



September 17, 2012

The Honorable Judge Katherine Feinstein
Presiding Judge
Superior Court of California, County of San Francisco
400 McAllister Street, Room 206
San Francisco, CA 94102

Dear Judge Feinstein,

Please find attached my response to the Civil Grand Jury's July 2012 report: "Surcharges and Healthy San Francisco: Healthy for Whom?" I appreciate the Civil Grand Jury's attention to such an important topic.

The passage of the Health Care Security Ordinance (HCSO) in 2006 was a momentous occasion for San Francisco, supporting a long-held San Francisco value that health care is an important right for our residents and workers and setting an example for federal policy. Implementing a significant new policy is never a simple, one step endeavor, which is why we will continue to shape this law to ensure its ultimate policy goal is met.

In November 2011, I signed into law an amendment to the Health Care Security Ordinance - sponsored by Board President David Chiu and Supervisor Malia Cohen - designed to strengthen the ordinance's policies regarding surcharge collection and the management of reimbursement programs. It is important to note that the changes required by these legislative amendments went into effect in January 2012. Therefore, findings in the recent Civil Grand Jury report and Office of Labor Standards Enforcement 2011 Analysis of HCSO Annual Reporting Forms serve as an important baseline against which we will measure 2012 data.

That being said, I am extremely encouraged by the data found in the 2011 Analysis of HCSO Annual Reporting Forms: 89% of our employers' health care expenditures went towards health insurance for employees. The report also identified areas where we need to do some work. Just as the passage of the HCSO was a consensus-driven process, so is the ongoing review and maintenance of this important law. I appreciate the ongoing outreach and partnerships between the Office of Labor Standards Enforcement, the Department of Public Health, the Office of Small Business, and our business community, to outreach to and educate businesses - small businesses in particular - about how to come into compliance with the new regulations in order to better serve their employees.

The Mayor's Office response to the Civil Grand Jury's findings is as follows:

Finding 1: "The Jury could not identify any government investigation that reports the number of businesses adding surcharges to pay for HCSO employer mandates and mandated paid sick days."

Response: Partially Disagree. The Mayor supported and signed legislation amending the Health Care Security Ordinance (HCSO) in November 2011 that directed the Office of Labor Standards Enforcement (OLSE) to begin collecting surcharge data from employers for inclusion in its annual report on employer compliance with the HCSO. This information was required in the 2011 annual reporting forms, distributed to employers in March 2012 by the OLSE.

Finding 2: "The City has not investigated health care related surcharges to determine whether or not employers are generating profits from these surcharges."

Response: Disagree. The Mayor supported and signed legislation amending the HCSO in November 2011 that directed the OLSE to begin collecting data from employers regarding the amount of money collected from surcharges to cover employee health care and the amount of healthcare expenditures made on behalf of employees. In anticipation of new legislative requirements beginning in January 2012 as a result of this amendment, OLSE began collecting this data in 2011, to serve as a baseline. The Mayor's Office also refers to the District Attorney's response.

Finding 3: "Neither the City nor the State of California, to the Jury's knowledge, has investigated whether the sales tax is being added to surcharges."

Response: Disagree. The Mayor's Office refers to the response by the City and County of San Francisco's Treasurer and Tax Collector.

Finding 4: "The City has neither a plan nor sufficient staff at the OSLE to audit employers' surcharges in compliance with HCSO regulations."

Response: Disagree. At the OLSE, there is a process in place to collect, analyze and report on this data, and OLSE has authority under the HCSO to enforce its provisions. The OLSE received an additional staff position in the FY2012-13 budget to focus exclusively on education about and compliance with the HCSO.

Finding 5: "San Francisco businesses that collected surcharges prior to January 1, 2012 have no obligation to report surcharge receipts to the City nor reconcile the surcharges with health care expenses."

Response: Disagree. In OLSE's 2011 Annual Reporting Form, employers were asked report on both surcharge collections and their expenditures for employee health benefits in 2011. Effective January 2012, as per an amendment to the HCSO signed by the Mayor in November 2011, if the amount of surcharges collected for employee health care exceeds the amount spent on employee health care, the employer must irrevocably pay or designate an amount equal to that difference for health care benefits for its employees.

Finding 6: "Due to the varied wording in describing surcharges on consumers' bills, and the wording of the ordinance, the auditing of surcharges will be difficult."

Response: Partially Disagree. OLSE has a straightforward reporting process in place and the recent amendment to the HCSO clarified expectations for employer practices regarding surcharges. However, education and outreach are important so that employers and employees understand the requirements and benefits of the HCSO. The Mayor's Office is committed to ensuring that stakeholders - in particular small businesses - understand and comply with the HCSO, and appreciates the efforts of OLSE, the Department of Public Health, the Office of Small Business, and the business community for their efforts.

