

1 [Increasing liquidated damages and civil penalty provisions from up to \$2,500.00 to up to
2 \$5,000.00 for violations of the First Source Hiring Program.]

3 **Ordinance amending the San Francisco Administrative Code by amending sections**
4 **83.10 and 83.12 of the First Source Hiring Program to increase the liquidated damages**
5 **and civil penalty provisions from up to \$2,500.00 to up to \$5,000.00 for every new hire**
6 **for an entry level position improperly withheld from the first source hiring process.**

7 Note: Additions are *single-underline italics Times New Roman*;
8 deletions are *strikethrough italics Times New Roman*.
9 Board amendment additions are double underlined.
10 Board amendment deletions are ~~strikethrough normal~~.

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

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

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

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

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

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

21 (3) That the contractor's commitment to comply with this Chapter is a material element
22 of the City's consideration for this contract; that the failure of the contractor to comply with the
23 contract provisions required by this Chapter will cause harm to the City and the public which is
24 significant and substantial but extremely difficult to quantify; and that the assessment of
25 liquidated damages of up to ~~\$2,500.00~~\$5,000.00 for every new hire for an entry level position

1 improperly withheld by the contractor from the first source hiring process is a reasonable
2 amount of damages to pay the City for the harm caused by the contractor's failure to comply
3 with the contract provisions required by this Chapter.

4 (4) That the failure of contractors to comply with this Chapter, except property
5 contractors, may be subject to the debarment and monetary penalties set forth in Sections
6 6.80 et seq. of the San Francisco Administrative Code, as well as any other remedies
7 available under the contract or at law; and

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

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

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

24 (1) the factual basis for the determination;

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- 1 (2) the corrective action that the contractor must take to remedy the violation;
- 2 (3) the amount of liquidated damages that the FSHA has assessed for the contractor's
3 violation of this Chapter;
- 4 (4) notice that the contractor has 15 days to either take the required corrective action,
5 including payment of liquidated damages, or to file an appeal consistent with subsection (5),
6 below;
- 7 (5) that the contractor has the right to appeal the FSHA's final determination to the
8 OLSE, including the assessment of liquidated damages and the amount assessed, but that
9 any such appeal must be filed in writing with the OLSE within 15 days of the date of the
10 issuance of FSHA's determination and that a contractor must file an appeal with the OLSE in
11 order to exhaust administrative remedies;
- 12 (6) that if the contractor fails to take the required corrective action or file an appeal in
13 writing with the OLSE within 15 days as set forth above, the FSHA's determination shall be
14 the City's final and binding decision which the City may enforce in a court of law, and
- 15 (7) that the contractor will be required to comply with the decision within 5 business
16 days of the FSHA's decision becoming final, including payment of liquidated damages, if any,
17 together with simple annual interest of 10% from the date that payment should have been
18 made.
- 19 (d)(1) While liquidated damages in the maximum amount set forth in this section are a
20 reasonable estimate of harm to the City caused by the contractor's non-compliance with
21 contract provisions required by this Chapter, the FSHA may determine that less than the full
22 amount is warranted depending on the circumstances of each case. The FSHA shall consider
23 the following factors in determining the amount of liquidated damages, if any, to impose
24 against a contractor who fails to comply with contract provisions required by this Chapter:
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- 1 (A) the size of the contractor's business;
- 2 (B) the contractor's good faith efforts to comply with contract provisions required by
3 this Chapter;
- 4 (C) the gravity of the violation;
- 5 (D) whether the contractor has a history of violations of contract provisions required
6 by this Chapter;
- 7 (E) whether the contractor has failed to comply with recordkeeping requirements
8 imposed by contract provisions under this Chapter; and
- 9 (F) whether the imposition of liquidated damages would undermine the purpose of
10 this Chapter by imposing unreasonable financial burdens on the contractor, thereby imperiling
11 the contractor's ability to continue complying with contract provisions required by this Chapter.
- 12 (e)(1) Within 15 days of receiving an appeal from the FSHA's final determination, the
13 OLSE shall appoint a hearing officer and shall so advise the FSHA and the contractor, and/or
14 their respective counsel or authorized representative.
- 15 (2) The hearing officer shall promptly set a date for a hearing. The hearing must
16 commence within 45 days of the notification of the appointment of the hearing officer and
17 conclude within 75 days of such notification, not including the issuance of a decision, unless
18 all parties agree to an extended period. If a contractor appeals the FSHA's initial
19 determination but fails to attend a hearing set under this subsection, the FSHA's initial
20 determination shall become final.
- 21 (3) The FSHA shall have the burden of producing evidence justifying its imposition of
22 liquidated damages under this Chapter, and of the contractor's violation of contract provisions
23 required by this Chapter, and shall have the burden of proving that a violation occurred. The
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1 contractor shall have the right to present evidence on its behalf in response to any alleged
2 violation of contract provisions required by this Chapter.

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

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

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

18 (7) When a contractor fails to take corrective action within the time required by the
19 provisions of this section, the City may immediately pursue all available remedies against the
20 contractor for breach of contract, including debarment proceedings where applicable and filing
21 a civil action to recover liquidated damages due under this section.

22 (8) The failure of the FSHA or OLSE to comply with the time requirements of this
23 Section shall not cause the OLSE or the hearing officer to lose jurisdiction over an appeal
24 from the FSHA's determination filed under this Section.

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

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

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

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

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

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

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

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

9 (A) the factual basis for the determination;

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

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

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

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

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

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

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

- 9 (A) the size of the employer's business;
- 10 (B) the employer's good faith efforts to comply with this Chapter;
- 11 (C) the gravity of the violation;
- 12 (D) whether or not the employer has a history of violations under this Chapter;
- 13 (E) whether or not the employer has failed to comply with recordkeeping
14 requirements under this Chapter; and
- 15 (F) whether the imposition of a penalty would undermine the purpose of this
16 Chapter by imposing unreasonable financial burdens on the employer, thereby imperiling the
17 employer's ability to continue complying with the obligations of this Chapter.

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

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

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

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

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

18 (6) The employer 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 an employer 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 employer, including filing a civil action to recover any penalty due under this section.

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1 (8) The failure of the FSHA or the OLSE to comply with the time requirements of this
2 section shall not cause the OLSE to lose jurisdiction over an appeal from the FSHA's
3 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) All penalties obtained under this Chapter shall be deposited in the general fund.

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

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12 By: _____
JENNIFER WILLIAMS
Deputy City Attorney

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