

1 [Increasing reporting requirements and liquidated damages and civil penalty provisions for
2 violations of the First Source Hiring Program.]

3 **Ordinance amending the San Francisco Administrative Code by: 1) amending section**
4 **83.6 to increase reporting requirements by the FSHA to include data reflecting the**
5 **length of time qualified individuals remain employed under this Chapter; 2) amending**
6 **sections 83.10 and 83.12 of the First Source Hiring Program to increase the liquidated**
7 **damages and civil penalty provisions from up to \$2,500.00 to up to \$5,000.00 for every**
8 **new hire for an entry level position improperly withheld from the first source hiring**
9 **process, and 3) amending section 83.10 by increasing the liquidated damages section**
10 **to up to \$10,000.00 for each violation discovered during a second investigation.**

11 Note: Additions are *single-underline italics Times New Roman*;
12 deletions are *strikethrough italics Times New Roman*.
13 Board amendment additions are double underlined.
14 Board amendment deletions are ~~strikethrough normal~~.

15 Be it ordained by the People of the City and County of San Francisco:

16 Section 1. The San Francisco Administrative Code is hereby amended by amending
17 Sections 83.6, 83.10 and 83.12, to read as follows:

18 **SEC. 83.6. FIRST SOURCE HIRING ADMINISTRATION.**

19 (a) **Establishment and Composition.** A First Source Hiring Administration (“FSHA”)
20 is hereby established for the purpose set forth in Subsection (b) below. The FSHA shall
21 consist of the following: (1) the Mayor or his/her designee from the Mayor’s Office of
22 Economic Development; (2) the Executive Director of the Department of Human Services, or
23 his/her designee; (3) the Director of the Mayor’s Office of Community Development, or his/her
24 designee; (4) the President of the Private Industry Council, or his/her designee; (5) the
25 Chancellor of the City College of San Francisco or his/her designee; (6) other City department

1 representatives appointed by the FSHA as necessary from time to time; and (67) other San
2 Francisco governmental agency representatives participating in the First Source Hiring
3 Program and invited by the FSHA .

4 (b) **Powers and Duties.** The FSHA shall be responsible for the implementation,
5 oversight, and monitoring of the first source hiring requirements of this Chapter. Its powers
6 and duties shall include:

7 (1) Providing assistance to individual City departments in designing first source
8 hiring implementation and monitoring plans for that department to use in contracts and
9 property contracts, including criteria for assigning particular numerical hiring goals, or
10 reviewing and approving existing Plans. The FSHA shall work with departments to identify
11 those contracts and property contracts that offer available entry level positions in duration and
12 numbers sufficient to justify the additional administrative duties resulting from the
13 implementation of the requirements of this Chapter. To the greatest extent possible, the
14 development of these plans shall utilize the department's existing contract-monitoring
15 procedures and facilitate a coordinated flow of information;

16 (2) Working with the Department of City Planning and the Department of
17 Building Inspection to establish conditions based upon first source hiring agreements for
18 development projects;

19 (3) Working with employers and unions to identify entry level positions for
20 qualified economically disadvantaged individuals, and to set appropriate recruitment, hiring
21 and retention goals;

22 (4) Determining appropriate monitoring and enforcement mechanisms to
23 achieve the purpose of this Chapter, and consistent with Sections 83.10 and 83.12, below;

24 (5) Developing written regulations to implement first source hiring;

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1 (6) Entering into cooperative agreements with other San Francisco
2 governmental agencies, including, but not limited to, the Housing Authority, the
3 Redevelopment Agency, the In-Home Supportive Services Public Authority, and the Parking
4 Authority, consistent with the laws governing such agencies and consistent with the purpose
5 of this Chapter;

6 (7) Conducting independent audits of City departmental implementation,
7 monitoring and enforcement of the requirements of this Chapter;

8 (8) Preparing an annual report on the progress of first source hiring for
9 presentation to the Mayor and the Board of Supervisors, that will include but not be limited to
10 the status of first source implementation by all City departments, the number of contractors by
11 department subject to first source requirements by department, the number and percent of
12 contractors with signed first source agreements on file, the number and percent of first source
13 employers posting jobs, the number of jobs posted and the wage data associated with those
14 jobs, the number of job seekers referred to employers, the number of job seekers hired by first
15 source employers, ~~and~~ the number and percent of first source employers hiring job seekers, ~~and~~
16 and the length of time that hired individuals remain employed. The FSHA shall review these data to
17 determine whether, in light of the data, the liquidated damages provision that this ordinance requires
18 continues to reflect a fair estimate of the injury that the City suffers when a contractor fails to comply
19 with its first source referral obligations. If the FSHA determines that the liquidated damages provision
20 can be improved it shall submit to the Board of Supervisors proposed amendments to this ordinance
21 reflecting those improvements. The Board of Supervisors shall hold a hearing on the report
22 within 45 days of its submission to the Clerk of the Board of Supervisors.