Finding 7: "Consumer fraud is committed if the consumer's receipt states that a surcharge is being assessed for a stated purposes and is not being used for that purpose."

Response: Agree. Consumer fraud is committed if a business collects a surcharge for a stated purpose and then knowingly does not use the resulting receipts for that purpose.

Finding 8: "Employers with HRAs in 2010 allocated \$62 million for medical care, reimbursed employees \$12 million, and retained up to the remaining \$50 million."

Response: Disagree. To clarify, in 2010, employers allocated \$62 million to a range of different types of reimbursement programs - not just to Health Reimbursement Accounts (HRA), as this finding states. The data does not report the use of the \$50 million that was not reimbursed directly to employees.

Finding 9: "Given similar demographics the 20% reimbursement rate for HRAs is well below the City's 50% reimbursement rate for MRAs due to lack of program notification to employees, strict HRA guidelines and employees' unwillingness to disclose their medical conditions to their employer."

Response: Disagree. The City and County does not know the demographics of employers and employees using Medical Reimbursement Accounts (MRA) versus HRA accounts. Similarly, there is no data stating the reasons behind the differing reimbursement rates. The Mayor's Office believes that the amendment made to the HCSO in November 2011 will increase reimbursement rates for HRA's and other reimbursement programs through increased notification and the requirement that contributions be available for 24 months.

Finding 10: "Significant numbers of restaurants utilizing HRAs in 2010 paid out no medical expenses for their employees."

Response: Partially Disagree. The Mayor's Office refers to the OLSE's response.

Finding 11: "Employees with two or more employers may have two or more HRAs, likely with differing guidelines for what constitutes medical expenses and with differing time limits."

Response: Partially Disagree. While there could be two or more HRA's, time limits are now standardized as per 2011 HCSO amendment.

Finding 12: "HRAs may not be an allowable option in meeting the federal requirements under the Affordable Care Act."

Response: Partially Disagree. No response possible at this time: we will not know what is allowable under the Affordable Care Act until the rules and regulations for employers are released by the federal government.

Finding 13: "The financial incentive to retain unspent HRA funds could be a motivating force for employers to restrict employee access to these funds."

Response: Agree – there are many different financial incentives that could be at play, including the fact that some businesses use these dollars to augment salaries and to make additional hires. Because the Mayor's Office does not know the motivations behind the choices made by businesses, we are focused on working with businesses to ensure they understand the components of the HCSO, its benefits for their employees, and the importance of being in compliance, to ensure that the ultimate goals of the Health Care Security Ordinance are met.

Finding 14: "By submitting personal medical invoices directly to their employers, employees are forced to reveal their medical history."

Response: Partially Disagree. There are a range of privacy regulations affording employee protection regarding health status and the majority of HRA's are administered by a third party, according to OLSE's data. That being said, if there is data showing privacy concerns on the part of employees, then this should become part of the policy discussion.

The Mayor's Office response to the Civil Grand Jury's recommendations is as follows:

Recommendation 1: "Disallow employers subject to the Office of Labor Standards Enforcement regulations from adding surcharges on customers' bill to pay for the HCSO employer mandates and mandated paid sick days."

Response: Will Not be implemented. The Mayor's Office supports businesses identifying how to cover their costs within their individual business models, as long as it is done in compliance with the HCSO.

Recommendation 2: "The Office of the Treasurer and Tax Collector investigate the under-reporting of sales taxes on surcharges."

Response: Will Not be implemented. Given that sales tax is collected by the State Board of Equalization, this recommendation falls outside of the purview of the City and County of San Francisco's Treasurer and Tax Collector.

Recommendation 3: "The District Attorney open an investigation to review the Jury's survey findings for possible consumer fraud."

Response: Requires Further Analysis. The Mayor's Office supports the District Attorney's response.

Recommendation 4: "Disallow the use of the employer HRA option."

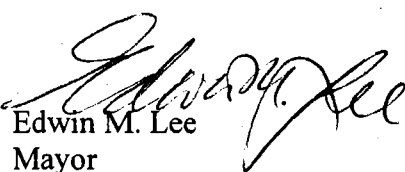
Response: Will Not be implemented. The Mayor's Office believes that the HRA, while used by a relatively small percentage of employers in San Francisco, is an important tool for businesses in respect to coming into compliance with the HCSO. The Mayor's Office is focused on strengthening HRA practices, to ensure that employees are aware of the benefits available to them and that employers make those benefits readily available.

Recommendation 5: "Eliminate time limits for employees to use their MRA funds."

Response: Will Not be implemented. The Mayor's Office refers to the Department of Public Health's response.

Thank you again for the opportunity to comment on this Civil Grand Jury report.

Sincerely,


Edwin M. Lee
Mayor