

1 [Board Response - Civil Grand Jury Report - Surcharges and Healthy San Francisco: Healthy
2 for Whom?]

3 **Resolution responding to the Presiding Judge of the Superior Court on the findings**
4 **and recommendations contained in the 2011-2012 Civil Grand Jury report entitled**
5 **"Surcharges and Healthy San Francisco: Healthy for Whom?" and urging the Mayor to**
6 **cause the implementation of accepted findings and recommendations through his/her**
7 **department heads and through the development of the annual budget.**

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9 WHEREAS, Under California Penal Code Section 933 et seq., the Board of
10 Supervisors must respond, within 90 days of receipt, to the Presiding Judge of the Superior
11 Court on the findings and recommendations contained in Civil Grand Jury Reports; and

12 WHEREAS, In accordance with Penal Code Section 933.05(c), if a finding or
13 recommendation of the Civil Grand Jury addresses budgetary or personnel matters of a
14 county agency or a department headed by an elected officer, the agency or department head
15 and the Board of Supervisors shall respond if requested by the Civil Grand Jury, but the
16 response of the Board of Supervisors shall address only budgetary or personnel matters over
17 which it has some decision making authority; and

18 WHEREAS, The 2011-2012 Civil Grand Jury Report entitled "Surcharges and Healthy
19 San Francisco: Healthy for Whom?" is on file with the Clerk of the Board of Supervisors in File
20 No. 12-0787, which is hereby declared to be a part of this resolution as if set forth fully herein;
21 and

22 WHEREAS, The Civil Grand Jury has requested that the Board of Supervisors respond
23 to Finding Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14 as well as Recommendations 1,
24 2, 3, 4, and 5 contained in the subject Civil Grand Jury report; and

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1 WHEREAS, Finding No. 1 states: “The Jury could not identify any government
2 investigation that reports the number of businesses adding surcharges to pay for Health Care
3 Security Ordinance (HCSO) employee mandates and mandated paid sick days;” and

4 WHEREAS, Finding No. 2 states: “The City has not investigated health care related
5 surcharges to determine whether or not employers are generating profits from these
6 surcharges;” and

7 WHEREAS, Finding No. 3 states: “Neither the City nor the state of California, to the
8 Jury's knowledge, has investigated whether sales tax is being added to surcharges;” and

9 WHEREAS, Finding No. 4 states: “The City has neither a plan nor sufficient staff at the
10 OSLE to audit employers' surcharges in compliance with HCSO regulations;” and

11 WHEREAS, Finding No. 5 states: “San Francisco businesses that collected surcharges
12 prior to January 1, 2012 have no obligation to report surcharge receipts to the City nor
13 reconcile the surcharges with health care expenses;” and

14 WHEREAS, Finding No. 6 states: “Due to the varied wording in describing surcharges
15 on consumers' bills, and the wording of the ordinance, the auditing of surcharges will be
16 difficult;” and

17 WHEREAS, Finding No. 7 states: “Consumer fraud is committed if the consumer’s
18 receipt states that a surcharge is being assessed for a stated purpose and is not being used
19 for that purpose;” and

20 WHEREAS, Finding No. 8 states: “Employers with Health Reimbursement Accounts
21 (HRAs) in 2010 allocated \$62 million for medical care, reimbursed employees \$12 million, and
22 retained up to the remaining \$50 million;” and

23 WHEREAS, Finding No. 9 states: “Given similar demographics the 20% reimbursement
24 rate for HRAs is well below the City's 50% reimbursement rate for MRAs due to lack of
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1 program notification to employees, stricter HRA guidelines, and employees' unwillingness to
2 disclose their medical conditions to their employer;" and

3 WHEREAS, Finding No. 10 states: "Significant numbers of restaurants utilizing HRAs
4 in 2010 paid out no medical expenses for their employees;" and

5 WHEREAS, Finding No. 11 states: "Employees with two or more employers may have
6 two or more HRAs, likely with differing guidelines for what constitutes medical expenses and
7 with differing time limits;" and

8 WHEREAS, Finding No. 12 states: "HRAs may not be an allowable option in meeting
9 the federal requirements under the Affordable Care Act;" and

10 WHEREAS, Finding No. 13 states: "The financial incentive to retain unspent HRA
11 funds could be a motivating force for employers to restrict employee access to these funds;"
12 and

13 WHEREAS, Finding No. 14 states: "By submitting personal medical invoices directly to
14 their employers, employees are forced to reveal their medical history and current health
15 conditions to their employers;" and

16 WHEREAS, the Recommendation No. 1 states: "Disallow employers subject to the
17 Office of Labor Standards Enforcement regulations from adding surcharges on customers' bill
18 to pay for HCSO employer mandates and mandated paid sick days;" and

19 WHEREAS, the Recommendation No. 2 states: "The Office of the Treasurer and Tax
20 Collector investigate the under-reporting of sales taxes on surcharges;" and

21 WHEREAS, the Recommendation No. 3 states: "The District Attorney open an
22 investigation to review the Jury's survey findings for possible consumer fraud;" and

