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PERSPECTIVE

More and more California cities are adopting 'right-to-recall' laws

By Bruce J. Sarchet

During the COVID-19 pandemic, many businesses were closed. Schools were closed. State courts were closed. But City Hall … City Hall was open.

California cities have, in the past few months, accelerated a trend that has been developing for a few years: they are passing employment laws applicable to employers within their city limits. We have federal employment laws, such as the Occupational Safety and Health Act, Title VII of the Civil Rights Act of 1964, and the Worker Adjustment and Retraining Notification Act (WARN). We have state employment laws that cover essentially the same topics. And now we have cities regularly getting into the mix. Compliance with this patchwork of overlapping and conflicting regulations is, to put it mildly, challenging.

Specific ordinances recently adopted in Los Angeles, Long Beach and San Francisco are the latest examples of this trend. The ordinances provide for a "right to be recalled" to work, in order of seniority. These ordinances are a direct consequence of the sweeping impact of COVID-19 on California workplaces.

As the shelter-in-place orders in California took hold only three months ago, consumers stayed home, businesses shut down, some workers were furloughed, and many more were let go. California's unemployment rate soared. Now that the orders have been lifted, and businesses are reopening, workers are being recalled to their former jobs. Up until just a few weeks ago, any business in California that was recalling employees from a layoff had complete flexibility to pick and choose which employees to bring back, the order in which workers would be recalled, and even the flexibility to decide to not recall particular workers.

That has now changed in Los Angeles, Long Beach and San Francisco. New city ordinances dictate the terms by which employees must be recalled, and employers face state court litigation for failure to comply.

First came the Los Angeles ordinances. The Right of Recall Ordinance and Worker Retention Ordinance, passed on May 4, require return-to-work preferences to certain employees in the hard-hit travel, entertainment, tourism, and hospitality sectors. The Recall Ordinance mandates that certain employees laid off from work on or after March 4, must be rehired pursuant to a recall procedure that is reminiscent of unionized workforces governed by collective bargaining agreements. The accompanying Los Angeles Retention Ordinance governs the same industries as the Recall Ordinance and mandates that in the event of a change in ownership of a covered business, employees of the previous business must be placed on a "preferential hiring list."

Many have asked: Can the city of Los Angeles actually do this? In 2011, the California Supreme Court upheld a similar ordinance, the Los Angeles Grocery Worker Retention Ordinance. *California Grocers Association v. City of Los Angeles*, 52 Cal. 4th 177 (2011). So it appears that the answer to the question — does the city have the authority to do this? — is yes.

The Los Angeles ordinances were trailblazing in more ways than one. The right to recall based on seniority was new. But the ordinances also contain a second, novel concept, providing that businesses have a "right to cure" alleged violations. Before bringing a lawsuit to enforce rights under either ordinance, a worker must provide written notice to the employer of the alleged violations and a statement of facts to support the claimed violation. The employer then has fifteen days from receipt of that notice to cure any alleged violation. If no such cure is implemented, then and only then may a lawsuit proceed.

In the opinion of many in the business community, this commonsense approach works. Workers and businesses don't want or need lengthy courthouse battles. The historic delays in our civil justice system will only be exacerbated by pandemic-caused court closures. The vast majority of business owners just want to comply with their legal duties and obligations. This right to cure provision has been touted as a win-win for both sides.

About two weeks later, Long Beach followed Los Angeles' lead and passed its own right to recall and right-to-retention ordinances. The Long Beach ordinances apply to a more limited subset of businesses: commercial property employers that provide janitorial services and hotel employers. It requires that these businesses rehire workers in a specified manner, rather than at the employer's discretion.

The accompanying Long Beach retention ordinance governs these same industries and mandates that in the event of a change in control or change in ownership, employees must be placed on a "preferential hiring list." The new entity must hire personnel from this list for at least six months and must retain these personnel for no less than 90 days, absent just cause to terminate. And as in Los Angeles, the Long Beach ordinances contain a right to cure.

And so we move north to San Francisco. The ordinance there applies to many more types of businesses, including for-profit and non-profit employers with 100 or more employees, and requires that laid off employees be recalled in order of seniority.

The San Francisco ordinance also contains two other components of interest to employers. First, it includes a notice provision similar to the federal and state plant closing laws (essentially a local WARN duty). Second, it also requires employers to provide reasonable accommodations to employees who are unable to work due to the need to care for children whose school has been closed due to the pandemic.

It appears that the trend of California cities regulating the workplace is here to stay. World history buffs may recall that at the end of the nineteenth century, Europe witnessed the unification of Germany and Italy. The former principalities joined together, which in turn took down barriers to trade, opened up commerce and helped to grow the economy. We seem to witnessing the reverse in California in 2020. The state is becoming more and more "de-unified" as cities pass competing and overlapping measures regulating commerce. The recent right-to-recall ordinances are tangible evidence of this trend. ■

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