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BY EMAIL, FAX, AND U.S. MAIL

October 26, 2020

Dennis J. Herrera
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Re: Proposed City Ordinance No. 201133

Dear Mr. Herrera:

We are writing to contest the legality of proposed City Ordinance No. 201133 ("Ordinance") on behalf of our client Airlines for America (A4A). The Airline Deregulation Act ("ADA"), Employee Retirement Income Security Act ("ERISA"), and Railway Labor Act ("RLA") will preempt the Ordinance. The Ordinance further creates significant administrative problems for A4A members at a time when the industry is in dire financial straits and is fighting to save employees' jobs. The actuarial valuation requirements in the current version of the Ordinance also could have the effect of employees losing health insurance because member carriers' plan or other plans do not meet the Ordinance's requirements, and therefore carriers will need to pay into the City fund. Ultimately, the Ordinance will not survive legal challenge and will have the opposite intended effect—workers not having health insurance because of the loss of additional airline industry jobs.

A4A Members' SFO Operations

A4A is the principal trade and service organization of the United States-scheduled airline industry. Its members and affiliates account for more than 90% of the passenger and cargo traffic that United States-scheduled airlines carry annually and for a significant portion of traffic in and out of San Francisco International Airport ("SFO"). Together, United States-schedule and cargo airlines employed more than 750,000 at the end of 2019 with thousands employed at SFO. A4A is well positioned to provide information on the impact of laws and regulations on airline workers at SFO, including benefits laws.

A4A members employ Quality Standards Program ("QSP") covered-employees at SFO, including ticket agents, gate agents, baggage handlers, fleet service workers, and maintenance technicians. Most of these employees are sited at SFO on a full-time or part-time basis. However, at least some A4A carriers send their employees who work at other Bay Area airports,

like Oakland International Airport ("OAK") or San Jose International Airport ("SJC"), to work at SFO for a day(s)/shift(s), weeks, or months when there are irregular or other special operations or assignments at SFO.

A4A Members' Health Insurance Benefits for SFO Employees

A4A members provide well-paying jobs with generous benefits to employees in every state in the Nation. A4A members have provided health insurance benefits for their employees for years, often through nationwide collective bargaining agreements. These bargained-for health insurance benefits typically require carriers to offer certain health insurance plans to employees throughout the United States with agreed-upon benefits and service offerings. The carriers who have employees not covered by a collective bargaining agreement also offer health insurance plans with benefits and service offerings, typically on a nationwide basis.

At SFO, A4A members have complied with SFO's QSP and the City's Healthcare Accountability Ordinance ("HCAO") for years. A4A members offer single-coverage at no cost to employees under these programs. They also offer generous, significantly subsidized single-plus and family coverage to employees under the above-described collective bargaining agreements and employment policies. A4A members' SFO employees already have ample access to no and low-cost health insurance for themselves and their family members.

Proposed Ordinance No. 201133

Under the Ordinance, employers who employ QSP-covered employees at SFO must (1) offer self- and dependent-healthcare coverage at no cost to those employees; or (2) pay at least $9.50 per each hour worked by those employees into a medical reimbursement account for employees established by the City under Section 14.2 of the City's Administrative Code. *See* Ordinance § 12.Q.3(d). The Ordinance applies to any QSP-covered employee who spends ***any*** amount of time working at SFO in a week. *Id.* at § 12.Q.2.9(a)(4).

Additionally, to avail themselves of option 1 described above, employers must provide a certain level of benefits to QSP-covered employees:

> The health benefits offered shall include at least one plan that provides a level of coverage that is designed to provide benefits that are actuarially equivalent to at least 90% of the full actuarial value of the benefits provided under the plan and to provide coverage for all services described in the California Essential Health Benefit Benchmark Plan.

Id. at § 12.Q.3(d)(1)(B). An employee also must be eligible for these benefits within 30 days of the covered employee's start of employment. *Id.* at § 12.Q.3(d)(1)(C).

