



City of Emeryville

CALIFORNIA

MEMORANDUM

DATE: April 20, 2021
TO: City Council
FROM: April Shabazz, Management Analyst, Community Development Department
SUBJECT: **Right to Recall SB93**

On April 16, 2021 the Governor signed SB93 into law, which is related to right to recall. The legislation is attached for the City Council's information.

Senate Bill No. 93

CHAPTER 16

An act to add and repeal Section 2810.8 of the Labor Code, relating to employment, and making an appropriation therefor, to take effect immediately, bill related to the budget.

[Approved by Governor April 16, 2021. Filed with Secretary
of State April 16, 2021.]

LEGISLATIVE COUNSEL'S DIGEST

SB 93, Committee on Budget and Fiscal Review. Employment: rehiring and retention: displaced workers: COVID-19 pandemic.

Existing law governs employment relations, defines the contract of employment, and establishes the obligations of employers to their employees.

This bill would, until December 31, 2024, require an employer, as defined, to offer its laid-off employees specified information about job positions that become available for which the laid-off employees are qualified, and to offer positions to those laid-off employees based on a preference system, in accordance with specified timelines and procedures. The bill would define the term "laid-off employee" to mean any employee who was employed by the employer for 6 months or more in the 12 months preceding January 1, 2020, and whose most recent separation from active service was due to a reason related to the COVID-19 pandemic, including a public health directive, government shutdown order, lack of business, a reduction in force, or other economic, nondisciplinary reason related to the COVID-19 pandemic. The bill would require an employer to keep records for 3 years, including records of communications regarding the offers. The bill would require an employer that declines to recall a laid-off employee on the grounds of lack of qualifications and instead hires someone other than a laid-off employee to provide the laid-off employee a written notice within 30 days including specified reasons for the decision, and other information on those hired.

This bill would, until December 31, 2024, prohibit an employer from refusing to employ, terminating, reducing compensation, or taking other adverse action against any laid-off employee for seeking to enforce their rights under these provisions. The bill would establish specified methods by which these provisions may be enforced, including authorizing an employee to file a complaint with the Division of Labor Standards Enforcement against the employer for specified relief, including hiring and reinstatement rights and awarding of back pay, as well as a civil penalty. The bill would authorize the Division of Labor Standards Enforcement to promulgate and enforce rules and regulations, and issue determinations and

interpretations concerning these provisions. The bill would prohibit the imposition of criminal penalties for a violation of these provisions.

This bill would appropriate \$6,000,000 and make available through June 30, 2025, from the Labor and Workforce Development Fund to the Labor Commissioner for staffing resources to implement and enforce the provisions related to the rehiring and retention of workers displaced due to the COVID-19 pandemic.

This bill would declare that it is to take effect immediately as a bill providing for appropriations related to the Budget Bill.

Appropriation: yes.

The people of the State of California do enact as follows:

SECTION 1. Section 2810.8 is added to the Labor Code, to read:

2810.8. (a) For purposes of this section, the following definitions apply:

(1) “Airport” means any area of land or water used or intended for landing or takeoff of aircraft including appurtenant area used or intended for airport buildings, facilities, as well as rights of way together with the buildings and facilities within the State of California, excluding any military base or federally operated facility.

(2) “Airport hospitality operation” means a business that prepares, delivers, inspects, or provides any other service in connection with the preparation of food or beverage for aircraft crew or passengers at an airport, or that provides food and beverage, retail, or other consumer goods or services to the public at an airport. The term airport hospitality operation does not include an air carrier certificated by the Federal Aviation Administration.

(3) “Airport service provider” means a business that performs, under contract with a passenger air carrier, airport facility management, or airport authority, functions on the property of the airport that are directly related to the air transportation of persons, property, or mail, including, but not limited to, the loading and unloading of property on aircraft, assistance to passengers under Part 382 (commencing with Section 382.1) of Title 14 of the Code of Federal Regulations, security, airport ticketing and check-in functions, ground-handling of aircraft, aircraft cleaning and sanitization functions, and waste removal. The term “airport service provider” does not include an air carrier certificated by the Federal Aviation Administration.

(4) “Building service” means janitorial, building maintenance, or security services.

(5) “Employee” means any individual who in a particular week performs at least two hours of work for an employer.

(6) “Employer” means any person, including a corporate officer or executive, who directly or indirectly or through an agent or any other person, including through the services of a temporary service or staffing agency or similar entity, owns or operates an enterprise and employs or exercises control over the wages, hours, or working conditions of any employee.

“Employer” also means the successor employer as set forth under paragraph (6) of subdivision (b).

(7) “Enterprise” means a hotel, private club, event center, airport hospitality operation, airport service provider, or the provision of building service to office, retail, or other commercial buildings.

(8) “Event center” means a publicly or privately owned structure of more than 50,000 square feet or 1,000 seats that is used for the purposes of public performances, sporting events, business meetings, or similar events, and includes concert halls, stadiums, sports arenas, racetracks, coliseums, and convention centers. The term “event center” also includes any contracted, leased, or sublet premises connected to or operated in conjunction with the event center’s purpose, including food preparation facilities, concessions, retail stores, restaurants, bars, and structured parking facilities.

(9) “Hotel” means a residential building that is designated or used for lodging and other related services for the public, and containing 50 or more guest rooms, or suites of rooms (adjoining rooms do not constitute a suite of rooms). “Hotel” also includes any contracted, leased, or sublet premises connected to or operated in conjunction with the building’s purpose, or providing services at the building. The number of guest rooms, or suites of rooms, shall be calculated based on the room count on the opening of the hotel or on December 31, 2019, whichever is greater.

(10) “Laid-off employee” means any employee who was employed by the employer for 6 months or more in the 12 months preceding January 1, 2020, and whose most recent separation from active service was due to a reason related to the COVID-19 pandemic, including a public health directive, government shutdown order, lack of business, a reduction in force, or other economic, nondisciplinary reason due to the COVID-19 pandemic.

(11) “Length of service” means the total of all periods of time during which an employee has been in active service with the employer, based on the employee’s date of hire, including periods of time when the employee was on leave or on vacation.

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

(13) “Private club” means a private, membership-based business or nonprofit organization that operates a building or complex of buildings containing at least 50 guest rooms or suites of rooms that are offered as overnight lodging to members. The number of guest rooms or suites of rooms shall be calculated based on the room count on the opening of the private club or on December 31, 2019, whichever is greater.

(b) (1) Within five business days of establishing a position, an employer shall offer its laid-off employees in writing, either by hand or to their last known physical address, and by email and text message to the extent the employer possesses such information, all job positions that become available after the effective date of this section for which the laid-off employees are qualified. A laid-off employee is qualified for a position if the employee

held the same or similar position at the enterprise at the time of the employee's most recent layoff with the employer.

(2) The employer shall offer positions to laid-off employees in an order of preference subject to paragraph (1) and this paragraph. If more than one employee is entitled to preference for a position, the employer shall offer the position to the laid-off employee with the greatest length of service based on the employee's date of hire for the enterprise.

(3) A laid-off employee who is offered a position pursuant to this section shall be given at least five business days, from the date of receipt, in which to accept or decline the offer. A "business day" is any day except Saturday, Sunday, or any official state holiday. An employer may make simultaneous, conditional offers of employment to laid-off employees, with a final offer of employment conditioned on application of the preference system set forth in paragraph (2).

(4) An employer must retain the following records for at least three years, measured from the date of the written notice regarding the layoff, for 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 notices regarding the layoff provided to the employee and all records of communications between the employer and the employee concerning offers of employment made to the employee pursuant to this section.

(5) An employer that declines to recall a laid-off employee on the grounds of lack of qualifications and instead hires someone other than a laid-off employee shall provide the laid-off employee a written notice within 30 days including the length of service with the employer of those hired in lieu of that recall, along with all reasons for the decision.

(6) This section also applies in any of the following circumstances:

(A) The ownership of the employer changed after the separation from employment of a laid-off employee but the enterprise is conducting the same or similar operations as before the COVID-19 state of emergency.

(B) The form of organization of the employer changed after the COVID-19 state of emergency.

(C) Substantially all of the assets of the employer were acquired by another entity that conducts the same or similar operations using substantially the same assets.

(D) The employer relocates the operations at which a laid-off employee was employed before the COVID-19 state of emergency to a different location.

(c) No employer shall refuse to employ, terminate, reduce in compensation, or otherwise take any adverse action against any laid-off employee as defined in subdivision (a) for seeking to enforce their rights under this section, for participating in proceedings related to this section, opposing any practice proscribed by this section, or otherwise asserting rights under this section. This subdivision shall also apply to any employee

or laid-off employee who mistakenly, but in good faith, alleges noncompliance with this section.

(d) The Division of Labor Standards Enforcement shall have exclusive jurisdiction to enforce this section. This section may be enforced only as follows:

(1) A laid off employee may file a complaint with the Division of Labor Standards Enforcement for violations of this section and may be awarded any or all of the following, as appropriate:

(A) Hiring and reinstatement rights pursuant to this section.

(B) Front pay or back pay for each day during which the violation continues, which shall be calculated at a rate of compensation not less than the highest of any of the following rates:

(i) The average regular rate of pay received by the laid-off employee during the last three years of that employee's employment in the same occupation classification.

(ii) The most recent regular rate received by the laid-off employee while employed by the employer.

(iii) The regular rate received by an employee occupying the position in place of the laid-off employee that should have been employed.

(C) Value of the benefits the laid-off employee would have received under the employer's benefit plan.

(2) No criminal penalties shall be imposed for violation of this section.

(3) Any employer, agent of the employer, or other person who violates or causes to be violated the provisions of this section shall be subject to a civil penalty of one hundred dollars (\$100) for each employee whose rights under these provisions are violated and an additional sum payable as liquidated damages in the amount of five hundred dollars (\$500), per employee, for each day the rights of an employee under this section are violated and continuing until such time as the violation is cured, which shall be recovered by the Labor Commissioner, deposited into the Labor and Workforce Development Fund, and paid to the employee as compensatory damages.

(4) The Labor Commissioner shall enforce this section, including investigating an alleged violation and ordering appropriate temporary relief to mitigate the violation pending the completion of a full investigation or hearing, through the procedures set forth in Section 98.3, 98.7, 98.74, or 1197.1, including by issuance of a citation against an employer who violates this section and by filing a civil action. If a citation is issued, the procedures for issuing, contesting, and enforcing judgments for citations and civil penalties issued by the Labor Commissioner shall be the same as those set out in Section 98.74 or 1197.1, as appropriate.

(5) In an action brought by the Labor Commissioner for enforcement of this section, the court may issue preliminary and permanent injunctive relief to vindicate the rights of employees.

(6) In an administrative or civil action brought under this section, the Labor Commissioner or court, as the case may be, shall award interest on

all amounts due and unpaid at the rate of interest specified in subdivision (b) of Section 3289 of the Civil Code.

(7) The remedies, penalties, and procedures provided under this section are cumulative.

(e) The Division of Labor Standards Enforcement may promulgate and enforce rules and regulations, and issue determinations and interpretations, consistent with and necessary for the implementation of this section. Those rules and regulations, determinations, and interpretations shall have the force of law and may be relied upon by employers, employees, and other persons to determine their rights and responsibilities under this section.

(f) Nothing in this section shall prohibit a local government agency from enacting ordinances that impose greater standards than, or establish additional enforcement provisions to, those prescribed by this section. This section shall not be construed to limit a discharged employee or eligible employee's right to bring a common law cause of action for wrongful termination.

(g) All of the provisions of this section, or any part of this section, may be waived in a valid collective bargaining agreement, but only if the waiver is explicitly set forth in that agreement in clear and unambiguous terms. Unilateral implementation of terms and conditions of employment by either party to a collective bargaining relationship shall not constitute or be permitted as a waiver of all or any part of the provisions of this section.

(h) The provisions of this section are severable. If any provision of this section or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

(i) This section shall remain in effect only until December 31, 2024, and as of that date is repealed.

SEC. 2. The sum of six million dollars (\$6,000,000) is hereby appropriated and available through June 30, 2025, from the Labor and Workforce Development Fund to the Labor Commissioner for staffing resources to implement and enforce the provisions related to the rehiring and retention of workers displaced due to the COVID-19 pandemic as described in Section 2810.8 of the Labor Code.

SEC. 3. This act is a bill providing for appropriations related to the Budget Bill within the meaning of subdivision (e) of Section 12 of Article IV of the California Constitution, has been identified as related to the budget in the Budget Bill, and shall take effect immediately.