

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

**Rules Implementing  
the Lactation in the Workplace Ordinance**

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## Introduction

The Office of Labor Standards Enforcement (“OLSE”) promulgates these Rules pursuant to Chapter 2A, Article 1, Section 2A.23 of the San Francisco Administrative Code and Article 33I of the San Francisco Police Code. Pursuant to Article 33I of the Police Code, the OLSE is authorized to coordinate implementation and enforcement of the San Francisco Lactation in the Workplace Ordinance (“LWO”) and may promulgate appropriate guidelines for such purposes.

The Lactation in the Workplace Ordinance requires Employers to:

1. Provide a reasonable amount of break time for Employees to express breast milk;
2. Provide a location for lactation, other than a bathroom, that:
  - Is shielded from view and free from intrusion;
  - Is safe and clean;
  - Contains a surface;
  - Contains a place to sit;
  - Has access to electricity;
3. Provide access to a refrigerator and a sink with running water; and
4. Develop and implement a Lactation Accommodation policy that affirms an Employee’s right to Lactation Accommodation and explains how Employees may request it.

In limited circumstances, the law provides for exemptions from requirements 1 – 3 above if the Employer can show that the requirements would impose an undue hardship.

The operative date of the LWO is January 1, 2018. For the calendar year 2018, OLSE will only issue warnings and notices to correct when it has determined that a violation has occurred. Starting January 1, 2019, OLSE may issue determinations and impose administrative penalties.

## Definitions<sup>1</sup>

**“Agency” or “OLSE”** means the San Francisco Office of Labor Standards Enforcement.

**“Employee”** means any person who is employed within the geographic boundaries of San Francisco by an Employer, including part-time Employees.

**“Employer”** means any person as defined in Section 18 of the California Labor Code who employs an Employee working in San Francisco, but does not include the City & County of San Francisco or any governmental entity.

**“Lactation Accommodation”** means Lactation Breaks and Lactation Location.

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<sup>1</sup> These definitions, provided here for ease of reference, mirror Section 3300I.3 of the LWO.

**“Lactation Break”** means the break time an Employer is required to provide an Employee for purposes of expressing breast milk.

**“Lactation Location”** means the space, room, or location an Employer must provide an Employee for purposes of expressing breast milk.

**“LWO” or “Ordinance”** means the San Francisco Lactation in the Workplace Ordinance, codified at Article 33I of the San Francisco Police Code and Sections 106A and 1210 of the San Francisco Building Code.

## Rule 1. Lactation Breaks

*Interprets Article 33I, Section 3300I.4(a)*

**Background:** Police Code Section 3300I.4(a) states, “An Employer shall provide a reasonable amount of break time to accommodate an Employee desiring to express breast milk for the Employee’s child. The break time shall, if possible, run concurrently with any break time already provided to the Employee. Break time for an Employee that does not run concurrently with the rest time authorized for the Employee by the applicable wage order of the Industrial Welfare Commission may be unpaid.”

**Rule 1.1.** The number of minutes needed to express breast milk per Lactation Break and the number of Lactation Breaks needed per day varies from Employee to Employee, and may change over time for the same Employee. If an Employer seeks to limit the duration of an Employee’s Lactation Break or the number of Lactation Breaks per day, the Employer must demonstrate that the duration of the break requested by the Employee is unreasonable.

**Rule 1.2.** The time that it takes an Employee to get to and from the Employer’s designated Lactation Location and, if at a separate location, to and from a refrigerator and a sink with running water, shall not be included as part of the Employee’s break time.

**Rule 1.3.** The Employer may not impose a limit on the duration of a Lactation Accommodation (e.g., months or years).

## Rule 2. Lactation Location

*Interprets Article 33I, Sections 3300I.4(b)(1) and 3300I.4(b)(2)*

**Background:** Police Code Section 3300I.4(b)(1) states, “An Employer shall provide a Lactation Location, other than a bathroom, in close proximity to the Employee’s work area that is shielded from view and free from intrusion from co-workers and the public. The room or other location may include the place where the Employee normally works if it otherwise meets the requirements of this Section 3300I.4. The Lactation Location shall also:

- (A) Be safe, clean, and free of toxic or hazardous materials;
- (B) Contain a surface (e.g., a table or shelf) to place a breast pump and other personal items;
- (C) Contain a place to sit; and
- (D) Have access to electricity.”

