

1 [Administrative Code - Health Care Security Ordinance]

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3 **Ordinance amending the San Francisco Administrative Code Sections 14.3 and 14.4,**
 4 **and adding Section 14.3.5, to: 1) clarify that only expenditures reasonably calculated to**
 5 **benefit the employee shall satisfy the employer expenditure requirements of the Health**
 6 **Care Security Ordinance; 2) add an employee notification requirement; 3) require**
 7 **employers imposing surcharges to pay for the required expenditures to report certain**
 8 **information to the City; 4) provide for a study of compliance with Chapter 14 and a**
 9 **recommendation regarding more stringent standards for expenditures, and set City**
 10 **policy regarding what those standards should be; 5) modify penalty provisions; and 6)**
 11 **set an operative date.**

12 NOTE: Additions are *single-underline italics Times New Roman*;
 13 deletions are ~~*strike-through italics Times New Roman*~~.
 14 Board amendment additions are double-underlined;
 Board amendment deletions are ~~strike through 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 adding
 17 Section 14.3.5 and by amending Sections 14.3 and 14.4, to read as follows:

18 **SEC. 14.3. REQUIRED HEALTH CARE EXPENDITURES.**

19 (a) **Required Expenditures.** Covered employers shall make required health care
 20 expenditures to or on behalf of their covered employees each quarter. The required health
 21 care expenditure for a covered employer shall be calculated by multiplying the total number of
 22 hours paid for each of its covered employees during the quarter (including only hours starting
 23 on the first day of the calendar month following ninety (90) calendar days after a covered
 24 employee's date of hire) by the applicable health care expenditure rate. In determining
 25 whether a covered employer has made its required health care expenditures, payments to or

1 on behalf of a covered employee shall not be considered if they exceed the following amount:
2 the number of hours paid for the covered employee during the quarter multiplied by the
3 applicable health care expenditure rate. The City's Office of Labor Standards Enforcement
4 (OLSE) shall enforce the health expenditure requirements under this Section.

5 (b) Employer Notice to Employees.

6 (1) By December 1 of each year, OLSE shall publish and make available to Covered
7 Employers, in all languages spoken by more than five percent of the San Francisco work force, a notice
8 suitable for posting by Covered Employers in the workplace informing Covered Employees of their
9 rights and the Covered Employer's obligations under the Ordinance.

10 (2) Every Covered Employer shall post in a conspicuous place at any workplace or job
11 site where any Covered Employee works the notice published each year by OLSE. Every Covered
12 Employer shall post such notices in English, Spanish, Chinese and any other language spoken by at
13 least five percent of the Employees at the workplace or job site.

14 (3) Within 15 days following each quarterly due date for health care expenditures,
15 every Covered Employer shall provide a written summary to every Covered Employee for whom the
16 employer made any health care expenditures to a reimbursement account in satisfaction of the health
17 care expenditure requirement. A Covered Employer may authorize a third-party to provide the
18 quarterly summary to covered employees.

19 (c) ~~(b)~~ Additional Employer Responsibilities. A covered employer shall: (i) maintain
20 accurate records of health care expenditures, required health care expenditures, and proof of
21 such expenditures made each quarter each year, and allow OLSE reasonable access to such
22 records, provided, however, that covered employers shall not be required to maintain such
23 records in any particular form; and (ii) provide information to the OLSE, or the OLSE's
24 designee, on an annual basis containing such other information as OLSE shall require,
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1 including information on the employer's compliance with this Chapter, but OLSE may not require an
2 employer to provide information in violation of State or federal privacy laws.

3 Where an employer does not maintain or retain adequate records documenting the
4 health expenditures made, or does not allow OLSE reasonable access to such records, it
5 shall be presumed that the employer did not make the required health expenditures for the
6 quarter for which records are lacking, absent clear and convincing evidence otherwise. The
7 Office of Treasurer and Tax Collector shall have the authority to provide any and all
8 nonfinancial information to OLSE necessary to fulfill the OLSE's responsibilities as the
9 enforcing agency under this Ordinance. With regard to all such information provided by the
10 Office of Treasurer and Tax Collector, OLSE shall be subject to the confidentiality provisions
11 of Subsection (a) of Section 6.22-1 of the San Francisco Business and Tax Regulations Code.

12 (d) If a Covered Employer imposes a surcharge on its customers to cover in whole or in part
13 the costs of the health care expenditure requirement under this Chapter, the Covered Employer shall
14 provide to OLSE on an annual basis the amount collected from the surcharge and the amount spent on
15 employee health care. If the amount collected from the surcharge is greater than the amount spent on
16 employee health care, OLSE shall refer any potential cases of consumer fraud to appropriate
17 authorities.

