

File No. 111030

Committee Item No. 6
Board Item No. 15

COMMITTEE/BOARD OF SUPERVISORS AGENDA PACKET CONTENTS LIST

Committee: Government Audit & Oversight

Date: October 13, 2011

Board of Supervisors Meeting

Date: 11/1/2011

Cmte Board

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Completed by: Andrea S. Ausberry

Date October 6, 2011

Completed by: A. Ausberry

Date 10-19-11

An asterisked item represents the cover sheet to a document that exceeds 25 pages. The complete document is in the file.

1 [Administrative Code - Health Care Security Ordinance]

2

3 Ordinance amending the San Francisco Administrative Code Sections 14.1, 14.3, and

4 14.4 and adding Section 14.1.5 to: 1) clarify that only expenditures reasonably

5 calculated to benefit the employee shall satisfy the employer expenditure requirements

6 of the Health Care Security Ordinance; 2) provide, in the alternative if triggered by court

7 action, that only amounts actually paid to provide employee health care services shall

8 satisfy the employer expenditure requirements of the Health Care Security Ordinance;

9 3) require employers imposing surcharges to pay for the required expenditures to

10 report certain information to OLSE in connection with the surcharge; 4) add an

11 employee notification requirement; 5) modify penalty provisions; and 6) set an

12 operative date.

13 NOTE: Additions are *single-underline italics Times New Roman*;

14 deletions are ~~*strike-through italics Times New Roman*~~.

15 Board amendment additions are double-underlined;

16 Board amendment deletions are ~~strikethrough normal~~.

17 Section 1. The San Francisco Administrative Code is hereby amended by amending

18 Sections 14.1, 14.3 and 14.4, to read as follows:

19 **SEC. 14.1. SHORT TITLE; DEFINITIONS.**

20 (a) **Short title.** This Chapter shall be known and may be cited as the "San Francisco

21 Health Care Security Ordinance."

22 (b) **Definitions.** For purposes of this Chapter, the following terms shall have the

23 following meanings:

24 (1) "City" means the City and County of San Francisco.

25 (2) "Covered employee" means any person who works in the City where such

person qualifies as an employee entitled to payment of a minimum wage from an employer

1 under the Minimum Wage Ordinance as provided under Chapter 12R of the San Francisco
2 Administrative Code and has performed work for compensation for his or her employer for
3 ninety (90) days, provided, however, that:

4 (A) ~~(a)~~ From the effective date of this Chapter through December 31,
5 2007, "at least twelve (12) hours" shall be substituted for "at least two (2) hours" where such
6 term appears in Section 12R.3(a);

7 (B) ~~(b)~~ From January 1, 2008 through December 31, 2008, "at least ten
8 (10) hours" shall be substituted for "at least two (2) hours" where such term appears in
9 Section 12R.3(a);

10 (C) ~~(c)~~ Beginning January 1, 2009, "at least eight (8) hours" shall be
11 substituted for "at least two (2) hours" where such term appears in Section 12R.3(a);

12 (D) ~~(d)~~ The term "employee" shall not include persons who are
13 managerial, supervisory, or confidential employees, unless such employees earn annually
14 under \$72,450.00 or in 2007 and for subsequent years, the figure as set by the administering
15 agency;

16 (E) ~~(e)~~ The term "employee" shall not include those persons who are
17 eligible to receive benefits under Medicare or TRICARE/CHAMPUS;

18 (F) ~~(f)~~ The term "covered employees" shall not include those persons
19 who are "covered employees" as defined in Section 12Q.2.9 of the Health Care Accountability
20 Ordinance, Chapter 12Q of the San Francisco Administrative Code, if the employer meets the
21 requirements set forth in Section 12Q.3 for those employees; and

22 (G) ~~(g)~~ The term "covered employees" shall not include those persons
23 who are employed by a nonprofit corporation for up to one year as trainees in a bona fide
24 training program consistent with Federal law, which training program enables the trainee to
25

1 advance into a permanent position, provided that the trainee does not replace, displace, or
2 lower the wage or benefits of any existing position or employee.

