File No. 120806 Committee Item No. 1
Board Item No. _____

COMMITTEE/BOARD OF SUPERVISORS

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Board of Supervisors Meeting **Date** _____

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Completed by: Alisa Miller **Date** September 21, 2012
Completed by: _____ **Date** _____

An asterisked item represents the cover sheet to a document that exceeds 25 pages.
The complete document can be found in the file.

[Administrative Code – Health Care Security Ordinance]

Ordinance amending the San Francisco Administrative Code by amending Sections 14.1, 14.3 and 14.4, and by adding ~~Sections~~ Section 14.1.5 ~~and 14.1.6~~, to: 1) clarify that only expenditures reasonably calculated to benefit the employee shall satisfy the employer expenditure requirements of the Health Care Security Ordinance; 2) require that contributions to a health reimbursement account remain available to the employee for two years, rather than one year; 3) condition use of a health reimbursement account in 2012 upon carry-over of any balance in the account at the end of 2011; 4) ~~2)~~ provide, in the alternative if triggered by court action, that only amounts actually paid to provide employee health care services shall satisfy the employer expenditure requirements of the Health Care Security Ordinance; 5) ~~3)~~ require employers imposing surcharges on customers to use the full amount collected under the surcharge for employee health care expenditures ~~pay for the required expenditures to report certain information to OLSE in connection with the surcharge~~; 6) ~~4)~~ add an employee notification requirement; 7) ~~5)~~ modify penalty provisions; and 8) ~~6)~~ set an operative date.

NOTE: Additions are *single-underline italics Times New Roman*; deletions are ~~*strike-through italics Times New Roman*~~. Board amendment additions are double-underlined; Board amendment deletions are ~~strikethrough normal~~.

Section 1. The San Francisco Administrative Code is hereby amended by amending Sections 14.1, 14.3 and 14.4, and adding Section 14.1.5, to read as follows:

SEC. 14.1. SHORT TITLE; DEFINITIONS.

(a) **Short title.** This Chapter shall be known and may be cited as the "San Francisco Health Care Security Ordinance."

(b) **Definitions.** For purposes of this Chapter, the following terms shall have the following meanings:

(1) "City" means the City and County of San Francisco.

(2) "Covered employee" means any person who works in the City where such person qualifies as an employee entitled to payment of a minimum wage from an employer under the Minimum Wage Ordinance as provided under Chapter 12R of the San Francisco Administrative Code and has performed work for compensation for his or her employer for ninety (90) days, provided, however, that:

(A) ~~(a)~~ From the effective date of this Chapter through December 31, 2007, "at least twelve (12) hours" shall be substituted for "at least two (2) hours" where such term appears in Section 12R.3(a);

(B) ~~(b)~~ From January 1, 2008 through December 31, 2008, "at least ten (10) hours" shall be substituted for "at least two (2) hours" where such term appears in Section 12R.3(a);

(C) ~~(c)~~ Beginning January 1, 2009, "at least eight (8) hours" shall be substituted for "at least two (2) hours" where such term appears in Section 12R.3(a);

(D) ~~(d)~~ The term "employee" shall not include persons who are managerial, supervisorial, or confidential employees, unless such employees earn annually under $72,450.00 or in 2007 and for subsequent years, the figure as set by the administering agency;

(E) ~~(e)~~ The term "employee" shall not include those persons who are eligible to receive benefits under Medicare or TRICARE/CHAMPUS;

(F) ~~(f)~~ The term "covered employees" shall not include those persons who are "covered employees" as defined in Section 12Q.2.9 of the Health Care Accountability

Ordinance, Chapter 12Q of the San Francisco Administrative Code, if the employer meets the requirements set forth in Section 12Q.3 for those employees; and

(G) ~~(g)~~ The term "covered employees" shall not include those persons who are employed by a nonprofit corporation for up to one year as trainees in a bona fide training program consistent with Federal law, which training program enables the trainee to advance into a permanent position, provided that the trainee does not replace, displace, or lower the wage or benefits of any existing position or employee.

(H) ~~(h)~~ Nor shall "covered employees" include those persons whose employers verify that they are receiving health care services through another employer, either as an employee or by virtue of being the spouse, domestic partner, or child of another person; provided that the employer obtains from those persons a voluntary written waiver of the health care expenditure requirements of this Chapter and that such waiver is revocable by those persons at any time.

(3) "Covered employer" means any medium-sized or large business as defined below engaging in business within the City that is required to obtain a valid San Francisco business registration certificate from the San Francisco Tax Collector's office or, in the case of a nonprofit corporation, an employer for which an average of fifty (50) or more persons per week perform work for compensation during a quarter. Small businesses are not "covered employers" and are exempt from the health care spending requirements under Section 14.3.

(4) "Employer" means an employing unit as defined in Section 135 of the California Unemployment Insurance Code or any person defined in Section 18 of the California Labor Code. "Employer" shall include all members of a "controlled group of corporations" as defined in Section 1563(a) of the United States Internal Revenue Code, and the determination shall be made without regard to Sections 1563(a)(4) and 1563(e)(3)(C) of the Internal Revenue Code.

(5) "Health Access Program" means a San Francisco Department of Public Health program to provide health care for uninsured San Francisco residents.

(6) "Health Access Program participant" means any uninsured San Francisco resident, regardless of employment or immigration status or pre-existing condition, who is enrolled by his or her employer or who enrolls as an individual in the Health Access Program under the terms established by the Department of Public Health.

(7) *(A)* "Health care expenditure" means any amount ~~designated or~~ paid by a covered employer to its covered employees or to a third party on behalf of its covered employees for the purpose of providing health care services for covered employees or reimbursing the cost of such services for its covered employees, including, but not limited to: (i) ~~(a)~~ contributions designated or paid by such employer on behalf of its covered employees to a health savings account as defined under section 223 of the United States Internal Revenue Code or to any other account having substantially the same purpose or effect without regard to whether such contributions qualify for a tax deduction or are excludable from employee income; (ii) ~~(b)~~ reimbursement by such covered employer to its covered employees for expenses incurred in the purchase of health care services; (iii) ~~(c)~~ payments by a covered employer to a third party for the purpose of providing health care services for covered employees; (iv) ~~(d)~~ costs incurred by a covered employer in the direct delivery of health care services to its covered employees; and (v) ~~(e)~~ payments by a covered employer to the City to be used on behalf of covered employees. The City may use these payments to~~: (i)~~ fund membership in the Health Access Program for uninsured San Francisco residents, ~~;~~ and ~~(ii)~~ establish and maintain reimbursement accounts for covered employees, whether or not those covered employees are San Francisco residents.

(B) A contribution designated or paid to a health savings account or to any other account having substantially the same purpose or effect, which is not irrevocably

paid to a third party on behalf of a covered employee, shall not constitute a "health care expenditure" unless all of the following conditions are met:

(i) The contribution is reasonably calculated to benefit the employee;

(ii) Except as provided in clause (v)(a), the contribution remains available to the employee (and any other person eligible for reimbursement for health care expenses through the employee) for a minimum of twenty-four (24) months from the date of the contribution.

(iii) On January 1, 2012, the account contains an amount equal to the balance in the account at the close of business on December 31, 2011, if any.

(iv) The employee receives a written summary of the contribution, within 15 days of the contribution which shall include: (a) the name, address, and telephone number of any third party to whom the contribution was made; (b) the date and amount of the contribution; (c) the date and amount of any other debits or credits to the account since the most recent written summary provided to the employee; (d) the balance in the account; and, (e) any applicable expiration dates for the funds in the account.

(v) If the employee separates from employment with a positive balance in a reimbursement account: (a) the balance in the account shall remain available to the employee (and any other person eligible for reimbursement for health care expenses through the employee) for a minimum of ninety days from the date of separation, and, (b) the employee shall receive, within three days following the separation, a written notice, which shall include the balance in the account and any applicable expiration dates for the funds in the account.

~~(B) An expenditure shall not be deemed a "health care expenditure" within the meaning of this Ordinance if it is not reasonably calculated to benefit the employee~~

~~as provided in Section 14.1.5. Where the funds are not irrevocably designated or paid by a covered employer to a covered employee or to a third party on behalf of a covered employee, the expenditure shall not be deemed reasonably calculated to benefit the employee unless each quarterly expenditure remains available to the employee (or any other person eligible for reimbursement for health care expenses through the employee) for at least 24 months from the date of the expenditure, and in the case of a covered employee who has separated from employment, for 90 days after separation, provided that the employer has provided the employee with written notification of the balance of the account no later than 3 business days after the employee's separation.~~

Notwithstanding any other provision of this subsection, "health care expenditure" shall not include any payment made directly or indirectly for workers' compensation or Medicare benefits.