The Ordinance further appears to place restrictions on other health insurance plans that employers may offer to their employees at SFO:

> A Contracting Party may offer additional health benefit plans, provided that each such health benefit plan offered shall provide a level of coverage that is designed to provide benefits that are actuarially equivalent to at least 80% of the full actuarial

> value of the benefits provided under the plan and to provide coverage for all services as described in the California Essential Health Benefit Benchmark Plan.

Id.

The above-described provisions of the Ordinance are not waivable by a union or through a collective bargaining agreement. *Id.* at § 12.Q.8. Covered employees may voluntarily waive the Ordinance's requirements, but only if the covered employee provides a waiver form establishing proof of current health plan coverage for the employee's dependents. *Id*. at § 12.Q.3(e).

Finally, it is our understanding that the Ordinance will apply only to airline, fixed-based operators/signature flight support, general aviation, and airline service provider employers. It will not apply to airport restaurant/retail, rental car, or airport commission employers.

The ADA, ERISA, and RLA Preempt the Ordinance

The Ordinance cannot survive legal challenge. It is preempted for the reasons described below.

1. The ADA preempts the Ordinance because it affects rates, routes, and services.

The ADA prohibits the enactment and enforcement of state and local laws "related to a price, route, or service of an air carrier." 49 U.S.C. § 41713(b)(1). Congress included this "broad" express preemption provision to promote efficiency and to avoid "regulatory patchwork[s]," *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 373 (2008), and to prevent states from "undo[ing] federal deregulation with regulation of their own, *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378, 383-84 (1992). The breadth of this provision is reflected in the ADA's "related to" language. It preempts any state law "having a connection" with air carrier "prices, routes, and services." *Rowe*, 552 U.S. at 370-71 (quotations omitted). That connection need not be direct, *id.*, and it is not necessary that the state law "actually prescribe[] rates, routes, or services," *Morales*, 504 U.S. at 385.

It is clear that the Ordinance will affect rates. The Board of Supervisors ("BOS") Budget & Legislative Analyst ("BLA") calculated that the Ordinance will cost air carriers between $8.4M to $33M annually, increasing ticket costs for passengers by $1.83 per ticket. *See* BOS Budget & Finance Committee Meeting Transcript (Oct. 21, 2020). San Francisco International Airport Director Ivar Satero places the cost much higher—at between $40.9M and $163M (see enclosed letter dated October 23, 2020). A4A agrees with Director Satero in this respect and believes the BLA drastically understates the true costs of the Ordinance. The BLA's admission that the Ordinance will affect rates ***at all*** is dispositive under the preemption analysis. The ADA preempts any state and local laws that affect rates, no matter how much or how little.

The Ordinance also will affect routes. SFO already is one of the most expensive airports to fly into and out of. The Ordinance's cost, coupled with the pandemic, will cause air carriers to eliminate flights altogether or to use other airports instead. Carrier representatives testified to this fact during the BOS Budget and Finance Committee meeting on October 21, 2020:

> I'm the managing director for state and local government based in the State of Hawaii representing Hawaiian Airlines. . . . I'm here to speak about the consequences of reduced services contemplated in the proposal by the healthy workers ordinance if passed this year and implemented in 2021. [A] [p]roposal such as this which target[s] the airline . . . industry [with] substantial cost increases will further devastate the impact of COVID-19 and could lead to sustained reduction [of flights] in SFO. This limits competition and restricts growth for smaller carriers. Hawaiian Airlines was poised for meaningful growth prior to the pandemic. If traffic returns to normal levels, these cost overruns make [growth] unlikely. . . . [A] [smaller carrier] cannot spread [costs] across multiple flights, and [the Ordinance] makes San Francisco prohibitively expensive.
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> I'm the director of government affairs [at jetBlue]. jetBlue is by no means the largest carrier at SFO, but we provide a critical role [and] historically [have had passenger loads on jetBlue increase at SFO]. [Our aircraft are a] finite resource [and] the cost of doing business at an airport is a leading factor [in where we fly]. The importance of keeping costs under control has only been exacerbated during the current COVID crisis. Higher costs due to policies [at] SFO could threaten new entran[ts] like [jetBlue] from starting new service[,] decreasing competition and negatively impacting the traveling public in the process.

