

File No. 110998

Committee Item No. _____

Board Item No. 8

COMMITTEE/BOARD OF SUPERVISORS

AGENDA PACKET CONTENTS LIST

Committee _____

Date _____

Board of Supervisors Meeting

Date 10/18/11

Cmte Board

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Completed by: Renee Craig

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[Administrative Code – Health Care Security Ordinance]

Ordinance amending Sections 14.1, 14.3 and 14.4 of the San Francisco Administrative Code, to: 1) clarify that only amounts actually paid to provide employee health care services shall satisfy the employer expenditure requirements of the Health Care Security Ordinance; 2) add an employee notification requirement; 3) modify penalty provisions; and 4) set an operative date.

NOTE: Additions are single-underline italics Times New Roman;
deletions are ~~strike-through italics Times New Roman~~.
Board amendment additions are double-underlined;
Board amendment deletions are ~~strikethrough-normal~~.

Section 1. The San Francisco Administrative Code is hereby amended by amending Sections 14.1, 14.3 and 14.4, to read as follows:

SEC. 14.1. SHORT TITLE; DEFINITIONS.

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

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

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

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

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

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

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

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

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

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

19 (G) ~~(g)~~ The term "covered employees" shall not include those persons
20 who are employed by a nonprofit corporation for up to one year as trainees in a bona fide
21 training program consistent with Federal law, which training program enables the trainee to
22 advance into a permanent position, provided that the trainee does not replace, displace, or
23 lower the wage or benefits of any existing position or employee.

24 (H) ~~(h)~~ Nor shall "covered employees" include those persons whose
25 employers verify that they are receiving health care services through another employer, either

1 as an employee or by virtue of being the spouse, domestic partner, or child of another person;
2 provided that the employer obtains from those persons a voluntary written waiver of the health
3 care expenditure requirements of this Chapter and that such waiver is revocable by those
4 persons at any time.

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

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

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

19 (6) "Health Access Program participant" means any uninsured San Francisco
20 resident, regardless of employment or immigration status or pre-existing condition, who is
21 enrolled by his or her employer or who enrolls as an individual in the Health Access Program
22 under the terms established by the Department of Public Health.

23 (7) "Health care expenditure" means any amount paid by a covered employer to
24 its covered employees or to a third party on behalf of its covered employees for the purpose of
25 providing health care services for covered employees or reimbursing the cost of such services

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

14 "Health care expenditure" shall only include an amount irrevocably paid by a covered
15 employer to a covered employee or to a third party on behalf of a covered employee. An amount that is
16 retained by the employer or that may be recovered by or returned to the employer shall not constitute a
17 "health care expenditure." An amount paid to a third party for the purpose of reimbursing a covered
18 employee for expenses incurred in the purchase of health care services shall not constitute a "health
19 care expenditure" unless any unused funds carry over from quarter to quarter and from year to year
20 and remain available to the covered employee, even after the covered employee's separation from
21 employment.

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

1 (A) The covered employee has not performed work for the employer for
2 18 months; or,

3 (B) The covered employee has died.

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

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

10 (A) (a) From the effective date of this Chapter through June 30, 2007,
11 \$1.60 per hour for large businesses and \$1.06 per hour for medium-sized businesses;

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

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

1 (9) "Health care services" means medical care, services, or goods that may
2 qualify as tax deductible medical care expenses under Section 213 of the Internal Revenue
3 Code, or medical care, services, or goods having substantially the same purpose or effect as
4 such deductible expenses.

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

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

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

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

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

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

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.** Each covered employer shall provide its covered
11 employees with a written notice of the employer's obligation under this Chapter to make health care
12 expenditures and how the employer is meeting this obligation. The City shall develop and promulgate
13 rules regarding the content and timing of the required notice.

14 (c) ~~(b)~~ **Additional Employer Responsibilities.** A covered employer shall: (i) maintain
15 accurate records of health care expenditures, required health care expenditures, and proof of
16 such expenditures made each quarter each year, and allow OLSE reasonable access to such
17 records, provided, however, that covered employers shall not be required to maintain such
18 records in any particular form; and (ii) provide information to the OLSE, or the OLSE's
19 designee, on an annual basis containing such other information as OLSE shall require, but
20 OLSE may not require an employer to provide information in violation of State or federal
21 privacy laws. Where an employer does not maintain or retain adequate records documenting
22 the health expenditures made, or does not allow OLSE reasonable access to such records, it
23 shall be presumed that the employer did not make the required health expenditures for the
24 quarter for which records are lacking, absent clear and convincing evidence otherwise. The
25 Office of Treasurer and Tax Collector shall have the authority to provide any and all

1 nonfinancial information to OLSE necessary to fulfill the OLSE's responsibilities as the
2 enforcing agency under this Ordinance. With regard to all such information provided by the
3 Office of Treasurer and Tax Collector, OLSE shall be subject to the confidentiality provisions
4 of Subsection (a) of Section 6.22-1 of the San Francisco Business and Tax Regulations Code.
5