23 (9) Submitting all approved first source hiring implementation and monitoring
24 plans ("approved plan") to the Workforce Development Advisory Committee for review;

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1 (10) Developing effective outreach, education, support services for, and
2 recognition of, employers.

3 (c) The FSHA shall phase-in implementation of this Chapter in accordance with Section
4 83.18, below, and as defined in Sections 83.4 (n) and (o), above. The FSHA shall first
5 establish a schedule for assisting in the development of, or approving existing first source
6 hiring implementation and monitoring plans by the following City departments: Airport;
7 Department of Building Inspection; Department of Planning; Department of Public Health;
8 Mayor's Office of Children, Youth and Families; Mayor's Office of Community Development;
9 Mayor's Office of Housing; Municipal Railway; Parks and Recreation; Port; Public Works, and
10 Purchasing. The FSHA shall also establish a schedule for the remaining City departments.

11 (d) The FSHA shall exercise its powers and duties in a manner that does not result in
12 delay for contractors or developers subject to this Chapter.

13 (e) The FSHA shall make the final administrative determination as to compliance with
14 the requirements of this Chapter. (Added by Ord. 264-98, App. 8/21/98)

15 **SEC. 83.10. VIOLATION OF FIRST SOURCE HIRING REQUIREMENTS IN CONTRACTS**
16 **AND PROPERTY CONTRACTS.**

17 (a) Every contract covered by this Chapter shall contain a provision in which the
18 Contractor agrees:

19 (1) To be liable to the City for liquidated damages as provided in this section;

20 (2) To be subject to the procedures governing enforcement of breaches of contracts
21 based on violations of contract provisions required by this Chapter as set forth in this section;

22 (3) That the contractor's commitment to comply with this Chapter is a material element
23 of the City's consideration for this contract; that the failure of the contractor to comply with the
24 contract provisions required by this Chapter will cause harm to the City and the public which is
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1 significant and substantial but extremely difficult to quantify; that the harm to the City includes not
2 only the financial cost of funding public assistance programs but also the insidious but impossible to
3 quantify harm that this community and its families suffer as a result of unemployment, and that the
4 assessment of liquidated damages of up to ~~\$2,500.00~~5,000.00 for every notice of a new hire for
5 an entry level position improperly withheld by the contractor from the first source hiring
6 process, as determined by the FHSA during its first investigation of a contractor, does not exceed a
7 fair estimate of the financial and other damages that the City suffers as a result of the contractor's
8 failure to comply with ~~the contract provisions required by this Chapter.~~its first source referral
9 contractual obligations;

10 (4) That the continued failure by a contractor to comply with its first source referral
11 contractual obligations will cause further significant and substantial harm to the City and the public,
12 and that a second assessment of liquidated damages of up to \$10,000.00 for each entry level position
13 improperly withheld from the FSHA, from the time of the conclusion of the first investigation forward,
14 does not exceed the financial and other damages that the City suffers as a result of the contractor's
15 continued failure to comply with its first source referral contractual obligations;

16 (5) That in addition to the cost of investigating alleged violations under this section, the
17 computation of liquidated damages for purposes of this section is based on the following data:

18 A. the average length of stay on public assistance in San Francisco's County Adult
19 Assistance Program is approximately 41 months at an average monthly grant of \$348.00 per month,
20 totaling approximately \$14,379.00; and

21 B. in 2004, the retention rate of adults placed in employment programs funded under the
22 Workforce Investment Act for at least the first six months of employment was 84.4%. Since qualified
23 individuals under the First Source program face far fewer barriers to employment than their
24 counterparts in programs funded by the Workforce Investment Act, it is reasonable to conclude that the

1 average length of employment for an individual whom the First Source Program refers to an employer
2 and who is hired in an entry level position is at least one year;
3 therefore, liquidated damages that total \$5,000.00 for first violations and \$10,000.00 for
4 subsequent violations as determined by FSHA constitute a fair, reasonable, and conservative attempt to
5 quantify the harm caused to the City by the failure of a contractor to comply with its first source
6 referral contractual obligations.