BOS Budget & Finance Committee Meeting Transcript (Oct. 21, 2020). Thus, the Ordinance is preempted under the ADA because it affects routes; it discourages carriers from flying into and out of SFO.

The Ordinance further will impact air carriers' service at SFO. The costs of the Ordinance will cause a decrease in headcount working flights:

> I work for Southwest Airlines. . . . Southwest Airlines is proud of its record related to [] employees. . . . [If the Ordinance is approved], it would increase the cost of healthcare during financial[ly] challenging times and add[] millions of dollars in unnecessary healthcare costs [that] will hinder the recovery process and result in consequences. It would reduce headcounts in SFO or shift flights to other airports that are more cost effective. We go above and beyond for our employees and we ask the committee members to consider the unintended consequences of this proposal.
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> I'm [a] managing director at United Airlines. I'm here today to speak with you about jobs, or more accurately the loss of jobs at SFO which would occur if a proposal set forth by the healthy workers ordinance is to be passed this year and implemented in 2021. Proposals such as this that target the airline industry will only further exacerbate the financial impact of COVID-19. It could lead to massive job cuts. This is clearly not the intent of the proposal. As you know, United is the largest carrier at SFO.

BOS Budget & Finance Committee Meeting Transcript (Oct. 21, 2020).

Further headcount reduction will lead to longer lines and waiting times for customer assistance, aircraft maintenance, baggage loading and unloading, *etc.* Laws that lead to such reduced staffing are preempted by the ADA because these laws affect airline services. *See, e.g., Brindle v. R.I. Dep't of Labor & Training*, 211 A.3d 930 (R.I. 2019) (overtime law that would cause air carriers to staff flights with fewer employees was preempted by the ADA because it affected services and service levels), *cert denied*, 140 S.Ct. 908 (2020).

It is apparent that the Ordinance is seeking to regulate the airline industry. One of its primary stated goals is to protect the traveling public from the spread of COVID-19 and restore confidence in the safety of air travel, yet the City is excluding non-airline employers that operate at SFO and that have employees who have contact with the traveling public (when several of the covered employee classifications do not). We raise this not to suggest that those employers and their employees should be covered by the Ordinance, but to point out that the Ordinance is clearly regulation directed at the airline industry in violation of the ADA and inconsistent with the purported regulatory goals of the Ordinance to boot. No employers operating in and around SFO should be subject to this costly and unnecessary Ordinance at a time when all are trying to restore job loss from the pandemic.

2. ERISA preempts the Ordinance because it relates to an ERISA-governed benefit plan.

ERISA supersedes "any and all state laws insofar as they may now or hereafter relate to any benefit plan." 29 U.S.C. § 1144(a). More specifically, ERISA preempts any state or local law that dictates the amount of employer contributions or the nature of required benefits. *See, e.g., Golden Gate Restaurant Ass'n v. City of San Francisco*, 546 F.3d 639, 658 (9th Cir. 2008) (finding that preemption of a state law is required when it "calculates its required payments based on the value or nature of the benefits"); *Local Union 598 v. J.A. Jones Const. Co.*, 846 F.2d 1213, 1219 (9th Cir. 1988) (a "statute which mandates employer contributions to benefit plans and which effectively dictates the level at which those required contributions must be made has a most direct connection with an employee benefit plan" and is "clearly preempted by ERISA"), *summarily aff'd*, 488 U.S. 881 (1988). The Ordinance dictates the level of benefits and services a covered employer must offer, to whom, and at 100% employer cost. It is thus preempted by ERISA.