Police Code Section 3300I.4(b)(2) states, “The Employer shall provide, in close proximity to the Employee’s work area, access to a refrigerator where the Employee can store breast milk and access to a sink with running water.”

**Rule 2.1.** Whether a Lactation Location, refrigerator, and sink with running water are “in close proximity to the Employee’s work area” depends on the specific situation. The Lactation Location, refrigerator, and sink with running water should not be placed so far away that it would be likely to deter a reasonable similarly situated person from exercising their rights under the Ordinance.

**Rule 2.2.** Subject to the requirements of state and local law, including but not limited to Building Code Sections 106A and 1210, as they may be amended from time to time, Employers may satisfy the Lactation Location requirements with temporary structures or spaces.

**Rule 2.3.** Subject to the requirements of state and local law, including but not limited to Building Code Sections 106A and 1210, as they may be amended from time to time, Employers are not required to provide a Lactation Location unless and until an Employee requests Lactation Accommodation.

**Rule 2.4.** Employers are not required to provide a refrigerator exclusively for Employees to store breast milk; provided, however, that the Employee’s need to store breast milk takes priority over other uses of the refrigerator.

### Rule 3. Lactation Accommodation – Exemption

*Interprets Article 33I, Section 3300I.4(c)*

**Background:** Police Code Section 3300I.4(c) states, “An Employer may establish an exemption from any requirement of this Section 3300I.4 if the Employer can show that such requirement would impose an undue hardship by causing the Employer significant expense or operational difficulty when considered in relation to the size, financial resources, nature, or structure of the Employer’s business. Examples of an undue hardship could, in some circumstances, include: requiring the Employer to build a room, undertake a construction project, remove seating from a restaurant, or remove retail floor space.”

**Rule 3.1.** The burden of proof is on the Employer to demonstrate that an Employee’s request for Lactation Accommodation would impose an undue hardship.

**Rule 3.2.** If an Employer asserts that it can only comply with some of the provisions of the required Lactation Location (e.g., surface to sit, access to electricity, etc.) without undue hardship, it should comply with those provisions, and then seek to assert an exemption for the provision(s) that it asserts it cannot provide without undue hardship.

## Rule 4. Required Policy and Process for Lactation Accommodation

*Interprets Article 33I, Section 3300I.5(a)*

**Background:** Police Code Section 3300I(a) states, in part:

(a) Lactation Accommodation Policy. Each Employer shall develop and implement a policy regarding Lactation Accommodation. The policy shall:

(1) Include a statement that Employees have a right to request Lactation Accommodation.

(2) Identify a process by which an Employee may request Lactation Accommodation. The process shall:

(A) specify the means by which an Employee may submit a request for Lactation Accommodation;

(B) require the Employer to respond to a request for Lactation Accommodation within five business days; and

(C) require the Employer and Employee to engage in an interactive process to determine the appropriate Lactation Break period(s) and the Lactation Location for the Employee.

**Rule 4.1** An Employee's request for Lactation Accommodation may be provided orally, by email, or in writing, and need not be submitted on a specific form.

**Rule 4.2.** Employers must respond to an Employee's request for Lactation Accommodation in writing or by email.

**Rule 4.3.** An Employer's Lactation Accommodation Policy must provide a clear plan to provide a Lactation Location in a responsive and timely manner. This rule modifies Rules 2.2 and 2.3.



## Rule 5. Exercise of Rights Protected; Retaliation Prohibited

*Interprets Article 33I, Section 3300I.7(a)*

**Background:** Police Code Section 3300I.7(a) states, “It shall be unlawful for an Employer or any other person to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right protected under this Article 33I.”

**Rule 5.1.** An Employer may not require any documentation (e.g., doctor’s note) regarding an Employee’s need for a Lactation Accommodation or the number or duration of Lactation Breaks the Employee needs.

## Rule 6. Alternative and Limited San Francisco Work Schedules

*Interprets Article 33I, Section 3300I.3*

**Rule 6.1.** Employees who perform work in San Francisco on an occasional basis are covered by the Ordinance only if they perform 56 or more hours of work in San Francisco within a calendar year. Employees returning from a leave of absence are covered by the Ordinance if they performed 56 or more hours of work in San Francisco in the calendar year preceding the leave or if there is a reasonable expectation that the Employee will perform 56 or more hours of work in San Francisco in the calendar year following the leave. This rule modifies Rules 6.2, 6.3, 6.4, and 6.5.