3 ~~(H)~~ Nor shall "covered employees" include those persons whose
4 employers verify that they are receiving health care services through another employer, either
5 as an employee or by virtue of being the spouse, domestic partner, or child of another person;
6 provided that the employer obtains from those persons a voluntary written waiver of the health
7 care expenditure requirements of this Chapter and that such waiver is revocable by those
8 persons at any time.

9 (3) "Covered employer" means any medium-sized or large business as defined
10 below engaging in business within the City that is required to obtain a valid San Francisco
11 business registration certificate from the San Francisco Tax Collector's office or, in the case of
12 a nonprofit corporation, an employer for which an average of fifty (50) or more persons per
13 week perform work for compensation during a quarter. Small businesses are not "covered
14 employers" and are exempt from the health care spending requirements under Section 14.3.

15 (4) "Employer" means an employing unit as defined in Section 135 of the
16 California Unemployment Insurance Code or any person defined in Section 18 of the
17 California Labor Code. "Employer" shall include all members of a "controlled group of
18 corporations" as defined in Section 1563(a) of the United States Internal Revenue Code, and
19 the determination shall be made without regard to Sections 1563(a)(4) and 1563(e)(3)(C) of
20 the Internal Revenue Code.

21 (5) "Health Access Program" means a San Francisco Department of Public
22 Health program to provide health care for uninsured San Francisco residents.

23 (6) "Health Access Program participant" means any uninsured San Francisco
24 resident, regardless of employment or immigration status or pre-existing condition, who is
25

1 enrolled by his or her employer or who enrolls as an individual in the Health Access Program
2 under the terms established by the Department of Public Health.

3 (7) (A) "Health care expenditure" means any amount *designated or* paid by a
4 covered employer to its covered employees or to a third party on behalf of its covered
5 employees for the purpose of providing health care services for covered employees or
6 reimbursing the cost of such services for its covered employees, including, but not limited to:
7 (a) contributions by such employer on behalf of its covered employees to a health savings
8 account as defined under section 223 of the United States Internal Revenue Code or to any
9 other account having substantially the same purpose or effect without regard to whether such
10 contributions qualify for a tax deduction or are excludable from employee income; (b)
11 reimbursement by such covered employer to its covered employees for expenses incurred in
12 the purchase of health care services; (c) payments by a covered employer to a third party for
13 the purpose of providing health care services for covered employees; (d) costs incurred by a
14 covered employer in the direct delivery of health care services to its covered employees; and
15 (e) payments by a covered employer to the City to be used on behalf of covered employees.
16 The City may use these payments to: (i) fund membership in the Health Access Program for
17 uninsured San Francisco residents; and (ii) establish and maintain reimbursement accounts
18 for covered employees, whether or not those covered employees are San Francisco
19 residents.

20 (B) An expenditure shall not be deemed a "health care expenditure" within the
21 meaning of this Ordinance if it is not reasonably calculated to benefit the employee. For example,
22 where the funds are not irrevocably designated or paid by a covered employer to a covered employee
23 or to a third party on behalf of a covered employee, the expenditure shall not be deemed reasonably
24 calculated to benefit the employee unless each quarterly expenditure remains available to the employee
25 (or any other person eligible for reimbursement for health care expenses through the employee) for at

1 least one year from the date of the expenditure, and in the case of a covered employee who has
2 separated from employment, for 90 days after separation.

3 Notwithstanding any other provision of this subsection, "health care expenditure"
4 shall not include any payment made directly or indirectly for workers' compensation or
5 Medicare benefits.