An employer's ability to pay into the City's fund, rather than to provide these required benefits, does not save the Ordinance from ERISA preemption. The Ninth Circuit admittedly upheld a similar option in *Golden Gate*, but the rationale upon which *Golden Gate* was based is no longer valid in the Ninth Circuit or elsewhere. *Golden Gate* presumed ERISA preemption does not apply. The Supreme Court, however, has since stated that there can be no presumption against ERISA preemption because of the ***express*** nature of ERISA's preemption provision. *See Gobeille v. Liberty Mut. Ins. Co.*, 136 S.Ct. 936, 946 (2016) ("Any presumption against preemption, whatever its force in other instances, cannot validate a state law that enters a fundamental area of ERISA regulation and thereby counters the federal purpose in the way this state law does."); *Puerto Rico v. Franklin California Tax-Free Tr.*, 136 S.Ct. 1938, 1946 (2016) ("And because the statute 'contains an express preemption clause,' we do not invoke any presumption against preemption.").

Moreover, the Ninth Circuit in *Golden Gate* and the Fourth Circuit in *Retail Industry Leaders Ass'n v. Fielder*, 475 F.3d 180 (4th Cir. 2007), have been at odds on this very issue. In *Fielder*, the Fourth Circuit concluded the exact opposite—that ERISA preempted a state law mandating employers to spend a certain level on healthcare and requiring an employer to pay into a state-run fund if the employer did not meet that level. The Fourth Circuit reasoned that allowing payment into a fund is really no option at all because it is highly unlikely that an employer would pay a government to run healthcare for some of its employees while having the option of covering them in a pre-existing ERISA plan. In other words, such state and local laws indirectly but effectively force an employer to amend its existing ERISA plan(s) to comply with the state and local law, and therefore are preempted by ERISA.

Upcoming decisions may resolve this circuit split or shed more light on the scope of ERISA preemption. For example, the Supreme Court is deciding *Rutledge v. Pharmaceutical Care Mgmt. Ass'n*, 891 F.3d 1109 (8th Cir. 2018), *cert granted*, 140 S.Ct. 812 (Jan. 10, 2020), likely in early 2021. This case should provide guidance on whether state or local regulation can be seen as a cost control or a control of ERISA plan terms or administration. The former may not be preempted, while the latter is preempted. The Court's decision may be dispositive or provide rationale important to determining the scope of ERISA preemption in the Ninth Circuit, including as to the Ordinance.

Even more specifically, *ERISA Indus. Comm. v. City of Seattle*, 2020 WL 2307481 (W.D.Wash. May 8, 2020), in which plaintiff challenged a law similar to the Ordinance, is pending before the Ninth Circuit, *ERISA Indus. Comm. v. City of Seattle*, Appeal No. 20-35472 (9th Cir.). Whether *Golden Gate* is still good law is at issue in this appeal. We believe that the Supreme Court and Ninth Circuit ultimately will resolve these issues in a way that shows the Ordinance is preempted. At the very least, rather than pass the Ordinance, at a time that would be devastating to air carriers who already provide generous healthcare coverage to their employees, the City should wait until these cases are decided and then re-evaluate the Ordinance.

3. The RLA preempts the Ordinance because the Ordinance interferes with the negotiation of benefits and creates issues of contract interpretation.

The RLA promotes the stability of labor relations in the air and rail industries by providing a federal framework for resolving labor disputes, including the negotiation of labor contracts. *See, e.g., Atchison, T. & S.F.R. Co. v. Buell*, 480 U.S. 557, 562 (1987). As the Supreme Court explained in *Lodge 76, Int'l Assoc. of Machinists and Aero. Workers v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 147-48 (1976) ("*Machinists*"), this federal framework leads to the preemption of state and local labor laws that regulate in areas that Congress left to be controlled by the free play of economic forces. The negotiation of complex benefits provisions in a labor contract is one such area.

The carriers have explained to the BOS that their labor contracts contain generous, detailed health insurance provisions, negotiated with unions, and approved by employees. These provisions are the product of carefully negotiated language, some of which was arrived at in exchange for other items:

> I work for Southwest Airlines. . . . Southwest Airlines is proud of its record related to employees. Over 82% of our workforce is unionized. . . . We have collective

> bargaining agreements, negotiated across the country with extremely generous provisions that extend to family members. Currently, Southwest employees can choose between a free healthcare plan or a premium plan at a discounted rate, but it's important to note that Southwest employees and unions approved these healthcare plans [in] the bargaining process. . . .
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> * * *
>
> [United Airlines] negotiate[s] collective bargaining agreements which are voted upon and approved by the employees. [They] include generous wage and benefit packages. We do not believe this legislation should supersede our collective bargaining agreements or interfere with our relationships with our labor partners…

BOS Budget and Finance Committee Hearing Transcript (Oct. 21, 2020).

