

City of Oakland

Regulations Interpreting the Oakland Hospitality and Travel Worker Right to Recall Ordinance

(Oakland Municipal Code Chapter 5.95)

Effective ____ 2021

I. Definitions/Coverage of Oakland Municipal Code Section 5.95.020

A. Laid-off Employee. A worker must be a Laid-off Employee to be eligible for the protections of OMC chapter 5.95. For purposes of Oakland Municipal Code (OMC) section 5.95.020(P):

1. An Employee who resigns from their employment is not a Laid-off Employee.
2. The ordinance applies equally to Laid-off Employees who worked as part-time employees.

B. Length of Service. For Laid-off Employees whose former Employer underwent a Change in Control, Length of Service means the total of all periods of time when an individual worked as an Employee for the Incumbent Employer and Successor Employer, including but not limited to periods of time when the Employee was on leave, including family leave, sick leave, or on vacation.

II. Right to Recall

A. Determining Which Laid-Off Employees are Qualified. To determine whether a Laid-off Employee is or can be qualified for an available position with the same training that would be provided to a non-Laid-Off Employee hired into that position:

1. An Employer may presume that a Laid-off Employee who did not work in the same department, group or work unit as the position for which the employer is hiring is not qualified for the position, unless the position is an unskilled entry-level position.
2. There shall be a rebuttable presumption that a Laid-off Employee is or can be qualified for an available unskilled entry-level position that does not require any particular educational background or experience with the same

training the Employer would provide to a new employee hired into that position.

B. Order of Reemployment Offers to Qualified Laid-off Employees. For purposes of OMC section 5.95.030:

1. If more than one Laid-off Employee is qualified for a position, the Employer shall first offer the position to the Laid-off Employee with the greatest Length of Service who held the same or substantially similar position. If that individual declines the reemployment offer, the Employer must offer the position to the next most senior Laid-off Employee who worked in the same or substantially similar job classification, even if that Laid-off Employee does not have the greatest Length of Service relative to all Laid-off Employees.
2. Once all Laid-off Employees who held the same or substantially similar job classification as the vacancy have received a reemployment offer, if an open position remains, the Employer must offer reemployment to the most senior Laid-off Employee who can be qualified for the position with the same training a new hire would receive.

C. Required Contents of a Written Offer of Reemployment. For purposes of OMC section 5.95.030 a written offer of reemployment shall contain sufficient information to allow a Laid-off Employee to make an informed decision whether to accept or decline an offer. A written offer of reemployment shall include but not be limited to the following information:

1. Identification of the job position being offered;
2. Brief explanation of the duties of the position;
3. Start date;
4. Rate of pay and description of benefits, if any;
5. Whether the position is full-time or part-time and the anticipated number of hours of work per week;
6. Anticipated work schedule; and
7. Name and contact information of the individual that recalled Laid-off Employee should contact to discuss, decline or accept the recall

offer. The Employer must promptly respond to questions regarding a recall offer from a recalled Laid-off Employee.

D. Determining Whether a Laid-off Employee Has Declined an Offer of Reemployment.

1. If a Laid-off Employee who receives an offer of reemployment in accordance with OMC section 5.95.030 and subsection II(C) of these regulations does not respond to the Employer's reemployment offer within the timeframe provided in OMC section 5.95.030(C), the Laid-off Employee has declined the offer and the Employer may remove their name from the recall list.
2. The Employer may set the terms and conditions of employment, subject to any collective bargaining agreement in effect and applicable law. An Employer is not required to offer reemployment on the same terms and with the same conditions of employment the Laid-off Employee had prior to being laid off, including hours of work and rate of pay. If a Laid-off Employee does not accept the terms of a reemployment offer issued in accordance with subsection II(C) of these regulations within the timeframe provided in OMC section 5.95.030(C), the Laid-off Employee has declined the offer and the Employer may remove their name from the recall list.

E. Job Offers to Individuals Who Are Not Laid-off Employees. An Employer may hire a non-Laid-off Employee only if there are no qualified Laid-off Employees willing to accept the position.

F. Written Notice of Non-Selection.

1. Pursuant to OMC section 5.95.030, if an Employer declines to recall Laid-off Employees on grounds of lack of qualification and instead hires an individual who is not a Laid-off Employee:
 - a. The Employer must send a written notice of non-selection to all Laid-off Employees who formerly held a position in the same department, group or work unit as the position for which the employer is hiring.
 - b. If an Employer hires an individual who is not a Laid-off Employee after all qualified Laid-off Employees have declined an offer of reemployment, the Employer need not notify any Laid-off Employee of their non-selection for the position.
2. The written notice of non-selection must contain the following information:

- a. Identification of the job position that Employer filled;
 - b. Brief explanation of the duties of the position;
 - c. Date of hire for the position;
 - d. Statement that Employer hired someone other than the Laid-off Employee for the job; and
 - e. Statement that the Employer did not offer the job to the Laid-off Employee on grounds of lack of qualification.
3. The Employer may send the notice of non-selection via email. If the Employer does not have a current email address for a Laid-off Employee, the Employer must send the notice via U.S. mail to the Laid-off Employee's last known mailing address.

G. Consideration of Applications of Laid-off Employees Employer Initially Deemed Unqualified. If an Employer concludes that no Laid-off Employee is qualified for a position and opens the application process to outside applicants, the Employer shall fairly consider the application of any Laid-off Employee who applies for the position.

III. Enforcement.

- A.** OMC Chapter 5.95 may be enforced in accordance with the procedures set forth in OMC sections 5.92.050(F) and (G). The remedies set forth in those sections apply with full force to violations of OMC Chapter 5.95, except that for a willful violation of section 5.95.040, the amount of damages attributable to lost income due to the violation shall be trebled.
- B.** “Appropriate relief” for violations of OMC Chapter 5.95, as authorized by OMC section 5.92.050(G), may include but is not limited to:
1. Hiring and reinstatement rights pursuant to OMC Chapter 5.95;
 2. Backpay (including, but not limited to, lost wages, benefits, and/or other income);
 3. The payment of an additional sum as an administrative penalty in the amount of fifty dollars (\$50.00) to each Laid-Off Employee or person whose rights under the Ordinance were violated for each day that the violation occurred or continued; and
 4. Any other appropriate relief to account for violations that have occurred and/or will continue to occur, including but not limited to front pay.
- C.** Backpay may be calculated by determining the amount of wages, value of benefits, and other income the Laid-Off Employee likely would have received had the Right to Recall violation(s) not occurred, including backpay from the time the Laid-off Employee could have been rehired (as determined by the date the Employer hired for the position) to the date of reinstatement or implementation or payment of other appropriate remedy.
1. Compensation that a Laid-Off Employee earned during the time period referenced in subsection C from other employment, or reasonably could have earned, may be excluded from the backpay calculation.
 2. Upon request, the Laid-off Employee must provide proof of earnings or non-earnings (including but not limited to Social Security Earnings records) to establish their earnings history during the time period referenced in subsection C; failure to produce such records shall result in an adverse inference.
 3. Absent special or mitigating circumstances, rejection of an Employer’s unconditional job offer for reinstatement ends the accrual of backpay.
- D.** Front pay may be awarded when rehiring or reinstatement would be impossible (for instance, the position has been filled or is otherwise no longer available) or unreasonable (for instance, there is demonstrated hostility between the Employer and the Laid-off Employee).

1. In such circumstances, front pay may be calculated by determining the amount of wages, value of benefits, and other income the Laid-Off Employee likely would have received in lieu of reinstatement, from the date DWES issues its Notice of Determination concluding that reinstatement would be unreasonable or impossible to the date that obtaining equivalent reemployment is reasonably possible.
 2. A Laid-off Employee is not entitled to front pay if the Employer proves the Laid-off Employee would not have taken the job had the Employer recalled them.
- E. In calculating backpay and/or front pay, there shall be a rebuttable presumption that it is reasonably possible for a laid off employee to obtain equivalent reemployment within six months of being laid off, provided the Laid-off Employee produces evidence of a consistent and reasonable job search from the time of the failure to reinstate.

IV. Exemption for Collective Bargaining Agreement.

- A. Individual Waiver Prohibited.** OMC section 5.95.070 allows for a waiver of the provisions of the ordinance, but only through a collective bargaining agreement in which the waiver is set forth explicitly, in clear and unambiguous terms.
- B. Severance Agreements Executed Prior to Effective Date of the Ordinance.** Individuals cannot waive their rights under the ordinance, except in the following circumstances:
1. The Laid-off Employee was separated from employment prior to the effective date of this ordinance; and
 2. As a result of the lay-off, the Laid-off Employee executed a severance agreement with the Employer prior to the effective date of the ordinance providing that in exchange for adequate consideration the Laid-off Employee agreed to a general release of claims against the Employer.