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19 **SEC. 14.3.5. STANDARDS FOR HEALTH CARE EXPENDITURES.**

20 (a) Phase One Standards. Beginning January 1, 2012, an expenditure shall not be deemed a
21 "health care expenditure" within the meaning of this Chapter if it is not reasonably calculated to
22 benefit the employee. For example, where the funds are not irrevocably designated or paid by a
23 covered employer to a Covered Employee or to a third party on behalf of a Covered Employee, the
24 expenditure shall not be deemed reasonably calculated to benefit the employee unless each quarterly
25 expenditure remains available to the employee (or any other person eligible for reimbursement for

1 health care expenses through the employee) for at least 18 months from the date of the expenditure, and
2 in the case of a Covered Employee who has separated from employment, for 90 days after separation.

3 (b) **Study, Outreach, and Enforcement.** OLSE shall conduct a comprehensive study of how
4 Covered Employers are complying with this Chapter 14, including how reimbursement accounts are
5 being structured and administered, and to what extent Covered Employees are aware of and
6 understand their rights under the Chapter. It shall be City policy that OLSE give priority to outreach
7 and enforcement efforts relating to this Chapter.

8 (c) **Health Access Standards Working Group.** There shall be a Health Access Standards
9 Working Group ("the Working Group"), consisting of the Director of the Department of Public Health,
10 the program administrator for Healthy San Francisco, and the Director and Supervising Compliance
11 Officer of the Office of Labor Standards Enforcement, or their designees. While OLSE is preparing the
12 study required under subsection (b), the Working Group shall develop Health Access Standards,
13 criteria which the Working Group may use to evaluate the qualitative and quantitative data collected
14 by OLSE, and to determine whether Covered Employers are, to a reasonable degree, structuring and
15 administering reimbursement accounts to benefit the employee.

16 (d) **Reports and Determinations.** No later than April 1, 2013, OLSE shall submit to the
17 Working Group, with copies to the Mayor and the Board of Supervisors, a report presenting OLSE's
18 findings based on the study required under subsection (b). The Working Group shall evaluate OLSE's
19 findings in light of the Health Access Standards that the Working Group has developed. No later than
20 July 1, 2013, the Working Group shall report to the Mayor and the Board of Supervisors the Working
21 Group's determination whether Covered Employers are, to a reasonable degree, structuring and
22 administering reimbursement accounts to benefit the employee, including but not limited to allowing
23 for reimbursement for privately purchased health insurance premiums or for participant fees for the
24 Healthy San Francisco program, when eligible.

1 It shall be City policy that if the Working Group determines that Covered Employers are, to a
2 reasonable degree, structuring and administering reimbursement accounts to benefit the employee, the
3 Phase One standards set out in subsection (a) should continue to apply. It shall further be City policy
4 that if the Working Group determines that Covered Employers are not, to a reasonable degree,
5 structuring and administering reimbursement accounts to benefit the employee, that the Mayor and the
6 Board of Supervisors should adopt the Phase Two standards set out in subsection (e).

7 (e) **Phase Two Standards; City Policy.** It shall be City policy that if Covered Employers are
8 not, to a reasonable degree, structuring and administering reimbursement accounts to benefit the
9 employee, "health care expenditure" should only include an amount irrevocably paid by a covered
10 employer to a covered employee or to a third party on behalf of a covered employee. An amount that is
11 retained by the employer or that may be recovered by or returned to the employer should not constitute
12 a "health care expenditure." An amount paid to a third party for the purpose of reimbursing a covered
13 employee for expenses incurred in the purchase of health care services should not constitute a "health
14 care expenditure" unless any unused funds carry over from quarter to quarter and from year to year
15 and remain available to the covered employee, even after the covered employee's separation from
16 employment.

17 Notwithstanding the above, an amount paid as a "health care expenditure" should be recovered
18 by or returned to the employer without losing its status as a "health care expenditure" in the following
19 circumstances:

20 (1) A former employee has not made a claim for any of the remaining available funds
21 for 18 months (including a claim made on behalf of any other person eligible for reimbursement from
22 health care expenses from the former employee's remaining available funds); or,

23 (2) The covered employee has died.

24 The provisions of this subsection (e) shall only become law if enacted by ordinance adopted by
25 the Mayor and the Board of Supervisors.

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SEC. 14.4. ADMINISTRATION AND ENFORCEMENT.

(a) The City shall develop and promulgate rules to govern the operation of this Chapter. The regulations shall include specific rules by the Department of Public Health on the operation of both the Health Access Program and the reimbursement accounts identified in Section 14.2(g), including but not limited to eligibility for enrollment in the Health Access Program and establishment of reimbursement accounts and rules by the OLSE for enforcement of the obligations of the employers under this Chapter. The rules shall also establish procedures for covered employers to maintain accurate records of health care expenditures and required health care expenditures and provide a report to the City without requiring any disclosures of information that would violate State or Federal privacy laws. The rules shall further establish procedures for providing employers notice that they may have violated this Chapter, a right to respond to the notice, a procedure for notification of the final determination of a violation, and an appeal procedure before a hearing officer appointed by the City Controller. The sole means of review of the hearing officer's decision shall be by filing in the San Francisco Superior Court a petition for a writ of mandate under Section 1094.5 of the California Code of Civil Procedure. No rules shall be adopted finally until after a public hearing.

(b) During implementation of this Chapter and on an ongoing basis thereafter, the City shall maintain an education and advice program to assist employers with meeting the requirements of this Chapter.