23 WHEREAS, the Recommendation No. 4 states: "Disallow the use of the employer HRA
24 option;" and

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1 WHEREAS, the Recommendation No. 5 states: "Eliminate time limits for employees to
2 use their MRA funds;" and

3 WHEREAS, in accordance with Penal Code Section 933.05(c), the Board of
4 Supervisors must respond, within 90 days of receipt, to the Presiding Judge of the Superior
5 Court on Finding Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14 as well as
6 Recommendations 1, 2, 3, 4, and 5 contained in the subject Civil Grand Jury report; now,
7 therefore, be it

8 RESOLVED, That the Board of Supervisors reports to the Presiding Judge of the
9 Superior Court that it partially disagrees with Finding 1 for reasons as follows: the Board of
10 Supervisors passed legislation amending the Health Care Security Ordinance (HCSO) in
11 November 2011 that directed the Office of Labor Standards and Enforcement (OLSE) to begin
12 collecting data from employers for inclusion in its annual report on employer compliance with
13 the HCSO. As a result, this information was required in the 2011 annual reporting forms,
14 distributed to employers in March 2012 by the OLSE. As of January 2012, San Francisco
15 Administrative Code Section 14.3(d) requires all Covered Employers to inform OLSE on an
16 annual basis if they add a surcharge for the purpose of covering, in whole or in part, the cost
17 of the employer expenditure mandate. This is reported annually in the OLSE "Analysis of the
18 Health Care Security Ordinance." The law requiring disclosure does not address mandated
19 paid sick days; and, be it

20 FURTHER RESOLVED, That the Board of Supervisors reports that it disagrees with
21 Finding 2 for reasons as follows: the Board of Supervisors passed legislation amending the
22 HCSO in November of 2011 directing OLSE to begin collecting data from employers regarding
23 the amount of money collected from surcharges to cover employee health care and the
24 amount of health care expenditures made on behalf of employees. That legislation requires all
25 Covered Employers to inform OLSE on an annual basis whether they add a surcharge for the

1 purpose of covering, in whole or in part, the cost of the employer expenditure mandate. The
2 City also requires the reporting of all healthcare expenditures for covered employees. This
3 information is reported annually in the OLSE "Analysis of the Health Care Security
4 Ordinance." Further, in October of 2011, the District Attorney's Office opened a preliminary
5 review into this issue; and, be it

6 FURTHER RESOLVED, That the Board of Supervisors reports that it disagrees with
7 Finding 3 for reasons as follows: the Board of Supervisors refers to the response of the City
8 and County of San Francisco's Treasurer and Tax Collector and to the response of the State
9 Board of Equalization; and, be it

10 FURTHER RESOLVED, That the Board of Supervisors reports that it disagrees with
11 Finding 4 for reasons as follows: there is a process in place at OLSE to collect, analyze and
12 report on employers' surcharges data in compliance with HCSO provisions. The 2012-2013
13 budget passed by the Board of Supervisors included an increase to OLSE's budget of close to
14 a half million dollars, with an additional staff person to be hired at OLSE to enforce the HCSO;
15 and, be it

16 FURTHER RESOLVED, That the Board of Supervisors reports that it disagrees with
17 Finding 5 for reasons as follows: on OLSE's 2011 Annual Reporting Form, employers were
18 asked to report on both surcharge collections and their expenditures for employee health
19 benefits in 2011. Effective January 2012, as per an amendment to the HCSO passed by the
20 Board of Supervisors and signed by the Mayor in November 2011, if the amount of
21 surcharges collected for employee health care exceeds the amount spent on employee health
22 care, the employer must irrevocably pay or designate an amount equal to that difference for
23 health care benefits for its employees; and, be it

24 FURTHER RESOLVED, That the Board of Supervisors reports that it partially
25 disagrees with Finding 6 for reasons as follows: the Board of Supervisors defers to the

1 response of OLSE, "The Ordinance regulates surcharges imposed on customers "to cover in
2 whole or in part the costs of the health care expenditure requirement." It will be difficult in
3 some circumstances to determine which, if any, portion of a surcharge is imposed on
4 customers for this specific purpose. However, the OLSE will work to ensure that employers
5 understand this provision of the Ordinance and are in compliance with it"; and, be it

6 FURTHER RESOLVED, That the Board of Supervisors reports that it agrees with
7 Finding 7; and, be it

8 FURTHER RESOLVED, That the Board of Supervisors reports that it disagrees with
9 Finding 8 for reasons as follows: the Board of Supervisors defers to the response of OLSE,
10 "The OLSE's Analysis of the 2010 Annual Reporting Forms provides that employers allocated
11 \$62 million to all types of health care reimbursement programs-not only HRAs, but also other
12 types of reimbursement programs such as Flexible Spending Accounts (FSAs), Health Saving
13 Accounts (HSAs) and Medical Spending Accounts (MSAs). The \$12 million represents the
14 amount that employers reported reimbursing to employees from all of these types of accounts.
15 The Annual Reporting Form did not ask employers to report what happened to the \$50 million
16 in unreimbursed funds. These allocations and reimbursements were reported by 2,960
17 employers who submitted 2010 Annual Reporting Forms to the OLSE"; and, be it

