San Francisco Supervisors Pass COVID-19 Emergency Ordinance on Cleaning Hotels and Commercial Office Buildings

By John Epperson

San Francisco's Board of Supervisors passed an Emergency Ordinance on July 7 entitled "Cleaning and Disease Prevention Standards in Tourist Hotels and Large Commercial Office Buildings" (the "EO"). The EO is expected to be signed by the Mayor and go into effect soon. The EO notes the importance of the hospitality and commercial office building industries to San Francisco's economy and is intended to restore public confidence in the safety of the City's hotels and office buildings. Although the EO automatically terminates in 60 days, it can be extended by the Board of Supervisors and will create significant compliance headaches for owners and managers of commercial office buildings and hotels, no matter how long it is in effect. This alert focuses on the requirements on large commercial office buildings, defined to be office buildings with greater than 50,000 square feet of office space (over 440 office buildings in San Francisco meet this definition).[i]

Section 4 of the EO requires Operators at covered hotels and office buildings to prepare and maintain written cleaning standards. "Operator" is poorly defined as anyone who "employs or hires Employees at a Covered Establishment" but is presumably intended to cover building owners and managers, not tenants. "Employee" is defined broadly to include full and part-time employees and independent contractors who perform work at the Covered Establishment. The cleaning standards must include cleaning and disinfection of defined high-contact areas "multiple times daily." The list of high-contact areas is extensive: all surfaces in lobbies, hallways, waiting areas, other public areas, including walls, floors, windows, desks, furniture, elevators, stairways, restrooms, meeting rooms, computer keyboards and other items used by multiple individuals. Doors must be regularly disinfected, and if a door cannot open automatically or be propped open, a gloved employee must be assigned to open the door. Furthermore, Operators are required to maintain a compliance log of all cleaning performed to comply with the EO, which is a herculean task on its own when compliance will essentially require continuous cleaning. Section 4 includes additional standards specific to hotels, which this alert will not review.

The EO also requires that employees doing the cleaning be provided training on Contagious Public Health Threat symptoms, including but not limited to COVID-19, how to prevent spread, the requirements of the EO, and their rights and responsibilities under the EO. Retaliation is prohibited against employees for complying with the EO, refusing to perform work the employee believes poses a health risk due to failure to comply with the EO, or for reporting unsafe work conditions.

The Department of Public Health has the authority to enforce the EO standards but employees are also given the independent right to bring a civil action in San Francisco Superior Court for any violations of the EO, including the anti-retaliation provisions. Employees may be awarded actual damages, including but limited to lost pay and benefits or statutory damages of $1,000 per violation, exemplary damages, and reasonable attorneys' fees and costs for a prevailing employee. This private right of action is in sharp contrast with Cal/OSHA's administrative enforcement mechanism. Cal/OSHA has been authorized by federal OSHA to regulate occupational safety within the State of California, through a process set forth in the federal Occupational Safety and Health Act. Therefore, it is not clear that San Francisco has the authority to pass an ordinance regulating occupational health and safety but sidestepping that process, particularly one creating a private right of action for employees to enforce violations. That challenge will likely need to wait until the first lawsuit is filed.

Creating a new cause of action like this also raises questions of insurance coverage. CGL policies cover liability for third-party claims for defined injury and damage, and it is unlikely that a suit over workplace safety or violations of municipal ordinances or retaliation, without more, would be deemed to allege such defined injury or damage. Employment practices liability (EPL) policies may cover such a claim, although exclusions could apply, depending on the policy language. Building owners and managers should review their EPL policies to see if there are troublesome exclusions that deny or limit coverage.

Building owners and managers need to review these obligations closely and for many buildings, compliance is going to be cumbersome, difficult, and costly, albeit for what is hopefully a brief time. Whether this will lead to a wave of civil lawsuits by employees alleging retaliation or violations is not knowable in advance, but with an ordinance that will be difficult to comply with and subject to multiple interpretations and a clear right of action, building owners and managers need to prepare as best they can. Given the right to recover attorneys' fees, some groups may try to seek out plaintiffs to bring "whistle blower" complaints, an added risk to building owners.

Buchalter advises clients on complex issues such as these with a broad range of relevant expertise for commercial property owners and managers in these challenging times. Please contact one of the following attorneys with follow up questions.

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[i] This alert does not address the additional provisions on Tourist Hotels, broadly defined as any building containing guest rooms to be used for commercial tourist use by providing accommodation on a nightly basis or longer.