7 (46) That the failure of contractors to comply with this Chapter, except property
8 contractors, may be subject to the debarment and monetary penalties set forth in Sections
9 6.80 et seq. of the San Francisco Administrative Code, as well as any other remedies
10 available under the contract or at law; and

11 (57) That in the event the City is the prevailing party in a civil action to recover
12 liquidated damages for breach of a contract provision required by this Chapter, the contractor
13 will be liable for the City's costs and reasonable attorneys fees.

14 (b) The FSHA shall promulgate appropriate guidelines or rules for the enforcement of
15 this Chapter. Such guidelines or rules may establish procedures for ensuring fair, efficient,
16 and cost-effective implementation of this Chapter, including mechanisms to monitor contractor
17 compliance with the contract provisions required by this Chapter, and for determining whether
18 a contractor has failed to comply with its contract obligation to make entry level positions
19 available to the FSHA for referral of economically disadvantaged individuals as specified in a
20 contractor's first source hiring agreement.

21 (c) The FSHA may investigate possible violations of contract provisions required by
22 this Chapter. Where the FSHA, after providing the contractor with the opportunity to respond
23 to the alleged violation, determines that a contractor failed to make available entry level
24 positions to the FSHA for referral of qualified economically disadvantaged individuals, as
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1 required by the applicable first source hiring agreement, the FSHA shall provide written notice
2 to the contractor as follows:

3 (1) the factual basis for the determination;

4 (2) the corrective action that the contractor must take to remedy the violation;

5 (3) the amount of liquidated damages that the FSHA has assessed for the contractor's
6 violation of this Chapter;

7 (4) notice that the contractor has 15 days to either take the required corrective action,
8 including payment of liquidated damages, or to file an appeal consistent with subsection (5),
9 below;

10 (5) that the contractor has the right to appeal the FSHA's final determination to the
11 OLSE, including the assessment of liquidated damages and the amount assessed, but that
12 any such appeal must be filed in writing with the OLSE within 15 days of the date of the
13 issuance of FSHA's determination and that a contractor must file an appeal with the OLSE in
14 order to exhaust administrative remedies;

15 (6) that if the contractor fails to take the required corrective action or file an appeal in
16 writing with the OLSE within 15 days as set forth above, the FSHA's determination shall be
17 the City's final and binding decision which the City may enforce in a court of law, and

18 (7) that the contractor will be required to comply with the decision within 5 business
19 days of the FSHA's decision becoming final, including payment of liquidated damages, if any,
20 together with simple annual interest of 10% from the date that payment should have been
21 made.

22 (d)(1) While liquidated damages in the maximum amount set forth in this section are a
23 reasonable estimate of harm to the City caused by the contractor's non-compliance with
24 contract provisions required by this Chapter, the FSHA may determine that less than the full
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1 amount is warranted depending on the circumstances of each case. The FSHA shall consider
2 the following factors in determining the amount of liquidated damages, if any, to impose
3 against a contractor who fails to comply with contract provisions required by this Chapter:

4 (A) the size of the contractor's business;

5 (B) the contractor's good faith efforts to comply with contract provisions required by
6 this Chapter;

7 (C) the gravity of the violation;

8 (D) whether the contractor has a history of violations of contract provisions required
9 by this Chapter;

10 (E) whether the contractor has failed to comply with recordkeeping requirements
11 imposed by contract provisions under this Chapter; and

12 (F) whether the imposition of liquidated damages would undermine the purpose of
13 this Chapter by imposing unreasonable financial burdens on the contractor, thereby imperiling
14 the contractor's ability to continue complying with contract provisions required by this Chapter.

15 (e)(1) Within 15 days of receiving an appeal from the FSHA's final determination, the
16 OLSE shall appoint a hearing officer and shall so advise the FSHA and the contractor, and/or
17 their respective counsel or authorized representative.

18 (2) The hearing officer shall promptly set a date for a hearing. The hearing must
19 commence within 45 days of the notification of the appointment of the hearing officer and
20 conclude within 75 days of such notification, not including the issuance of a decision, unless
21 all parties agree to an extended period. If a contractor appeals the FSHA's initial
22 determination but fails to attend a hearing set under this subsection, the FSHA's initial
23 determination shall become final.

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1 (3) The FSHA shall have the burden of producing evidence justifying its imposition of
2 liquidated damages under this Chapter, and of the contractor's violation of contract provisions
3 required by this Chapter, and shall have the burden of proving that a violation occurred. The
4 contractor shall have the right to present evidence on its behalf in response to any alleged
5 violation of contract provisions required by this Chapter.

6 (4) Within 30 days of the conclusion of the hearing, the hearing officer shall issue a
7 written decision affirming, modifying, or vacating the FSHA's determination of whether the
8 contractor violated the first source hiring agreement, of what corrective action that the
9 contractor must take to remedy any violation, and of the amount of liquidated damages to be
10 assessed, if any. The hearing officer's decision shall consist of findings and a determination,
11 which shall be the City's final decision.

12 (5) The contractor shall comply with the hearing officer's decision within 5 business
13 days of service of the decision. Service shall be made by first class mail to the contractor's
14 address of record. If the hearing officer imposed liquidated damages, the contractor shall pay
15 the liquidated damages within 5 business days of the receipt of the decision. Payment of
16 liquidated damages after that day shall be subject to simple annual interest of 10% from the
17 day that such damages were due.

18 (6) The contractor may seek review of the hearing officer's decision only by filing in the
19 San Francisco Superior Court a petition for a writ of mandate under California Code of Civil
20 Procedure, section 1094.5, as may be amended from time to time.

21 (7) When a contractor fails to take corrective action within the time required by the
22 provisions of this section, the City may immediately pursue all available remedies against the
23 contractor for breach of contract, including debarment proceedings where applicable and filing
24 a civil action to recover liquidated damages due under this section.
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1 (8) The failure of the FSHA or OLSE to comply with the time requirements of this
2 Section shall not cause the OLSE or the hearing officer to lose jurisdiction over an appeal
3 from the FSHA's determination filed under this Section.

4 (f) If the developer fulfills its obligations as set forth in this Chapter, the developer shall
5 not be held responsible for the failure of an employer to comply with the requirements of this
6 Chapter.

7 (g) Liquidated damages obtained under this Chapter shall be deposited in the general
8 fund.

9 **SEC. 83.12. VIOLATION OF FIRST SOURCE HIRING REQUIREMENTS IN PERMITS AND**
10 **IN WORK PERFORMED BY A CITY CONTRACTOR ON NON-CITY PROJECTS IN THE**
11 **CITY.**

12 (a)(1) The sole financial remedy for violation of the requirements of this Chapter are
13 the penalties set forth below. Additionally, failure to comply with the conditions imposed on a
14 permit may be subject to the provisions of San Francisco Building Code Section 104.2.

15 (2) Every employer covered by this section shall be subject to the procedures
16 governing enforcement of violations of this Chapter. In addition, the failure of an employer to
17 make entry level positions available to the FSHA for referral of economically disadvantaged
18 individuals, as specified in an employer's first source hiring agreement, shall be subject to a
19 penalty of up to ~~\$2,500.00~~5,000.00 for every new hire improperly withheld from the FSHA for
20 this purpose.

21 (3) In the event that the City is the prevailing party in a civil action to recover a penalty
22 awarded pursuant to this section, the employer will be liable for the City's costs and
23 reasonable attorneys fees.

1 (b) The FSHA shall promulgate appropriate guidelines or rules for the enforcement of
2 this Chapter. Such guidelines or rules may establish procedures for ensuring fair, efficient,
3 and cost-effective implementation of this Chapter, including mechanisms to monitor employer
4 compliance with this Chapter, and for determining whether an employer has failed to comply
5 with its obligation to make entry level positions available to the FSHA for referral of
6 economically disadvantaged individuals as specified in the employer's first source hiring
7 agreement.

8 (c)(1) The FSHA may investigate possible violations of this Chapter. Where the
9 FSHA, after providing an employer with the opportunity to respond to the alleged violation,
10 determines that an employer failed to make available entry level positions to the FSHA for
11 referral of qualified economically disadvantaged individuals, as required by the applicable first
12 source hiring agreement, the FSHA shall provide written notice to the employer as follows:

13 (A) the factual basis for the determination;

14 (B) the corrective action that the employer must take to remedy the violation;

15 (C) the amount of a penalty that the FSHA has assessed for the employer's violation of
16 this Chapter;

17 (D) notice that the employer has 15 days to either take the required corrective action,
18 including payment of the penalty, or to file an appeal consistent with subsection (5), below;

19 (E) that the employer has the right to appeal the FSHA's final determination to the
20 OLSE, including the assessment of a penalty and the amount assessed, but that any such
21 appeal must be filed in writing with the OLSE within 15 days of the date of the issuance of
22 FSHA's determination and that an employer must file an appeal with the OLSE in order to
23 exhaust administrative remedies; and

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1 (F) that if the employer fails to take the required corrective action or file an appeal in
2 writing with the OLSE within 15 days as set forth above, the FSHA's determination shall be
3 the City's final and binding decision which the City may enforce in a court of law, and

4 (G) that the employer will be required to comply with the decision within 5 business
5 days of the FSHA's decision becoming final, including payment of the penalty, if any, together
6 with simple annual interest of 10% from the date that payment should have been made.

7 (d)(1) While the maximum amount set forth in this section is a reasonable measure of
8 the harm to the City caused by the employer's non-compliance, the FSHA may determine that
9 less than the full amount is warranted depending on the circumstances of each case. The
10 FSHA shall consider the following factors in determining the amount of the penalty, if any, to
11 impose against an employer who fails to comply with this Chapter:

12 (A) the size of the employer's business;

13 (B) the employer's good faith efforts to comply with this Chapter;

14 (C) the gravity of the violation;

15 (D) whether or not the employer has a history of violations under this Chapter;

16 (E) whether or not the employer has failed to comply with recordkeeping
17 requirements under this Chapter; and

18 (F) whether the imposition of a penalty would undermine the purpose of this
19 Chapter by imposing unreasonable financial burdens on the employer, thereby imperiling the
20 employer's ability to continue complying with the obligations of this Chapter.

21 (e)(1) Within 15 days of receiving an appeal from the FSHA's final determination, the
22 OLSE shall appoint a hearing officer and shall so advise the FSHA and the employer, and/or
23 their respective counsel or authorized representative.

1 (2) The hearing officer shall promptly set a date for a hearing. The hearing must
2 commence within 45 days of the notification of the appointment of the hearing officer and
3 conclude within 75 days of such notification, not including the issuance of a decision, unless
4 all parties agree to an extended period. If an employer appeals the FSHA's initial
5 determination but fails to attend a hearing set under this subsection, the FSHA's initial
6 determination shall become final.

7 (3) The FSHA shall have the burden of producing evidence justifying its imposition of a
8 penalty under this Chapter, and of the employer's violation of the requirements of this
9 Chapter, and shall have the burden of proving that a violation occurred. The employer shall
10 have the right to present evidence on its behalf regarding an alleged violation of this Chapter.

11 (4) Within 30 days of the conclusion of the hearing, the hearing officer shall issue a
12 written decision affirming, modifying, or vacating the FSHA's determination of whether the
13 employer violated the first source hiring agreement, of what corrective action that the
14 employer must take to remedy any violation, and of the amount of a penalty to be assessed, if
15 any. The hearing officer's decision shall consist of findings and a determination, which shall
16 be the City's final decision.

17 (5) The employer shall comply with the hearing officer's decision within 5 business
18 days of service of the decision. Service shall be made by first class mail to the employer's
19 address of record. If the hearing officer imposed a penalty, the employer shall pay the penalty
20 within 5 business days of the receipt of the decision. Payment of a penalty after that day shall
21 be subject to simple annual interest of 10% from the day that such penalty was due.

22 (6) The employer may seek review of the hearing officer's decision only by filing in the
23 San Francisco Superior Court a petition for a writ of mandate under California Code of Civil
24 Procedure, section 1094.5, as may be amended from time to time.
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1 (7) When an employer fails to take corrective action within the time required by the
2 provisions of this section, the City may immediately pursue all available remedies against the
3 employer, including filing a civil action to recover any penalty due under this section.

4 (8) The failure of the FSHA or the OLSE to comply with the time requirements of this
5 section shall not cause the OLSE to lose jurisdiction over an appeal from the FSHA's
6 determination filed under this section.

7 (f) If the developer fulfills its obligations as set forth in this Chapter, the developer shall
8 not be held responsible for the failure of an employer to comply with the requirements of this
9 Chapter.

10 (g) All penalties obtained under this Chapter shall be deposited in the general fund.

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

14
15 By: _____
16 JENNIFER WILLIAMS
Deputy City Attorney