, ~~from employment by an Employer of 10 or more employees 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 Public Health Emergency and any SIP ~~Orders~~Order. This definition includes any ~~layoff~~Layoff ~~-~~conducted in conjunction with the closure or cessation of an Employer's business operations in the City.

"Public Health Emergency" means the states of emergency declared by the ~~State of California or the City~~Governor and the Mayor in response to the novel coronavirus COVID-19.

"Separate" and "Separation" means the termination or end of employment.

"SIP ~~Orders~~Order" mean ~~orders issued by the State and City, including without limitation State Executive Order N-33-20 and City~~ any order of the Health Officer of the City and County of San Francisco directing residents to stay at home and shelter in place and prohibiting operation of any business activities other than those expressly authorized, including without limitation Order Nos. C19-07, C19-07b, and C19-07c, C19-07d, and C19-07e and any subsequent superseding orders or updates to such orders.

Section 5. Records Regarding Layoff.

(a) Written Notice of Layoff and Right to Reemployment for Existing Employees. When an Employer implements a Layoff after the Beginning of the Public Health Emergency, the Employer shall provide all ~~affected employees~~Eligible Workers with written notice of the Layoff at or before the time when the Layoff becomes effective. The Employer shall provide notice to each ~~affected employee~~Eligible Worker in a language understood by the ~~affected employee~~Eligible Worker. ~~The written notice shall include below-listed terms.~~

~~(1) A notice of the Layoff and the Layoff's effective date.~~

~~(2) A summary of the right to reemployment created by this emergency ordinance.~~

~~(3) A telephone number for a hotline, to be operated by the Office of Labor Standards and Enforcement ("OLSE"), which affected employees may call to receive information regarding the right to reemployment created by this emergency ordinance, as well as navigation services and other City resources related to unemployment.~~

~~(4) A hyperlink to a website, to be operated by OLSE, where affected employees may complete an online form reflecting their name, Employer, date of Layoff, telephone number, email address, and address of residence, which, with an affected employee's consent, OLSE may use to contact an affected employee regarding navigation~~

~~services and other resources related to unemployment. The form shall also include an option for an affected employee to withhold their consent from being contacted by OLSE regarding such services. An affected employee's decision to withhold such consent shall not adversely affect any right to reemployment under this emergency ordinance.~~

~~(5) A request that an affected employee authorize their Employer to provide their name and contact information to the City. The request must advise an affected employee that: the California Constitution recognizes a right to privacy with respect to personal information, including contact information; the City wishes to obtain such information so that OLSE may contact affected employees in order to provide information about navigation services and other City resources regarding unemployment and so that the City may gather comprehensive data regarding the number of layoffs occurring in San Francisco as a result of the Public Health Emergency; the Employer requests the affected employee's written consent to disclose to the City the employee's full legal name, last known address of residence, last known telephone number(s), and last known email address(es). The consent form shall also include an attestation from the employee, indicating which of the above-listed categories of personal information they consent for the Employer to disclose to the City and the affected employee's signature authorizing such disclosure. The Employer shall include a pre-addressed and stamped envelope with the written notice required by this Section 5 to facilitate the employee's return of the requested information. The request shall also state that, should an affected employee consent to disclosure of their contact information, the employee is directed to return the written authorization to the Employer within seven days of the affected employee's receipt of the Employer's notice of Layoff.~~ The written notice shall include: a notice of the Layoff and the Layoff's effective date; a summary of the right to reemployment created by this emergency ordinance; and a telephone number for a hotline, to be operated by the Office of Economic and Workforce Development ("OEWD"), which Eligible Workers may

call to receive information regarding the right to reemployment created by this emergency ordinance, as well as navigation services and other City resources related to unemployment.

(b) Written Notice of Layoff and Right to Reemployment for Former Employees. ~~To the extent an Employer has Separated any affected employee before this emergency ordinance becomes effective, the Employer shall provide written notice of the Layoff, consistent with the requirements set forth in subsection (a) of this Section 5, to each affected employee who the Employer Separated due to Layoff within 30 days of the effective date of this emergency ordinance.~~ An Employer shall provide written notice, consistent with the requirements set forth in subsection (a) of this Section 5, to any Eligible Worker who the Employer Separated due to Layoff before the effective date of this emergency ordinance. An Employer shall provide such notice within 30 days of the effective date of this emergency ordinance.

