**MODEL ORDINANCE FOR CITIES & COUNTIES**

**(Workplace Retaliation Protection for All Workers)**

**WHEREAS,** Coronavirus Disease 2019 (COVID-19) has sickened over 29 million and led to the deaths of over 530,000 people in the United States in just one year; and

**WHEREAS**, The COVID-19 pandemic is not only one of the largest public health crises our nation has faced in a hundred years, it is also the single largest occupational health crisis; and

**WHEREAS,** COVID-19 can spread from both symptomatic and asymptomatic individuals through exhaling; and

**WHEREAS,** more contagious versions of the virus are spreading in the country; and

**WHEREAS,** to mitigate the spread of COVID-19 in the United States, we must mitigate the spread of COVID-19 at work; and

**WHEREAS**, frontline workers, whether employees or independent contractors, face magnified risks of being infected with COVID-19 because the nature of their work can involve close contact with the public, including members of the public who are not showing symptoms of COVID-19 but who can spread the disease; and

**WHEREAS**, frontline workers are supporting community efforts to engage in physical distancing and sheltering in place to mitigate the spread of COVID-19 while simultaneously exposing themselves to a higher risk of infection; and

**WHEREAS**, the work and health of frontline workers is fundamental to the health of the community because frontline workers are on the frontlines of this devastating pandemic supporting public health, safety, and welfare by providing vital services to the public while working in hazardous conditions; and

**WHEREAS,** a [national survey](https://s27147.pcdn.co/wp-content/uploads/Silenced-About-COVID-19-Workplace-Fear-Retaliation-June-2020.pdf) found that retaliation against whistleblowers in the workplace is prevalent during the pandemic; and

**WHEREAS,** retaliation and the fear of retaliation impact Black and Latinx workers at higher rates than their white counterparts during the COVID-19 pandemic, making Black and Latinx workers more likely than white workers to continue to work despite believing that they are seriously risking their health or their family’s health; and

**WHEREAS,** the federal Occupational Safety and Health Administration has [failed](https://www.washingtonpost.com/road-to-recovery/2020/10/08/osha-retaliation-complaints/) to adequately investigate and resolve retaliation complaints filed by workers during the COVID-19 pandemic; and

**WHEREAS,** retaliation and the fear of retaliation was [rampant](https://s27147.pcdn.co/wp-content/uploads/Retal-Report-6-26-19.pdf) across workplaces and across issues like health and safety, pay, sexual harassment, discrimination, paid leave, and more before the COVID-19 pandemic began and will continue to threaten workers’ safety in the workplace in the post-COVID-19 economy; and

**WHEREAS,** retaliation and the fear of retaliation hurt workers across industries and demographics, but low-wage workers, immigrant workers, Black workers, and women are particularly [vulnerable](https://www.nelp.org/wp-content/uploads/2015/03/BrokenLawsReport2009.pdf); and

**WHEREAS,** a worker who experiences retaliation can experience devastating economic and emotional consequences that can, in turn, lead to long-lasting harm for the worker, their family, and their broader community; and

**WHEREAS,** state and federal laws addressing retaliation often lack critical protections and remedies, such as meaningful fines and damages, a right to hold an employer accountable in court, and attorney’s fees and costs for workers who prevail with their retaliation claims; and

 **WHEREAS,** all workers benefit from ensuring that any worker can exercise their workplace rights without fear of retaliation and from ensuring that employers are held accountable for misconduct so that unscrupulous employers do not drive down wages and conditions, which makes it harder for law-abiding employers to compete; and

**WHEREAS,** ensuring that all workers can report unsafe conditions and violations of workers’ rights without fear of retaliation is critical to protecting the general welfare of workers and residents in <CITY/COUNTY> during the COVID-19 pandemic and in building a stronger post-COVID-19 economy; and

**WHEREAS**, protecting the health and safety of residents and workers in <CITY/COUNTY> is among the most important functions of local government; and

**WHEREAS**, establishing strong retaliation protections for all workers in <CITY/COUNTY> is a subject of vital and imminent concern to the people of this <CITY/COUNTY> and requires appropriate action by the <CITY/COUNTY COUNCIL>; NOW, THEREFORE,

**BE IT ORDAINED BY THE <CITY/COUNTY>, AS FOLLOWS:**

**Section 1. Definitions**

1. "Worker" means any person who performed any service or labor for a Covered Entity, including where such work is assigned through an online-enabled application or platform to connect customers with workers, and regardless of whether the individual is an employee of a Covered Entity or is an independent contractor and regardless of a Covered Entity’s classification of such worker as employee or independent contractor.
2. “Covered Entity” means any individual or entity who suffers or permits to work or pays for the services of a Worker, including any person acting directly or indirectly in the interest of a Covered Entity in relation to a Worker. Covered Entity shall specifically include any Delivery Network Company (as defined in <STATE LAW>) and any Transportation Network Company and any Marketplace Platform (as defined in <STATE LAW>). For the purposes of this Act, a Covered Entity does not include any of the following:
	1. The United States Government.
	2. The <State of [X]>, including any office department, agency, authority, institution, association, society, or other body of the state, including the legislature and the judiciary.
	3. Any county or local government other than <CITY/COUNTY>. [**Note:** If necessary due to limitations on the authority of the local legislative body to determine benefits for the locality’s own workers, this can read: “Any county or local government.”]
3. “Department” means <Local Agency Responsible for Enforcing this Act>.
4. “Adverse action” means any threat, discharge, suspension, demotion, reduction of hours or pay, reporting or threatening to report a Worker’s suspected citizenship or immigration status, or the suspected citizenship or immigration status of a family member of the Worker, to a federal, state, or local agency, or any other action against a Worker for exercising or attempting to exercise any right guaranteed herein if that action would dissuade a reasonable person from exercising or attempting to exercise any right protected under this Act. Adverse action shall also include interfering with or punishing an individual for in any manner participating in or assisting an investigation, proceeding, or hearing under this Act, or willfully preventing or attempting to prevent an individual from securing other employment by word, writing, or any other action.
5. “Protected Disclosure” means a good faith written or oral communication to the Covered Entity, the Covered Entity’s agent, other Workers, a government agency, an attorney or legal aid organization, a community or labor organization, or to the public such as through print, online, social, or any other media that discloses or is intended to disclose a concern about the terms and conditions of employment.
6. “Relator” means a current or former Worker, contractor, subcontractor, or employee of such a contractor or subcontractor of an alleged violator of this Act, regardless of whether that person has received full or partial relief from harm, who seeks relief through a public enforcement action brought under this Act. [**Note:** “*qui tam*” protections are included as an enforcement option under Section 3(h) of this model bill; this definition should only be included if those protections are added.]
7. “Representative organization” means a nonprofit or labor organization selected by a relator to initiate a public enforcement action on the relator’s behalf.

**Section 2. Exercise of Rights Protected; Retaliation Prohibited**

1. No person shall discharge or in any way discriminate or take adverse action against any Worker for making a protected disclosure. A Worker need not explicitly refer to this Act or the rights enumerated herein to be protected from an adverse action.
2. If a Covered Entity or other person takes adverse action against a Worker within ninety (90) days of the Worker’s engagement or attempt to engage in activities protected by this Act, such conduct shall raise a presumption that the action is an adverse action in violation of this Act. The presumption may be rebutted by clear and convincing evidence that 1) the action was taken for other permissible reasons; and 2) that the engagement or attempt to engage in activities protected by this Act was not a motivating factor in the adverse action.
3. Protections of this section shall apply to any person who mistakenly but in good faith alleges violations of this Act.

**Section 3. Enforcement**

1. **Administrative Enforcement.** The Department shall enforce the requirements of this Act. Either on its own initiative or after receiving a complaint, it shall have the authority to conduct investigations, including the authority to enter and inspect workplaces and to subpoena records and witnesses. Where a Covered Entity does not comply with any of the requirements of this Act, the Department shall order relief as authorized in this section. In effectuating its enforcement:
2. The Department shall establish a system utilizing multiple means of communication to receive complaints regarding non-compliance with this Act and investigate complaints received by the Department in a timely manner.
3. Upon receiving a complaint alleging a violation of this Act, the Department shall investigate such complaint and attempt to resolve it through mediation between the complainant and the subject of the complaint, or other means. The Department shall keep complainants notified regarding the status of their complaint and any resultant investigation. If the Department believes that a violation has occurred, it shall issue to the offending person or entity a notice of violation and the relief required of the offending person or entity. The Department shall prescribe the form and wording of such notices of violation, including any method of appealing the decision of the Department.
4. **Administrative Relief.** For administrative proceedings brought to enforce this Act, the appropriate court or the Department shall order relief as follows:
5. For any violation of any provision of this Act:

	1. An order to comply with the requirements of this Act, and to refrain from continued violations, including through a stop-work order or business closure;
	2. Payment to the <CITY/COUNTY> by the Covered Entity of reasonable costs and attorney’s fees;
	3. A civil penalty payable to the <CITY/COUNTY> of: An amount not to exceed $100 for a willful violation of the notice and posting requirements of this Act; and an amount of $3,000 for each violation of the retaliation protections in Section 2 this Act, per Worker affected. Each day that a violation occurs or is not corrected shall constitute a separate violation;
	4. Damages payable to each Worker aggrieved by a violation of Section 2 equal to the greater of $10,000 or three times the actual damages including but not limited to unpaid wages and benefits, plus punitive damages, and equitable relief as appropriate; and
	5. Where a Worker was discharged or demoted in violation of this Act, reinstatement of the Worker to the same position held before any adverse action, or to an equivalent position, and reinstatement of full fringe benefits and seniority rights.