(8) "Health care expenditure rate" means the amount of health care expenditure that a covered employer shall be required to make for each hour paid for each of its covered employees each quarter. The "health care expenditure rate" shall be computed as follows:

(A) ~~*(a)*~~ From the effective date of this Chapter through June 30, 2007, $1.60 per hour for large businesses and $1.06 per hour for medium-sized businesses;

(B) ~~*(b)*~~ From July 1, 2007 through December 31, 2007, January 1, 2008 through December 31, 2008, and January 1, 2009 through December 31, 2009, the rates for large and medium-sized businesses shall increase five (5) percent over the expenditure rate calculated for the preceding year;

(C) ~~*(c)*~~ From January 1, 2010 and each year thereafter, the "health care expenditure rate" shall be determined annually based on the "average contribution" for a full-time employee to the City Health Service System pursuant to Section A8.423 of the San Francisco Charter based on the annual ten county survey amount for the applicable fiscal

year, with such average contribution prorated on an hourly basis by dividing the monthly average contribution by one hundred seventy-two (172) (the number of hours worked in a month by a full-time employee). The "health care expenditure rate" shall be seventy-five percent (75%) of the annual ten county survey amount for the applicable fiscal year for large businesses and fifty percent (50%) for medium-sized businesses.

(9) "Health care services" means medical care, services, or goods that may qualify as tax deductible medical care expenses under Section 213 of the Internal Revenue Code, or medical care, services, or goods having substantially the same purpose or effect as such deductible expenses.

(10) "Hour paid" or "hours paid" means a work hour or work hours for which a person is paid wages or is entitled to be paid wages for work performed within the City, including paid vacation hours and paid sick leave hours, but not exceeding 172 hours in a single month. For salaried persons, "hours paid" shall be calculated based on a 40-hour work week for a full-time employee.

(11) "Large business" means an employer for which an average of one hundred (100) or more persons per week perform work for compensation during a quarter.

(12) "Medium-sized business" means an employer for which an average of between twenty (20) and ninety-nine (99) persons per week perform work for compensation during a quarter.

(13) "Person" means any natural person, corporation, sole proprietorship, partnership, association, joint venture, limited liability company, or other legal entity.

(14) "Required health care expenditure" means the total health care expenditure that a covered employer is required to make every quarter for all its covered employees.

(15) "Small business" means an employer for which an average of fewer than twenty (20) persons per week perform work for compensation during a quarter.

~~**SEC. 14.1.5. REASONABLY CALCULATED TO BENEFIT THE EMPLOYEE.**~~

~~If a Covered Employer uses health reimbursement accounts to satisfy its obligation to make health care expenditures for its Covered Employees and the funds are not irrevocably designated or paid to a third party on behalf of a covered employee, an expenditure will not be deemed to be reasonably calculated to benefit the employee unless on January 1, 2012, the account contains an amount equal to the balance in the account at the close of business on December 31, 2011, if any.~~

SEC.* 14.1.5 ~~14.1.6~~. *ALTERNATE PROVISIONS.

(a) If the City Attorney certifies to the Mayor and the Board of Supervisors that a court of competent jurisdiction in a lawsuit brought by or on behalf of a Covered Employer has struck down the provisions of Section 14.1.5, or permanently enjoined their enforcement, then the following provisions shall become operative on the first day of the next calendar quarter following the City Attorney's certification.

Notwithstanding any other provision of this Chapter, "health care expenditure" shall only include an amount irrevocably paid by a covered employer to a covered employee or to a third party on behalf of a covered employee. An amount that is retained by the employer or that may be recovered by or returned to the employer shall not constitute a "health care expenditure." An amount paid to a third party for the purpose of reimbursing a covered employee for expenses incurred in the purchase of health care services shall not constitute a "health care expenditure" unless any unused funds carry over from quarter to quarter and from year to year and remain available to the covered employee, even after the covered employee's separation from employment.

Notwithstanding the above, an amount paid as a "health care expenditure" may be recovered by or returned to the employer without losing its status as a "health care expenditure" in the following circumstances:

(A) A former employee has not made a claim for any of the remaining available funds for 18 months (including a claim made on behalf of any other person eligible for reimbursement from health care expenses from the former employee's remaining available funds); or,

(B) The covered employee has died.

(b) If the City Attorney subsequently certifies to the Mayor and the Board of Supervisors that an order enjoining enforcement of the provisions of Section 14.1.5 has been lifted, then the original provisions shall again become operative on the first day of the next calendar quarter following the City Attorney's certification.

SEC. 14.3. REQUIRED HEALTH CARE EXPENDITURES.

(a) **Required Expenditures.** Covered employers shall make required health care expenditures to or on behalf of their covered employees each quarter. The required health care expenditure for a covered employer shall be calculated by multiplying the total number of hours paid for each of its covered employees during the quarter (including only hours starting on the first day of the calendar month following ninety (90) calendar days after a covered employee's date of hire) by the applicable health care expenditure rate. In determining whether a covered employer has made its required health care expenditures, payments to or on behalf of a covered employee shall not be considered if they exceed the following amount: the number of hours paid for the covered employee during the quarter multiplied by the applicable health care expenditure rate. The City's Office of Labor Standards Enforcement (OLSE) shall enforce the health expenditure requirements under this Section.

(b) Employer Notice to Employees.

(1) By December 1 of each year, OLSE shall publish and make available to Covered Employers, in all languages spoken by more than five percent of the San Francisco work force, a notice suitable for posting by Covered Employers in the workplace informing Covered Employees of their rights and the Covered Employer's obligations under the Ordinance.

(2) Every Covered Employer shall post in a conspicuous place at any workplace or job site where any Covered Employee works the notice published each year by OLSE. Every Covered Employer shall post such notices in English, Spanish, Chinese and any other language spoken by at least five percent of the Employees at the workplace or job site.

~~(3) Within 15 days following each quarterly due date for health care expenditures, every Covered Employer shall provide a written summary to every Covered Employee for whom the employer made any health care expenditures to a reimbursement account in satisfaction of the health care expenditure requirement. A Covered Employer may authorize a third-party to provide the quarterly summary to covered employees.~~

(c) ~~(b)~~ **Additional Employer Responsibilities.** A covered employer shall: (i) maintain accurate records of health care expenditures, required health care expenditures, and proof of such expenditures made each quarter each year, and allow OLSE reasonable access to such records, provided, however, that covered employers shall not be required to maintain such records in any particular form; and (ii) provide information to the OLSE, or the OLSE's designee, on an annual basis containing such other information as OLSE shall require, *including information on the employer's compliance with this Chapter,* but OLSE may not require an employer to provide information in violation of State or federal privacy laws. If a Covered Employer uses a health reimbursement account to satisfy its obligation to make health care expenditures for any of its Covered Employees, the Employer shall also report to OLSE the terms of such accounts, including what costs are eligible for reimbursement.

Where an employer does not maintain or retain adequate records documenting the health expenditures made, or does not allow OLSE reasonable access to such records, it shall be presumed that the employer did not make the required health expenditures for the quarter for which records are lacking, absent clear and convincing evidence otherwise. The Office of Treasurer and Tax Collector shall have the authority to provide any and all nonfinancial information to OLSE necessary to fulfill ~~the~~ OLSE's responsibilities as the enforcing agency under this Ordinance. With regard to all such information provided by the Office of Treasurer and Tax Collector, OLSE shall be subject to the confidentiality provisions of Subsection (a) of Section 6.22-1 of the San Francisco Business and Tax Regulations Code.

(d) If a Covered Employer imposes a surcharge on its customers to cover in whole or in part the costs of the health care expenditure requirement under this Chapter, the Covered Employer shall provide to OLSE on an annual basis the amount collected during the 12-month reporting period *from the surcharge for employee health care and the amount spent on employee health care. If the amount collected from the surcharge is greater than the amount spent on employee health care,* the Covered Employer must irrevocably pay or designate an amount equal to that difference for health care expenditures for its Covered Employees under this Chapter. *OLSE may refer any potential cases of consumer fraud to appropriate authorities.*

SEC. 14.4. ADMINISTRATION AND ENFORCEMENT.

(a) The City shall develop and promulgate rules to govern the operation of this Chapter. The regulations shall include specific rules by the Department of Public Health on the operation of both the Health Access Program and the reimbursement accounts identified in Section 14.2(g), including but not limited to eligibility for enrollment in the Health Access Program and establishment of reimbursement accounts and rules by the OLSE for enforcement of the obligations of the employers under this Chapter. The rules shall also

establish procedures for covered employers to maintain accurate records of health care expenditures and required health care expenditures and provide a report to the City without requiring any disclosures of information that would violate State or Federal privacy laws. The rules shall further establish procedures for providing employers notice that they may have violated this Chapter, a right to respond to the notice, a procedure for notification of the final determination of a violation, and an appeal procedure before a hearing officer appointed by the City Controller. 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. No rules shall be adopted finally until after a public hearing.

(b) During implementation of this Chapter and on an ongoing basis thereafter, the City shall maintain an education and advice program to assist employers with meeting the requirements of this Chapter.

(c) Any employer that reduces the number of employees below the number that would have resulted in the employer being considered a "covered employer," or below the number that would have resulted in the employer being considered a medium-sized or large business, shall demonstrate that such reduction was not done for the purpose of evading the obligations of this Chapter or shall be in violation of the Chapter.

