

LEGISLATIVE DIGEST

[Administrative Code - Irrevocable Employer Health Care Expenditure Requirement]

Ordinance revising the Health Care Security Ordinance to phase in over a three-year period requirement that all health care expenditures be made irrevocably; to permit waiver of certain revocable expenditures; to clarify that the existing City public benefit program known as the Health Access Program (HAP) has two component programs, Healthy San Francisco and Medical Reimbursement Accounts; and to charge the Department of Public Health with creating a plan to maximize HAP participants' enrollment in the State health insurance exchange, Covered California, by plan year 2016.

Existing Law

The Health Care Security Ordinance currently allows covered employers to meet their obligation to make "health care expenditures" on behalf of their covered employees either with irrevocable expenditures, such as insurance premium payments, or with revocable expenditures, such as allocations to health reimbursement accounts where unspent funds return to the employer. Revocable expenditures must meet additional conditions to be credited as "health care expenditures" under the Ordinance. They must be "reasonably calculated to benefit the employee"; remain available to the employee for at least two years from the date of the expenditure or 90 days after separation; and are subject to additional notice and reporting requirements.

The Ordinance includes an alternate provision that goes into effect if a court strikes down or enjoins the extra conditions placed on revocable expenditures. In that event, revocable health care expenditures must remain available to an employee indefinitely, regardless of separation, until the employee's benefit account has been inactive for 18 months or the employee has died.

The Ordinance also allows employers to meet their health care spending requirement by making health care expenditures to the City. Under existing law, the City uses those funds on behalf of the employer's covered employees in one of two ways. First, the Ordinance establishes Healthy San Francisco (HSF), a program that provides comprehensive medical care to eligible, uninsured San Francisco residents, regardless of employment or immigration status or preexisting medical conditions. HSF-eligible employees whose employers have made contributions to the City on their behalf receive discounts on HSF program participation fees. If the covered employee is not eligible for HSF, the City creates a Medical Reimbursement Account for that employee.

Amendments to Current Law

As amended, the Ordinance phases in over three years the requirement that “health care expenditures” be irrevocably paid. Sixty percent of employer expenditures for hours payable to the employee in 2015 must be irrevocable; eighty percent for employee hours in 2016; and all employer health care expenditures must be irrevocable for hours payable to a covered employee on and after January 1, 2017. The amended Ordinance would continue to place certain conditions on revocable expenditures, and it would provide that the full irrevocability requirement will go into effect if a court enjoins or strikes down any of those conditions. It would also permit employees to voluntarily waive the unused balance of revocable expenditures made on their behalf for hours worked prior to January 1, 2014.

The amended Ordinance would also update stale language to clarify that Healthy San Francisco and Medical Reimbursement Accounts are both components of the Health Access Program (HAP), a public health benefits program for employees whose employers choose to make health care expenditures to the City.

Finally, the amended Ordinance would require DPH to develop a plan by August 2015 to maximize HAP participants’ enrollment in health insurance through the State insurance exchange, Covered California, and to explore options for incenting employers to provide insurance to their employees directly. If the Health Commission and the Board of Supervisors approved the DPH plan, it would be implemented for the 2016 Covered California plan year.

Background Information

As originally enacted and until 2011, the Health Care Security Ordinance did not contain additional requirements for revocable health care expenditures, which generally took the form of health reimbursement accounts (HRAs). According to the information employers provided to the Office of Labor Standards Enforcement (OLSE) on their Annual Reporting Forms, the average reimbursement rate for HRAs in 2010 was 20%. That meant that employers providing such accounts recouped on average 80% of their health care expenditures from their employee account-holders. OLSE further determined that more than half of the HRAs in place for each of the years 2008-2010 had reimbursement rates of between 0 and 10%, meaning that more than half of the employers using revocable expenditures to reimbursement accounts to satisfy their obligations under the Ordinance recaptured 90% or more of their health care expenditures. Conversely, the affected employees received 10% or less of the dollars the HCSO required their employers to allocate for employee health care.

This information about revocable expenditures raised legislative concern, and in 2011, the Ordinance was amended to include the additional criteria currently in place for revocable health care expenditures. According to the information employers reported to OLSE about their post-amendment expenditures in 2012, the average reimbursement rate rose from 20% to 25%, and the median reimbursement rate rose from 12% to 18%.

Provisions of the Affordable Care Act that went into effect on January 1, 2014, are likely to reduce these uptake rates for reimbursement plans. Employee reimbursement accounts that are not linked to health insurance plans can now only reimburse for limited medical expenses, primarily vision and dental care. Such accounts can no longer reimburse employees for the full range of health care services or for non-vision or dental insurance premiums, co-pays, or prescription drugs. Although employers have not yet reported the reimbursement rates they are experiencing for these much more restricted plans, it is reasonable to assume that the rates will drop, perhaps significantly, below current levels.

This legislative digest reflects an amendment to legislation introduced on April 1, 2014, and amended in committee on May 29, 2014. That legislation provides that all employer health care expenditures would have to be made irrevocably as of October 1, 2014. This amendment adds a three-year phase-in of the irrevocability requirement, allows employees to waive the unused portion of pre-2014 revocable expenditures, and directs DPH to consider possible options for incenting more employers to provide health insurance to their employees directly.

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