(c) Notification to the City Regarding Layoff. An Employer shall provide written notice to ~~OLSE~~ OEWD of a Layoff. An Employer shall provide such notice within 30 days of the date it initiates a Layoff. In the event, however, that an Employer did not foresee that Separation of employees would result in a Layoff, as defined ~~in this emergency ordinance~~, the Employer shall provide such written notice within seven days of its Separation of the tenth employee in a 30-day period as a result of Public Health Emergency and any SIP ~~Orders~~Order. Written notice to ~~OLSE~~ OEWD shall identify: the total number of employees located in San Francisco affected by the Layoff; the job classification at the time of Separation for each ~~affected employee~~Eligible Worker; the original hire date for each ~~affected employee~~Eligible Worker; and the date of Separation from employment for each ~~affected employee~~Eligible Worker. ~~To the extent any Separated employee expressly consents to disclosure of their full legal name, last known address of residence, last known telephone number(s), and/or last known email address(es), as provided for in subsection (a) of this Section 5, the Employer shall include~~

~~such information in its notice to OLSE. To the extent an Employer receives written authorization from any Separated employee after the Employers notifies the City of the Layoff in accordance with this subsection (c), the Employer shall provide to OLSE, on a supplemental basis, any information an affected employee authorizes for disclosure to the City.~~

(d) Retention of Records. Where an Employer initiates a Layoff after the Beginning of the Public Health Emergency, an Employer must retain the following records for at least two years regarding each ~~affected employee~~Eligible Worker: ~~the employee's Eligible Worker's~~ full legal name; the ~~employee's~~ job classification at the time of Separation ~~from employment~~; the ~~employee's~~ date of hire; the ~~employee's~~ last known address of residence; the ~~employee's~~ last known email address; the ~~employee's~~ last known telephone number; and a copy of the written notice regarding the Layoff provided to the ~~employee~~. For the purpose of this Section 5, two years is measured from the date of the written notice provided by the Employer to ~~a laid off employee~~the Eligible Worker, as required by subsections (a) and (b) of this Section 5.

Section 6. Employer's Obligation to Make Offer of Reemployment to Eligible Workers Following Layoff.

(a) Offer of Reemployment Following Layoff to Same Position. Where an Employer has initiated a Layoff after the Beginning of the Public Health Emergency and subsequently seeks to hire a person to a position formerly held by an Eligible Worker, the Employer shall first offer the Eligible Worker an opportunity for reemployment to their former position before offering the position to another person.

(b) Offer of Reemployment Following Layoff to Similar Position. Where an Employer has initiated a Layoff after the Beginning of the Public Health Emergency and subsequently seeks to hire a person to any position that is substantially similar to the Eligible Worker's

former position and the position is also located in the City, an Employer shall first offer the Eligible Worker an opportunity for reemployment to the substantially similar position before offering the position to another person. For the purpose of this Section 6, a "substantially similar position" includes any of the following: a position with comparable job duties, pay, benefits, and working conditions to the Eligible Worker's position at the time of Layoff; any position in which the Eligible Worker worked for the Employer in the 12 months preceding the Layoff; and any position for which the Eligible Worker would be qualified, including a position that would necessitate training that an Employer would otherwise make available to a new employee to the particular position upon hire.

(c) Offers of Reemployment Made in Order of Seniority. In the event an 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. For the purpose of this subsection (c), seniority with the Employer shall be based upon an Eligible Worker's earliest date of hire with the Employer.

(d) ~~Exception for Hires Made Prior to Effective Date. The right to an offer of reemployment created by this emergency ordinance as stated in this Section 6, and the attendant rights and remedies set forth in Sections 7, 8, 9 and 11 of this emergency ordinance, shall not apply where an Employer initiated a Layoff after the Beginning of the Public Health Emergency and hired a person other than an Eligible Worker to a position formerly held by an Eligible Worker on or before the effective date of this emergency ordinance.~~ Exceptions. An Employer may withhold an offer of reemployment under the following circumstances.

(1) Misconduct. An Employer may withhold an offer of reemployment if, based on information learned subsequent to the Layoff of an Eligible Worker, the Employer learns

that the Eligible Worker engaged in any act of dishonesty, violation of law, violation of policy or rule of the Employer or other misconduct during their employment with the Employer.