6 (8) "Health care expenditure rate" means the amount of health care expenditure
7 that a covered employer shall be required to make for each hour paid for each of its covered
8 employees each quarter. The "health care expenditure rate" shall be computed as follows:

9 (A) ~~(a)~~ From the effective date of this Chapter through June 30, 2007,
10 \$1.60 per hour for large businesses and \$1.06 per hour for medium-sized businesses;

11 (B) ~~(b)~~ From July 1, 2007 through December 31, 2007, January 1, 2008
12 through December 31, 2008, and January 1, 2009 through December 31, 2009, the rates for
13 large and medium-sized businesses shall increase five (5) percent over the expenditure rate
14 calculated for the preceding year;

15 (C) ~~(c)~~ From January 1, 2010 and each year thereafter, the "health care
16 expenditure rate" shall be determined annually based on the "average contribution" for a full-
17 time employee to the City Health Service System pursuant to Section A8.423 of the San
18 Francisco Charter based on the annual ten county survey amount for the applicable fiscal
19 year, with such average contribution prorated on an hourly basis by dividing the monthly
20 average contribution by one hundred seventy-two (172) (the number of hours worked in a
21 month by a full-time employee). The "health care expenditure rate" shall be seventy-five
22 percent (75%) of the annual ten county survey amount for the applicable fiscal year for large
23 businesses and fifty percent (50%) for medium-sized businesses.

24 (9) "Health care services" means medical care, services, or goods that may
25 qualify as tax deductible medical care expenses under Section 213 of the Internal Revenue

1 Code, or medical care, services, or goods having substantially the same purpose or effect as
2 such deductible expenses.

3 (10) "Hour paid" or "hours paid" means a work hour or work hours for which a
4 person is paid wages or is entitled to be paid wages for work performed within the City,
5 including paid vacation hours and paid sick leave hours, but not exceeding 172 hours in a
6 single month. For salaried persons, "hours paid" shall be calculated based on a 40-hour work
7 week for a full-time employee.

8 (11) "Large business" means an employer for which an average of one hundred
9 (100) or more persons per week perform work for compensation during a quarter.

10 (12) "Medium-sized business" means an employer for which an average of
11 between twenty (20) and ninety-nine (99) persons per week perform work for compensation
12 during a quarter.

13 (13) "Person" means any natural person, corporation, sole proprietorship,
14 partnership, association, joint venture, limited liability company, or other legal entity.

15 (14) "Required health care expenditure" means the total health care
16 expenditure that a covered employer is required to make every quarter for all its covered
17 employees.

18 (15) "Small business" means an employer for which an average of fewer than
19 twenty (20) persons per week perform work for compensation during a quarter.

20
21 **SEC. 14.1.5. ALTERNATE PROVISIONS.**

22 (a) If the City Attorney certifies to the Mayor and the Board of Supervisors that a court of
23 competent jurisdiction in a lawsuit brought by or on behalf of a Covered Employer has struck down the
24 provisions of Section 14.1(b)(7)(B), or permanently enjoined their enforcement, then the following

1 provisions shall become operative on the first day of the next calendar quarter following the City

2 Attorney's certification:

3 "Health care expenditure" shall only include an amount irrevocably paid by a covered
4 employer to a covered employee or to a third party on behalf of a covered employee. An amount that is
5 retained by the employer or that may be recovered by or returned to the employer shall not constitute a
6 "health care expenditure." An amount paid to a third party for the purpose of reimbursing a covered
7 employee for expenses incurred in the purchase of health care services shall not constitute a "health
8 care expenditure" unless any unused funds carry over from quarter to quarter and from year to year
9 and remain available to the covered employee, even after the covered employee's separation from
10 employment.

11 Notwithstanding the above, an amount paid as a "health care expenditure" may be
12 recovered by or returned to the employer without losing its status as a "health care expenditure" in the
13 following circumstances:

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

17 (B) The covered employee has died.

18 (b) If the City Attorney subsequently certifies to the Mayor and the Board of Supervisors that
19 an order enjoining enforcement of the provisions of Section 14.1(b)(7)(B) has been lifted, then the
20 original provisions shall again become operative on the first day of the next calendar quarter following
21 the City Attorney's certification.