(d) It shall be unlawful for any employer or covered employer to deprive or threaten to deprive any person of employment, take or threaten to take any reprisal or retaliatory action against any person, or directly or indirectly intimidate, threaten, coerce, command or influence or attempt to intimidate, threaten, coerce, command or influence any person because such person has cooperated or otherwise participated in an action to enforce, inquire about, or inform others about the requirements of this Chapter. Taking adverse action against a person

within ninety (90) days of the person's exercise of rights protected under this Chapter shall raise a rebuttable presumption of having done so in retaliation for the exercise of such rights.

(e) (1) The City shall enforce the obligations of ~~*employers and*~~ covered employers under this Chapter, *including requiring restitution to employees where appropriate,* and shall ~~may~~ impose administrative penalties upon ~~*employers and*~~ covered employers who fail to make required health care expenditures on behalf of their employees *within five* business *days of the quarterly due date*. *Failure to make a required health care expenditure shall include making a purported expenditure that is determined by OLSE not to be reasonably calculated to benefit the employee.* The amount of the penalty shall be up to one-and-one-half times the total expenditures that a covered employer failed to make ~~*plus simple annual interest of up to ten (10) percent from the date payment should have been made*~~, but in any event the total penalty for this violation shall not exceed $100 ~~$1,000~~ for each employee for each *quarter* ~~*week*~~ that *the required* ~~*such*~~ expenditures *were* ~~*are*~~ not made *within five* business *days of the quarterly due date*. *The* $100 ~~$1,000~~ *penalty* limit *shall increase* each year *by an amount corresponding to the prior year's increase, if any, in the Consumer Price Index for urban wage earners and clerical workers for the San Francisco-Oakland-San Jose, CA metropolitan statistical area.*

(2) For other violations of this Chapter by employers and covered employers, the maximum administrative penalties shall be as follows: For refusing to allow access to records, pursuant to Section *14.3(c)* ~~*14.3(b)*~~, $25.00 as to each worker whose records are in issue for each day that the violation occurs; for the failure to maintain or retain accurate and adequate records pursuant to Section *14.3(c)* ~~*14.3(b)*~~ and for the failure to make the annual *reports* ~~*report*~~ of information required by OLSE pursuant to *Sections 14.3(c) and 14.3(d)*, ~~*Section 14.3(b).*~~ $500.00 *for each* quarter ~~week~~ *that the violation occurs*; for violation of Section 14.4(d) (retaliation), $100.00 as to each person who is the target of the prohibited action for each day

that the violation occurs; and for any other violation not specified in this subsection (e)(2), $25.00 per day for each day that the violation occurs.

(3) The City Attorney may bring a civil action to recover civil penalties for the violations set forth in subsections (e)(1) and (e)(2) in the same amounts set forth in those subsections, and to recover the City's enforcement costs, including attorneys' fees.

(4) Amounts recovered under this Section shall be deposited in the City's General Fund.

(f) The City Controller shall coordinate with the Department of Public Health and OLSE to prepare periodic reports on the implementation of this Chapter including participant rates, any effect on services provided by the Department of Public Health, the cost of providing services to the Health Access Program participants and the economic impact of the Chapter's provisions. Reports shall be provided to the Board of Supervisors on a quarterly basis for quarters beginning July 1, 2007 through June 30, 2008, then every six months through June 30, 2010. Reports shall include specific information on any significant event affecting the implementation of this Chapter and also include recommendations for improvement where needed, in which case the Board of Supervisors or a committee thereof shall hold a hearing within thirty (30) days of receiving the report to consider responsive action.

(g) The Director of Public Health shall convene an advisory Health Access Working Group to provide the Department of Public Health and the Health Access Program with expert consultation and direction, with input on members from the Mayor and the Board of Supervisors. The Health Access Working Group shall be advisory in nature and may provide the Health Access Program with input on matters including: setting membership rates; designing the range of benefits and health care services for participants; and researching utilization, actuaries, and costs.

(h) The Department of Public Health and the OLSE shall report to the Board of Supervisors by July 1, 2007, on the development of rules for the Health Access Program and for the enforcement and administration of the employer obligations under this Chapter. The Board of Supervisors or a committee thereof shall hold a hearing on the proposed rules to ensure that participants in the Health Access Program shall have access to high quality and culturally competent services.

Section 2. Additional Uncodified Provisions.

(a) Effective Date; Operative Date. This ordinance shall become effective 30 days from the date of passage. This ordinance shall become operative on January 1, 2012.

(b) General Welfare. In adopting and implementing this ordinance, the City and County of San Francisco is assuming an undertaking only to promote the general welfare. It is not assuming, nor is it imposing on its officers and employees, an obligation for breach of which it is liable in money damages to any person who claims that such breach proximately caused injury.

(c) Conflict with State or Federal Law. This ordinance shall be construed so as not to conflict with applicable federal or State laws, rules or regulations. Nothing in this ordinance shall authorize any City agency or department to impose any duties or obligations in conflict with limitations on municipal authority established by State or federal law at the time such agency or department action is taken.

(d) Severability. If any of the provisions of this ordinance or the application thereof to any person or circumstance is held invalid, the remainder of those provisions, including the application of such part or provisions to persons or circumstances other than those to which it is held invalid, shall not be affected thereby and shall continue in full force and effect. To this end, the provisions of this ordinance are severable.

(e) Amendments. In enacting this Ordinance, the Board intends to amend only those words, phrases, paragraphs, subsections, sections, articles, numbers, punctuation, charts, diagrams, or any other constituent part of the Environment Code that are explicitly shown in this legislation as additions, deletions, Board amendment additions, and Board amendment deletions in accordance with the "Note" that appears under the official title of the legislation.

APPROVED AS TO FORM:
DENNIS J. HERRERA, City Attorney

By: _____
THOMAS J. OWEN
Deputy City Attorney

City and County of San Francisco
Tails
Ordinance

City Hall
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102-4689

File Number: 111030 **Date Passed:** November 22, 2011

Ordinance amending the San Francisco Administrative Code Sections 14.1, 14.3, 14.4, and adding Section 14.1.5 to: 1) clarify that only expenditures reasonably calculated to benefit the employee shall satisfy the employer expenditure requirements of the Health Care Security Ordinance; 2) require that contributions to a health reimbursement account remain available to the employee for two years; rather than one year; 3) condition use of a health reimbursement account in 2012 upon carry-over of any balance in the account at the end of 2011; 4) provide, in the alternative if triggered by court action, that only amounts actually paid to provide employee health care services shall satisfy the employer expenditure requirements of the Health Care Security Ordinance; 5) require employers imposing surcharges on customers to use the full amount collected under the surcharge for employee health care expenditures; 6) add an employee notification requirement; 7) modify penalty provisions; and 8) set an operative date.

October 13, 2011 Government Audit and Oversight Committee - REFERRED WITHOUT RECOMMENDATION

October 25, 2011 Board of Supervisors - CONTINUED ON FIRST READING

Ayes: 11 - Avalos, Campos, Chiu, Chu, Cohen, Elsbernd, Farrell, Kim, Mar, Mirkarimi and Wiener

November 01, 2011 Board of Supervisors - AMENDED, AN AMENDMENT OF THE WHOLE BEARING NEW TITLE

Ayes: 11 - Avalos, Campos, Chiu, Chu, Cohen, Elsbernd, Farrell, Kim, Mar, Mirkarimi and Wiener

November 01, 2011 Board of Supervisors - CONTINUED AS AMENDED ON FIRST READING

Ayes: 6 - Chiu, Chu, Cohen, Elsbernd, Farrell and Wiener

Noes: 5 - Avalos, Campos, Kim, Mar and Mirkarimi

November 15, 2011 Board of Supervisors - AMENDED, AN AMENDMENT OF THE WHOLE BEARING NEW TITLE

Ayes: 11 - Avalos, Campos, Chiu, Chu, Cohen, Elsbernd, Farrell, Kim, Mar, Mirkarimi and Wiener

November 15, 2011 Board of Supervisors - PASSED ON FIRST READING AS AMENDED

Ayes: 6 - Chiu, Chu, Cohen, Elsbernd, Farrell and Wiener

Noes: 5 - Avalos, Campos, Kim, Mar and Mirkarimi

November 22, 2011 Board of Supervisors - DUPLICATED

Ayes: 11 - Avalos, Campos, Chiu, Chu, Cohen, Elsbernd, Farrell, Kim, Mar, Mirkarimi and Wiener

November 22, 2011 Board of Supervisors - FINALLY PASSED

Ayes: 6 - Chiu, Chu, Cohen, Elsbernd, Farrell and Wiener

Noes: 5 - Avalos, Campos, Kim, Mar and Mirkarimi

File No. 111030

I hereby certify that the foregoing Ordinance was FINALLY PASSED on 11/22/2011 by the Board of Supervisors of the City and County of San Francisco.