(2) Severance Agreement. An Employer may withhold an offer of reemployment if: (A) the Employer Separated an Eligible Worker between the Beginning of the Public Health Emergency and the effective date of this emergency ordinance as part of a Layoff; and (B) the Employer and the Eligible Worker executed a severance agreement as a result of the Eligible Worker's Separation due to Layoff, provided that the parties executed such agreement before the effective date of this emergency ordinance and that, in exchange for adequate consideration, the Eligible Worker agreed to a general release of claims against the Employer.

(3) Rehiring. An Employer may withhold an offer of reemployment if: (A) the Employer Separated an Eligible Worker between the Beginning of the Public Health Emergency and the effective date of this emergency ordinance as part of a Layoff; and (B) prior to the effective date of this emergency ordinance, the Employer hired a person other than the Eligible Worker to the Eligible Worker's former position or to a substantially similar position, as defined in subsection (b) of this Section 6.

Section 7. Notice of Offer and Acceptance.

(a) ~~Method of Delivery. An Employer shall transmit an offer of reemployment to an Eligible Worker to the Eligible Worker's last known address of residence by reasonable means identified by an Employer, including, without limitation, first class mail or personal delivery. With the Eligible Worker's consent and confirmation of receipt, an Employer may transmit an offer of reemployment to an Eligible Worker by email.~~ Methods of Delivery for Offer of Reemployment. An Employer shall engage in good faith efforts to notify Eligible Workers by telephone and email of offers of reemployment extend offers of reemployment to all Eligible

Workers, consistent with the terms set forth in this Section 7. If an Employer does not have telephone or email contact information for an Eligible Worker or is unable to make contact with an Eligible Worker by telephone or email, then an Employer shall attempt to contact an Eligible Worker by certified mail or courier delivery, consistent with the terms set forth in this Section 7.

(1) Delivery of Offer Following Initial Contact by Telephone. If an Employer has a record of an Eligible Worker's last known telephone number, the Employer shall attempt to notify the Eligible Worker of an offer of reemployment by telephone by contacting the Eligible Worker at their last known telephone number. An Employer shall notify an Eligible Worker that: it wishes to extend an offer of reemployment; it seeks an Eligible Worker's consent to transmit a written offer of reemployment by email; and, if an Eligible Worker consents, the Eligible Worker must provide an 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 Eligible Worker spoke by telephone. 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 Eligible 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. The offer shall remain open for at least two business days following delivery by certified mail or courier.

(2) Delivery of Offer Following Initial Contact by Email. If an Employer has a record of an Eligible Worker's last known email address, the Employer shall attempt to notify the Eligible Worker of an offer of reemployment by email. In the email communication, the Employer shall state that: it wishes to extend an offer of reemployment; it seeks the Eligible

Worker's consent to transmit a written offer of reemployment by email; and, if an Eligible Worker consents, the Eligible 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 the next business day. 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 the first business day following receipt of the Eligible 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. The offer shall remain open for at least two business days following delivery by certified mail or courier.

(3) Delivery of Offer by Mail or Courier. If an Employer cannot obtain an Eligible Worker's consent to receive an offer of reemployment by email, the Employer shall transmit the offer to the Eligible Worker's last known address of residence by certified mail or courier delivery. The offer shall remain open for at least two business days following delivery by certified mail or courier. Under such circumstances, the courier is authorized to deliver the offer to the address of residence without obtaining proof of receipt by the Eligible Worker.

(b) Order of Delivery of Offers. Where more than one Eligible Worker is eligible for an offer of reemployment, as set forth in subsections (a) and (b) in Section 6, an Employer shall transmit offers to Eligible Workers in their order of seniority, as set forth in subsection (c) in Section 6.

