

## **LEGISLATIVE DIGEST**

[Health Code - Sugar-Sweetened Beverage Warning for Advertisements]

**Ordinance amending the Health Code by amending the Sugar-Sweetened Beverage Warning Ordinance to 1) update the statement of findings and purpose; 2) revise the definition of Advertiser; 3) reduce the required warning size; 4) modify the required warning text; 5) require use of a translated version of the warning text on certain SSB advertisements in languages other than English; 6) remove exemptions for certain types of SSB advertisements; and 7) revise the enforcement provisions.**

### Existing Law

The City's Sugar-Sweetened Beverage Warning Ordinance was enacted in 2015 in Article 42 of the Health Code. It mandated that "advertisers" who post, or cause others to post, ads in San Francisco for sugar-sweetened beverages ("SSBs") include on the ads a 20% size warning about the health effects of sugar consumption. The required text of the health warning was as follows: "WARNING: Drinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay. This is a message from the City and County of San Francisco."

It defined "advertisers" to include persons or entities, as well as their agents or contractors, that are in the business of manufacturing, distributing, or selling sugar-sweetened beverages, or in the business of placing or installing ads, or providing space for ads. The requirement applied to ads on paper, poster, billboards, or in or on transit shelters, stadiums, or other structures, buses, trains, cars, or other vehicles, or on walls or other surfaces or materials, but not print, television, or electronic media ads. It provided for a 2016 operative date.

Litigation regarding the ordinance prevented it from becoming operative. Shortly after the ordinance's enactment in 2015, the American Beverage Association, California Retailers Association, and California State Outdoor Advertising Association (collectively, "the plaintiffs") filed a lawsuit in federal court alleging that the ordinance presented a misleading, and an unjustified or unduly burdensome, disclosure requirement that offends the First Amendment by chilling protected commercial speech. Supreme Court precedent set forth in *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626 (1985), requires that government-mandated warnings in connection with commercial speech be purely factual and uncontroversial, not unduly burdensome, and reasonably related to a substantial government interest. The plaintiffs moved for a preliminary injunction to halt enforcement of the ordinance. While the District Court ruled for the City and denied the preliminary injunction, it enjoined enforcement of the ordinance while the plaintiffs sought an appeal. First a three-judge appellate panel of the Ninth Circuit, and then an 11-judge panel that reheard the appeal en banc, reversed the District Court's decision and found in the plaintiffs' favor. See *American Beverage, et al. v. City and County of San Francisco*, 916 F.3d 749 (9th Cir. 2019). The en

banc court concluded only that the City had not carried its burden to justify the requirement that the required health warning occupy 20% of the advertisement. The District Court recently entered a preliminary injunction pursuant to the Ninth Circuit's decision.

#### Amendments to Current Law

The proposed ordinance would amend the Sugar-Sweetened Beverage Advertising Warning Ordinance in several ways. First, it updates the ordinance's statement of findings and purpose with more recent information about the U.S. Department of Agriculture's Dietary Guidelines and patterns of consumption. Second, it amends the definition of "advertiser" to include persons in the business of manufacturing, selling, or promoting SSBs or their agents or contractors, but to exclude persons generally in the business of placing, installing, or providing space for display of advertisements. Third, it reduces the size of the required warning from 20% to 10% of the total area of the ad.

Fourth, it modifies the text of the required warning to: "SAN FRANCISCO GOVERNMENT WARNING: Drinking beverages with added sugar(s) can cause weight gain, which increases the risk of obesity and type 2 diabetes."

Fifth, it requires the Director of the Department of Public Health to adopt official translations of the required warning message into certain languages prior to the ordinance's operative date, and permits the Director to adopt official translations in additional languages. An advertiser who displays, or causes display, of a SSB ad containing text predominantly in a language other than English for which the Director has adopted an official translation, must use the Director's official translation of the warning in that language, to comply with the warning requirement. Sixth, it eliminates certain exemptions from the warning requirement for specific types of SSB ads.

And seventh, it revises the ordinance's enforcement provisions, charging the Director of the Department of Public Health with issuing administrative notices, conducting hearings, and ordering administrative penalties. The revised enforcement provisions would also permit the City Attorney's Office to pursue civil enforcement.

Except as otherwise noted, these proposed amendments would become operative one year from the ordinance's effective date.

#### Background Information

This legislative digest accompanies a substitute ordinance introduced at the December 17, 2019 Board of Supervisors' meeting. The initial ordinance was introduced at the Board's September 10, 2019 meeting. As compared with the initial ordinance, the substitute ordinance further revises the ordinance's findings and the proposed text of the required warning message, adds the requirement for adoption and use of a translated version of the warning message on certain SSB ads in languages other than English, and eliminates certain exemptions for specific types of SSB ads.