Angela Calvillo
Clerk of the Board

Mayor Edwin Lee

11/22/11

Date Approved

GENERAL SERVICES AGENCY
OFFICE OF LABOR STANDARDS ENFORCEMENT
DONNA LEVITT, MANAGER

ANALYSIS OF THE HEALTH CARE SECURITY ORDINANCE 2011 ANNUAL REPORTING FORMS

ISSUED: AUGUST 23, 2012

EXECUTIVE SUMMARY

The Health Care Security Ordinance (HCSO or "Ordinance"), enacted in July 2006, established a health access program (now called "Healthy San Francisco") and mandated that employers subject to the Ordinance "make required health care expenditures to or on behalf of their covered employees each quarter" beginning in 2008. For-profit employers with 20 or more employees and nonprofit employers with 50 or more employees are covered by the Ordinance, and covered employees are those who have been employed for at least 90 calendar days, regularly work 8 or more hours per week in San Francisco, and do not meet any of the limited exemption criteria.

The Ordinance was amended effective January 1, 2012 to make the following changes:

- Employers shall post the official OLSE Notice about the HCSO at every workplace;
- If the dollar amount that an employer collects from a health care surcharge is greater than the amount spent on employee health care, the employer must irrevocably pay or designate an amount equal to that difference for health care expenditures for its covered employees; and
- Contributions to reimbursement programs must meet the following criteria to qualify as valid health care expenditures:
  - The contributions must be reasonably calculated to benefit the employee;
  - The contributions must remain available to the employee for a minimum of twenty-four months from the date of the contribution (whereas the standard industry practice had been twelve months);
  - The employee must receive a written summary of each contribution within 15 days of the date of the contribution;
  - Any reimbursement funds available at the end of 2011 must roll-over to 2012; and
  - Upon separation, employees must be provided with a written summary of their account within 3 days and the funds must remain available for a minimum of 90 days.

The Office of Labor Standards Enforcement (OLSE) collects compliance data ("Annual Reporting Forms") from covered employers on an annual basis, as required by the Ordinance. Employers were required to submit the 2011 Annual Reporting Form by April 30, 2012. This report summarizes data from 3,652 businesses and nonprofit organizations employing over 220,000 persons entitled to health care expenditures under the HCSO. The data reflect employers' expenditures prior to the effective date of the HCSO amendment. The report also offers comparisons to prior years where illustrative.

For the first time this year, OLSE required employers to indicate whether they contributed to Health Reimbursement Accounts (previous reporting forms did not distinguish these types of accounts from other plans that reimburse employees for out-of-pocket health care costs). Employers were also required to report surcharges collected to cover the cost of complying with the HCSO.

Some of the key findings are as follows:

- Most employers continue to satisfy the HCSO health care expenditure requirement by providing health insurance to their covered employees. In 2011, 89% of all health care dollars reported were spent on health insurance, 4% of health care dollars were spent on the "City Option" (Healthy San Francisco), and 7% of health care dollars were allocated to various types of reimbursement plans.

- The aggregate reimbursement rate for *all* reimbursement programs increased slightly in 2011. Employers reported that 26% of the funds allocated to the full range of reimbursement programs – Health Reimbursement Accounts (HRAs), Health Savings Accounts (HSAs), Medical Savings Accounts (MSAs) and Flexible Spending Accounts (FSAs) – were reimbursed to employees in 2011, compared with 20% in 2010.

- While the aggregate reimbursement rate for *all* reimbursement programs increased from 20% to 26%, the reimbursement rate reported specifically for Health Reimbursement Accounts was lower. A total of 743 employers allocated $65 million to HRAs and reimbursed only $11 million (17%). Half of these employers reimbursed less than 10% of funds allocated. Comparative reimbursement rates for HRAs specifically are not available for 2010. In contrast with the reimbursement rate for HRAs, the City's Healthy San Francisco Medical Reimbursement Account program reimbursed 60% of funds that employers contributed in 2011.

- More than half of employers that contributed to HRAs reported that their accounts did not reimburse employees for at least one common type of health care cost. Data indicated that 34% percent did not reimburse employees for the cost of insurance premiums, 28% did not reimburse Healthy San Francisco fees, 26% did not reimburse dependents' health care costs, 24% did not reimburse dental care expenses, and 24% did not reimburse vision expenses.

- Five percent of employers (172 employers) reported collecting $14.7 million in health care surcharges to cover, in whole or in part, the cost of complying with the HCSO.

- 101 of the 172 employers who imposed health surcharges in 2011 reported that the amount collected in surcharges was higher than the amount they irrevocably spent on health care (including insurance premium payments, Healthy San Francisco contributions, and reimbursements actually paid to employees from HRAs). This practice was not a violation of the HCSO in 2011. However, pursuant to the recent HCSO amendment, effective January 1, 2012, employers who collect more in health care surcharges than they irrevocably spend on health care during a year must irrevocably pay or designate an amount equal to that difference for health care expenditures for their covered employees.

GENERAL SERVICES AGENCY
OFFICE OF LABOR STANDARDS ENFORCEMENT
DONNA LEVITT, MANAGER

ANALYSIS OF THE HEALTH CARE SECURITY ORDINANCE 2011 ANNUAL REPORTING FORMS

ISSUED: AUGUST 23, 2012

I. INTRODUCTION

The San Francisco Health Care Security Ordinance (HCSO or "Ordinance") was passed unanimously by the Board of Supervisors in July of 2006. The HCSO is comprised of two main components:

1) a health access program – now called "Healthy San Francisco" (HSF) – created by the Department of Public Health, and
2) an Employer Spending Requirement (ESR), which mandates that employers subject to the HCSO "make required health care expenditures to or on behalf of their covered employees each quarter."[1]

The City's Office of Labor Standards Enforcement (OLSE) is charged with enforcing the ESR (or "health care expenditure requirement"). As required by the Ordinance, the OLSE promulgated "Regulations Implementing the Employer Spending Requirement of the San Francisco Health Care Security Ordinance."[2]

Employers are required to maintain accurate records of their health care expenditures and to provide information to the OLSE on an annual basis regarding their compliance with the health care expenditure requirement. To facilitate compliance with this reporting requirement, the OLSE established procedures for covered employers to submit an Annual Reporting Form (ARF) to the OLSE by April 30th every year (regarding the employer's compliance with the ESR in the previous calendar year). The OLSE prepared the forgoing analysis based on the aggregate ARF data submitted to the OLSE for 2011.

A. The HCSO Employer Spending Requirement

Commencing in January 2008, the HCSO requires covered employers to make health care expenditures for their covered employees. Covered employers are for-profit employers engaged in business in San Francisco with 20 or more employees worldwide and nonprofit employers with 50 or more employees worldwide. The HCSO defines "health care expenditure" as "any amount paid by a covered employer to its covered employees or to a third party on behalf of its covered employees for the purpose of providing health care services for covered employees or reimbursing the cost of such services for its covered employees."

Employers can make valid health care expenditures in a number of ways, including: a) payments for health, dental, or vision insurance on behalf of covered employees, b) payments to the City to be

[1] The HCSO is codified in Chapter 14 of the San Francisco Administrative Code, and is available via the HCSO website: www.sfgov.org/olse/hcso.
[2] The Regulations are available at http://sfgsa.org/Modules/ShowDocument.aspx?documentid=1246.

used on behalf of covered employees' health care, and c) contributions "to a health savings account" or to other reimbursement account having substantially the same purpose or effect on behalf of covered employees.

B. Amendment and Mayoral Directive

The San Francisco Board of Supervisors passed an amendment to the HCSO in November 2011, which went into effect on January 1, 2012. The amendment created new rules for employers who contribute to reimbursement programs to satisfy the spending requirement of the HCSO as well as for those who collect health care surcharges. The findings in this report reflect employers' health care expenditures from 2011, before the amendment took effect.

As of January 1, 2012, contributions to reimbursement programs must meet the following criteria to qualify as valid health care expenditures:

- The contributions must be reasonably calculated to benefit the employee;
- The contributions must remain available to the employee for a minimum of twenty-four months from the date of the contribution (whereas the standard industry practice had been twelve months);
- The employee must receive a written summary of each contribution within 15 days of the date of the contribution;
- Any reimbursement funds available at the end of 2011 must roll-over to 2012; and
- Upon separation, employees must be provided with a written summary of their account within 3 days and the funds must remain available for a minimum of 90 days.

The amended HCSO also regulates health care surcharges collected to cover, in whole or in part, the cost of complying with the HCSO. If the dollar amount that an employer collects from the surcharge is greater than the amount spent on employee health care, the amendment stipulates that the employer must irrevocably pay or designate an amount equal to that difference for health care expenditures for its covered employees.[3] In addition, the amendment requires employers to post the official OLSE Notice about the HCSO at every workplace or job site and changes the penalty provisions of the HCSO.

In conjunction with the amendment to the HCSO, Mayor Lee issued Executive Directive 11-04, which instructed OLSE to collect additional data from employers that contribute to Health Reimbursement Accounts (HRAs). This report includes the information about HRA utilization rates and plan restrictions requested in the Executive Directive.

[3] For more information about the amendment see the HCSO website at www.sfgov.org/olse/hcso

C. The 2011 Annual Reporting Form

The Annual Reporting Form (ARF) is a one-page form, comprised of sections that track the employer health care expenditure requirement. The 2011 ARF was similar to the 2010 form, but included new questions on aspects of the Ordinance that were amended in 2011.

Section A required employers to report the number of persons, including those employed outside of San Francisco, who worked for the business in each quarter of 2011.