6 **SEC. 14.4. ADMINISTRATION AND ENFORCEMENT.**

7 (a) The City shall develop and promulgate rules to govern the operation of this
8 Chapter. The regulations shall include specific rules by the Department of Public Health on
9 the operation of both the Health Access Program and the reimbursement accounts identified
10 in Section 14.2(g), including but not limited to eligibility for enrollment in the Health Access
11 Program and establishment of reimbursement accounts and rules by the OLSE for
12 enforcement of the obligations of the employers under this Chapter. The rules shall also
13 establish procedures for covered employers to maintain accurate records of health care
14 expenditures and required health care expenditures and provide a report to the City without
15 requiring any disclosures of information that would violate State or Federal privacy laws. The
16 rules shall further establish procedures for providing employers notice that they may have
17 violated this Chapter, a right to respond to the notice, a procedure for notification of the final
18 determination of a violation, and an appeal procedure before a hearing officer appointed by
19 the City Controller. The sole means of review of the hearing officer's decision shall be by
20 filing in the San Francisco Superior Court a petition for a writ of mandate under Section
21 1094.5 of the California Code of Civil Procedure. No rules shall be adopted finally until after a
22 public hearing.

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

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

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

14 (e) (1) The City shall enforce the obligations of ~~employers and~~ covered employers
15 under this Chapter, and ~~shall may~~ impose administrative penalties upon ~~employers and~~ covered
16 employers who fail to make required health care expenditures on behalf of their employees
17 within five days of the quarterly due date. The amount of the penalty shall be equal to up to one-
18 and one-half times the total expenditures that a covered employer failed to make ~~plus simple~~
19 ~~annual interest of up to ten (10) percent from the date payment should have been made,~~ but in any
20 event the total penalty for this violation shall not exceed \$100 ~~\$1,000.00~~ for each employee for
21 each ~~quarter week~~ that ~~the required such~~ expenditures ~~were are~~ not made within five days of the
22 quarterly due date. The \$100 penalty shall increase by an amount corresponding to the prior year's
23 increase, if any, in the Consumer Price Index for urban wage earners and clerical workers for the San
24 Francisco-Oakland-San Jose, CA metropolitan statistical area.

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

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

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

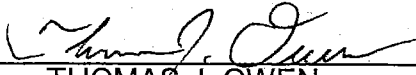
15 (f) The City Controller shall coordinate with the Department of Public Health and OLSE
16 to prepare periodic reports on the implementation of this Chapter including participant rates,
17 any effect on services provided by the Department of Public Health, the cost of providing
18 services to the Health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

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.

14
15 **Section 2. Effective Date; Operative Date.** This ordinance shall become effective
16 30 days from the date of passage. This ordinance shall become operative January 1, 2012.

17
18 APPROVED AS TO FORM:
19 DENNIS J. HERRERA, City Attorney

20 By: 
21 THOMAS J. OWEN
22 Deputy City Attorney
23
24
25

LEGISLATIVE DIGEST

(Amendment of the Whole, dated 10/04/2011)

[Administrative Code – Health Care Security Ordinance]

Ordinance amending Sections 14.1, 14.3 and 14.4 of the San Francisco Administrative Code, to: 1) clarify that only amounts actually paid to provide employee health care services shall satisfy the employer expenditure requirements of the Health Care Security Ordinance; 2) add an employee notification requirement; 3) modify penalty provisions; and 4) 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 amount that (1) is actually paid by an employer to an employee or to a third party on behalf of the employee, and (2) cannot be returned to the employer. With respect to amounts paid for the purpose of reimbursing future health care services, unused amounts must carry over from quarter to quarter and from year to year and remain available to the employee, even after the employee has changed jobs.

The proposal would specify, however, that an employer may recover unused amounts paid out for the purpose of reimbursing future health care services under two circumstances:

- The employee has not performed work for the employer for 18 months; or,
- The employee has died.

The proposal would also add a requirement that employers provide their employees with a written explanation of the employer's duties under the Health Care Security Ordinance, and what the employer is doing to comply with the Ordinance.

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 require that the fines always be one-and-one-half times the amount of the missed expenditures, but would eliminate the interest on the penalty amount and reduce the cap to \$100 per quarter for each employee. Other remedies and corrective actions available to enforce the Ordinance, including restitution to the injured employee, would remain unchanged.

* * *

There is one significant difference between the version of the legislation on file, dated 9/13/2011, and the proposed amendment of the whole, dated 10/04/2011:

The 9/13/2011 draft provides that an employer may recover unused funds paid to a reimbursement account if "[a] former employee has not made a claim for any of the remaining available funds for 18 months (including a claim made on behalf of any other person eligible for reimbursement from health care expenses from the former employee's remaining available funds)."

The 10/04/2011 draft provides that an employer may recover unused funds paid to a reimbursement account if "[t]he covered employee has not performed work for the employer for 18 months."

In addition, the amendment of the whole fixes some formatting errors and corrects some cross-references in Section 14.4(e)(2).

4