22
23 **SEC. 14.3. REQUIRED HEALTH CARE EXPENDITURES.**

24 (a) **Required Expenditures.** Covered employers shall make required health care
25 expenditures to or on behalf of their covered employees each quarter. The required health

1 care expenditure for a covered employer shall be calculated by multiplying the total number of
2 hours paid for each of its covered employees during the quarter (including only hours starting
3 on the first day of the calendar month following ninety (90) calendar days after a covered
4 employee's date of hire) by the applicable health care expenditure rate. In determining
5 whether a covered employer has made its required health care expenditures, payments to or
6 on behalf of a covered employee shall not be considered if they exceed the following amount:
7 the number of hours paid for the covered employee during the quarter multiplied by the
8 applicable health care expenditure rate. The City's Office of Labor Standards Enforcement
9 (OLSE) shall enforce the health expenditure requirements under this Section.

10 **(b) Employer Notice to Employees.**

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

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

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

24 **(c) (b) Additional Employer Responsibilities.** A covered employer shall: (i) maintain
accurate records of health care expenditures, required health care expenditures, and proof of

1 such expenditures made each quarter each year, and allow OLSE reasonable access to such
2 records, provided, however, that covered employers shall not be required to maintain such
3 records in any particular form; and (ii) provide information to the OLSE, or the OLSE's
4 designee, on an annual basis containing such other information as OLSE shall require,
5 including information on the employer's compliance with this Chapter, but OLSE may not require an
6 employer to provide information in violation of State or federal privacy laws.

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

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

22 23 **SEC. 14.4. ADMINISTRATION AND ENFORCEMENT.**

24 (a) The City shall develop and promulgate rules to govern the operation of this
25 Chapter. The regulations shall include specific rules by the Department of Public Health on

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

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

18 (c) Any employer that reduces the number of employees below the number that would
19 have resulted in the employer being considered a "covered employer," or below the number
20 that would have resulted in the employer being considered a medium-sized or large business,
21 shall demonstrate that such reduction was not done for the purpose of evading the obligations
22 of this Chapter or shall be in violation of the Chapter.

23 (d) It shall be unlawful for any employer or covered employer to deprive or threaten to
24 deprive any person of employment, take or threaten to take any reprisal or retaliatory action
25 against any person, or directly or indirectly intimidate, threaten, coerce, command or influence

1 or attempt to intimidate, threaten, coerce, command or influence any person because such
2 person has cooperated or otherwise participated in an action to enforce, inquire about, or
3 inform others about the requirements of this Chapter. Taking adverse action against a person
4 within ninety (90) days of the person's exercise of rights protected under this Chapter shall
5 raise a rebuttable presumption of having done so in retaliation for the exercise of such rights.

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

20 (2) For other violations of this Chapter by employers and covered employers,
21 the administrative penalties shall be as follows: For refusing to allow access to records,
22 pursuant to Section ~~14.3(c) 14.3(b)~~, \$25.00 as to each worker whose records are in issue for
23 each day that the violation occurs; for the failure to maintain or retain accurate and adequate
24 records pursuant to Section ~~14.3(c) 14.3(b)~~ and for the failure to make the annual ~~reports report~~
25 of information required by OLSE pursuant to ~~Sections 14.3(c) and 14.3(d), Section 14.3(b).~~

1 \$500.00 for each week that the violation occurs; for violation of Section 14.4(d) (retaliation),
2 \$100.00 as to each person who is the target of the prohibited action for each day that the
3 violation occurs; and for any other violation not specified in this subsection (e)(2), \$25.00 per
4 day for each day that the violation occurs.

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

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

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

20 (g) The Director of Public Health shall convene an advisory Health Access Working
21 Group to provide the Department of Public Health and the Health Access Program with expert
22 consultation and direction, with input on members from the Mayor and the Board of
23 Supervisors. The Health Access Working Group shall be advisory in nature and may provide
24 the Health Access Program with input on matters including: setting membership rates;

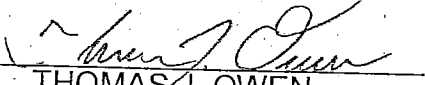
1 designing the range of benefits and health care services for participants; and researching
2 utilization, actuaries, and costs.

