

File No. 111030

Committee Item No. _____
Board Item No. 9

COMMITTEE/BOARD OF SUPERVISORS
AGENDA PACKET CONTENTS LIST

Committee _____

Date _____

Board of Supervisors Meeting

Date Nov. 22, 2011

Cmte Board

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| <input type="checkbox"/> | <input type="checkbox"/> | Budget Analyst Report |
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| <input type="checkbox"/> | <input type="checkbox"/> | Award Letter |
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OTHER

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Completed by: Rana Calmesag
Completed by: _____

Date Nov. 16, 2011
Date _____

An asterisked item represents the cover sheet to a document that exceeds 20 pages. The complete document is in the file.

1 [Administrative Code – Health Care Security Ordinance]

2

3 Ordinance amending the San Francisco Administrative Code by amending

4 Sections 14.1, 14.3 and 14.4, and by adding Sections Section 14.1.5 and 14.1.6, to:

5 1) clarify that only expenditures reasonably calculated to benefit the employee shall

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

7 2) require that contributions to a health reimbursement account remain available to the

8 employee for two years, rather than one year; 3) condition use of a health

9 reimbursement account in 2012 upon carry-over of any balance in the account at the

10 end of 2011; 4) 2) provide, in the alternative if triggered by court action, that only

11 amounts actually paid to provide employee health care services shall satisfy the

12 employer expenditure requirements of the Health Care Security Ordinance; 5) 3) require

13 employers imposing surcharges on customers to use the full amount collected under

14 the surcharge for employee health care expenditures pay for the required expenditures

15 to report certain information to OLSE in connection with the surcharge; 6) 4) add an

16 employee notification requirement; 7) 5) modify penalty provisions; and 8) 6) set an

17 operative date.

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

19 deletions are *strike through italics Times New Roman*.

20 Board amendment additions are double-underlined;

Board amendment deletions are ~~strikethrough normal~~.

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

22 Sections 14.1, 14.3 and 14.4, and adding Section 14.1.5, to read as follows:

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

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

25 Health Care Security Ordinance."

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

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

4 (2) "Covered employee" means any person who works in the City where such
5 person qualifies as an employee entitled to payment of a minimum wage from an employer
6 under the Minimum Wage Ordinance as provided under Chapter 12R of the San Francisco
7 Administrative Code and has performed work for compensation for his or her employer for
8 ninety (90) days, provided, however, that:

9 (A) ~~(a)~~ From the effective date of this Chapter through December 31,
10 2007, "at least twelve (12) hours" shall be substituted for "at least two (2) hours" where such
11 term appears in Section 12R.3(a);

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

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

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

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

23 (F) ~~(f)~~ The term "covered employees" shall not include those persons
24 who are "covered employees" as defined in Section 12Q.2.9 of the Health Care Accountability
25

1 Ordinance, Chapter 12Q of the San Francisco Administrative Code, if the employer meets the
2 requirements set forth in Section 12Q.3 for those employees; and

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

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

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

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

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

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

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

24 (B) A contribution designated or paid to a health savings account or to
25 any other account having substantially the same purpose or effect, which is not irrevocably

1 paid to a third party on behalf of a covered employee, shall not constitute a "health care
2 expenditure" unless all of the following conditions are met:

3 (i) The contribution is reasonably calculated to benefit the
4 employee;

5 (ii) Except as provided in clause (v)(a), the contribution remains
6 available to the employee (and any other person eligible for reimbursement for health care
7 expenses through the employee) for a minimum of twenty-four (24) months from the date of
8 the contribution.

9 (iii) On January 1, 2012, the account contains an amount equal to
10 the balance in the account at the close of business on December 31, 2011, if any.

11 (iv) The employee receives a written summary of the contribution,
12 within 15 days of the contribution which shall include: (a) the name, address, and telephone
13 number of any third party to whom the contribution was made; (b) the date and amount of the
14 contribution; (c) the date and amount of any other debits or credits to the account since the
15 most recent written summary provided to the employee; (d) the balance in the account; and,
16 (e) any applicable expiration dates for the funds in the account.

17 (v) If the employee separates from employment with a positive
18 balance in a reimbursement account: (a) the balance in the account shall remain available to
19 the employee (and any other person eligible for reimbursement for health care expenses
20 through the employee) for a minimum of ninety days from the date of separation, and, (b) the
21 employee shall receive, within three days following the separation, a written notice, which
22 shall include the balance in the account and any applicable expiration dates for the funds in
23 the account.