The Ordinance may require these carriers to violate their labor contracts if, for example, a plan required by the CBA does not meet the valuation requirement established by the Ordinance. *See, infra*, *The Ordinance Creates Real Administrative Problems*, Number 3. The carrier would be forced to discontinue the plan under the Ordinance or to pay into the City fund, even though the employee already has health insurance. A complex benefits law that directly conflicts with a collective bargaining agreement in such a way that the carrier cannot comply with its CBA is preempted under the RLA. *See, e.g., San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959).

Even if a carrier's health insurance language in a CBA does not conflict with the Ordinance, there is RLA preemption. Requiring benefits over and above those that carriers and their unions negotiated disrupts the bargaining process, placing a thumb on the scale in favor of the provision of certain levels of benefits instead of the provision of other terms and conditions of employment, such as wages or leaves. Such requirements also place a thumb on the scale in favor of labor by providing unions with benefits that they chose not to bargain for in exchange for more generous other terms and conditions of employment. Such governmental interference with bargaining is not allowed under the RLA. *See, e.g., Machinists*, 427 U.S. at 147-48.

Additionally, the carefully negotiated health insurance provisions in the CBA may conflict with the Ordinance in a way that requires interpretation of the labor contract. For example, if the language of an entire health insurance plan is negotiated and contained in the CBA, but the plan does not meet the Ordinance's requirement that the benefits be "at least 90% of the full actuarial value of the benefits provided under the plan" or required minimum benefits or service offerings, Ordinance at § 12.Q.3(d)(1)(B), then how can the plan be reconciled with the Ordinance? The nuances related to how to interpret the plan in this regard are not necessarily a question of interpretation of the Ordinance, but could be an interpretation of the CBA itself.

Such issues are questions for a labor arbitrator—not for the City's enforcement arm, administrative agency, or a court—to resolve. In such cases, the dispute would be a contract interpretation dispute (*i.e.*, a "minor dispute" in RLA parlance) and preempted by the RLA. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 394 (1987) (state law cause of action that is "founded directly on rights created by collective-bargaining agreements" or that involves claims "substantially dependent on analysis of a collective-bargaining agreement," is governed by federal law) (quotations and citations omitted).

4. The market-participant exception to preemption does not apply.

The Ordinance contemplates amendments to the HCAO. Air carriers would not be bound only to the Ordinance or to their contracts with the City, but by the entire regulatory scheme of the HCAO as well. Therefore, the City cannot use the market-participant exception to escape preemption. *See, e.g., American Trucking Ass'n, Inc. v. City of Los Angeles*, 569 U.S. 641, 650 ("But that statutory reading gets the Port nothing, because it exercised classic regulatory authority—complete with the use of criminal penalties—in imposing the placard and parking requirements at issue here . . . So the contract here functions as part and parcel of a governmental program wielding coercive power over private parties, backed by the threat of criminal punishment.").

This is particularly true where, as here, the City seeks to further policy goals. The Ninth Circuit applies a disjunctive test to determine whether the government can avail itself of the market-participant exception:

> First, is the challenged governmental action undertaken in pursuit of the efficient procurement of needed goods and services, as one might expect of a private business in the same situation?
>
> Second, does the narrow scope of the challenged action defeat an inference that its primary goal was to encourage a general policy rather than [to] address a specific proprietary problem?

Airline Serv. Providers Ass'n v. Los Angeles World Airports, 873 F.3d 1074, 1080 (9th Cir. 2017).

