

File No. 111030

Committee Item No. _____

Board Item No. 13

COMMITTEE/BOARD OF SUPERVISORS

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Committee _____

Date _____

Board of Supervisors Meeting

Date Nov 15, 2011

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Completed by: Renee Craig

Date 11/2/11

Completed by: _____

Date _____

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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 14.1.5 and 14.1.6, to: 1) clarify that
5 only expenditures reasonably calculated to benefit the employee shall satisfy the
6 employer expenditure requirements of the Health Care Security Ordinance; 2) require
7 that contributions to a health reimbursement account remain available to the employee
8 for two years, rather than one year; 3) condition use of a health reimbursement account
9 in 2012 upon carry-over of any balance in the account at the end of 2011; 4) 2) provide,
10 in the alternative if triggered by court action, that only amounts actually paid to provide
11 employee health care services shall satisfy the employer expenditure requirements of
12 the Health Care Security Ordinance; 5) 3) require employers imposing surcharges on
13 customers to use the full amount collected under the surcharge for employee health
14 care expenditures pay for the required expenditures to report certain information to
15 OLSE in connection with the surcharge; 6) 4) add an employee notification
16 requirement; 7) 5) modify penalty provisions; and 8) 6) set an operative date.

17 NOTE: Additions are *single-underline italics Times New Roman*;
18 deletions are *strike-through italics Times New Roman*.
19 Board amendment additions are double-underlined;
20 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 Sections 14.1.5 and 14.1.6, 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 (a) contributions by such employer on behalf of its covered employees to a health savings
12 account as defined under section 223 of the United States Internal Revenue Code or to any
13 other account having substantially the same purpose or effect without regard to whether such
14 contributions qualify for a tax deduction or are excludable from employee income; (b)
15 reimbursement by such covered employer to its covered employees for expenses incurred in
16 the purchase of health care services; (c) payments by a covered employer to a third party for
17 the purpose of providing health care services for covered employees; (d) costs incurred by a
18 covered employer in the direct delivery of health care services to its covered employees; and
19 (e) payments by a covered employer to the City to be used on behalf of covered employees.
20 The City may use these payments to: (i) fund membership in the Health Access Program for
21 uninsured San Francisco residents; and (ii) establish and maintain reimbursement accounts
22 for covered employees, whether or not those covered employees are San Francisco
23 residents.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 SEC. 14.1.5. REASONABLY CALCULATED TO BENEFIT THE EMPLOYEE.

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

8
9 SEC. 14.1.6. ALTERNATE PROVISIONS.

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

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

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

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

4 (B) The covered employee has died.

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

9
10 **SEC. 14.3. REQUIRED HEALTH CARE EXPENDITURES.**

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

22 (b) Employer Notice to Employees.

23 (1) By December 1 of each year, OLSE shall publish and make available to Covered
24 Employers, in all languages spoken by more than five percent of the San Francisco work force, a notice
25

1 suitable for posting by Covered Employers in the workplace informing Covered Employees of their
2 rights and the Covered Employer's obligations under the Ordinance.

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

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

12 (c) ~~(b)~~ Additional Employer Responsibilities. A covered employer shall: (i) maintain
13 accurate records of health care expenditures, required health care expenditures, and proof of
14 such expenditures made each quarter each year, and allow OLSE reasonable access to such
15 records, provided, however, that covered employers shall not be required to maintain such
16 records in any particular form; and (ii) provide information to the OLSE, or the OLSE's
17 designee, on an annual basis containing such other information as OLSE shall require,
18 including information on the employer's compliance with this Chapter, but OLSE may not require an
19 employer to provide information in violation of State or federal privacy laws. If a Covered
20 Employer uses health reimbursement accounts to satisfy its obligation to make health care
21 expenditures for its Covered Employees, the Employer shall also report to OLSE the terms of
22 such accounts, including what costs are eligible for reimbursement.

23 Where an employer does not maintain or retain adequate records documenting the
24 health expenditures made, or does not allow OLSE reasonable access to such records, it
25 shall be presumed that the employer did not make the required health expenditures for the

1 quarter for which records are lacking, absent clear and convincing evidence otherwise. The
2 Office of Treasurer and Tax Collector shall have the authority to provide any and all
3 nonfinancial information to OLSE necessary to fulfill the OLSE's responsibilities as the
4 enforcing agency under this Ordinance. With regard to all such information provided by the
5 Office of Treasurer and Tax Collector, OLSE shall be subject to the confidentiality provisions
6 of Subsection (a) of Section 6.22-1 of the San Francisco Business and Tax Regulations Code.

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

15 16 **SEC. 14.4. ADMINISTRATION AND ENFORCEMENT.**

17 (a) The City shall develop and promulgate rules to govern the operation of this
18 Chapter. The regulations shall include specific rules by the Department of Public Health on
19 the operation of both the Health Access Program and the reimbursement accounts identified
20 in Section 14.2(g), including but not limited to eligibility for enrollment in the Health Access
21 Program and establishment of reimbursement accounts and rules by the OLSE for
22 enforcement of the obligations of the employers under this Chapter. The rules shall also
23 establish procedures for covered employers to maintain accurate records of health care
24 expenditures and required health care expenditures and provide a report to the City without
25 requiring any disclosures of information that would violate State or Federal privacy laws. The

1 rules shall further establish procedures for providing employers notice that they may have
2 violated this Chapter, a right to respond to the notice, a procedure for notification of the final
3 determination of a violation, and an appeal procedure before a hearing officer appointed by
4 the City Controller. The sole means of review of the hearing officer's decision shall be by filing
5 in the San Francisco Superior Court a petition for a writ of mandate under Section 1094.5 of
6 the California Code of Civil Procedure. No rules shall be adopted finally until after a public
7 hearing.

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

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

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

24 (e) (1) The City shall enforce the obligations of ~~employers and~~ covered employers
25 under this Chapter, including requiring restitution to employees where appropriate, and may

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

3 (2) For other violations of this Chapter by employers and covered employers,
14 the administrative penalties shall be as follows: For refusing to allow access to records,
15 pursuant to Section ~~14.3(c) 14.3(b)~~, \$25.00 as to each worker whose records are in issue for
16 each day that the violation occurs; for the failure to maintain or retain accurate and adequate
17 records pursuant to Section ~~14.3(c) 14.3(b)~~ and for the failure to make the annual ~~reports report~~
18 of information required by OLSE pursuant to ~~Sections 14.3(c) and 14.3(d), Section 14.3(b).~~
19 \$500.00 for each week that the violation occurs; for violation of Section 14.4(d) (retaliation),
20 \$100.00 as to each person who is the target of the prohibited action for each day that the
21 violation occurs; and for any other violation not specified in this subsection (e)(2), \$25.00 per
22 day for each day that the violation occurs.

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

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

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

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

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

1 Section 2. Additional Uncodified Provisions.

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

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

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

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

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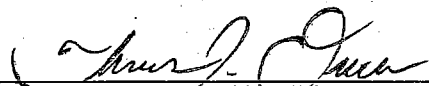
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1 (e) Amendments. In enacting this Ordinance, the Board intends to amend only those
2 words, phrases, paragraphs, subsections, sections, articles, numbers, punctuation, charts,
3 diagrams, or any other constituent part of the Environment Code that 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 By:


10 THOMAS J. OWEN
11 Deputy City Attorney
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