**Rule 6.2** Employees who live in San Francisco and perform work for an Employer from home are covered by the Ordinance. In these circumstances, the Employer is not responsible for providing a Lactation Location, but all other provisions of the Ordinance apply.

**Rule 6.3** Employees who work outside of San Francisco and who travel through San Francisco, but do not stop in the city, are not covered by the Ordinance. Employees who travel through San Francisco, and stop in the city to work (e.g., to make pickups or deliveries) are covered by the Ordinance for hours worked in the city, including travel within the city to and from the work site(s).

**Rule 6.4** Employees on temporary assignment (e.g., a business trip) are covered by the Ordinance for hours worked in San Francisco.

**Rule 6.5** Employees attending meetings and retreats in San Francisco at locations other than their ordinary place of work are covered by the Ordinance during those functions.

## Rule 7. Joint Employment

*Interprets Article 33I, Section 3300I.3*

**Background:** An Employee may be jointly employed by two or more Employers. Joint employment can occur in a variety of situations, including but not limited to when a person uses a temporary staffing agency, leading agency, professional Employer organization, or other entity serving the same or similar functions. OLSE looks to California law when assessing whether an Employee is jointly employed.

**Rule 7.1.** If an Employee is jointly employed, each Employer shall have an obligation to ensure compliance with the Ordinance. Whether an Employee is jointly employed by more than one Employer shall not impact an Employer's responsibilities under the Ordinance.

## **Rule 8. Computation of Time for Actions Required Under Rules 9, 10, and 11**

**Rule 8.1.** Unless otherwise specified, the time in which any act provided by Rules 9, 10, or 11 is to be performed is computed by excluding the first day and including the last, unless the last day is Saturday, Sunday, or other legal holiday, and then it is also excluded.

**Rule 8.2.** Unless otherwise specified, when Rules 9, 10, or 11 require performance of an act within a specified number of days, that number refers to calendar days, not business days.

**Rule 8.3.** Unless otherwise specified, if the last day for the performance of any act that is required by Rules 9, 10, or 11 to be performed within a specific period of time falls on a Saturday, Sunday, or other legal holiday, the period is extended to, and includes, the next day that is not a Saturday, Sunday, or legal holiday.

## Rule 9. Enforcement Procedures

### *Establishes Procedures Pursuant Section 3300I.8*

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

### **Investigation Procedure**

Upon making a preliminary determination that an Employer has violated the LWO, OLSE will send the Employer a Notice to Correct. For all alleged violations other than an allegation of retaliation, the Employer shall have 15 days to respond. If one of the alleged violations is retaliation, the Employer shall have 10 days to respond.

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

After reviewing the Employer's response to the Notice to Correct, or if an Employer 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 an Employer has violated the LWO.

A DOV will include: (1) a list of all LWO provisions the Employer has violated; (2) an explanation of why OLSE has concluded that the Employer has violated the specified provisions; (3) the corrective actions the Employer 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 deadline for filing the appeal.

### **Service**

OLSE may serve Notices to Correct and DOVs in the 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 date of the mailing.

## Rule 10. Administrative Penalties

### *Establishes Procedures Pursuant Section 3300I.8*

The LWO authorizes OLSE to impose administrative penalties up to \$500 for each violation of the Ordinance. This penalty shall be payable to the affected worker(s) and be due within 30 days from the date of the DOV.

In order to compensate the City for the cost of investigating and remedying violations, the LWO also provides for OLSE to impose administrative penalties up to \$50 for each day or portion thereof and for each Employee or person as to whom the violation occurred or continued. Such funds shall be made payable to the City and County of San Francisco and be due within 30 days from the date of the DOV.

The failure of an Employer to pay restitution or penalties within the time specified in the DOV constitutes a debt to the City.

Actions that may be taken by OLSE and/or other City agencies to collect unpaid amounts from Employers for LWO violations include, but are not limited to:

- a civil action;
- revocation of licenses and permits; and
- referral to state regulatory, licensing, permitting, or other collections agencies.

## Rule 11. Administrative Appeal Procedures

*Establishes Procedures Pursuant Section 3300I.8*

### **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 briefly state the basis for the appeal (this is a brief statement only; the parties will have the opportunity to submit full written briefs later as part of the appeals process);
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.



### **Setting a Hearing Date**

Within fifteen (15) 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 LWO.

### **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.

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, beyond 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.