Neither prong applies to the Ordinance. First, the BOS has said that its interest in the Ordinance is to "[p]rotect[] the health of employees and their families . . . ." Ordinance at Section 2, Findings (k). While it is a noble goal, the statement reveals that it is not the economic interests of the BOS itself that is primarily at issue—the employees are the direct beneficiaries. The City is, at best, an indirect beneficiary. The first prong of the test is not met here.

Second, the Ordinance is not narrow. It effectively reaches employer conduct "unrelated to the employer's performance of contractual obligations to the [City]," announces a regulatory policy, and brings complicated recordkeeping and litigation risks to employers if passed. This is quintessential regulation such that the City cannot avail itself of the market-participant exception. *See, e.g., Building & Const. Trades Council of Metro. Dist. v. Associated Builders & Contractors of Mass/R.I., Inc.*, 507 U.S. 218, 229 (1993); *Airline Serv. Providers Ass'n*, 873 F.3d at 1083. The second prong of the test also is not met here.

The Ordinance Creates Real Administrative Problems

The obvious problem with enacting the Ordinance at this time is that it seriously hinders the industry's recovery efforts. *See also* Director Satero's October 23, 2020 letter (enclosed). Setting aside that primary concern for the time being and instead addressing more tactical issues here, the City should be aware that there are major administrative problems for air carriers in implementing the Ordinance. As described below, these administrative burdens are

unreasonable and should give the City pause because the burdens could lead to the loss of health insurance for more workers.

1. The 30-day limit on waiting periods is unreasonably short and creates huge trailing liability.

Federal law permits employers to impose waiting periods of up to 90 days (or even longer in the context of "variable hour" employees who have not been determined to be full-time). The longer waiting periods allow employers who experience greater churn within their workforce to avoid the need to engage in the expensive and administratively cumbersome process of enrolling a new employee in health coverage, only to have that employee cycle out of the job a few weeks later.

Moreover, health plans are typically subject to either federal COBRA, Cal-COBRA, or both, which require 18 months of continuation coverage (at a minimum) if an employee (and/or the employee's dependents) were covered under the employer's plan for even a single day. While COBRA coverage is intended to be priced such that the full cost of coverage is charged to the employee, in reality COBRA participants have a much more adverse risk profile than the population as a whole (given the high cost of the coverage), meaning employers can regularly spend significant sums of money extending coverage to COBRA participants. Given these risks, this law has the potential to have a "chilling" effect, limiting employers' willingness to bring on new workers, ultimately resulting in fewer employees having health insurance coverage.

2. Required plan offerings under the Ordinance are out of step with employer plan benchmarks.

In both the private and public sector marketplace, it is exceedingly rare to see a plan available to an employee at no cost. Even where low-cost plans exist, they are usually plans at lower actuarial value (*e.g.*, a high-deductible health plan), rather than the richest offering of the employer (*i.e.*, one with a 90% actuarial value). As such, this law creates a mandate that extends far beyond what even the most generous employers offer.

Additionally, the law mandates that the plan cover all California-determined essential health benefits. This mandate extends to no other self-insured or large group fully-sourced plan in the market. The essential health benefit coverage mandate only applies to individual and small-group insurance policies. These types of plans typically do not exist in the large employer group market and would require employers to create custom plans for what would only be a subset of their population.

3. The Ordinance may impact the ability to offer other and more diverse and innovative healthcare offerings.

The Ordinance appears to not only mandate that employers offer an incredibly rich coverage option to its covered employees, but it also restricts the other options that may be made available (requiring that they represent a value of at least 80% of the "platinum" option). While further actuarial analysis would be required, this may inhibit employers' ability to offer a high-deductible health plan, which is a lower-value plan but one that offers employees the ability to contribute to tax-preferred Health Savings Accounts. It also may inhibit their ability to offer other plans, including bargained-for plans. As structured, the law denies employees this

freedom of choice and potentially prohibits employers from offering employees a valuable benefit offered to other employees or required by their collective bargaining agreement. It could lead to the loss of insurance for these employees.