24 ~~(B) An expenditure shall not be deemed a "health care expenditure"~~
25 ~~within the meaning of this Ordinance if it is not reasonably calculated to benefit the employee~~

1 as provided in Section 14.1.5. Where the funds are not irrevocably designated or paid by a
2 covered employer to a covered employee or to a third party on behalf of a covered employee,
3 the expenditure shall not be deemed reasonably calculated to benefit the employee unless
4 each quarterly expenditure remains available to the employee (or any other person eligible for
5 reimbursement for health care expenses through the employee) for at least 24 months from
6 the date of the expenditure, and in the case of a covered employee who has separated from
7 employment, for 90 days after separation, provided that the employer has provided the
8 employee with written notification of the balance of the account no later than 3 business days
9 after the employee's separation.

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

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

16 ~~(A) (a)~~ From the effective date of this Chapter through June 30, 2007,
17 \$1.60 per hour for large businesses and \$1.06 per hour for medium-sized businesses;

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

22 ~~(C) (c)~~ From January 1, 2010 and each year thereafter, the "health care
23 expenditure rate" shall be determined annually based on the "average contribution" for a full-
24 time employee to the City Health Service System pursuant to Section A8.423 of the San
25 Francisco Charter based on the annual ten county survey amount for the applicable fiscal

1 year, with such average contribution prorated on an hourly basis by dividing the monthly
2 average contribution by one hundred seventy-two (172) (the number of hours worked in a
3 month by a full-time employee). The "health care expenditure rate" shall be seventy-five
4 percent (75%) of the annual ten county survey amount for the applicable fiscal year for large
5 businesses and fifty percent (50%) for medium-sized businesses.

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

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

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

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

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

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

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

3
4 **~~SEC. 14.1.5. REASONABLY CALCULATED TO BENEFIT THE EMPLOYEE.~~**

5 If a Covered Employer uses health reimbursement accounts to satisfy its obligation to
6 make health care expenditures for its Covered Employees and the funds are not irrevocably
7 designated or paid to a third party on behalf of a covered employee, an expenditure will not be
8 deemed to be reasonably calculated to benefit the employee unless on January 1, 2012, the
9 account contains an amount equal to the balance in the account at the close of business on
10 December 31, 2011, if any.

11
12 **SEC. 14.1.5 14.1.6. ALTERNATE PROVISIONS.**

13 *(a) If the City Attorney certifies to the Mayor and the Board of Supervisors that a court of*
14 *competent jurisdiction in a lawsuit brought by or on behalf of a Covered Employer has struck down the*
15 *provisions of Section 14.1.5, or permanently enjoined their enforcement, then the following provisions*
16 *shall become operative on the first day of the next calendar quarter following the City Attorney's*
17 *certification.*

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

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

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

7 (B) The covered employee has died.

8 (b) If the City Attorney subsequently certifies to the Mayor and the Board of Supervisors that
9 an order enjoining enforcement of the provisions of Section 14.1.5 has been lifted, then the original
10 provisions shall again become operative on the first day of the next calendar quarter following the City
11 Attorney's certification.

12
13 **SEC. 14.3. REQUIRED HEALTH CARE EXPENDITURES.**

14 (a) **Required Expenditures.** Covered employers shall make required health care
15 expenditures to or on behalf of their covered employees each quarter. The required health
16 care expenditure for a covered employer shall be calculated by multiplying the total number of
17 hours paid for each of its covered employees during the quarter (including only hours starting
18 on the first day of the calendar month following ninety (90) calendar days after a covered
19 employee's date of hire) by the applicable health care expenditure rate. In determining
20 whether a covered employer has made its required health care expenditures, payments to or
21 on behalf of a covered employee shall not be considered if they exceed the following amount:
22 the number of hours paid for the covered employee during the quarter multiplied by the
23 applicable health care expenditure rate. The City's Office of Labor Standards Enforcement
24 (OLSE) shall enforce the health expenditure requirements under this Section.

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

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

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

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

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,
20 including information on the employer's compliance with this Chapter, but OLSE may not require an
21 employer to provide information in violation of State or federal privacy laws. If a Covered
22 Employer uses a health reimbursement account to satisfy its obligation to make health care
23 expenditures for any of its Covered Employees, the Employer shall also report to OLSE the
24 terms of such accounts, including what costs are eligible for reimbursement.

