

1 [Police Code - Grocery Store, Drug Store, Restaurant, and On-Demand Delivery Service
2 Employee Worker Protections]

3 **Ordinance amending the Police Code to require grocery store, drug store, restaurant,**
4 **and on-demand delivery service employers to provide health and scheduling**
5 **protections related to COVID-19 to employees workers; and to sunset an emergency**
6 **ordinance with similar requirements.**

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

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

15 Section 1. The Police Code is hereby amended by adding Article 33M, consisting of
16 Sections 3300M.1-3300M.134, to read as follows:

17 **ARTICLE 33M: GROCERY STORE, DRUG STORE, RESTAURANT, AND ON-**
18 **DEMAND DELIVERY SERVICE EMPLOYEE WORKER PROTECTIONS**

19
20 **SEC. 3300M.1. FINDINGS AND PURPOSE.**

21 *(a) In response to the threat of the novel coronavirus “COVID-19” global pandemic, the City*
22 *intends, through a proactive, comprehensive, science-based approach, to mitigate the spread of*
23 *COVID-19 in our community, protect the most vulnerable among us, and gradually reopen all sectors*
24 *of the local economy as it is safe to do so.*

1 (b) On February 25, 2020, Mayor London Breed proclaimed a state of emergency, with which
2 the Board of Supervisors concurred on March 3, 2020. To mitigate the spread of COVID-19, on March
3 16, 2020, the Local Health Officer issued Health Order No. C19-07 directing San Franciscans to
4 “shelter in place,” or stay at home, except for certain essential businesses, services, and activities.
5 That Order has been amended several times to allow additional businesses and activities to resume,
6 and it remains in effect without an end date as Order No. ~~C19-07~~C19-07t, as of ~~October 20, 2020~~
7 March 4, 2021.

8 (c) Under this Health Order, essential businesses, including grocery stores, drug stores, and on-
9 demand delivery services for food, medicines, and other essential items, have continued to operate.
10 Restaurants initially were permitted to operate for carry out and delivery service, subsequently for
11 Outdoor dining, and then ~~for~~ limited indoor dining, were permitted during a period when case
12 rates had declined. Although both were subsequently suspended because of a rise in case
13 rates, outdoor dining was permitted again starting on January 27, 2021, and limited indoor
14 dining was permitted again starting on March 3, 2021, as case rates started to fall. Grocery
15 stores, drug stores, restaurants, and on-demand delivery services have provided and will continue to
16 provide critical access to essential items during the public health emergency. Many San Franciscans,
17 especially residents who are particularly vulnerable to COVID-19 due to age or underlying health
18 conditions, use on-demand delivery services to receive food and other essential items while staying safe
19 at home.

20 (d) Grocery store, drug store, and restaurant ~~employees~~workers, and on-demand delivery
21 drivers and shoppers are an essential population of workers who cannot perform their work remotely,
22 making them particularly vulnerable to COVID-19 exposure. These workers must be provided the
23 necessary supplies, tools, and equipment to protect themselves from infection and to prevent the spread
24 of COVID-19 to other employees or to the members of the public to whom they supply essential goods.
25 This need is particularly pressing for on-demand delivery drivers and shoppers. Many delivery services

1 incorrectly classify their delivery shoppers and drivers as independent contractors, so they are unlikely
2 to be provided health insurance, sick leave, other paid leave, unemployment insurance, or workers’
3 compensation; they may not be provided or reimbursed for the necessary supplies, tools, and
4 equipment to protect themselves from COVID-19; and they may not be provided guidance on COVID-
5 19 health and safety. With the adoption by the voters of Proposition 22 (November 3, 2020),
6 delivery drivers and shoppers may be properly classified as independent contractors if certain
7 conditions are met, but these workers remain uniquely vulnerable because they lack the
8 employment protections described in the preceding sentence.

9 (e) Order No. C19-07js, Appendix A, includes extensive health and safety requirements for
10 businesses operating during the pandemic. In addition, the Local Health Officer has issued several
11 health Directives applicable to specific industries and activities. These include Directive No. 2020-05b,
12 for restaurants and other facilities that prepare food for carry out and delivery; Directive No. 2020-06,
13 for delivery and shipping businesses; Directive No. 2020-16ee, for indoor and outdoor dining; and
14 Directive No. 2020-17b, for indoor retail. Each of these Directives applies certain protections and
15 requirements to defined “Personnel” who provide services at the applicable businesses, including both
16 employees and independent contractors.

17 (f) Although the Local Health Officer’s Orders and Directives have the force of law, and their
18 violation can be punished by fines and misdemeanor criminal prosecution, both employees and
19 workers who are independent contractors whose health may be jeopardized by violations of Health
20 Orders and Directives, may have no effective remedy. This Article 33M is required to provide effective
21 remedies to workers, including employees and independent contractors, whose rights are violated,
22 and in turn to reduce the likelihood of COVID-19 infection among employees of workers at grocery
23 stores, drug stores, restaurants, and on-demand delivery services and the members of the public with
24 whom they interact.

25

1 (g) Further, by providing additional scheduling flexibility and hours protections, this Article
2 33M provides grocery store, drug store, restaurant, and on-demand delivery employees workers
3 additional tools to protect themselves and others from infection and thereby protect public health.
4

5 **SEC. 3300M.2. DEFINITIONS.**

6 For purposes of this Article 33M, the following definitions apply.

7 “Agency” means the Office of Labor Standards Enforcement.

8 “City” means the City and County of San Francisco.

9 “Covered EmployerEntity” means any person, as defined in Section 18 of the California Labor
10 Code, including corporate officers or executives, who directly or indirectly or through an agent or any
11 other person, including through the services of a temporary services or staffing agency or similar
12 entity, employs, suffers or permits to work, or exercises control over the wages, hours, or working
13 conditions, or facilitates contracting for delivery services of an Employee-Worker for any of the
14 following: (a) a grocery store, supermarket, convenience store, restaurant, cafe, or other establishment
15 primarily engaged in the retail sale of food; or (b) a drug store, pharmacy, or other establishment
16 primarily engaged in the retail sale of medication, pharmaceuticals, or medical supplies; or (c) an On-
17 Demand Delivery Service.

18 ~~“Employee” means any person who in a particular week performs at least two hours of~~
19 ~~work for a Covered Employer within the geographical boundaries of the City, without regard to~~
20 ~~whether the Covered Employer classifies the person as an employee for any other purpose.~~

21 ~~“Employee” includes, without limitation, shoppers and drivers for an On-Demand Delivery~~
22 ~~Service.~~

23 “On-Demand Delivery Service” means a third-party online or mobile application or other
24 internet service that offers or arranges for the consumer purchase and same-day or scheduled delivery
25 of food products, medications, or other goods directly from no fewer than 20 businesses that are

1 restaurants, cafes, grocery stores, supermarkets, convenience stores, drug stores, pharmacies, or other
2 establishments primarily engaged in the retail sale of food, medication, pharmaceuticals, or medical
3 supplies.

4 “Worker” means any person who in a particular week performs at least two hours of
5 work within the geographical boundaries of the City for, or contracted through the online or
6 mobile application of, a Covered Entity, without regard to whether the Covered Entity
7 classifies the person as an employee or an independent contractor. “Worker” includes, without
8 limitation, shoppers and drivers for an On-Demand Delivery Service.

9
10 **SEC. 3300M.3. EMPLOYEE WORKER HEALTH AND SAFETY PROTECTIONS.**

11 (a) A Covered Employer Entity must comply with all requirements issued by the Local Health
12 Officer, including but not limited to those in Order No. C19-07j; Appendix A; Directive No. 2020-05b;
13 Directive No. 2020-06; Directive No. 2020-16ee; and Directive No. 2020-17b; and any successor
14 Orders and Directives.

15 (b) The following requirements of such Order and Directives under subsection (a) are
16 independently required by this Article 33M:

17 (1) Covered Employers Entities must provide all Employees Workers items such as
18 face coverings; gloves; hand sanitizer or handwashing stations, or both; and disinfectant and related
19 supplies.

20 (2) Covered Employers Entities must provide all Employees Workers with a Social
21 Distancing Protocol and must educate all Employees Workers on such Social Distancing Protocol.

22 (3) Covered Employers Entities must instruct all Employees Workers and customers
23 to maintain at least six-feet distance from others, except if momentarily necessary to facilitate or accept
24 payment and hand off items or deliver goods; provide for contactless payment systems or, if not

1 feasible, sanitize payment systems after each use; and provide for no-contact delivery or pick up if
2 feasible.

3 (4) Covered ~~Employers~~Entities must require ~~Employees~~Workers to regularly
4 disinfect high-touch surfaces during their ~~shifts~~work and must pay Workers who are classified as
5 employees their normal wage rate and Workers who are classified as independent contractors
6 no less than the rate required under Section 12V.3 of the Administrative Code for time spent
7 doing so, which must be adequate to allow Workers to meet health and safety requirements
8 for sanitation.

9
10 **SEC. 3300M.4. RIGHT TO SCHEDULE CHANGES.**

11 A Covered ~~Employer~~Entity shall where reasonably feasible approve an ~~Employee's~~
12 Worker's request to cancel scheduled work for any reason for which an ~~Employee~~Worker may use
13 leave under the City's Paid Sick Leave Ordinance (Administrative Code Chapter 12W), and the
14 Agency's rules and guidance implementing those provisions, ~~or emergency paid sick leave under~~
15 the Families First Coronavirus Response Act, Public Law No. 116-127, Section 5102(a) and
16 implementing regulations, 29 CFR § 826.20, as may be amended from time to time, without
17 regard to whether such ~~Employee~~Worker has paid leave available for use. If such ~~Employee~~Worker
18 has no paid leave available or chooses not to use paid leave, the ~~Employer~~Covered Entity shall
19 where reasonably feasible allow the ~~Employee~~Worker to reschedule the work.

20
21 **SEC. 3300M.5. EXERCISE OF RIGHTS PROTECTED; RETALIATION PROHIBITED.**

22 (a) It shall be unlawful for a Covered ~~Employer~~Entity or any other person to interfere with,
23 restrain, or deny the exercise of, or the attempt to exercise, any right protected under this Article 33M.

24 (b) It shall be unlawful for a Covered ~~Employer~~Entity or any other person to discharge,
25 threaten to discharge, demote, suspend, or in any manner discriminate or take adverse action against

1 any person in retaliation for exercising rights protected under this Article 33M, including the right to
2 file a complaint or inform any person about any Covered EmployerEntity's alleged violation of this
3 Article; the right to cooperate with the Agency in its investigations of alleged violations of this Article;
4 and the right to inform any person of that person's possible rights under this Article.

5 (c) Protections of this Article 33M shall apply to any person who mistakenly but in good faith
6 alleges violations of this Article.

7 (d) Taking adverse action against a person within 90 days of the person's filing a complaint
8 with the Agency or a court alleging a violation of any provision of this Article 33M; of informing any
9 person about a Covered EmployerEntity's alleged violation of this Article; of cooperating with the
10 Agency or other persons in the investigation or prosecution of any alleged violation of this Article; of
11 opposing any policy, practice, or act that is unlawful under this Article; or of informing any person of
12 that person's rights under this Article, shall raise a rebuttable presumption that such adverse action
13 was taken in retaliation for the exercise of one or more of the aforementioned rights. Unless the
14 Covered EmployerEntity rebuts the presumption with clear and convincing evidence that the adverse
15 action was solely for a reason other than retaliation, the Covered EmployerEntity shall be deemed to
16 have violated this Section 3300M.5.

17
18 **SEC. 3300M.6. NOTICE TO WORKERS.**

19 (a) The Agency shall, within seven days of the effective date of this Article 33M, publish
20 and make available on its website and through electronic communication to Covered Entities
21 a notice suitable for Covered Entities to inform Workers of their rights under this Article.

22 (b) Every Covered Entity shall, within 10 days after the Agency has published and
23 made available the notice described in subsection (a), provide the notice to Workers in a
24 manner calculated to reach all Workers: by posting in a conspicuous place at the workplace,
25 via electronic communication, and/or by posting in a conspicuous place in a Covered Entity's

1 web-based or app-based platform. Every Covered Entity shall provide the notice in English,
2 Spanish, Chinese, and any language spoken by at least 5% of the Workers who are, or prior
3 to the Public Health Emergency were, at the workplace or job site.

4
5 **SEC. 3300M.67. IMPLEMENTATION AND ENFORCEMENT.**

6 *(a) The Agency is authorized to implement and enforce this Article 33M and may promulgate*
7 *regulations and guidelines for such purposes*

8 *(b) An individual who has reason to believe that a violation of this Article 33M has occurred*
9 *may report the suspected violation to the Agency or to the City’s 311 Customer Service Center online*
10 *or by telephone.*

11 *(c) Covered Entities shall retain records pertaining to their compliance with this Article*
12 *33M for a period of three years and shall allow the Agency access to such records with*
13 *reasonable notice. Failure to maintain records or to allow the Agency reasonable access to*
14 *such records shall result in a presumption that the Covered Entity has violated this Article,*
15 *absent clear and convincing evidence otherwise.*

16 *(d) The Agency may investigate potential violations and may coordinate investigation by other*
17 *City officials as appropriate. Where the Agency has reason to believe that a violation has occurred, it*
18 *may order any appropriate temporary or interim relief to mitigate the violation or maintain the status*
19 *quo pending completion of a full investigation or hearing. Where the Agency determines that a*
20 *violation has occurred following an investigation, the Agency may issue a determination of violation*
21 *and order any appropriate relief, including the reinstatement of an ~~an Employee~~Worker, and payment of*
22 *lost wages or other payments to an ~~an Employee~~Worker. Further, the Agency may order the payment*
23 *of an additional sum as an administrative penalty of \$25 to each Worker or other person whose*
24 *rights under this Article 33M were violated for each day or portion thereof that the violation*
25 *occurred or continued. For any violation committed by a Covered Entity that either (a) is an*

1 On-Demand Delivery Service or (b) has 500 or more employees in any location worldwide,
2 including at least 20 Workers, the minimum total administrative penalty for a violation shall be
3 not less than that does not exceed \$1,000 for the Covered EmployerEntity's first violation, \$5,000
4 for the second violation, and \$10,000 for the third and subsequent violations. For the purpose of this
5 calculation of the minimum penalty, if multiple EmployeesWorkers are impacted by the same
6 violation at the same time, the Agency shall treat the violation as a single violation rather than multiple
7 violations. To compensate the City for the costs of investigating and remedying the violation, the
8 Agency may also order the violating Covered EmployerEntity to pay to the City an amount that does
9 not exceed the Agency's enforcement costs. Subject to the budgetary and fiscal provisions of the
10 Charter, such funds shall be allocated to the Agency and used to offset the costs of implementing and
11 enforcing this Article 33M and other ordinances the Agency enforces.

12 (d)(e) The determination of violation shall provide notice to the Covered EmployerEntity of
13 the right to appeal the determination to the Controller and that failure to do so within 15 days shall
14 result in the determination becoming a final administrative decision enforceable as a judgment by the
15 Superior Court.

16 (e)(f) The determination of violation shall specify a reasonable time period for payment of any
17 relief ordered. The Agency may award interest on all amounts due and unpaid at the expiration of such
18 time period at the rate of interest specified in subdivision (b) of Section 3289 of the California Civil
19 Code, as may be amended from time to time.

20 (f)(g) The remedies and penalties provided under subsection (c) are cumulative and are
21 independent of any remedies or penalties that may be imposed under other City laws or Local Health
22 Officer Orders or Directives.

23 (g)(h) The Agency may require that remedies and penalties due and owing to
24 EmployeesWorkers be paid directly to the City for disbursement to the EmployeesWorkers. The
25 Controller shall hold these funds in escrow for the EmployeesWorkers. The Agency shall make best

1 efforts to distribute such funds to ~~Employees~~Workers. In the event such funds are unclaimed for a
2 period of three years, the Controller may undertake administrative procedures for escheat of unclaimed
3 funds under California Government Code Sections 50050 et seq., as may be amended from time to time.
4 Subject to the budgetary and fiscal provisions of the Charter, such escheated funds shall be dedicated
5 to the enforcement of this Article 33M or other laws the Agency enforces.

6
7 **SEC. 3300M.78. APPEAL PROCEDURE.**

8 (a) A Covered ~~Employer~~Entity may file an appeal from a determination of violation
9 ("Appeal") in accordance with the following procedures:

10 (1) The Covered ~~Employer~~Entity shall file the Appeal with the Controller and serve a
11 copy on the Agency. The Appeal shall be filed in writing within 15 days of the date of service of the
12 determination of violation, and shall specify the basis for the Appeal and shall request that the
13 Controller appoint a hearing officer to hear and decide the Appeal. Failure to submit a timely, written
14 Appeal shall constitute concession to the violation, and the determination of violation shall be deemed
15 the final administrative decision upon expiration of the 15-day period. Further, failure to submit a
16 timely, written Appeal shall constitute a failure to exhaust administrative remedies, which shall serve
17 as a complete defense to any petition or claim brought against the City regarding the determination of
18 violation.

19 (2) Following the filing of the Appeal and service of a copy on the Agency, the Agency
20 shall promptly afford the Covered ~~Employer~~Entity an opportunity to meet and confer in good faith
21 regarding possible resolution of the determination of violation.

22 (3) Within 30 days of receiving an Appeal, the Controller shall appoint an impartial
23 hearing officer who is not part of the Agency and immediately notify the Agency and Covered
24 ~~Employer~~Entity.

1 (4) The hearing officer shall promptly set a date for a hearing. The hearing must
2 commence within 45 days of the date of the Controller’s notice of appointment of the hearing officer,
3 and conclude within 75 days of such notice, provided, however, that the hearing officer may extend
4 these time limits for good cause.

5 (5) The hearing officer shall conduct a fair and impartial evidentiary hearing. The
6 Covered ~~Employer~~Entity shall have the burden of proving by a preponderance of the evidence that the
7 Agency erred in its determination of violation, and/or the relief ordered therein.

8 (6) Within 30 days of the conclusion of the hearing, the hearing officer shall issue a
9 written decision affirming, modifying, or dismissing the determination of violation. The hearing
10 officer’s decision shall be the final administrative decision. The decision shall consist of findings, a
11 determination, any relief ordered, a reasonable time period for payment of any relief ordered, and
12 notice to the Covered ~~Employer~~Entity of the right to appeal by filing a petition for a writ of mandate
13 as described in subsection (7), and that failure to file a timely appeal shall result in the final
14 administrative decision becoming enforceable as a judgment by the Superior Court.

15 (7) The Covered ~~Employer~~Entity may appeal the final administrative decision only by
16 filing in San Francisco Superior Court a petition for a writ of mandate under California Code of Civil
17 Procedure, Section 1094.5 et seq., as applicable, and as may be amended from time to time.

18 (b) The final administrative decision is enforceable as a judgment in Superior Court. Where a
19 Covered ~~Employer~~Entity fails to comply with a final administrative decision within the time period
20 required therein, the Agency may take any appropriate enforcement action to secure compliance,
21 including referring the action to the City Attorney to enforce the final administrative decision as a
22 judgment and, except where prohibited by State or Federal law, requesting that City agencies or
23 departments revoke or suspend any registration certificates, permits, or licenses held or requested by
24 the Covered ~~Employer~~Entity until such time as the violation is remedied.

1 **SEC. 3300M.89. SUNSET OF EMERGENCY ORDINANCE.**

2 *If the emergency ordinance (Ordinance No. 74-20) is reenacted and thereby remains in effect as*
3 *of the effective date of this Article 33M, that emergency ordinance shall sunset on the effective date of*
4 *this Article; provided, however, that any alleged violations of that emergency ordinance remain*
5 *subject to investigation, resolution, and remedy under this Article, regardless of whether a complaint of*
6 *violation of the emergency ordinance was filed before or after the sunset of the emergency ordinance,*
7 *or an Agency investigation was commenced before or after that sunset date, or an appeal or other*
8 *process regarding the complaint was commenced before or after that sunset date.*

9
10 **SEC. 3300M.910. OTHER CITY LAWS.**

11 *This Article 33M is not intended to limit the operation of any other City law or any Local*
12 *Health Officer Order or Directive. Should there be any overlap in application between this Article 33M*
13 *and another City law, Order, or Directive, both shall be followed, except if there is a conflict between*
14 *the two that cannot be reconciled, the City law, Order, or Directive providing greater protection to the*
15 *EmployeeWorker shall take precedence.*

16
17 **SEC. 3300M.4011. PREEMPTION.**

18 *Nothing in this Article 33M shall be interpreted or applied so as to create any right,*
19 *requirement, power, or duty in conflict with federal or state law. The term “conflict,” as used in this*
20 *Section 3300M.4011 means a conflict that is preemptive under federal or state law.*

21
22 **SEC. 3300M.4412. UNDERTAKING FOR THE GENERAL WELFARE.**

23 *In undertaking the adoption and enforcement of this Article 33M, the City is undertaking only to*
24 *promote the general welfare. The City is not assuming, nor is it imposing on its officers and employees,*
25 *an obligation for breach of which it is liable in money damages to any person who claims that such*

1 breach proximately caused injury. This Article does not create a legally enforceable right by any
2 member of the public against the City.

3
4 **SEC. 3300M.4213. SEVERABILITY.**

5 If any section, subsection, sentence, clause, phrase, or word of this Article 33M, or any
6 application thereof to any person or circumstance, is held to be invalid or unconstitutional by a
7 decision of a court of competent jurisdiction, such decision shall not affect the validity of the remaining
8 portions or applications of this Article. The Board of Supervisors hereby declares that it would have
9 passed this Article and every section, subsection, sentence, clause, phrase, and word not declared
10 invalid and unconstitutional without regard to whether any other portion of this Article or application
11 thereof would be subsequently declared invalid or unconstitutional.

12
13 **SEC. 3300M.4314. SUNSET DATE.**

14 This Article 33M shall expire by operation of law the sooner of (a) two years from its effective
15 date or (b) the Local Health Officer's termination of the local health emergency. Upon expiration
16 of this Article, the City Attorney shall cause the ordinance it to be removed from the Police Code.

17
18 Section 2. Effective Date.

19 This ordinance shall become effective 30 days after enactment. Enactment occurs
20 when the Mayor signs the ordinance, the Mayor returns the ordinance unsigned or does not
21 sign the ordinance within ten days of receiving it, or the Board of Supervisors overrides the
22 Mayor's veto of the ordinance.

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

3 By: /s/ _____
4 LISA POWELL
5 Deputy City Attorney

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