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

9
10 Section 2. **Effective Date; Operative Date.** This ordinance shall become effective
11 30 days from the date of passage. This ordinance shall become operative on January 1,
12 2012.

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

16
17 By:


18 THOMAS J. OWEN
Deputy City Attorney

LEGISLATIVE DIGEST

[Administrative Code – Health Care Security Ordinance]

Ordinance amending Sections 14.1, 14.3 and 14.4 of the San Francisco Administrative Code, and adding Section 14.1.5, to: 1) clarify that only expenditures reasonably calculated to benefit the employee shall satisfy the employer expenditure requirements of the Health Care Security Ordinance; 2) provide, in the alternative if triggered by court action, that only amounts actually paid to provide employee health care services shall satisfy the employer expenditure requirements of the Health Care Security Ordinance; 3) require employers imposing surcharges to pay for the required expenditures to report certain information to OLSE in connection with the surcharge; 4) add an employee notification requirement; 5) modify penalty provisions; and 6) set an operative date.

Existing Law

The City's Health Care Security Ordinance ("the HCSO" or "the Ordinance"), codified as Chapter 14 of the San Francisco Administrative Code, requires, among other things, that certain employers make "health care expenditures" on behalf of certain of their employees.

The City may impose a number of sanctions on employers who fail to make the required expenditures, including administrative fines. The fines may reach up to one-and-one-half times the amount of the missed expenditures, plus 10 percent interest, not to exceed \$1,000 per week for each employee.

Amendments to Current Law

The proposal would amend the Health Care Security Ordinance to clarify that a "health care expenditure" only includes an expenditure that is "reasonably calculated to benefit the employee." If an expenditure is set up so that the money may at some point be returned to the employer, the expenditure would only satisfy the requirements of the Ordinance if the money remained available to the employee for reimbursement of health care expenses for at least one year from the date of the expenditure. If the employee left the job, voluntarily or involuntarily, the money would have to remain available for at least 90 days.

Under the proposal, if an employer covered by the Ordinance successfully sued to prevent enforcement of the new provisions regarding what constitutes a "health care expenditure" discussed above, a different rule would apply. In that case, a "health care expenditure" would only include an amount that (1) was actually paid by an employer to an employee or to a third party on behalf of the employee; and (2) could not be returned to the employer. Unused amounts in the employee's reimbursement account would have to carry over from quarter to quarter and from year to year and remain available to the employee, even after the employee changed jobs. An employer could recover unused amounts paid out for the purpose of reimbursing future health care services if (1) the employee no longer worked for the employer and had not made a claim for reimbursement from the funds for 18 months; or, (2) the employee had died.

The proposal would add a requirement that employers provide their employees with a written explanation, prepared by OLSE, of what an employee's rights are under the Health Care Security Ordinance and what an employer's duties are. The proposal would also require the employer to provide a quarterly written summary to employees if the employer made payments to a reimbursement account to satisfy the requirements of the Ordinance.

Under the proposal, an employer who imposed a surcharge on its customers to pay for the health care expenditures required under the Ordinance would be required to report to OLSE each year on how much money the employer collected from the surcharge and on how much money the employer spent on employee health care. If the amount collected from the surcharge was more than the amount spent on employee health care, OLSE could refer potential cases of consumer fraud to the appropriate authorities.

Finally, the proposal would revise the amount of administrative fines that the City may impose for failure to make health care expenditures required under the Ordinance. The proposal would retain the provision that City may impose fines in an amount up to one-and-one-half times the amount of the missed expenditures, but would reduce the cap to \$1,000 per quarter (rather than per week) for each employee. The proposal would also eliminate the interest on the penalty amount. Other remedies and corrective actions available to enforce the Ordinance, including restitution to employees, would remain unchanged.

The proposal would become operative on January 1, 2012.