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

10 (d) If a Covered Employer imposes a surcharge on its customers to cover in whole or in part
11 the costs of the health care expenditure requirement under this Chapter, the Covered Employer shall
12 provide to OLSE on an annual basis the amount collected during the 12-month reporting period
13 from the surcharge for employee health care and the amount spent on employee health care. If the
14 amount collected from the surcharge is greater than the amount spent on employee health care, the
15 Covered Employer must irrevocably pay or designate an amount equal to that difference for
16 health care expenditures for its Covered Employees under this Chapter. OLSE may refer any
17 potential cases of consumer fraud to appropriate authorities.

18 19 **SEC. 14.4. ADMINISTRATION AND ENFORCEMENT.**

20 (a) The City shall develop and promulgate rules to govern the operation of this
21 Chapter. The regulations shall include specific rules by the Department of Public Health on
22 the operation of both the Health Access Program and the reimbursement accounts identified
23 in Section 14.2(g), including but not limited to eligibility for enrollment in the Health Access
24 Program and establishment of reimbursement accounts and rules by the OLSE for
25 enforcement of the obligations of the employers under this Chapter. The rules shall also

1 establish procedures for covered employers to maintain accurate records of health care
2 expenditures and required health care expenditures and provide a report to the City without
3 requiring any disclosures of information that would violate State or Federal privacy laws. The
4 rules shall further establish procedures for providing employers notice that they may have
5 violated this Chapter, a right to respond to the notice, a procedure for notification of the final
6 determination of a violation, and an appeal procedure before a hearing officer appointed by
7 the City Controller. The sole means of review of the hearing officer's decision shall be by filing
8 in the San Francisco Superior Court a petition for a writ of mandate under Section 1094.5 of
9 the California Code of Civil Procedure. No rules shall be adopted finally until after a public
10 hearing.

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

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

19 (d) It shall be unlawful for any employer or covered employer to deprive or threaten to
20 deprive any person of employment, take or threaten to take any reprisal or retaliatory action
21 against any person, or directly or indirectly intimidate, threaten, coerce, command or influence
22 or attempt to intimidate, threaten, coerce, command or influence any person because such
23 person has cooperated or otherwise participated in an action to enforce, inquire about, or
24 inform others about the requirements of this Chapter. Taking adverse action against a person
25

1 within ninety (90) days of the person's exercise of rights protected under this Chapter shall
2 raise a rebuttable presumption of having done so in retaliation for the exercise of such rights.

3 (e) (1) The City shall enforce the obligations of ~~employers and~~ covered employers
4 under this Chapter, including requiring restitution to employees where appropriate, and shall may
5 impose administrative penalties upon ~~employers and~~ covered employers who fail to make
6 required health care expenditures on behalf of their employees within five business days of the
7 quarterly due date. Failure to make a required health care expenditure shall include making a
8 purported expenditure that is determined by OLSE not to be reasonably calculated to benefit the
9 employee. The amount of the penalty shall be up to one-and-one-half times the total
10 expenditures that a covered employer failed to make ~~plus simple annual interest of up to ten (10)~~
11 ~~percent from the date payment should have been made,~~ but in any event the total penalty for this
12 violation shall not exceed \$100 \$1,000 for each employee for each ~~quarter week~~ that the
13 required such expenditures ~~were are~~ not made within five business days of the quarterly due date.
14 The \$100 \$1,000 penalty limit shall increase each year by an amount corresponding to the prior
15 year's increase, if any, in the Consumer Price Index for urban wage earners and clerical workers for
16 the San Francisco-Oakland-San Jose, CA metropolitan statistical area.

17 (2) For other violations of this Chapter by employers and covered employers,
18 the maximum administrative penalties shall be as follows: For refusing to allow access to
19 records, pursuant to Section ~~14.3(c) 14.3(b)~~, \$25.00 as to each worker whose records are in
20 issue for each day that the violation occurs; for the failure to maintain or retain accurate and
21 adequate records pursuant to Section ~~14.3(c) 14.3(b)~~ and for the failure to make the annual
22 ~~reports report~~ of information required by OLSE pursuant to Sections 14.3(c) and 14.3(d), Section
23 14.3(b). \$500.00 for each quarter week that the violation occurs; for violation of Section 14.4(d)
24 (retaliation), \$100.00 as to each person who is the target of the prohibited action for each day
25

1 that the violation occurs; and for any other violation not specified in this subsection (e)(2),
2 \$25.00 per day for each day that the violation occurs.

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

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

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

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

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

7
8 Section 2. Additional Uncodified Provisions.

9 (a) Effective Date; Operative Date. This ordinance shall become effective 30 days
10 from the date of passage. This ordinance shall become operative on January 1, 2012.

11 (b) General Welfare. In adopting and implementing this ordinance, the City and
12 County of San Francisco is assuming an undertaking only to promote the general welfare. It is
13 not assuming, nor is it imposing on its officers and employees, an obligation for breach of
14 which it is liable in money damages to any person who claims that such breach proximately
15 caused injury.

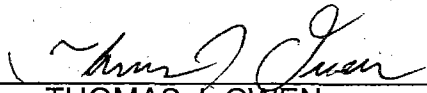
16 (c) Conflict with State or Federal Law. This ordinance shall be construed so as not to
17 conflict with applicable federal or State laws, rules or regulations. Nothing in this ordinance
18 shall authorize any City agency or department to impose any duties or obligations in conflict
19 with limitations on municipal authority established by State or federal law at the time such
20 agency or department action is taken.

21 (d) Severability. If any of the provisions of this ordinance or the application thereof to
22 any person or circumstance is held invalid, the remainder of those provisions, including the
23 application of such part or provisions to persons or circumstances other than those to which it
24 is held invalid, shall not be affected thereby and shall continue in full force and effect. To this
25 end, the provisions of this ordinance are severable.

1 (e) Amendments. In enacting this Ordinance, the Board intends to amend only those
2 words, phrases, paragraphs, subsections, sections, articles, numbers, punctuation, charts,
3 diagrams, or any other constituent part of the Environment Code that are explicitly shown in
4 this legislation as additions, deletions, Board amendment additions, and Board amendment
5 deletions in accordance with the "Note" that appears under the official title of the legislation.
6

7 APPROVED AS TO FORM:
8 DENNIS J. HERRERA, City Attorney

9
10 By:


11 THOMAS J. OWEN
12 Deputy City Attorney
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LEGISLATIVE DIGEST

(Second Amendment of the Whole, dated 11/15/2011)

[Administrative Code – Health Care Security Ordinance]

Ordinance amending the San Francisco Administrative Code by amending Sections 14.1, 14.3 and 14.4, and by 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) require that contributions to a health reimbursement account remain available to the employee for two years, rather than one year; 3) condition use of a health reimbursement account in 2012 upon carry-over of any balance in the account at the end of 2011; 4) 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; 5) require employers imposing surcharges on customers to use the full amount collected under the surcharge for employee health care expenditures pay for the required expenditures to report certain information to OLSE in connection with the surcharge; 6) add an employee notification requirement; 7) modify penalty provisions; and 8) 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 two years from the date of the expenditure. An employer could recover any unused funds left in the account 90 days after an employee separated from employment, if the employer provided the employee with a written notice of the balance in the account no later than 3 days after the employee's separation.

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.

If an employer wished to continue using an existing health reimbursement account in 2012 to satisfy its obligation to make health care expenditures, the employer would have to roll over any unused funds left in the account at the end of 2011 to 2012.

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. If the employer used health reimbursement accounts to satisfy its obligations under the Ordinance, the proposal would also require the employer to report to OLSE the terms of those accounts, including what costs were eligible for reimbursement. 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, the proposal would require the employer to irrevocably pay or designate that difference for employee health care expenditures.

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 \$100 per quarter (rather than \$1,000 per week) for each employee. The proposal would also eliminate

the interest on the penalty amount. The proposal would reduce the maximum penalty for failure to maintain records or to make annual reports from \$500 per week to \$500 per quarter. 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.

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The amendment of the whole, dated 11/15/2011, consolidates and re-states various provisions from the legislation on file, dated 11/1/2011, that relate to contributions to health reimbursement accounts, but do not significantly change those provisions.

The 11/15/2011 amendment of the whole would reduce the cap on administrative fines for failure to make mandated expenditures, from \$1,000 per week to \$100 per quarter, for each employee. The 11/15/2011 amendment of the whole would also reduce the maximum penalty for failure to maintain records or to make annual reports from \$500 per week to \$500 per quarter.