4. The Ordinance unreasonably impacts employees at other Bay Area airports.

On occasion, A4A members send their employees from OAK, SJC, and other Bay Area airports during times of irregular operation or special assignment. Such work stints are often limited to short periods of time. The Ordinance, however, reaches to cover such employees' work at SFO because it covers any work in a week, no matter how short the amount of work is.

Air carriers are left with no choice in this situation but to pay into the City's fund under Ordinance Section 12.Q.3(d)(2). Air carriers are not likely to offer Ordinance-required plans at other airports, and these non-SFO employees cannot move into and out of healthcare plans on an hourly, daily, weekly, or even monthly basis. It is unreasonable for the City to require payment for these employees who are covered by health insurance plans in effect elsewhere.

5. Ambiguous terms in the Ordinance make compliance difficult.

The Ordinance contains numerous ambiguities that make it challenging for employers to assess what compliance would even entail. For instance, does the term "dependents" include only dependent children (consistent with federal guidelines) or something else? What other forms of coverage would suffice for an employee signing a coverage waiver? Individual coverage? Medicaid? Medicare? These ambiguities will create compliance questions and ultimately lead to more litigation. The Ordinance should, at the very least, be clarified accordingly.

The Ordinance Will Lead to Fewer Workers Having Access to Healthcare Coverage

As set forth above, airline employers already offer generous healthcare benefits to their employees. The carriers provided comments to the BOS Budget & Finance Committee explaining that the Ordinance will lead to further job loss at SFO:

> [Hawaiian Airlines] SFO is already expensive for passengers. This will have a negative impact on the supply and demand for air service. And result in additional job losses. It will eliminate direct and indirect jobs and over $300 million in annual income to the San Francisco region.
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> ***
>
> [United Airlines] I'm here today to speak with you about jobs, or more accurately the loss of jobs at SFO which would occur if a proposal set forth by the healthy workers ordinance is to be passed this year and implemented in 2021. Proposals such as this that target the airline industry will only further exacerbate the financial impact of COVID-19. It could lead to massive job cuts. This is clearly not the intent of the proposal. As you know, United is the largest carrier at SFO. Prior to COVID-19, just at the beginning of [2020], we employed over 12,000 workers throughout the airport. Unfortunately just a few weeks ago, we had to furlough approximately 3,000 employees at SFO and 13,000 [employees] nationwide due to the

> pandemic's financial impact. . . . SFO has taken a huge hit and we expect a slow recovery in the future. Contrary to what I heard from some other [] comments, these cuts could[] continue. . . . SFO is among the most expensive in the country for airlines and passengers. Significantly increasing the cost of doing business at SFO will have a negative impact on the supply and demand for air service and result in additional job losses.

BOS Budget & Finance Committee Meeting Transcript (Oct. 21, 2020).

In fact, due to the pandemic, the four A4A members with the largest presence at SFO have been forced to reduce their SFO-based workforce by roughly 3,000 jobs, from 14,700 to 11,700. The higher costs incurred if the Ordinance is enacted will reduce air travel demand as airlines will attempt to pass the higher costs onto Bay Area constituents and visitors. As prices are forced up, demand will fall accordingly and these airlines will not be able to support as much payroll expense, so they will curtail hours worked and limit the number of employees otherwise rehired. A4A estimates that reduced demand and reduced profitability will ultimately result in a 6.2 percent reduction in capacity and associated airline full-time equivalent employees ("FTE"). This means a further reduction of 728 FTEs and $97 million in lower salaries, wages, and benefits over the course of a single year. The cumulative effect of these direct effects plus indirect effects that would ripple through the supply chain and economy places the statewide impact at approximately 2,900 fewer jobs and $306 million loss to the economy. This additional job loss will cause workers to lose health insurance altogether; the exact opposite of the stated goal of the Ordinance.

Moreover, as explained above in *The Ordinance Will Create Real Administrative Problems*, numbers 1 and 3, *supra*, the maximum 30-day waiting period requirement and the valuation requirements in the Ordinance may actually cause carriers to hesitate to hire employees or for existing employees to lose valued healthcare plan features, such as Healthcare Savings Accounts. Surely the City wants job gains and does not want employees to lose plans that they want and that, in many cases, they and their unions have bargained for and are entitled to receive in their CBAs.