SMALL BUSINESS COMMISSION
OFFICE OF SMALL BUSINESS



CITY AND COUNTY OF SAN FRANCISCO
EDWIN M. LEE, MAYOR

October 12, 2011

Ms. Angela Calvillo, Clerk of the Board
Board of Supervisors
City Hall room 244
1 Carlton B. Goodlett Place
San Francisco, CA 94102-4694

Re: File No. 111030 [Administrative Code- Health Care Security Ordinance]

Small Business Commission Recommendation: **Approval**

Dear Ms. Calvillo:

On October 3, 2011, the Small Business Commission (SBC) voted 6-0 to recommend that the Board of Supervisors approve BOS File No. 111030.

The SBC recognizes that modifications to the Health Care Security Ordinance (HSCO) are necessary and the Commission supports this legislative approach to fixing this issue.

The HSCO was enacted just prior to one of the worst economic crises in recent history. The use of health reimbursement accounts on an accrual basis and their cash flow management characteristics have been a key factor in preventing the ordinance from negatively affecting jobs, especially in the hospitality and restaurant industries.

Although available data shows that only 7% of health care expenditures are spent on reimbursement accounts, figures also show that 29% of employers use reimbursement plans as a full or partial means of complying with the HSCO. Of the 29% of businesses that use reimbursement accounts, a majority of these businesses use health reimbursement accounts to supplement a primary expenditure, most cases likely being a health insurance plan. Therefore, nearly 1/3 of businesses in the City of San Francisco utilize these accounts, demonstrating that any changes must be enacted after careful consideration and with caution.

The SBC noted the following items when voting to support File No. 111030:

Accrual Accounting

The Commission finds that an accrual method is a more appropriate direction and is a key factor in the Commission supporting this proposed ordinance over earlier proposals.

According to the Office of Labor Standards and Enforcement (OLSE), the total reimbursement account expenditures are \$62 million per year. Of this, \$50 million is currently not being utilized by employees. A Cash trust accounting mandate would legislate this into a \$50 million reduction in economic activity in San Francisco. The proposed accrual based accounting mandate however, will allow businesses to budget and maximize cash flow options that work for their individual businesses. Remaining consistent with the

SMALL BUSINESS ASSISTANCE CENTER/ SMALL BUSINESS COMMISSION
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CITY AND COUNTY OF SAN FRANCISCO
EDWIN M. LEE, MAYOR

San Francisco Health Plan, this accrual accounting policy, along with other provisions in the ordinance, may lead to an additional \$20-25 million dollars being retained in the San Francisco economy versus earlier proposals, should the same level of utilization as the City administered plan be realized over the upcoming years.

In summary, the accrual based policy also provides equal access to employees, while allowing businesses maintain their delicate cash flow needs. The accrual method is keeping businesses operating and is keeping people employed.

Definition of Expenditure and Business Budgeting

A system of a quarter rolling benefit, where funds will accumulate for at least four consecutive quarters, will allow for accumulation of funds for employees while at the same time allowing businesses the adequately budget and prepare for the costs associated with providing these accounts. Proponents of amending the legislation commonly refer to the "January Problem" and this ordinance will address this concern. At the same time, this will allow businesses to budget their expenditures on a yearly basis, rather than relying on the attrition of employees as under earlier proposals. Furthermore, the provision which will revert to language included in a proposal by Supervisor Campos demonstrates prudence and the Commission finds that this inclusion will both deter litigation and will also provide prudence should litigation occur and be successful.

Customer Surcharge Reporting

The Commission recognizes concerns over customer surcharges and in supporting this ordinance, the Commission supports the policy intent of Supervisor Chiu's mandate to require businesses to report on an annual basis the amounts collected from these surcharges. The Commission reminds policy makers that in addition to a healthcare mandate, businesses are subjected to additional "only in San Francisco" fees including mandatory sick time and higher minimum wages. Businesses often use similar language on checks to help offset these additional mandates.