[**Note:** The exact remedies and penalties that a local government may have the authority to impose vary depending on state law.]

1. **Confidentiality.** The Department shall encourage reporting pursuant to this subsection by keeping confidential, to the maximum extent permitted by applicable laws, the name and other identifying information of the Worker or person reporting the violation, provided, however, that with the authorization of such person, the Department may disclose his or her name and identifying information as necessary to enforce this Act or for other appropriate purposes.
2. **Private Civil Action.** Any person aggrieved by a violation of this Act may bring a civil action in a court of competent jurisdiction and, upon prevailing in whole or in part, shall be awarded reasonable attorney’s fees and costs. In addition, they shall be entitled to such legal or equitable relief as may be appropriate to remedy the violation, including without limitation, reinstatement in employment, punitive damages, compensatory damages, including damages payable to the aggrieved Worker for a violation of Section 2 equal to the greater of $10,000 or three times the actual damages, back and front pay, where appropriate, and damages for emotional distress, and/or injunctive relief. Such action may be brought by a person aggrieved by a violation of this Act without first filing an administrative complaint.
3. **Other Government Enforcement.** The <CITY/COUNTY> Attorney may also enforce the requirements of this Act, acting in the public interest, including the need to deter future violations. The <CITY/COUNTY> Attorney may inspect workplaces and subpoena records and witnesses and, where they determine that a violation has occurred, may bring a civil action. The filing of a complaint with the <CITY/COUNTY> Attorney will not preclude the filing of a private civil action.
4. **Record of Noncompliance.** <CITY/COUNTY> officials are hereby authorized to consider, to the maximum extent permitted by law, a Covered Entity’s record of noncompliance with this Act in making decisions on <CITY/COUNTY> contracts, land use approvals, and other entitlements to expand or operate within the <CITY/COUNTY>. The <CITY/COUNTY> is authorized to either deny approval or to condition approval on the Covered Entity’s future compliance.
5. **Annual Department Report.** The Department shall annually report on its website the number and nature of the complaints received pursuant to this Act, the results of investigations undertaken pursuant to this Act, including the number of complaints not substantiated and the number of notices of violations issued, the number and nature of adjudications pursuant to this Act, and the average time for a complaint to be resolved pursuant to this Act.
6. **Qui Tam Enforcement.** The civil penalties, injunctive relief, and declaratory relief specified in subsection (b) of this section may be recovered through a public enforcement action brought on behalf of the Department in a court of competent jurisdiction by a relator, or by a representative organization designated by a relator according to the following procedures:
	* + 1. The relator or representative organization shall give written notice to the Department of the specific provisions of this Act alleged to have been violated, including the facts and theories to support the alleged violation. The notice shall be given in such a manner as the Department may prescribe by regulation. Where a representative organization is designated by a relator, the relator may elect to have their name and personal identifying information be kept confidential in the notice and in a subsequent civil complaint.
			2. If the Department intends to investigate the alleged violation, it shall notify the relator or representative organization of its decision within thirty (30) calendar days of the postmark date of the notice. Within sixty (60) days of that decision, the Department may investigate the alleged violation and take any enforcement action authorized by law. If the Department determines that additional time is necessary to complete the investigation, it may extend the time by not more than sixty (60) additional calendar days and shall notify the relator or representative organization of the extension.
			3. The relator or representative organization may commence a civil action under this subsection if no enforcement action is taken by the Department within thirty (30) days of the postmark date of the notice, or if the Department informs the relator or representative organization that no enforcement action will be taken.
			4. The Department may intervene in an action brought under this Act and proceed with any and all claims in the action as of right within thirty (30) days after the filing of the action, or for good cause, as determined by the court, at any time after the thirty-day period after the filing of the action.
			5. Notwithstanding any other provision of law, a public enforcement action brought under this Act must be commenced within three (3) years of the date the relator or representative organization knew or should have known of the alleged violation. The statute of limitations for bringing a public enforcement action under this Act shall be tolled from the date a relator or representative organization files a notice under this Act with the Department, or the Department commences an investigation, whichever is earlier.
			6. Civil penalties recovered pursuant to this subsection shall be distributed as follows:
7. If the Department does not intervene in the action, sixty (60) percent to the Department for enforcement of this Act, and forty (40) percent to the relator or representative organization, to be distributed to the workers affected by the violation, including a service award that reflects the burden and risks assumed by the relator or representative organization in prosecuting the action.
8. If the Department does intervene in the action, seventy (70) percent to the Department for enforcement of this Act, and thirty (30) percent to the relator or representative organization, to be distributed to the workers affected by the violation, including a service award that reflects the burden and risks assumed by the relator or representative organization in prosecuting the action.
9. Twenty-five (25) percent of the Department’s share of the penalties shall be reserved for grants to community organizations for outreach and education about rights under this Act.

	* + 1. In any public enforcement action commenced under this Act, the court shall allow a prevailing relator or representative organization to recover all reasonable attorney’s fees, expert fees, and other costs. For the purposes of this provision, a “prevailing” relator or representative organization includes a relator or representative organization whose commencement of litigation has acted as a catalyst to effect policy change on the part of the defendant, regardless of whether that change has been implemented voluntarily, as a result of a settlement, or as a result of a judgment in such relator or representative organization’s favor.
			2. No public enforcement action brought under this Act shall be required to meet class action certification requirements under <RELEVANT PROVISION OF STATE LAW> or Rule 23(a) of the Federal Rules of Civil Procedure.
			3. The relator or representative organization may not recover compensatory damages or back pay, or seek reinstatement, in a public enforcement action. But the filing of a public enforcement action does not preclude a Worker from pursuing these remedies in another forum.
			4. The right to bring an action under this subsection shall not be impaired by any private contract. A public enforcement action shall be tried promptly, without regard to concurrent adjudication of private claims.
10. The rights and remedies under this Act may not be waived by any agreement, policy, form, or condition of employment.
11. Actions brought pursuant to this section may be brought as a class action pursuant to the laws of <State>.
12. **Statute of Limitations.** Any person alleging a violation of this Act shall have a right to pursue enforcement as provided in this section within three (3) years of the date the person knew or should have known of the alleged violation.

**Section 4. Notice and Posting**

1. Covered Entities shall give notice to each Worker at the time of hiring or by the effective date of this Act, whichever is later, and on an annual basis that Workers are entitled to protection from retaliation under this Act.
2. The Department shall create and make available to Covered Entities a poster and written notice, hereinafter referred to as the “notice,” which contains the information required under subsection (a) of this section for their use in complying with this section. The notice and poster shall be printed in English, Spanish, and any language that is the first language spoken by at least five (5) percent of the workforce in the <CITY/COUNTY> (as calculated by the Department).
3. Covered Entities shall display the poster in a conspicuous and accessible place in each establishment where Workers are employed; provided, however, that in cases where the Covered Entity does not maintain a physical workplace, or a Worker teleworks or performs work through a web-based or app-based platform, notification shall be sent via electronic communication or a conspicuous posting in the web-based or app-based platform. The poster displayed shall be in English, Spanish, and any language that is the first language spoken by at least five (5) percent of the Covered Entity’s workforce, provided that such poster has been provided by the Department.
4. A Covered Entity that provides a handbook to its Workers must include in the handbook the notice of rights required under this section.

**Section 5. Encouragement of More Policies; No Effect on More Generous Policies or Laws**

1. Nothing in this Act shall be construed to discourage or prohibit a Covered Entity from the adoption or retention of a policy more generous than the one required herein.
2. Nothing in this Act shall be construed as diminishing the obligation of a Covered Entity to comply with any contract, collective bargaining agreement, employment benefit plan or other agreement providing more generous policy than required herein. Nothing in this Act shall be construed as diminishing the rights of public employees regarding the rights addressed in this Act as provided in <Laws of the state and/or locality pertaining to public employees>.

**Section 6. Public Education and Outreach**

The Department shall develop and implement a multilingual outreach program to Workers and Covered Entities about the protections and requirements under this Act. This program shall include the distribution of notices and other written materials in English, Spanish, and any language that is the first language spoken by at least five (5) percent of the workforce in the <CITY/COUNTY> (as calculated by the Department).

**Section 7. Regulations**The Department may promulgate and enforce rules and regulations, and issue determinations and interpretations, consistent with and necessary for the implementation of this Act.

**Section 8. Severability**

If any provision of this Act or application thereof to any person or circumstance is judged invalid, the invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared severable.

**Section 9. Effective Date**

This Act will take effect <**#**> days following enactment. [**Note:** The effective date should be as soon as possible according to the local government’s laws, and advocates should consider whether any emergency clauses can have it take effect sooner than a legal default.]

**Please note that this document does not constitute legal advice.**