~~(c) Notification by Telephone. In addition to the transmittal requirement of subsection (a) of this Section 7, an Employer shall make a good faith effort to notify the Eligible Worker of the offer by telephone at the Eligible Worker's last known telephone number.~~

~~(d) Duration of Offer.~~

~~(1) If the Employer makes contact with the Eligible Worker by telephone, and the Eligible Worker consents to receiving the offer by email, the offer shall remain open for two business days following the telephone call, provided that, at the time the Employer makes contact with the Eligible Worker by telephone, the Employer notifies the Eligible Worker of the two business days duration for which the offer shall remain open.~~

~~(2) If the Employer is unable to make contact with the Eligible Worker by telephone or the Eligible Worker does not consent to receiving the offer by email, the offer shall remain open for seven calendar days after the date of confirmed receipt by mail or personal delivery. If the Eligible Worker does not confirm receipt by mail or personal delivery, the offer shall remain open for ten calendar days after the date on which the offer is sent by the Employer by mail or personal delivery.~~

~~(e)~~(c) Acceptance. 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 an Employer, by applying an electronic signature and transmitting acceptance of the offer to an Employer by email or other reasonable electronic method. If the Eligible Worker notifies the Employer by other means, including but not limited to by telephone or text message, of their intent to accept the offer, the Employer must allow the Eligible Worker two business days from that date to respond in the written reasonable means identified by the Employer. If the Eligible Worker fails to respond to an offer of reemployment within the timeframes prescribed under subsection ~~(d)~~ (a) of this Section 7, then the Eligible Worker shall be deemed to have rejected the offer of reemployment, and then the Employer is permitted to offer the position to the next most senior Eligible Worker, as set forth under subsection (c) of Section 6, or, if there are no alternative Eligible Workers, then to offer the position to alternative job candidate.

~~(f)~~(d) Extension by Mutual Agreement. An Employer and Eligible Worker may extend the offer or acceptance periods beyond the timeframes prescribed in this Section 7 by mutual agreement.

~~Section 8. Terms of Reemployment.~~

~~(a) 90-Day Reemployment Period. An Eligible Worker shall be entitled to reemployment for a period of 90 days after the date the Eligible Worker resumes employment. An Employer may, however, based on clear and convincing evidence, Separate an Eligible Worker during the 90-day reemployment period:~~

~~(1) based on information learned subsequent to rehiring the Eligible Worker that would disqualify the Eligible Worker from their position, including, without limitation, acts of dishonesty, violations of law, violations of a policy or rule of the Employer, or other misconduct;~~

~~(2) for acts of dishonesty, violations of law, violations of a policy or rule of the Employer, or other misconduct committed by the Eligible Worker after the Eligible Worker has resumed employment; or~~

~~(3) if the Employer suffers a demonstrable financial hardship or other event pertaining to the operations of the Employer's business that necessitates Separation of the Eligible Worker.~~

~~(b) Minimum Terms of Reemployment. With the exception of the term of employment defined in subsection (a) of this Section 8, an Employer shall offer reemployment based on at least the same terms and conditions that the Employer previously provided to the Eligible Worker at the time of the Eligible Worker's Separation due to Layoff. For the purpose of this subsection, terms and conditions of prior employment include, without limitation, job duties, pay, benefits, and working conditions. An Employer shall comply with this subsection (b)~~

~~unless, as a result of the economic impact caused by the Public Health Emergency to the Employer's business, offering reemployment to the Eligible Worker at one or more of their former terms of employment would cause the Employer demonstrable financial hardship. Nothing in this subsection shall be interpreted to limit an Eligible Worker's rights to benefits under the Families First Coronavirus Response Act, Public Law 116-127 ("FFCRA"), Coronavirus Aid, Relief, and Economic Security Act, Public Law 116-136 ("CARES Act"), the Public Health Emergency Leave ("PHEL") Ordinance, S.F. Emergency Ordinance No. 200355, or any other law providing benefits to employees that were not available prior to April 1, 2020.~~

Section ~~9~~8. Non-Discrimination and Duty to Reasonably Accommodate Eligible Workers Experiencing a Family Care Hardship.

For the purpose of this emergency ordinance, an Employer shall not discriminate against or take an adverse employment action against an Eligible Worker as a consequence of an Eligible Worker experiencing a Family Care Hardship. An Eligible Worker shall be entitled to reasonable accommodation of a job duty or job requirement if a Family Care Hardship impacts their ability to perform a job duty or to satisfy a job requirement. An Employer shall, in response to a request for accommodation by an Eligible Worker, make good faith efforts to reasonably accommodate an Eligible Worker during the period in which they experience a Family Care Hardship. For the purpose of this Section ~~9~~8, to "reasonably accommodate" includes, without limitation, modifying an Eligible Worker's schedule, modifying the number of hours to be worked, or permitting telework, to the extent operationally feasible, to accommodate the Eligible Worker's Family Care Hardship. This duty to accommodate shall expire upon expiration of this emergency ordinance.