18 FURTHER RESOLVED, That the Board of Supervisors reports that it disagrees with
19 Finding 9 for reasons as follows: the City and County does not know the demographics of
20 employers and employees using Medical Reimbursement Accounts (MRA) versus HRA
21 accounts. Similarly, there is no data stating the reasons behind the differing reimbursement
22 rates. The Board of Supervisors made amendments to the HCSO in November of 2011 and
23 believes that they will help increase reimbursement rates for HRA's and other reimbursement
24 programs through increased notification and the requirement that contributions be available
25 for 24 months; and, be it

1 FURTHER RESOLVED, That the Board of Supervisors reports that it partially
2 disagrees with Finding 10 for reasons as follows: the Board of Supervisors defers to the
3 response of OLSE; and, be it

4 FURTHER RESOLVED, That the Board of Supervisors reports that it partially
5 disagrees with Finding 11 for reasons as follows: while there could be two or more HRA's,
6 time limits are now standardized as per amendments made to the HCSO in November of
7 2011; and, be it

8 FURTHER RESOLVED, That the Board of Supervisors reports that it partially
9 disagrees with Finding 12 for reasons as follows: the Board of Supervisors defers to the
10 response of the City Attorney, "The City Attorney agrees that HRAs may not be an allowable
11 option under the Affordable Care Act, but this question will likely be answered definitively by
12 forthcoming regulations from the Secretary of Health and Human Services"; and, be it

13 FURTHER RESOLVED, That the Board of Supervisors reports that it partially
14 disagrees with Finding 13 for reasons as follows: under the previous law this could have been
15 the case. Under the recent amendments which became effective in 2012, this issue is
16 addressed in a variety of ways – including posting and quarterly notice requirements so that
17 employees are aware of their benefits and how to use them, and by requiring all unused
18 monies to remain with the employee for a minimum of 24 months, and for at least 90 days
19 post separation from employment. In addition, the law now requires that any benefit plan must
20 be structured as to be "reasonably calculated to benefit the employee." OLSE now has the
21 authority to determine that an overly restrictive reimbursement account is not designed to
22 reasonably benefit the employee and therefore the account would not be considered a
23 qualifying expenditure under the HCSO. Previously, there may have been financial incentives
24 for restricting information and benefits, but the new law that went into effect in January 2012
25 addresses any potential financial incentives for restricting HRAs; and, be it

1 FURTHER RESOLVED, That the Board of Supervisors reports that it partially
2 disagrees with Finding 14 for reasons as follows: there are a range of privacy regulations
3 affording employee protection regarding health status and the majority of HRA's are
4 administered by a third party, according to OLSE's data. Eighty-five percent (85%) of
5 employers use third-party administrators or provide the type of benefit that would never
6 require the employee to provide the employer with health information. For those plans that are
7 self-administered, many employers build in other safe guards to ensure that private health
8 information is kept confidential. That being said, if there is data showing privacy concerns on
9 the part of employees, then the Board of Supervisors will address this in future policy
10 discussions; and, be it

11 FURTHER RESOLVED, That the Board of Supervisors reports that it will not
12 implement Recommendation 1 for reasons as follows: recent amendments to the HSCO
13 which became effective in January 2012 adequately address the issue of consumer fraud.
14 The Board of Supervisors supports businesses identifying how to cover their costs within their
15 individual business models, as long as it is done in compliance with the HCSO; and, be it

16 FURTHER RESOLVED, That the Board of Supervisors reports that it will not
17 implement Recommendation 2 for reasons as follows: such investigations are within the
18 purview of the State Board of Equalization not the City and County of San Francisco's
19 Treasurer and Tax Collector; and, be it

20 FURTHER RESOLVED, That the Board of Supervisors reports that it will not
21 implement Recommendation 3 for reasons as follows: the Board of Supervisors defers to the
22 District Attorney's ongoing investigation of the issue. The Board does not have the power to
23 require the Office of the District Attorney to pursue investigations so the recommendation
24 cannot be implemented by the Board; and, be it

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1 FURTHER RESOLVED, That the Board of Supervisors reports that it will not
2 implement Recommendation 4 for reasons as follows: the HRA is an important tool for
3 businesses in respect to complying with the HCSO. The focus should be on ensuring that
4 employees are aware of the benefits available to them and allowing employers to use
5 appropriate tools to make benefits readily available to their employees; and, be it

6 FURTHER RESOLVED, That the Board of Supervisors reports that it will not
7 implement Recommendation 5 for reasons as follows: the Board of Supervisors defers to the
8 response of the Department of Public Health; and, be it

9 FURTHER RESOLVED, That the Board of Supervisors urges the Mayor to cause the
10 implementation of accepted findings and the recommendation through his/her department
11 heads and through the development of the annual budget.

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