Section B required employers to report the number of persons who were entitled to health care expenditures under the HCSO in each quarter of 2011. Persons entitled to health care expenditures under the HCSO ("covered employees") were those who had been employed for at least 90 calendar days, regularly worked 8 or more hours per week in San Francisco, and did not meet any of the following special exemptions:

1. Employees who signed an HCSO Employee Voluntary Waiver form verifying that they received coverage through another employer or spouse/registered domestic partner and voluntarily waived the right to have their employer make health care expenditures on their benefit;

2. Managers, supervisors, and confidential employees who earned more than $81,450 annually;

3. Employees who were covered by Medicare or TRICARE/CHAMPUS;

4. Employees who were employed by a non-profit corporation for up to one year as trainees in a bona fide training program consistent with Federal law, or

5. Employees who received health care benefits pursuant to the San Francisco Health Care Accountability Ordinance.

Sections C through E required employers to provide information regarding their health care expenditures for health insurance, the "City Option" (Healthy San Francisco), and reimbursement plans.

Health Insurance. Section C required employers to indicate 1) the total number of employees for whom the employer paid health insurance premiums and 2) the total dollar amount of those health insurance premiums, per quarter. This included expenditures to health insurance carriers to provide group coverage (medical, vision, and/or dental), contributions to a Taft-Hartley plan pursuant to a collective bargaining agreement or union contract, and expenditures for self-insured or self-funded health insurance plans.

Healthy San Francisco (The "City Option"). Section D required employers to specify 1) the total number of employees for whom the employer paid into "the City Option" and 2) the total dollar amount of those payments, per quarter. For employees who were eligible to enroll in Healthy San Francisco, the employer contributions permitted the employees to enroll in HSF with a discounted enrollment fee. For employees who were not eligible for Healthy San Francisco, the employer contributions funded Medical Reimbursement Accounts (MRAs), which employees could access to

reimburse out-of-pocket health care expenses. The Healthy San Francisco MRAs reimburse employees for a wide range of health care costs for both the employee and dependents, including the full range of IRS-recognized medical, dental, vision, and prescription drug services.

Reimbursement Plans. Section E of the 2011 ARF required employers to report on contributions to various types of programs that reimburse employees for out-of-pocket health care costs. The first question in Section E required employers to indicate whether they contributed to any of the following types of reimbursement programs:

1. Third Party Administered Health Reimbursement Arrangement (HRA) – A tax-exempt health reimbursement arrangement administered by an independent third party administrator. These plans do not require an employee contribution or participation in a high deductible health plan;

2. Self-administered HRA (Health Reimbursement Arrangement) – A health reimbursement arrangement administered by the employer without the assistance of a third-party administrator;

3. Health Savings Account / Medical Savings Account (HSA / MSA) – A tax-exempt account to pay or reimburse medical expenses. An employee must be covered under a high deductible health plan (HDHP) to have an HSA or MSA.

4. Flexible Spending Arrangement (FSA) – An account that allows employees to use payroll deductions to save pre-tax income for health care expenditures. In some cases, employers may make contributions to these plans.[4]

IRS publication 969 describes these programs in detail.[5] One key difference among these programs for the purposes of the HCSO is that funds allocated to HRA or FSA programs generally revert to the employer after a specified period, while funds allocated to HSAs or MSAs become irrevocably the property of the employee.

The second part of Section E required employers to indicate 1) the total number of employees for whom the employer had a reimbursement plan, 2) the total dollar amount *allocated* to the plan, and 3) the total dollar amount *reimbursed* under the plan, per quarter. The "Dollar Amount Allocated" is the total amount of money that was *made available* to the employee under the plan. The "Dollar Amount Reimbursed" is the amount of money that was *actually reimbursed* to the employee or a health provider under the plan.[6]

Section E asked employers to indicate whether their plan reimbursed employees for all IRS Code

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[4] Employers were permitted to contribute to FSAs to meet their required minimum Health Care Expenditure for 2011. As a result of the November 2011 amendment to the Ordinance, however, contributions to these types of plans do not meet the requirements of minimum Health Care Expenditures for 2012 because funds are available for less than 24 months. More information on the amendment is available at www.sfgov.org/olse/hcso.

[5] IRS Publication 969 is available at http://www.irs.gov/pub/irs-pdf/p969.pdf.

[6] Employers administering Health Savings Accounts (HSAs) – which, by law, are the property of the employee in perpetuity – were instructed to report all HSA "allocations" as "reimbursed" (because the money could never revert to the employer, thus would always be reimbursed to the employee eventually).

Section 213(d) allowable health care expenses for employees and eligible dependents. IRS publication 502 describes these allowable expenses, which include medical, dental, and vision services, prescription medications, insurance premiums, and others.[7]

The final question in Section E required employers to identify the types of health care expenses that were excluded from their reimbursement program, if any. Employers indicated whether employees were not permitted to obtain reimbursements for: a) insurance premiums; b) Healthy San Francisco fees; c) dental; d) vision; e) dependent expenses; or f) other health care expenses.

Section F required employers to report whether they collected surcharges from customers to cover in whole or in part the cost of the health care requirement under the HCSO, and if so, the total dollar amount of surcharges collected.

II. DATA COLLECTION

This report analyzes data collected from the ARFs for 2011 and shows comparative data from the 2008, 2009, and 2010 ARFs,[8] when available and appropriate.

All "covered employers" were required to submit an ARF for 2011. A covered employer is a for-profit business for which 20 or more persons perform work or a nonprofit organization for which 50 or more persons perform work that engages in business within the city of San Francisco and is required to obtain a valid business registration certificate (pursuant to Article 12 of the Business and Tax Regulations Code).

In conjunction with the San Francisco Office of the Treasurer and Tax Collector, the OLSE identified approximately 5,900 businesses that may have been subject to the HCSO in 2011. In late March 2012, the OLSE sent a Notice, via U.S. Mail, to these businesses explaining the requirement to submit a 2011 ARF by April 30, 2012. This Notice directed employers to the OLSE website where they could access and submit the form electronically. The OLSE also sent electronic reminders of the requirement to submit the ARF to 4,800 email addresses in March and April. Finally, other City Departments, including the Office of Small Business and the Department of Public Health, reached out to constituents to remind them about the ARF requirement.

As of May 31, 2012, the OLSE had received 3,939 ARFs. OLSE removed duplicate submissions and ARFs submitted by employers who were not subject to the HCSO, including those that reported having fewer than 20 employees worldwide in all four quarters of 2011 and those that reported that they had no covered employees in San Francisco in any quarter. After this process, OLSE was left with 3,652 valid, unique ARFs submitted by covered businesses and nonprofit organizations employing over 220,000 persons entitled to health care expenditures under the HCSO. The 3,652 submissions represent a 23% increase over the 2,960 ARFs submitted for 2010.

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[7] IRS Publication 502 is available at http://www.irs.gov/pub/irs-pdf/p502.pdf

[8] A more comprehensive analysis of the 2010 ARF data is available at www.sfgov.org/solse/hcso. Additional analysis of the HCSO 2008 & 2009 Annual Reporting Forms is available from the OLSE.

All of the ARF data are self-reported, and some employers may have misunderstood the questions on the ARF or otherwise failed to provide accurate data. Moreover, not all covered employers fulfilled the requirement to submit the ARF, and the employers that did submit the ARF may not be representative of the population of covered employers as a whole. Finally, any ARFs or corrections to an ARF submitted after May 31, 2012 are not included in this analysis.

III. FINDINGS

1. Population Summary

The Ordinance defines "employer" as an employing unit as defined in Section 135 of the California Unemployment Insurance Code or any person defined in Section 18 of the California Labor Code, including all members of a "controlled group of corporations" as defined in Section 1563(a) of the United States Internal Revenue Code.

A large business is an employer for which an average of 100 or more persons per week perform work for compensation during a quarter. A medium-size business is an employer for which an average of 20 to 99 persons per week perform work for compensation during a quarter; this category includes only those nonprofit organizations for which an average of 50 to 99 persons per week perform work for compensation during a quarter. Large and medium-size businesses are subject to different health care expenditure rates.

Tables 1 and 2 provide the number and percentage of employers, by type of employer and size of employer, respectively.[9]

Table 1: Number and Percentage of Employers, by Type of Employer (2011)

	TYPE OF EMPLOYER			
	All Employers	Nonprofit Organization	Control Group of Corporations	For-Profit, No Control Group
Number of Employers	3,652	177	312	3,163
Percentage of Employers	100%	5%	9%	87%

Table 2: Number and Percentage of Employers, by Size of Employer (2011)

	SIZE OF EMPLOYER*				
	20-49	50-99	100-499	500-1999	2000+
Number of Employers	1,151	674	848	390	589
Percentage of Employers	32%	18%	23%	11%	16%
	50%		50%		

* Number of employees worldwide, based on the highest quarter reported by the employer.

[9] Percentages in these and subsequent tables may not add up to 100% due to rounding.

Table 3 provides a historical comparison. In both 2010 and 2011, half of the employers that submitted the ARF employed fewer than 100 employees.

Table 3: Percentage of Employers, by Size of Employer (2008 to 2011 Comparison)

	SIZE OF EMPLOYER*					
	20-49	50-99	Medium	100-499	500+	Large
2008	35%	20%	55%	23%	22%	45%
2009	33%	18%	51%	23%	26%	49%
2010	31%	19%	50%	22%	28%	50%
2011	32%	18%	50%	23%	27%	50%

* Number of employees worldwide, based on the highest quarter reported by the employer.

Table 4 provides the number and percentage of covered employees for whom employers were required to make health care expenditures. Seventy-nine percent of covered employees were employed by large employers.

Table 4: Number and Percentage of Covered Employees, By Size of Employer (2011)

	SIZE OF EMPLOYER*					
	20-49	50-99	100-499	500 – 1999	2000+	All
Number of Covered Employees**	22,042	23,582	49,832	32,664	91,921	220,040
Percentage of Covered Employees	10%	11%	23%	15%	42%	100%
	21%		79%			

* Number of employees worldwide, based on the highest quarter reported by the employer.
**Based on average number of covered employees, per quarter.

Table 5 provides a historical comparison. The proportion of covered employees employed by the largest employers (500+) declined slightly this year after increasing in previous years.

Table 5: Percentage of Covered Employees, by Size of Employer (2008 to 2010 Comparison)

	SIZE OF EMPLOYER*					
	20-49	50-99	Medium	100-499	500+	Large
2008	14%	13%	27%	26%	47%	73%
2009	12%	12%	24%	23%	53%	76%
2010	8%	9%	18%	19%	63%	82%
2011	10%	11%	21%	23%	57%	79%

* Number of employees worldwide, based on the highest quarter reported by the employer. Note that some employees may have been double counted if they were covered employees for multiple employers.

2. *Health Care Expenditures*

Sections C through E required employers to provide aggregate data regarding their health care expenditures for health insurance, the "City Option," and reimbursement plans. For additional details, refer to Section B ("The Annual Reporting Form") in the Introduction to this report.

Table 6 provides the total dollar amount of health care expenditures for the three principal categories of expenditures, by employer size. In every business size category, employers spent substantially more on health insurance than they contributed to the City Option or allocated to reimbursement accounts.

Table 6: Dollar Amount of Health Care Expenditures, By Size of Employer (2011)

	SIZE OF EMPLOYER*					
	20-49	50-99	100-499	500 – 1999	2000+	Total
Health Insurance	$105,462,287	$109,259,518	$291,852,921	$183,289,572	$366,344,553	$1,056,208,851
"City Option"	$1,962,135	$3,937,332	$9,842,810	$2,739,547	$27,059,502	$45,541,326
Reimbursement Plans Allocations	$12,309,621	$12,088,045	$23,519,313	$15,789,941	$24,672,107	$88,379,027
TOTALS	$119,734,043	$125,284,895	$325,215,044	$201,819,060	$418,076,162	$1,190,129,204

* Number of employees worldwide, based on the highest quarter reported by the employer.

Table 7 provides the same data as percentages of total spending. Overall, employers reported spending the vast majority of their health care expenditures (89%) on health insurance. While employers spent only 4% of total health care expenditures on the "City Option," 727 employers (20% of the total) reported at least some contributions to the City Option. Employers often use the City Option to make expenditures for a subset of employees (such as part-time employees) who are not covered by the company's group health insurance.

Table 7: Percentage of Health Care Expenditures, By Size of Employer (2011)

	SIZE OF EMPLOYER*							
	20-49	50-99	Medium	100-499	500 – 1999	2000+	Large	All
Health Insurance	88%	87%	88%	90%	91%	88%	89%	89%
"City Option"	2%	3%	2%	3%	1%	6%	4%	4%
Reimbursement Plans Allocations	10%	10%	10%	7%	8%	6%	7%	7%

* Number of employees worldwide, based on the highest quarter reported by the employer.

Table 8 provides a comparison between the health care expenditures for 2011 and 2010. The percentage of reported expenditures in each category remained stable from one year to the next, despite the 23% increase in the number of employers reporting.

Table 8: Percentage of Health Care Expenditures ($), by Size of Employer (2010 to 2011 Comparison)*

	2010			2011		
	Medium**	Large***	All	Medium**	Large***	All
Health Insurance	90%	89%	90%	89%	88%	89%
"City Option"	3%	2%	4%	4%	2%	4%
Reimbursement Plans Allocations	7%	9%	6%	7%	10%	7%

* The expenditures made in each category are not available for earlier years. In 2008 and 2009, employers reported only the "primary expenditure" made for each employee – other types of expenditures were unreported.

** Fewer than 100 employees worldwide, based on highest of four quarters reported by employer.

*** 100 or more employees worldwide, based on highest of four quarters reported by employer.

Table 9 provides a historical comparison of the "primary" type of expenditure selected by employers to meet the health care expenditure requirement. The proportion of employers electing each type of expenditure remained stable between 2010 and 2011.

Table 9: Primary Health Care Expenditure Selected, by Size of Employer (2008 to 2011 Comparison)*

	MEDIUM-SIZE EMPLOYERS**			LARGE EMPLOYERS**			ALL EMPLOYERS		
	Health Insurance	City Option	Reimb. Plans***	Health Insurance	City Option	Reimb. Plans***	Health Insurance	City Option	Reimb. Plans***
2008	84%	5%	11%	85%	9%	7%	84%	7%	9%
2009	81%	5%	14%	82%	9%	9%	81%	7%	12%
2010	79%	5%	16%	80%	10%	10%	80%	7%	13%
2011	79%	5%	16%	81%	10%	9%	80%	7%	13%

*The method for determining an employer's "primary expenditure" differed in 2010 and 2011 from the method used in previous years. On the 2010 and 2011 ARFs, employers reported all health care expenditures for all covered employees, and the "primary expenditure" was the option for which the employer made the largest expenditure in total dollars. In 2008 and 2009, however, employers reported only on the highest-value health care expenditure for each employee (secondary expenditures for a single employee were unreported). The "primary expenditure" was the option under which the employer reported the most employees.

** Number of employees worldwide, based on the highest quarter reported by the employer.

***For 2008 and 2009, employers reported expenditures separately for third-party administered and self-administered reimbursement programs. For 2010 and 2011, these expenditures were combined into a single category. Therefore, the 2008 and 2009 categories were combined in order to make this historical comparison.

3. *All Reimbursement Plans*

Section E of the 2011 ARF required employers to provide aggregate data on the utilization of reimbursement programs. Tables 10 and 11 and Chart 1 summarize contributions made to all types of accounts (including Health Reimbursement Accounts, Health Savings Accounts, Medical Savings Accounts, and Flexible Spending Accounts[10]) and reimbursements actually paid to employees. In past years, the ARF did not require employers to specify which type of reimbursement plan they offered, but the aggregated statistics in these tables parallel the information collected in previous years.

Table 10 provides information on the number and percentage of employers providing any type of reimbursement plan. 32% of all employers (1,194) allocated money to a reimbursement plan. Medium-size employers (34%) were more likely to utilize such plans than large employers (30%).

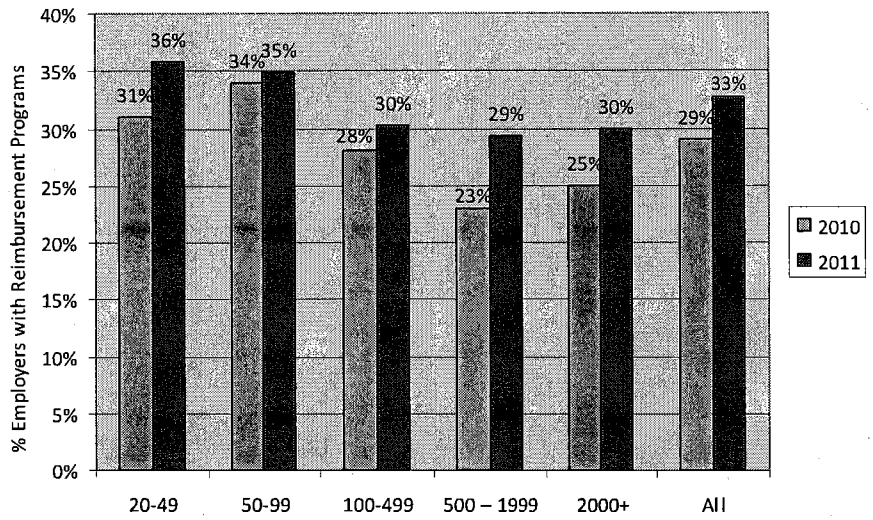
Table 10: Number and Percentage of Employers with Reimbursement Plans, By Size of Employer (2011)

	SIZE OF EMPLOYER*					
	20-49	50-99	100-499	500 – 1999	2000+	All
Number of Employers (all)	1,151	674	848	390	589	3,652
Number of Employers (w/Reimbursement Plans)	412	235	257	114	176	1,194
Employers w/ Reimb. Plans (as % of employers in size range)	36%	35%	30%	29%	30%	33%

* Number of employees worldwide, based on the highest quarter reported by the employer.

Chart 1 shows that 32% of employers offered some type of reimbursement program in 2011, compared with 29% in 2010. The utilization of reimbursement programs increased in every business size category.

Chart 1: Percentage of Employers with Reimbursement Plans, By Size of Employer (Comparison of 2010 to 2011)



* Number of employees worldwide, based on the highest quarter reported by the employer.

[10] See the Introduction to this report or IRS Publication 969 for more information.

Table 11 provides a comparison of the 2010 and 2011 reimbursement rates across all types of reimbursement plans. The percentage of all allocations reimbursed to employees increased from 20% to 26%, and the median reimbursement rate across all employers with reimbursement programs increased from 12% to 18%.

Table 11: Reimbursement Plan Utilization (2010 to 2011 Comparison)

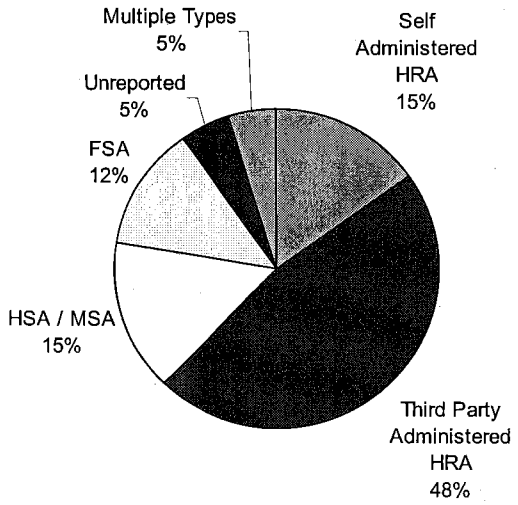
	2010	2011
Total Number of Employers	2,960	3,652
Number of Employers with Allocations to Reimbursement Plans	860	1,194
Percent of Employers with Reimbursement Plans	29%	33%
Total Allocations ($)	$62,467,022	$88,379,027
Total Reimbursements ($)*	$12,383,154	$22,769,994
Percent of Total Reimbursed	20%	26%
Median Reimbursement Rate	12%	18%

* Dollars reimbursed by employers who reported allocating more than $0 dollars to reimbursement accounts.

For the first time this year, the ARF required employers to identify the types of reimbursement programs they offered. Chart 1 identifies the percentage of employers that contributed to the following types of accounts: (a) self-administered Health Reimbursement Arrangements (HRAs); (b) third-party administered HRAs; (c) Health Savings Accounts or Medical Savings Accounts (HSA/MSA); or (d) Flexible Spending Accounts (FSA). See the Introduction of this report for more information on types of reimbursement programs.

Chart 2 shows that of the 1,194 employers who contributed to reimbursement programs, 63% (743 employers) contributed to either self-administered or third party administered HRAs. Fifteen percent (184) contributed to HSAs or MSAs, and 12% (146) reported contributions to FSAs. Five percent reported allocations to a reimbursement program, but did not specify the type of program used (i.e. unreported), and an additional five percent contributed to more than one type of program.

Chart 2: Number of Employers Reporting Reimbursement Plan Allocations, by Reimbursement Program Type*



4. Health Reimbursement Accounts

Mayoral Executive Directive 11-04, issued on November 22, 2011 instructed OLSE to collect specific information about Health Reimbursement Accounts (HRAs), including the dollar amount allocated to these accounts, the amounts reimbursed to employees, and the restrictions placed on the accounts. The Mayor also instructed OLSE to compare HRA reimbursement rate to the usage rates of Medical Reimbursement Accounts under the City Option.

Table 12 provides information on the dollars that employers allocated to HRAs and the actual dollar amounts reimbursed to employees. Overall, employers allocated nearly $66 million to HRA programs in 2011 and reimbursed $11 million (17%) of the dollars allocated. The median reimbursement rate for the 743 employers that contributed to HRAs was 9%.[11]

To compare the reported data on HRAs with data from a well-established reimbursement program, Table 12 also summarizes usage of the Medical Reimbursement Accounts (MRAs) available through the "City Option." When an employer contributes to the City Option on behalf of an employee who is not eligible for Healthy San Francisco (because the employee does not meet the program's eligibility requirements), the funds are deposited into a Medical Reimbursement Account (MRA) administered under rules established by the Department of Public Health. Employees are provided regular written notice of the accounts, can access online information about the balance of their accounts, and can obtain reimbursements for a wide range of health care expenses, including insurance premiums and dental, vision, and dependent expenses.

The right-hand column in Table 12 summarizes contributions to the City Option's MRA program and claims paid out to employees (as reported by the Healthy San Francisco program). In calendar year 2011, the City's MRA program reimbursed 60% of the employer contributions – a rate more than three times higher than the reimbursement rate for employer-provided HRAs.

Table 12: HRA Usage Compared with MRA Usage

	HRA Accounts	"City Option" MRA*
Total Allocations / Contributions	$65,965,091	$22,488,038
Total Reimbursements	$11,314,575	$13,448,513
Percent of Total Reimbursed	17%	60%
Total Unreimbursed	$54,650,516**	$9,042,528
Median Reimbursement Rate	9%	Unknown

* Data on contributions and reimbursements provided by the Department of Public Health for calendar year 2011.

** The November 2011 amendment to the HCSO restricts the circumstances under which employers can reclaim these unreimbursed funds. In previous years, employers commonly reclaimed unused funds at the end of the year. The amendment stipulates that for an employer's HRA contributions in 2012 and beyond to constitute qualifying health care expenditures, the employer must roll-over their employees' HRA funds from December 31st 2011 to January 1, 2012 and make those funds available for at least 24 months from the date the funds were originally contributed.

[11] Note that the HRA reimbursement rates reported in Table 12 are lower than the aggregated reimbursement rates for *all* reimbursement programs shown above in Table 11. The latter category includes HSAs and MSAs, which by their nature have higher reimbursement rates. As a result, the aggregated reimbursement rate for all reimbursement programs is higher than the rate for HRAs alone.

Chart 3 shows the distribution of reimbursement rates for employers that contributed to HRA accounts. Of 743 employers that contributed to HRAs, more than half (388) reimbursed less than 10% of funds allocated, and 282 reimbursed less than 5%.

Chart 3: HRA Reimbursement Rate Frequency

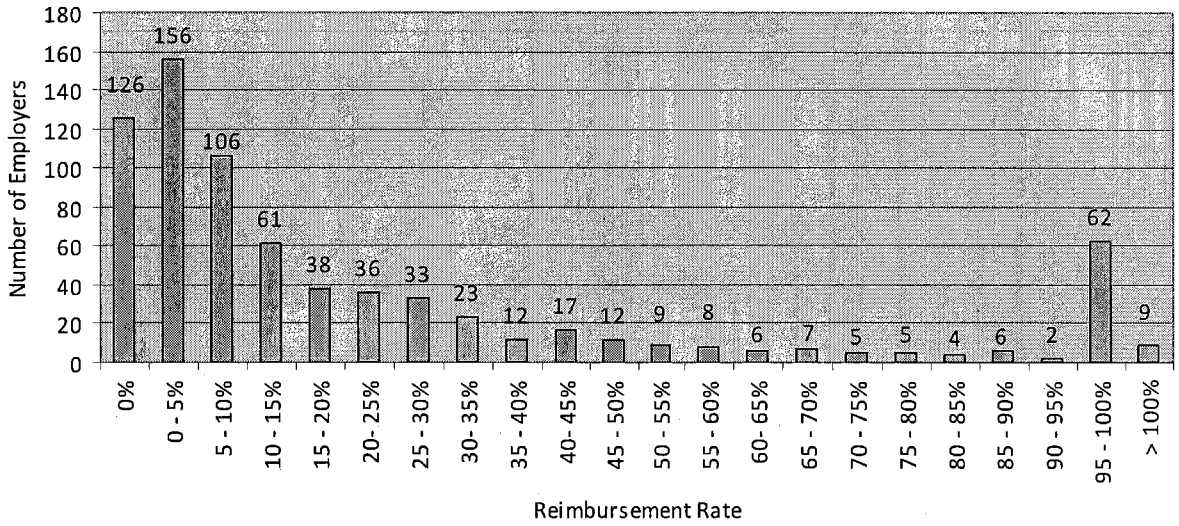


Table 13 summarizes the exclusions that employers who allocated funds to HRA accounts placed on those accounts, as requested in Mayoral Directive 11-04. More than half (53%) of employers with HRA programs imposed one or more restrictions on the types of health care expenditures they reimbursed. Medium-size employers were more likely to report restrictions on HRA reimbursements than large employers.

Table 13: Health Care Expenditures Excluded from HRA Programs, by Employer Size (2011)

	SIZE OF EMPLOYER		
	Medium*	Large**	All
All Employers Contributing to HRAs	421	322	743
Employers with No Restrictions (#)	184	165	349
Employers with No Restrictions (%)	44%	51%	47%
Employers that Restrict HRAs (#)	237	157	394
Employers that Restrict HRAs (%)	56%	49%	53%

* Fewer than 100 employees worldwide, based on the highest of four quarters reported.

** 100 or more employees worldwide, based on the highest of four quarters reported.

Table 14 provides information on the types of expenditures that employers excluded from HRA programs. These are *specific* exclusions from the broad range of IRS-recognized medical expenses, which include medical, dental and vision services, prescription medications, insurance premiums and others. Of the 743 employers that offered HRAs, 34% did not reimburse employees for the cost of insurance premiums, 28% did not reimburse Healthy San Francisco fees, 26% did not reimburse for dependents' costs, 24% did not reimburse for dental care expenses, and 24% did not reimburse for

vision expenses. Employers that placed restrictions on employees' HRAs reported lower reimbursement rates than those that reported no restrictions; the median reimbursement rate for HRAs with restrictions was 7% compared with a median reimbursement rate of 13% for HRAs with no restrictions.

Table 14: Health Care Expenditures Excluded from HRA Programs, by Type of Exclusion (2011)

Expenses Excluded from HRA Reimbursement Plans*	Number of HRA Programs	Percent of All HRA Programs (743 programs in total)
Insurance Premiums	251	34%
Healthy San Francisco Fees	206	28%
Dependent Expenditures	191	26%
Dental Expenditures	175	24%
Vision Expenditures	179	24%
Other Health Expenditures	88	12%

*Does not include employers with multiple types of reimbursement accounts.

5. *Surcharges*

Table 15 provides a summary of the surcharges that employers imposed on customers to cover "in whole or in part" the cost of complying with the HCSO. Businesses commonly listed this charge as a "Healthy SF surcharge" or "San Francisco health care surcharge" on customers' bills. A total of 172 employers reported $14.7 million in surcharges.

Table 15: Customer Surcharges, by Employer Size (2011)

	SIZE OF EMPLOYER		
	Medium*	Large**	All Employers
Number of Employers	127	45	172
% of All Employers Reporting	7%	2%	5%
Total Surcharges	$7,608,855	$7,111,154	$14,720,009
Average Surcharges / Employer	$59,912	$158,026	$85,581
Median Surcharge / Employer	$40,980	$85,152	$47,093

* Fewer than 100 employees worldwide, based on the highest of four quarters reported.

** 100 or more employees worldwide, based on the highest of four quarters reported.

*** Based on the highest number of employees reported for a single quarter.

Table 16 summarizes health care expenditures made by employers who collected health care surcharges. While the HCSO did not regulate health care surcharges collected in 2011 (and summarized here), the amended HCSO regulates the use of health care surcharges beginning on January 1, 2012. Employers are now required to spend an amount on employees' health care that is at least equal to the amount they collect in surcharges. The data on 2011 health care surcharges and expenditures will provide a useful comparison with 2012 data.

Table 16 shows that the 172 employers who collected health care surcharges from their customers made $32 million in health care expenditures for their employees. These employers were more likely to put their health care dollars in reimbursement programs and less likely to spend money on health insurance than other employers. Businesses that reported surcharges allocated 37% of their health care dollars to reimbursement accounts and spent 60% of health care dollars on health insurance. In contrast, all employers allocated 7% of health care dollars to reimbursement programs and spent 89% on health insurance.

Table 16: Surcharges and Health Care Expenditures (2011)

	Health Insurance	"City Option"	Reimbursement Plan Allocations	Total
Employers with Surcharges	$19,129,850	$1,018,003	$11,942,819	$32,090,672
% of Employers with Surcharges	60%	3%	37%	
All Employers	$1,056,208,851	$45,541,326	$88,379,027	$1,190,129,204
% of All Employers	89%	4%	7%	

Forty-nine (49) employers reported that they collected more in health care surcharges than they irrevocably spent on health care, notwithstanding the fact that their reimbursement plan *allocations* exceeded their surcharges collected. Another 52 employers collecting more in surcharges than they made in health care expenditures – even when including any reimbursement plan allocations that were not reimbursed to employees. Combined, 101 of the 172 employers who imposed health care surcharges in 2011 reported that the amount collected in surcharges was higher than the amount they irrevocably spent on health care (including insurance premium payments, Healthy San Francisco contributions, and reimbursements actually paid to employees from HRAs).

Pursuant to the recent HCSO amendment, effective January 1, 2012, employers who collect more in health care surcharges than they irrevocably spend on health care during a year must irrevocably pay or designate an amount equal to that difference for health care expenditures for their covered employees. Fifty-two (52) of these employers reported that the total dollar amount of the surcharges they collected was higher than their health care expenditures – even including any reimbursement plan designations that were not reimbursed to employees.

V. Conclusion

As in previous years, the overwhelming majority of the total health care expenditures in 2011 went to health insurance and the overwhelming majority of employers reported that their primary expenditure was for health insurance. A slightly higher proportion of employers reported offering employees some type of reimbursement program in 2011, and the reimbursement rate across all types of reimbursement accounts increased slightly.

Despite the higher reimbursement rate across all reimbursements plans, Health Reimbursement Accounts in particular had lower reimbursement rates – over half of employers with HRAs reported reimbursing less than 10% of funds allocated to those accounts. In addition, a majority of employers with HRAs restrict reimbursements for at least one type of common health care expense.

Only a small number of employers (172 or 5%) reported imposing health care surcharges on their customers to comply with the HCSO in 2011. Of these, nearly 60% collected more than they irrevocably spent on employees' health care.

The 2011 Annual Reporting Forms provided data on the health care expenditure choices of San Francisco employers and the access to health care provided to San Francisco employees. They will also serve as a useful baseline comparison for evaluating the 2012 Annual Reporting Forms, which will reflect employer choices following the recent amendment to the HCSO.

Effective January 1, 2012, employers shall post the official OLSE Notice about the HCSO at every workplace, meet new requirements regarding contributions to reimbursement programs, and comply with the following new rule regarding health care surcharges: if the dollar amount that an employer collects from a health care surcharge is greater than the amount spent on employee health care, the employer must irrevocably pay or designate an amount equal to that difference for health care expenditures for its covered employees.

Print Form

Introduction Form

By a Member of the Board of Supervisors or the Mayor

Time stamp
or meeting date

I hereby submit the following item for introduction (select only one):

☐ 1. For reference to Committee: _____
An ordinance, resolution, motion, or charter amendment.

☐ 2. Request for next printed agenda without reference to Committee.

☒ 3. Request for hearing on a subject matter at Committee: GAO

☐ 4. Request for letter beginning "Supervisor _____ inquires"

☐ 5. City Attorney request.

☐ 6. Call File No. _____ from Committee.

☐ 7. Budget Analyst request (attach written motion).

☐ 8. Substitute Legislation File No. _____

☐ 9. Request for Closed Session (attach written motion).

☐ 10. Board to Sit as A Committee of the Whole.

☐ 11. Question(s) submitted for Mayoral Appearance before the BOS on _____

Please check the appropriate boxes. The proposed legislation should be forwarded to the following:

☐ Small Business Commission ☐ Youth Commission ☐ Ethics Commission

☐ Planning Commission ☐ Building Inspection Commission

Note: For the Imperative Agenda (a resolution not on the printed agenda), use a different form.

Sponsor(s):

Campos

Subject:

Civil Grand Jury Report, "Surcharges and Healthy San Francisco: Healthy for Whom?" released to the public on July 19, 2012.

The text is listed below or attached:

On July 19, 2012, the Civil Grand Jury released a report entitled, "Surcharges and Healthy San Francisco: Healthy for Whom?" The report concluded that a significant number of restaurant owners are benefitting financially from the addition of surcharges on restaurant bills that are falsely portrayed as paying for employee health care. The report calls upon the City to disallow the use of surcharges to pay for employer mandates under the Health Care Security Ordinance (HCSO) and Paid Sick Leave laws and calls on the District Attorney to investigate possible cases of consumer fraud.

The report also concludes that a loophole continues to exist in the HCSO and the loophole continues to cause problems for employees attempting to utilize their Health Reimbursement Accounts (HRA). The report finds:

120806

- Employers retained the vast majority of funds allocated for employee medical care in 2010.
- The reimbursement rate for privately administered HRAs is much lower than the City's reimbursement rate through Medical Reimbursement Accounts.
- Employees with two or more employers have a difficult time navigating the different rules of different reimbursement accounts.
- HRAs may be unlawful under the Affordable Care Act.
- The financial incentive to retain unspent HRA funds could be a motivating force for employers to restrict employee access to funds.
- By having to submit personal medical invoices directly to their employers, employees are forced to reveal their medical history and current health conditions to their employers.

The Civil Grand Jury recommends that the City disallow the employer use of HRAs to meet the HCSO's employer spending requirement.

I call a hearing on the Civil Grand Jury Report. Specifically, to what extent does Ordinance Number 232-11, authored by Supervisors Chiu and Cohen and signed into law by Mayor Lee on November 22, 2011, that made amendments to the HCSO, fail to address the concerns raised by the Civil Grand Jury's Report? In addressing this question, I would also like to review OLSE's Report on the 2011 Employer Reporting Forms.

I kindly request that the clerk of the board forward this hearing request to the director of OLSE, the director of the Department of Public Health, the City Attorney, and the District Attorney.

Signature of Sponsoring Supervisor: David Campos

For Clerk's Use Only: