

ORDINANCE NUMBER O-_____ (NEW SERIES)

DATE OF FINAL PASSAGE _____

AN EMERGENCY ORDINANCE AMENDING CHAPTER 3
OF THE SAN DIEGO MUNICIPAL CODE BY ADDING NEW
ARTICLE 11, DIVISION 1, SECTIONS 311.0101 THROUGH
311.0109 AND ARTICLE 11, DIVISION 2, SECTIONS 311.0201
THROUGH 311.0209 RELATING TO COVID-19 WORKER
RECALL AND RETENTION.

WHEREAS, on January 31, 2020, the Secretary of Health and Human Services declared a public health emergency in response to a novel coronavirus, SARS-CoV-2, which causes the COVID-19 disease (COVID-19); and

WHEREAS, on February 19, 2020, the San Diego County Board of Supervisors ratified a declaration of local health emergency related to COVID-19; and

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

WHEREAS, on March 12, 2020, the Mayor of the City of San Diego (Mayor) proclaimed the existence of a local emergency related to the COVID-19 threat, which was ratified by the San Diego City Council (City Council) on March 17, 2020, by Resolution No. R-312895; and

WHEREAS, since that time, the Governor, the Mayor, and the County of San Diego Public Health Official have all issued various directives and guidance to state and local residents, including stay-at-home directives and restrictions on certain business activities; and

WHEREAS, as a result of the COVID-19 pandemic and the stay-at-home directives, many workers in the City are facing significant job and economic insecurity; and

WHEREAS, workers in the San Diego service and hospitality industries, and those who provide services to commercial properties, are especially impacted by layoffs because travel has been severely limited, and businesses cannot easily adjust to the lack of patronage; and

WHEREAS, many San Diego hotel and janitorial service workers have already been separated from their jobs during the COVID-19 pandemic, and thousands more are expected to face separation in the coming months; and

WHEREAS, while federal, state, and local programs, and efforts by certain non-profits, have provided some support to hotel and janitorial service workers, the economy may better recover if impacted workers can return to their previous jobs as the COVID-19 pandemic recedes and business activities return to normal levels; and

WHEREAS, this emergency ordinance ensures fair employment practices during the economic upheaval resulting from the COVID-19 pandemic; and

WHEREAS, the provisions of this emergency ordinance are severable as provided for under Municipal Code section 11.0205; and

WHEREAS, San Diego City Charter (Charter) section 11 vests all legislative authority for the City in the Council; and

WHEREAS, the Council adopts this ordinance through the police powers vested in the City under the California Constitution; and

WHEREAS, the Council finds there is an emergency necessitating immediate adoption of the ordinance pursuant to Charter section 295 in order to insure that employees will be restored to the original jobs in an orderly fashion and reduce the demand on City-funded social services; and

WHEREAS, under charter section 280(a)(3), this ordinance is not subject to veto by the Mayor because it is an emergency ordinance; and

WHEREAS, under charter section 295(e), a supermajority vote of the City Council is required for passage of this ordinance; NOW, THEREFORE,

BE IT ORDAINED, by the Council of the City of San Diego, as follows:

Section 1. That Chapter 3 of San Diego Municipal Code is amended by adding new Article 11, Division 1, Sections 311.0101 through 311.0109 to read as follows:

Article 11: City of San Diego COVID-19 Worker Recall and Retention

Division 1: City of San Diego Service COVID-19 Worker Recall Ordinance

§311.0101 Purpose and Intent

Since the declaration of a national public health emergency on January 31, 2020, the COVID-19 pandemic has caused many building service, hospitality, and travel-related employers in the *City* to discharge, lay off, and furlough workers. Through this Division, the *City* seeks to ensure that these workers enjoy a right to return to their previous jobs when business activity resumes in order to aid economic recovery.

§311.0102 Citation

This Division shall be cited as the City of San Diego COVID-19 Building Service and Hotel Worker Recall Ordinance.

§311.0103 Definitions

For purposes of this Division defined terms appear in italics. The following definitions apply in this Division:

City means the City of San Diego.

Commercial property employer means an owner, operator, manager, or lessee, including a contractor, subcontractor, or sublessee, of a non-residential property located within the geographical boundaries of the *City* that employs 10 or more

janitorial, maintenance, or security service employees. Only the janitorial, maintenance, and security service employees who perform work for a *commercial property employer* are covered by this Division.

Customary seasonal work means work performed by an individual during approximately the same part of each calendar year, such as summer or winter.

Employer means a *commercial property employer*, a *hotel employer*, and an *event center employer*.

Event center employer means an owner, operator, or manager of a privately-owned structure of more than 50,000 square feet or 5,000 seats that is used for the purposes of public performances, sporting events, business meetings, or similar events, and includes concert halls, stadiums, sports arenas, racetracks, coliseums, and convention centers. The term *event center* also includes any contracted, leased, or sublet premises connected to or operated in conjunction with the *event center's* purpose, including food preparation facilities, ushering services, ticket-taking services, concessions, retail stores, restaurants, bars, and structured parking facilities. For purposes of this Division, *event center employer* does not include a governmental entity.

Hotel employer means the owner, operator, or manager of a residential building located within the geographical boundaries of the *City* with at least 100 guest rooms that provides temporary lodging in the form of overnight accommodations to transient patrons, and may provide additional services, such as conference and meeting rooms, restaurants, bars, or recreation facilities available to guests or to

the general public. A *hotel employer* also includes the owner, operator, manager, or lessee of any contracted, leased, or sublet premises connected to or operated in conjunction with the building's purpose, or providing services at the building.

Laid-off employee means any individual who, in a particular week, performs at least two hours of work within the geographic boundaries of the *City* for an *employer*, has a *length of service* with the *employer* of six months or more in the 12 months preceding March 4, 2020, or in the case of an *event center employee*, 3 months or more in the 12 months preceding March 4, 2020, and whose most recent separation from active service, or failure to be scheduled for *customary seasonal work*, occurred on or after March 4, 2020, and before any termination of the Declaration of Emergency proclaimed by California's Governor on March 4, 2020, and was due to a government shutdown order, lack of business, a reduction in force or other, economic, non-disciplinary reason. For purposes of this Division, a *laid-off employee* does not include a manager, supervisor, or confidential employee.

Length of service means the total of all periods of time during which an *employee* has been in active service, including periods of time when the *employee* was on leave or on vacation.

§311.0104 Right of Recall

- (a) An *employer* must offer its *laid-off employees* in writing, by mailing to their last known physical address, and by email and text message to the extent the *employer* possesses such information, all job positions which

become available after this Division's effective date for which the *laid-off employees* are qualified. A *laid-off employee* is qualified for a position if the *employee*:

- (1) held the same or similar position at the site of employment at the time of the *laid-off employee's* most recent separation from active service with the *employer*; or
- (2) is or can be qualified for the position with the same training that would be provided to a new employee hired into that position.

The *employer* must offer positions to *laid-off employees* in an order of preference corresponding to categories (1) and (2) in the preceding sentence. Where more than one *employee* is entitled to preference for a position, the *employer* must offer the position to the *laid-off employee* with the greatest *length of service* for the *employer*.

- (b) A *laid-off employee* who is offered a position pursuant to this Division must be given no less than 10 business days in which to accept or decline the offer. An *employer* may make simultaneous, conditional offers of employment to *laid-off employees*, with the final offer of employment conditioned on application of the priority system set forth in Municipal Code section 311.0104 (a).
- (c) An *employer* that declines to recall a *laid-off employee* on the grounds of lack of qualifications and instead hires someone other than the *laid-off employee* must provide the *laid-off employee* a written notice of the non-

selection within 30 days of the date of hire documenting the reasons for such decision. The written record must be retained for no less than 3 years and made available to the *City* or *laid-off employee* upon request.

- (d) An *employer* must provide each *laid-off employee* with a written notice of the date of their lay off and their rights under this Division. The employer must provide such written notice within 30 days of the effective date of this Division, if the lay off took place before that date, or at the time of the lay off if the lay off occurs after that date. Such notice shall be provided in person or to the *laid-off employee's* last known mailing address, and by email to the extent the employer possesses that information.
- (e) An *employer* must retain the following records for at least 3 years regarding each *laid-off employee*: the employee'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 lay off provided to the *employee*. For purpose of this Division, the 3 years is measured from the date of the date of the written notice provided under subsection (d).
- (f) The provisions of this Division also apply when the ownership of the *employer* changes due to a sale, assignment transfer, or other disposition of substantially all assets of the *employer*, after the *laid-off employee*

separates from employment provided the enterprise is conducting the same or similar operation as before March 4, 2020.

§311.0105 Retaliatory Action Prohibited

No *employer* may refuse to terminate, refuse to employ, reduce in compensation, or otherwise take any adverse action against any *laid-off employee* for seeking to enforce his or her rights under this Division by any lawful means, for participating in proceedings related to this Division, for opposing any practice proscribed by this Division, or for otherwise asserting rights under this Division.

§311.0106 Enforcement

This Division may be enforced as follows:

- (a) A *laid-off employee* may bring an action in the Superior Court of the State of California against an *employer* for violations of this Division and may be awarded all of the following, as appropriate:
 - (1) Hiring and reinstatement rights pursuant to this Division.
 - (2) All actual damages (including, but not limited to, lost pay and benefits) suffered by the *laid-off employee*, or for statutory damages in the sum of \$1,000, whichever is greater.
 - (3) Punitive damages, pursuant to California Civil Code Section 3294.
 - (4) If a *laid-off employee* is the prevailing party in any legal action taken pursuant to this Division, the court must award reasonable attorney's fees and costs.
- (b) Notwithstanding any provision of this Code or any other ordinance to the contrary, no criminal penalties shall attach for violation of this Division.

§311.0107 No Preemption of Higher Standards

The purpose of this Division is to ensure minimum labor standards. This Division does not preempt or prevent the establishment of superior employment standards or the expansion of coverage by ordinance, resolution, contract, or any other action adopted by the City Council or the Port of San Diego. This Division may not be construed to limit a discharged employee's right to bring a common law cause of action for wrongful termination.

§311.0108 Report

On or before 60 days prior to the expiration of this Division, the Mayor must report to the City Council on the effectiveness this Division in promoting employment stability and on the status of recovery of employment and business in the affected industries to a state comparable to that which existed prior to March 4, 2020, and must advise the City Council on the need for further action.

§311.0109 Sunset Provision

This Division will be effective immediately from the date of adoption by the City Council and will remain effective for 6 months from the date of adoption and as of that date is repealed unless the City Council enacts an ordinance that rescinds or extends that date.

Section 2. That Chapter 3, Article 11 of the San Diego Municipal Code is amended by adding new Division 2, Section 311.0201 through 311.0209 to read as follows:

Article 11: City of San Diego COVID-19 Worker Recall and Retention

Division 2: City of San Diego COVID-19 Worker Retention Ordinance

§311.0201 Purpose and Intent

Since the declaration of a national public health emergency on January 31, 2020, the COVID-19 pandemic has caused many building service, hospitality, and travel-related employers in the *City* to discharge, lay off, and furlough workers. Through this Division, the City seeks to ensure fair employment practices for workers when a *business* changes ownership during this time of economic uncertainty.

§311.0202 Citation

This Division shall be cited as the City of San Diego COVID-19 Worker Retention Ordinance.

§311.0203 Definitions

For purposes of this Division defined terms appear in italics. The following definitions apply in this Division:

Business means a *commercial property business* or *hotel business*.

Change in control means any sale, assignment, transfer, bankruptcy, contribution or other disposition of all or substantially all of the assets used in the operation of the *business*.

City means the City of San Diego.

Commercial property business means an owner, operator, manager, or lessee, including a contractor, subcontractor, or sublessee, of a non-residential property in the *City* that employs 10 or more janitorial, maintenance, or security service employees.

Employment commencement date means the date on which an *eligible employee* commences work for the *successor business employer* in exchange for compensation under the terms and conditions established by the *successor business employer* or as required by law.

Eligible employee means an individual employed by the *incumbent business employer*:

- (1) who has a *length of service* with the *incumbent business employer* of six months or more;
- (2) whose primary place of employment is a *business* subject to a *change in control*;
- (3) who is employed or contracted to perform work functions directly by the *incumbent business employer*, or by a *person* who has contracted with the *incumbent business employer* to provide services at the *business* subject to the *change in control*; and
- (4) who worked for the *incumbent business employer* on or after March 4, 2020, and prior to the execution of the *transfer document*.

Eligible employee does not include a managerial, or supervisory, or confidential employee.

Hotel business means the owner, operator, or manager of a building in the *City* with at least 100 guest rooms that provides temporary lodging in the form of overnight accommodations to transient patrons, and may provide additional services, such as conference and meeting rooms, restaurants, bars, or recreation facilities available to guests or to the general public. A *hotel business* also includes the owner, operator, manager, or lessee of any contracted, leased, or sublet premises connected to or operated in conjunction with the building's purposes, or providing services to the building.

Incumbent business employer means any *person* who owns, controls, or operates a *business* prior to a *change in control*.

Length of service means the total of all periods of time during which an employee has been in active service, including periods of time when the employee was on leave or on vacation.

Person has the same meaning as defined in Municipal Code section 11.0210.

Successor business employer means the *person* who owns, controls, or operates a *business* after a *change in control*.

Transfer document means the purchase agreement or other documents creating a binding agreement to affect the *change in control*.

§311.0204 Employee Retention

- (a) Employer Responsibilities.

- (1) The *incumbent business employer* must, within 15 days after execution of a *transfer document*, provide to the *successor business employer* the name, address, date of hire, and job classification of each *eligible employee*.
- (2) The *successor business employer* must maintain a preferential hiring list of *eligible employees* identified by the *incumbent business employer* as set forth in subsection (a)(1) of this section, and will be required to hire from that list for a period beginning upon the execution of the *transfer document* and continuing for 6 months after the *business* is open to the public under the *successor business employer*.
- (3) If the *successor business employer* extends an offer of employment to an *eligible employee*, the *successor business employer* must retain written verification of that offer for no fewer than three years from the date the offer was made. The verification will include the name, address, date of hire, and occupation classification of each *eligible employee*.

(b) Transition Employment Period.

- (1) A *successor business employer* must retain each *eligible employee* hired pursuant to this Division for no fewer than 90 days following the *eligible employee's employment commencement date*, provided the *successor business employer* continues operating for 90 days. During the 90-day transition employment period, an *eligible*

employee must be employed under terms and conditions of employment established by the *successor business employer* or as required by law. The *successor business employer* must provide an *eligible employee* with a written offer of employment for the transition period. This offer must remain open for at least 10 business days from the date of the offer.

- (2) If, within the period established by subsection (a)(2) to this section, the *successor business employer* determines that it requires fewer employees than were required by the *incumbent business employer*, the *successor business employer* must offer the position to the *eligible employee* in the same occupational classification with the greatest *length of service* with the *incumbent business employer*.
- (3) During the 90-day transition employment period, the *successor business employer* must not discharge without cause an *eligible employee* retained pursuant to this Division.
- (4) At the end of the 90-day transition employment period, the *successor business employer* must perform a written performance evaluation for each *eligible employee* retained pursuant to this Division. If the *eligible employee's* performance during the 90-day transition employment period is satisfactory, the *successor business employer* must consider offering the *eligible employee* continued employment under the terms and conditions established by the *successor business*

employer or as required by law. The *successor business employer* must retain a record of the written performance evaluation for a period of no fewer than 3 years.

(c) Notice of Change in Control.

(1) The *incumbent business employer* or *successor business employer* must post written notice of the *change in control* at the location of the affected *business* within five business days following the execution of the *transfer document*. Notice must remain posted during any closure of the *business* and for six months after the *business* is open to the public under the *successor business employer*.

(2) Notice must include, but not be limited to, the name of the *incumbent business employer* and its contact information, the name of the *successor business employer* and its contact information, and the effective date of the *change in control*. Notice must be posted in a conspicuous place at the *business* visible to *eligible employees*, other employees, and applicants for employment.

§311.0205 Retaliatory Action Prohibited

No *incumbent business employer* or *successor business employer* may refuse to employ, terminate, reduce in compensation, or otherwise take any adverse action against any *eligible employee* for seeking to enforce his or her rights under this

Division by any lawful means, for participating in proceedings related to this Division, for opposing any practice proscribed by this Division, or for otherwise asserting rights under this Division.

§311.0206 Enforcement

This Division may be enforced as follows:

- (a) An *eligible employee* may bring an action in the Superior Court of the State of California against an *incumbent business employer* or *successor business employer* for violations of this Division and may be awarded all of the following, as appropriate:
 - (1) Hiring and reinstatement rights pursuant to this Division. For purposes of this Division, the 90-day transition employment period may not commence until the *eligible employee's employment commencement date* with the *successor business employer*.
 - (2) Front or back pay for each day the violation continues, which must be calculated at a rate of compensation not less than the higher of:
 - (i) The average regular rate of pay received by the *eligible employee* during the last year of their employment in the same job classification;
 - (ii) The most recent regular rate received by the *eligible employee* while employed by either the *incumbent business employer* or *successor business employer*;

- (iii) The regular rate received by the individual in the position during the time that the *eligible employee* should have been employed.
 - (3) Value of the benefits the *eligible employee* would have received under the *successor business employer's* benefit plans.
 - (4) If an *eligible employee* is the prevailing party in any legal action taken pursuant to this Division, the court will award reasonable attorney's fees and costs.
- (b) No criminal penalties will be imposed for violation of this Division.

§311.0207 No Preemption of Higher Standards

The purpose of this Division is to ensure minimum labor standards. This Division does not preempt or prevent the establishment of superior employment standards or the expansion of coverage by ordinance, resolution, contract, or any other action adopted by the City Council or the Port of San Diego. This Division may not be construed to limit a discharged employee's right to bring a common law cause of action for wrongful termination.

§311.0208 Report

On or before 60 days prior to the expiration of this Division, the Mayor must report to the City Council on the effectiveness this Division in promoting employment stability and on the status of recovery of employment and business in the affected industries to a state comparable to that which existed prior to March 4, 2020, and will advise the City Council on the need for further action.

§311.0209 Sunset Provision

This Division will be effective immediately from the date of adoption by the City Council and will remain effective for 6 months from the date of adoption and as of that date is repealed unless the City Council enacts an ordinance that rescinds or extends that date.

Section 2. A full reading of this ordinance is dispensed with prior to passage, a written copy having been made available to the City Council and the public prior to the day of its passage.

Section 3. This ordinance is declared to be an emergency measure required for the immediate preservation of the public peace, safety, health, and welfare pursuant to Charter section 295, and shall take effect immediately from the day of adoption upon the affirmative vote of at least six members of the City Council.

APPROVED: MARA W. ELLIOTT, City Attorney

By _____
Thomas J. Brady
Deputy City Attorney

TJB:jvg:soc:jvg
07/27/2020
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