Section ~~10~~9. Notification to City of Offers of Reemployment.

An Employer shall notify the Office of ~~Labor Standards Enforcement~~ Economic and Workforce Development in writing of all offers of reemployment made under this emergency ordinance, in addition to all acceptances and rejections by Eligible Workers of such offers or reemployment.

Section 10. Regulations.

The Office of Labor Standards and Enforcement may issue regulations regarding this emergency ordinance.

Section 11. Remedies for Violations.

(a) An Eligible Worker may bring an action in the Superior Court of the State of California against an Employer for violating this emergency ordinance, and may be awarded the following relief:

(1) Hiring and reinstatement rights~~, whereupon the 90-day reemployment period referenced in Section 8 of this ordinance shall not commence until the date the Employer rehires an Eligible Worker~~;

(2) Back pay for each day of the violation and front pay for each day during which the violation will continue. Back pay and front pay shall be calculated at a rate of pay not less than the higher of: (A) if employed for less than three years prior to the Eligible Worker's date of Separation due to Layoff, the average regular rate received by the Eligible Worker during the Eligible Worker's employment; (B) if employed for more than three years prior to the Eligible Worker's date of Separation due to Layoff, the average regular rate received by the Eligible Worker during the last three years of the Eligible Worker's

employment; or (C) the most recent regular rate received by the Eligible Worker as of the date of Separation due to Layoff; and

(3) The value of the benefits the Eligible Worker would have received under the Employer's benefit plan had the violation not occurred.

(b) If the Eligible Worker is the prevailing party in any legal action taken pursuant to this Section ~~10~~11, the court shall also award reasonable attorneys' fees and costs.

Section 12. No Limitation on Other Rights and Remedies.

This emergency ordinance does not in any way limit the rights and remedies that the law otherwise provides to Eligible Workers, including without limitation, the rights to be free from wrongful termination and unlawful discrimination.

Section 13. Waiver Through Collective Bargaining.

This emergency ordinance shall not apply to Eligible Workers covered by a bona fide collective bargaining agreement to the extent that the requirements of this emergency ordinance are expressly waived in the collective bargaining agreement in clear and unambiguous terms.

Section 14. Preemption.

Nothing in this emergency ordinance shall be interpreted or applied so as to create any right, power, or duty in conflict with federal or state law. The term "conflict" as used in this Section 14 means a conflict that is preemptive under federal or state law.

Section 15. Severability.

If any section, subsection, sentence, clause, phrase, or word of this emergency ordinance, or any application thereof to any person or circumstance, is held to be invalid or unconstitutional by a decision of a court of competent jurisdiction, such decision shall not affect the validity of the remaining portions or applications of this emergency ordinance. The Board of Supervisors hereby declares that it would have passed this emergency ordinance and every section, subsection, sentence, clause, phrase, and word not declared invalid and unconstitutional without regard to whether any other portion of the emergency ordinance or application thereof would be subsequently declared invalid or unconstitutional.

Section 16. Effective Date; Expiration.

Consistent with Charter Section 2.107, this emergency ordinance shall become effective immediately upon enactment, and shall expire upon ~~whichever of the two following occurrences happens first: (a)~~ the 61st day following enactment unless the emergency ordinance is reenacted as provided by Section 2.107~~; or, (b) the Conclusion of the Public Health Emergency and rescission of the SIP Orders~~. Enactment occurs when the Mayor signs the emergency ordinance, the Mayor returns the emergency ordinance unsigned or does not sign the emergency ordinance within ten days of receiving it, or the Board of Supervisors overrides the Mayor's veto of the emergency ordinance.

Section 17. Supermajority Vote Required.

In accordance with Charter Section 2.107, passage of this emergency ordinance by the Board of Supervisors requires an affirmative vote of two-thirds of the Board of Supervisors.

APPROVED AS TO FORM:
DENNIS J. HERRERA, City Attorney

By: /s/
JON GIVNER
Deputy City Attorney

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