(c) Any employer that reduces the number of employees below the number that would have resulted in the employer being considered a "covered employer," or below the number that would have resulted in the employer being considered a medium-sized or large business,

1 shall demonstrate that such reduction was not done for the purpose of evading the obligations
2 of this Chapter or shall be in violation of the Chapter.

3 (d) It shall be unlawful for any employer or covered employer to deprive or threaten to
4 deprive any person of employment, take or threaten to take any reprisal or retaliatory action
5 against any person, or directly or indirectly intimidate, threaten, coerce, command or influence
6 or attempt to intimidate, threaten, coerce, command or influence any person because such
7 person has cooperated or otherwise participated in an action to enforce, inquire about, or
8 inform others about the requirements of this Chapter. Taking adverse action against a person
9 within ninety (90) days of the person's exercise of rights protected under this Chapter shall
10 raise a rebuttable presumption of having done so in retaliation for the exercise of such rights.

11 (e) (1) The City shall enforce the obligations of *employers and* covered employers
12 under this Chapter, including requiring restitution to employees where appropriate, and may
13 impose administrative penalties upon *employers and* covered employers who fail to make
14 required health care expenditures on behalf of their employees within five days of the quarterly
15 due date. Failure to make a required health care expenditure shall include making a purported
16 expenditure that is determined by OLSE not to be reasonably calculated to benefit the employee. The
17 amount of the penalty shall be up to one-and-one-half times the total expenditures that a
18 covered employer failed to make plus simple annual interest of up to ten (10) percent from the date
19 payment should have been made, but in any event the total penalty for this violation shall not
20 exceed \$1,000.00 for each employee for each quarter ~~week~~ that the required ~~such~~ expenditures
21 were ~~are~~ not made within five days of the quarterly due date. The \$1,000 penalty shall increase by an
22 amount corresponding to the prior year's increase, if any, in the Consumer Price Index for urban wage
23 earners and clerical workers for the San Francisco-Oakland-San Jose, CA metropolitan statistical
24 area.

1 (2) For other violations of this Chapter by employers and covered employers, the
2 administrative penalties shall be as follows: For refusing to allow access to records, pursuant
3 to Section 14.3(c) ~~14.3(b)~~, \$25.00 as to each worker whose records are in issue for each day
4 that the violation occurs; for the failure to maintain or retain accurate and adequate records
5 pursuant to Section 14.3(c) ~~14.3(b)~~ and for the failure to make the annual reports ~~report~~ of
6 information required by OLSE pursuant to Sections 14.3(c) and 14.3(d), ~~Section 14.3(b)~~. \$500.00
7 for each week that the violation occurs; for violation of Section 14.4(d) (retaliation), \$100.00 as to
8 each person who is the target of the prohibited action for each day that the violation occurs;
9 and for any other violation not specified in this subsection (e)(2), \$25.00 per day for each day
10 that the violation occurs.

11 (3) The City Attorney may bring a civil action to recover civil penalties for the violations
12 set forth in subsections (e)(1) and (e)(2) in the same amounts set forth in those subsections,
13 and to recover the City's enforcement costs, including attorneys' fees.

14 (4) Amounts recovered under this Section shall be deposited in the City's General
15 Fund.

16 (f) The City Controller shall coordinate with the Department of Public Health and OLSE
17 to prepare periodic reports on the implementation of this Chapter including participant rates,
18 any effect on services provided by the Department of Public Health, the cost of providing
19 services to the Health Access Program participants and the economic impact of the Chapter's
20 provisions. Reports shall be provided to the Board of Supervisors on a quarterly basis for
21 quarters beginning July 1, 2007 through June 30, 2008, then every six months through June
22 30, 2010. Reports shall include specific information on any significant event affecting the
23 implementation of this Chapter and also include recommendations for improvement where
24 needed, in which case the Board of Supervisors or a committee thereof shall hold a hearing
25 within thirty (30) days of receiving the report to consider responsive action.

1 (g) The Director of Public Health shall convene an advisory Health Access Working
2 Group to provide the Department of Public Health and the Health Access Program with expert
3 consultation and direction, with input on members from the Mayor and the Board of
4 Supervisors. The Health Access Working Group shall be advisory in nature and may provide
5 the Health Access Program with input on matters including: setting membership rates;
6 designing the range of benefits and health care services for participants; and researching
7 utilization, actuaries, and costs.

8 (h) The Department of Public Health and the OLSE shall report to the Board of
9 Supervisors by July 1, 2007, on the development of rules for the Health Access Program and
10 for the enforcement and administration of the employer obligations under this Chapter. The
11 Board of Supervisors or a committee thereof shall hold a hearing on the proposed rules to
12 ensure that participants in the Health Access Program shall have access to high quality and
13 culturally competent services.

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15 Section 2. **Effective and Operative Dates.** This ordinance shall become effective
16 30 days from the date of passage. This ordinance shall become effective on January 1, 2012.

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

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22 By: _____
23 THOMAS J. OWEN
24 Deputy City Attorney
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