In the end, the Ordinance makes no sense, especially at a time like this. The industry experienced massive job loss on or shortly after October 1, 2020. Additional job loss will occur if the industry does not recover or if costs drastically increase. This is especially true at an airport like SFO, where air carriers have the ability to fly elsewhere in the Bay Area. Why the City is considering an Ordinance that will lead to additional job loss, a hesitancy to hire new employees, and healthcare coverage loss defies comprehension.

Conclusion

The Ordinance is preempted, creates significant administrative problems, and ultimately will lead to fewer workers having health insurance coverage. It is unworkable and will lead to litigation at a time when airport employers, the City, and BOS should be focused on the pandemic and recovery from it. We strongly caution against its passage for all of these reasons. BOS should not pass the Ordinance.

Very Truly Yours,

SEYFARTH SHAW LLP

s/ Molly Gabel
s/ Mark Casciari
s/ Ben Conley

Molly Gabel, Partner
Mark Casciari, Senior Counsel
Ben Conley, Partner
Counsel for Airlines for America

cc: Patricia Vercelli, General Counsel, Airlines for America (by email)

Riva Parker, Vice President, Labor & Employment/Litigation, Airlines for America (by email)

City of San Francisco, Board of Supervisors (by email to board.of.supervisors@sf.gov.org and fax to 1-415-554-5163)

Enclosure

San Francisco International Airport

October 23, 2020

Budget and Finance Committee
San Francisco Board of Supervisors
City Hall
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TRANSMITTED VIA EMAIL
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SUBJECT: File No. 201133, Administrative Code - Dependent Health Care Requirements for Certain Employers at San Francisco International Airport

Dear Chair Fewer, Vice Chair Walton, and Supervisor Mandelman:

I would like to take this opportunity to clarify some statements that were made at the October 21, 2020 Budget and Finance Committee hearing on the Healthy Airport Ordinance (File No. 201133).

All airlines and airline service providers are part of the San Francisco International Airport's (SFO) Quality Standards Program (QSP), and all are required to provide the health care benefits as defined in the City's Health Care Accountability Ordinance (HCAO). In some cases, such as with the catering service providers, we understand that the employers and the union have negotiated a waiver of the HCAO in their collective bargaining agreement. This waiver has apparently resulted in some QSP employees having health care coverage that may not meet the standards prescribed under the HCAO. The discussion of additional costs airlines may pass on to passengers as the result of the proposed legislation belies the greater financial impact of the ordinance – the increased cost of doing business at SFO. We estimate that implementing this proposal could double health care costs for airlines and their service providers. As you know, the pandemic has led to a substantial decline in passenger volumes. Fewer passengers means less non-airline revenue to SFO – from sources such as parking, concessions, and TNC trip fees – which results in a greater share of expenses the airlines must cover, based on SFO's residual rate setting/"break-even" budgeting methodology. These increased costs, paired with reduced passenger demand and a doubling in health care costs at SFO, have the potential to slow SFO's post-pandemic recovery relative to that of other airports.

Lastly, estimating the number of workers currently employed by the airlines and their service providers is challenging due to the dynamic nature of the pandemic. For the worker estimates we shared with the Budget and Legislative Analyst, we correlated projected passenger activity to the number of employees per category, based on our 2019 Economic Impact Report. Based on the 2019 Economic Impact Report, Airlines, Fixed Based Operators, General Aviation, and Service Providers employed 20,634 workers. Using these pre-pandemic worker numbers, the costs of offering qualifying family health plans under the proposed legislation (Option 1) would result in estimated additional annual costs ranging from approximately $40.9 million to $120 million, depending on the health plan. Under the proposed legislation, the costs of the $9.50 per hour contribution (Option 2) would result in estimated additional annual costs of approximately $163 million.

I hope this clarifies some of the context for the regional impacts that were referenced during the hearing. Please feel free to contact me if you need further background.

Very truly yours,

Ivar C. Satero
Airport Director

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