

**City and County of San Francisco
Office of Labor Standards Enforcement**

**Rules Implementing
the Displaced Worker Protections Under Service
Contracts Ordinance (as amended)**

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Introduction

The Office of Labor Standards Enforcement (“OLSE”) promulgates these proposed Rules pursuant to Article 71, Section 71.3 (a) of the Labor and Employment Code (L.E.C.) (formerly codified as Police Code 33C). Pursuant to Section 71.3 (a), OLSE is authorized to enforce and to coordinate implementation and enforcement of the Displaced Worker Protections Under Certain Service Contracts Ordinance (“DWPO”) and may promulgate appropriate rules and guidelines for such purposes.

The DWPO requires qualifying Awarding Authorities and Contractors to:

1. Share information regarding current employees to facilitate retention requirements within a certain timeframe upon termination of a contract; and
2. Retain employees for 90 days pursuant to the express guidelines.

The operative date of the amended DWPO is May 22, 2023. As of the operative date, OLSE may issue determinations and impose administrative penalties.

Definitions¹

“Agency” means the Office of Labor Standards Enforcement or any successor department or office.

“Awarding Authority” means any person that awards or otherwise enters into contracts for security, janitorial, or building maintenance services performed within the City, except that the City is not an “awarding authority” under this Article with respect to City contracts for janitorial services as defined in L.E.C. Section 102.3 or City contracts for security guard services as defined in L.E.C. Section 102.10, because the worker retention requirements for those City contracts are governed by Section 102.7 of the L.E.C. (formerly codified as Administrative Code Section 21C.7).

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

“Contractor” means any person that enters into a service contract with the awarding authority and who employs 25 or more persons.

“Employee” means any person employed as a service employee of a contractor or subcontractor who works at least 15 hours per week and whose primary place of employment is in the City under a contract to provide security services, janitorial services, or building maintenance services for the awarding authority. “Employee” does not include a person who is (1) a managerial, supervisory, or confidential employee, including those employees who would be so defined under the Fair Labor Standards Act; or (2) does not possess or has not maintained a required occupational license; or (3) is employed less than 15 hours per week.

“Person” means any individual, proprietorship, partnership, joint venture, corporation limited liability company, trust, association, or other entity that may employ individuals or enter into contracts.

“Public sector contractor” means any person or persons, firm partnership, corporation, or combination thereof, who enters into a contract with officers or employees empowered by law to enter into contracts for the City for the services governed by this Article.

“Service contract” means a contract let to a contractor by the awarding authority for the furnishing of service (as opposed to the purchase of goods or other property) and that the involves an expenditure or receipt in excess of \$25,000 per contract and a contract term of at least three months.

“Subcontractor” means any person not an employee who enters into a contract with the contractor to assist the contractor in performing a service contract and that employs employees for such person.

“Successor service contract” means a service contract with the awarding authority where the services to be performed have previously been rendered to the awarding authority as part of

¹ These definitions, provided here for ease of reference, mirror Section 71.1 of the DWPO.

the same program or at the same facility under another substantially similar service contract that recently has been terminated or has ended.

Rule 1. Covered Contractors

Section 71.1 Rules and Guidelines:

Background: Section 71.1 states the definitions of Contractor and Subcontractor separately, as incorporated above.

Rule 1.1. In determining whether the Contractor “employs 25 or more persons,” all persons employed should be counted, including those inside and outside of San Francisco, regardless of their status or classification as seasonal, commissioned, permanent or temporary, or full-time or part-time and regardless of whether they are assigned to work pursuant to the relevant service contract.

Rule 1.2. If the number of persons employed varies, the Contractor is covered if it had an average of 25 employees performing paid work per week during the preceding calendar quarter.

For example: A Contractor that has 5 employees during the first 6 weeks of the quarter and 30 employees during the last 7 weeks of a quarter would not be covered in the subsequent quarter because it has employed an average of only 18 persons per week during that quarter: $[(5 \text{ employees/week} \times 6 \text{ weeks}) + (30 \text{ employees/week} \times 7 \text{ weeks})] / 13 \text{ weeks} = 18 \text{ employees/week}$.

Rule 1.3. A Subcontractor, as defined in Section 71.1, need not employ a minimum number of persons to qualify as a Subcontractor pursuant to the DWPO.

Rule 2. Covered Employee

Section 71.1 Rules and Guidelines:

Background: Section 71.1 states the definition of Employee, as incorporated above.

Rule 2.1. “Primary place of employment” means the person regularly conducts the essential job duties of the covered type of service (security, janitorial, or building maintenance) in the jurisdictional boundaries of the City.

Example: Employee who regularly works 20 hours per week as a security guard in a building South of Market would be a covered Employee. Whereas, an Employee who works as a security guard 20 hours per week in a building in Oakland, but on occasion, such as no more than one 8-hour shift per month, covers a shift in the City would not be a covered Employee.

Rule 2.2. For the purposes of the DWPO, “required occupational license” means the Federal, State, or local license required by law or contract to perform the relevant covered services and is defined by the scope of work established by the contracting parties.

Example: If working as a security guard for a private security employer as defined in California Business and Professions Code Section 7582.1, an Employee must possess their Security Guard Registration through the California Bureau of Security and Investigative Service and any other required permit as determined by the scope of the requirements of the position.

Rule 3. Transition Employment Period

Section 71.2 Rules and Guidelines:

Background: Section 71.2(a) states, “Where the awarding authority has given notice that a service contract has been terminated or ended, or where a service contractor has given notice of such termination, upon giving or receiving notice, as the case may be, the terminated or ending contractor shall, within 10 days thereafter, provide to the successor contractor, the name, date of hire, and employment occupation classification of each employee employed at the site or sites covered by the prospective contractor at the time of the contract termination. This provision shall also apply to the subcontractors of the terminated contractor.”

Rule 3.1. Giving notice of termination or ending of a contract is determined at the moment notice is given, whether verbally or in writing, regardless of the express requirement established in any relevant contract term. Thus the 10-day time period for providing information is triggered on the day the notice is given, but the day of notice is not counted in the 10-day time period. The contract need not terminate on the same day the notice of termination is given to trigger the 10-day time period.

Example: On February 15, the awarding authority calls the contractor via phone and states the service contract is terminated, effective March 1. The relevant contract requires notice of termination to be in writing. The contractor must provide the successor contractor (or if no successor contractor has been identified within the 10-day time frame, the awarding authority) with the name, date of hire, and employment occupation classification of each employee employed at the site or sites as of February 15 by no later than close of business on February 25 (10 days thereafter).

Background: Section 71.2(b) states, “A successor contractor shall retain, for a 90-day transition employment period, employees who have been employed by the terminated contractor or its subcontractors, if any, for the preceding eight months or longer at the site or sites covered by the contract.”

Rule 3.2. Eight months shall be measured from calendar date of termination to the calendar date in the prior months (e.g. July 7 to June 7 amounts to one month, March 31 to February 28 amounts to one month, etc. counting back for eight months)

Example: On February 15, the awarding authority terminated the contract to provide janitorial services to Location A. On February 20, the terminated contractor provided the required information to the successor contractor. On March 1, the new service contract begins and the successor contractor must retain all employees who have provided janitorial services at Location A since June 15 of the prior year (preceding eight months) or earlier.

Rule 4. Notice to Employees of Right to Retention

Section 71.3 Rules and Guidelines:

Background: Section 71.3 authorizes OLSE to “coordinate implementation and enforcement” of DWPO and to “promulgate appropriate rules for such purposes” and to issue “supplementary procedures for helping to inform employees of their rights under this Article.”

Rule 4.1. Private Contractors, Public Sector Contractors and Subcontractors covered by the DWPO shall notify all covered Employees of their potential rights under this law at the time of hire or upon assignment to a covered service contract. Notice shall be provided in writing.

Example: Upon assigning an employee to work at Location A on a service contract, Contractor provides a written notice to employee stating, “San Francisco law requires that certain employees who have worked for eight months or more at a particular site be retained for at least 90 days after the contract is terminated if a successor contract is awarded. You may be entitled to this protection. For more information, go to www.sf.gov/olse-dwpo.”

Rule 5. Enforcement – Timely Exchange of Information

Section 71.3 Rules and Guidelines:

Background: The DWPO requires the following exchanges of information within the prescribed timeframes:

- Within 10 days from notice of the termination, as defined in Rule 3.1, or ending of a service contract, the terminated contractor must provide the successor contractor with the name, date of hire, and employment occupation classification of each employee employed at the site or sites covered by the prospective contractor at the time of the contract termination. This provision shall also apply to the subcontractors of the terminated contractor.
- Within 3 days of hiring a successor contractor, the awarding authority shall provide the name and address of the successor contractor to the terminated contractor.
- If a successor contract has not been awarded by the end of the 10-day period, the terminated contractor shall provide the employment information to the awarding authority. Within three days of hiring a successor contractor, the awarding authority shall provide the employment information to the successor contractor.

Section 71.3(b)(3) states, “if a violation of this Article 71 resulted in other harm to the employee or any other person, or otherwise violated the rights of employees or other persons, this administrative penalty shall also include \$50 to each employee or person whose rights under this Article were violated for each day or portion thereof that the violation occurred or continued.”

Rule 5.1. If at the time of notice of termination, the awarding authority has hired a successor contractor, and the awarding authority provides the successor contractor’s name and address to the terminated contractor within three days as required, the terminated contractor will be charged a penalty of \$50 per employee for every day after the tenth day that the terminated contractor fails to provide the employment information to the successor contractor.

Rule 5.2. If a successor contractor has not been hired by the end of the 10-day period, the terminated contractor will be charged a penalty of \$50 per employee for every day after the tenth day that the terminated contractor fails to provide the employment information to the awarding authority.

Rule 5.3. If the awarding authority fails to provide the terminated contractor with the name and address of the successor contractor within three days of hiring as required in section 71.2(a), the awarding authority will be charged a penalty of \$50 per employee for every day after the third day.

Rule 5.4. If the awarding authority does not hire a successor contractor within 10 days after termination of the contract, and having received the employment information from the

terminated contractor fails to provide that information to the successor contractor within three days of hire, the awarding authority will be charged a penalty of \$50 per employee for every day after the third day.

Rule 5.5. OLSE reserves the right to waive timeline related penalties if the terminated contractor or awarding authority cures the delay such that the employees experience no lapse in pay or other employment benefit, or any other type of harm, as a result of the delay.

Rule 6. Enforcement – Failure to Retain

Section 71.2 Rules and Guidelines:

Background: Section 71.2(b) states, “A successor contractor shall retain, for a 90-day transition employment period, employees who have been employed by the terminated contractor or its subcontractors, if any, for the preceding eight months or longer at the site or sites covered by the contract.”

Rule 6.1. If all required information is provided to the successor contractor and successor contractor does not retain the covered Employees for the 90-day transition period, the successor contractor is liable for any and all appropriate relief as determined by OLSE pursuant to Section 71.3(b)(2).

Background: Section 71.2(d) states, “During such 90-day period, the successor contractor (or subcontractor, where applicable) shall maintain a preferential hiring list of eligible covered employees not retained by the successor contractor (or subcontractor) from which the successor contractor (or subcontractor) shall hire additional employees.”

Rule 6.2. If the successor contractor hires additional employees that are not on the preferential hiring list during the 90-day period, the successor contractor is liable for any and all appropriate relief as determined by OLSE pursuant to Section 71.3(b)(2)

Background: Section 71.2(f) states, “At the end of such 90-day period, a successor public sector contractor (or subcontractor, where applicable) shall perform a written performance evaluation for each employee retained pursuant to this Article 71. If the employee’s performance during such 90-day period is satisfactory, the successor public sector contractor (or subcontractor) shall offer the employee continued employment under the terms and conditions established by the public sector successor contractor (or subcontractor) or as required by law.”

Rule 6.3. If the public sector contractor (or subcontractor) does not perform a written performance evaluation for each employee retained pursuant to DWPO, the contractor will be liable for any and all appropriate relief as determined by OLSE pursuant to Section 71.3(b)(2). If the employee is retained past the 90-day period despite not receiving a written performance evaluation, OLSE reserves the right to waive any penalties or relief.

Rule 7. Enforcement - Investigations

Section 71.3 Rules and Guidelines:

OLSE has the authority to conduct investigations, monitor compliance, and impose penalties for violations of the DWPO. As part of this authority, OLSE may examine Employer records, conduct inspections of employment sites, speak with workers and other witnesses, conduct audits, and engage in other investigative methods as needed.

Investigation Procedure

Upon making a preliminary determination that a party has violated the DWPO, OLSE may send the party a Notice to Correct, which shall include OLSE's findings. For all alleged violations the party shall have 15 days to respond.

The party may resolve the matter by remedying the situation per OLSE's direction and fully complying with the DWPO. If the party contests the Notice to Correct findings, the response shall explain, in detail, the reasons why the party believes it has not violated the provisions listed in the Notice to Correct. The party may provide supporting evidence to prove compliance. OLSE may, in its discretion, grant an extension of time to respond. Any request for an extension must be timely, in writing, and must state the reason for the requested extension.

After reviewing the party's response to the Notice to Correct, or if a party fails to respond to the Notice to Correct by the date specified, OLSE will decide whether to (1) conduct further investigation, (2) issue a Determination of Violation ("DOV"), or (3) conclude the investigation. The issuance of a DOV constitutes OLSE's final determination that a party has violated the DWPO.

A DOV will include: (1) a list of all provisions the party has violated; (2) a summary of why OLSE has concluded that the party has violated the specified provisions; (3) the corrective actions the party must take to remedy its violations; (4) the amount of the administrative penalty imposed for the violation(s) and a timeline for payment of such penalty, if applicable; and (5) the procedure for appealing the DOV and the 15-day deadline for filing the appeal.

Service

OLSE may serve Notices to Correct and DOVs in any of the following ways:

- personal service upon the Employer or legal representative;
- posting the document in a conspicuous place on the Employer's place of business or the fixed location within the City from or at which the Employer conducts business in the City;
- email, so long as the Employer has consented in writing to service by email; or

- first class mail, with postage prepaid and a declaration of service under penalty of perjury by the person mailing the document. If OLSE affects service by mail, service is effective on the postmark date.

Rule 8. Administrative Appeal Procedures

Section 71.4 Rules and Guidelines:

Filing an Appeal

Employers receiving a DOV may file an appeal by requesting a hearing before a neutral hearing officer appointed by the Office of the Controller. The appeal must:

1. Be in writing and state the basis for the appeal;
2. Include a return address;
3. Include a check or bond payable to the City and County of San Francisco for the full penalty amount; and
4. Be received by the Controller's Office within fifteen (15) days from the date on the Proof of Service accompanying the DOV.

The appeal must be submitted in person, by U.S. mail, or by other delivery service such as FedEx or UPS, to:

San Francisco Office of the Controller
City Hall, Room 316
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102

A copy of the appeal, including a copy of the check or bond for the penalty amount, must also be submitted to OLSE in one of the following ways: in person, by email to the compliance officer listed on the DOV, by U.S. mail, or by other delivery service such as FedEx or UPS, to:

San Francisco Office of Labor Standards Enforcement
City Hall, Room 430
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102

The Controller's Office must receive the appeal and the check or bond for the penalty amount, and OLSE must receive the copy of the appeal, on or before the day of the appeal deadline by close of business (5:00 p.m.).

The failure to file an appeal that complies with this Rule shall constitute concession to the assessment, and the DOV shall be final upon expiration of the appeal deadline.

Hardship Waiver

In lieu of submitting a check or bond for the penalty amount (as outlined above), employers may request a waiver of this obligation due to financial hardship. The waiver request must include evidence in support of the financial hardship. OLSE shall grant or deny the waiver request, in writing, within 10 days of receiving the request. If OLSE denies the waiver request, the employer shall have 10 days to submit the check or bond. If the employer fails to timely submit the check or bond (following denial of the waiver), the appeal shall be deemed invalid. This will constitute concession to the assessment, and the DOV shall be final.

Setting a Hearing Date

Within thirty (30) days of receiving a properly filed appeal, or as soon thereafter as is practicable, the Controller or his or her designee shall appoint a neutral hearing officer (who shall not be employed by OLSE) to hear and decide the administrative appeal. The Controller's Office shall advise OLSE and the appellant of the appointment of the hearing officer.

The hearing officer shall promptly set a date, time, and place for a hearing on the appeal. The Controller's Office shall serve—by first class mail to the address listed on the appeal, and by email if the appellant has included an email address on the appeal—a written notice of the time and place for the hearing.

Except as otherwise provided by law, the appellant's failure to receive a properly served notice of the hearing shall not affect the validity of any proceedings under the DWPO.

Pre-Hearing Procedures

No later than ten days prior to the hearing, the parties shall submit the following documents to the hearing officer, with simultaneous service on all other parties: a statement of issues to be decided by the hearing officer, a list of all witnesses likely to be called (other than for impeachment or rebuttal), a list describing each piece of evidence to be offered at the hearing, and any other information or documents requested by the hearing officer.

An employer's pre-hearing submissions shall be limited to the basis of the appeal, as set forth in writing in the appeal. (See Rule 8.) If an employer's pre-hearing submissions address matters outside the scope of the written appeal, OLSE has the right to request such submissions be struck or, alternatively, the right to submit a written response to such submissions.

If a hearing is continued to a later date, a party may request permission to submit an amended witness or exhibit list. Such requests must be made in writing and submitted to the hearing officer and all other parties at least 15 days before the new hearing date. Such requests shall not be granted unless the hearing officer determines that there is good cause to allow the party to call the new witness or submit the new evidence.

Failure to Appear

An appellant's failure to appear at the hearing shall constitute concession to the assessment in the DOV and a withdrawal of the appeal.

Evidence

A DOV shall constitute *prima facie* evidence of all violations set forth in the DOV.

Absent good cause, and other than impeachment or rebuttal witnesses, a witness who does not appear on the witness list described above may not be called at the hearing.

Absent good cause, an Employer may not present evidence at a hearing that it failed to provide to OLSE in response to a request before the issuance of a DOV.

Burden of Proof

The appellant shall have the burden of proving, by a preponderance of the evidence, that OLSE's determination of a violation is incorrect.

Hearing Record

The hearing shall be open to the public and shall be tape-recorded. Any person or entity, or OLSE, may retain a certified court reporter to record and transcribe the hearing.

Findings and Decision

The hearing officer may continue the hearing and request additional information from any party prior to issuing a written decision. The hearing officer shall make findings based on the record of the hearing and issue a written decision based on such findings within 20 days of the conclusion of the hearing. The hearing officer may affirm or reject the DOV in whole, or in part. The hearing officer may also impose conditions and/or deadlines to correct violations or pay penalties. OLSE will promptly post the hearing officer's decision on its website.

Finality of Hearing Officer's Decision

The decision of the hearing officer shall be final. The sole means of review of the hearing officer's decision shall be by filing in the San Francisco Superior Court a petition for a writ of mandate under Section 1094.5 of the California Code of Civil Procedure. If the hearing officer concludes that the violation(s) set forth in the DOV did not occur or that the party was not the responsible party, OLSE shall refund the penalty amount to the party that deposited such amount. The hearing officer's decision shall be served on the appellant and OLSE by certified mail.