Employee Notification and Usage

Consistent with our response to previous proposals, The SBC finds that requiring notification of reimbursement account benefits provided under the HCSO is a very important right that workers should be entitled to. The Commission determined that the increased notice will lead to additional utilization of the reimbursement accounts, without leading to an immediate \$50 million impact on the economy. The San Francisco Health Plan, in administering Healthy San Francisco reimbursement accounts, has demonstrated that increased notice and outreach has led to improved utilization of these accounts.

It is important to note that the San Francisco Health Plan's usage rates took several years to reach the 50+% reimbursement rate now realized. The employee reimbursement account usage rate has increased steadily as noted in the data below, as provided by the San Francisco Health Plan:

Fiscal Year 2007-08 less than 1% (one quarter only)
Fiscal Year 2008-09 10% (average for four quarters)
Fiscal Year 2009-10 39% (average for four quarters)

SMALL BUSINESS ASSISTANCE CENTER/ SMALL BUSINESS COMMISSION
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SMALL BUSINESS COMMISSION
OFFICE OF SMALL BUSINESS



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Fiscal Year 2010-11 55% (average for three quarters)

Should the reimbursement rates steadily improve under the proposed ordinance, it is likely that significant improvements in usage will occur, gradually increasing and allowing businesses to absorb and accommodate the impact over a several year period.

Additional Comments by the Commission:

The SBC does not support employers that are intentionally structuring their HRA accounts to limit their use. Remaining consistent with our responses to previous similar legislation, the Commission recommends that as a policy direction, that the Board of Supervisors give OLSE the tools to better collect data to show how pervasive the practice of denying or withholding benefits to employees. This information, which can be collected on annual statements, employee and employer interviews and through other methods, can be used in future discussion on the HSCO, including discussions that take place leading up to and preparing for the national health care reform mandates. Data should be collected yearly and reported to the Mayor, Board of Supervisors and Small Business Commission. Should usage rates not increase, similar to the increase over three years that the San Francisco Health Plan realized, then the Mayor and Board of Supervisors may wish to revisit this policy and consider further revision and changes.

The Commission supports continued discussions and engagement by all parties to come up with a solution that works for both workers and employers. The SBC is confident that this can be accomplished and welcomes further discussions on this matter over the upcoming weeks and months.

Sincerely,

Regina Dick-Endrizzi
Director, Office of Small Business

cc. Members of the Board of Supervisors Government Audit and Oversight Committee
Jason Elliott, Mayor's Office
Donna Levitt, Office of Labor Standards Enforcement

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INTRODUCTION FORM

By a member of the Board of Supervisors or the Mayor

Time Stamp or Meeting Date

RECEIVED
BOARD OF SUPERVISORS
SAN FRANCISCO
2011 SEP 20 PM 4:00
BY RC

I hereby submit the following item for introduction:

- 1. For reference to Committee: _____
An ordinance, resolution, motion, or charter amendment
- 2. Request for next printed agenda without reference to Committee
- 3. Request for hearing on a subject matter at Committee: _____
- 4. Request for letter beginning "Supervisor _____ inquires..."
- 5. City Attorney request
- 6. Call file from Committee
- 7. Budget Analyst request (attach written motion).
- 8. Substitute Legislation File Nos.
- 9. Request for Closed Session
- 10. Board to Sit as A Committee of the Whole
- 11. Question(s) submitted for Mayoral Appearance before the BOS on _____

Please check the appropriate boxes. The proposed legislation should be forwarded to the following:

- Small Business Commission
- Ethics Commission
- Building Inspection Commission
- Youth Commission
- Planning Commission

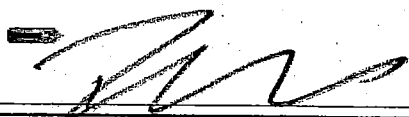
Note: For the Imperative Agenda (a resolution not on the printed agenda), use a different form.]

Sponsor(s): Supervisor David Chiu

Subject: Administrative Code - Health Care Security Ordinance

The text is listed below or attached:
See Attached.

Signature of Sponsoring Supervisor: _____



For Clerk's Use Only:

