CITY AND COUNTY OF SAN FRANCISCO
OFFICE OF LABOR STANDARDS ENFORCEMENT

Donna Levitt, Manager

Cited in Golden Gate Restaurant v. City and County of San Francisco, No. 07-17370, archvied on January 11, 2008

REGULATIONS IMPLEMENTING THE EMPLOYER SPENDING REQUIREMENT OF THE SAN FRANCISCO HEALTH CARE SECURITY ORDINANCE (HCSO)

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INTRODUCTION

The Office of Labor Standards Enforcement ("OLSE") promulgates these Regulations pursuant to Chapter 2A, Article 1, Section 2A.23 and Chapter 14 of the San Francisco Administrative Code. Pursuant to Chapter 14, the San Francisco Health Care Security Ordinance ("HCSO"), the OLSE is mandated to enforce the Employer Spending Requirement of the HCSO.

From February 1 through July 17, 2006, and again on March 7 and May 8, 2007, the Board of Supervisors held 19 hearings at which there were opportunities for public comment on the HCSO and its amendments. In January and June of 2007, the OLSE issued draft Regulations, which were vetted through a public process that included public hearings and the opportunity to provide both oral and written comments and updated several times based upon public input.

In developing these Regulations, the OLSE has been guided by its understanding of the importance of fulfilling the goals of the Ordinance, providing clear direction to employers and employees, and giving weight to considerations of equity and practicality.

Fulfilling the goals of the Ordinance. In developing these Regulations, the OLSE has tried to be faithful to the basic goals of the Ordinance. These goals are well established. The Ordinance and its amendments include extensive statements of legislative findings and purpose, explaining the multiple rationales for the Ordinance and articulating its goals. These statements of legislative findings and purpose is found in Sections 1 of the Ordinance and Amended Ordinance, and, as such, have the full force and effect of law. Particularly in light of the statements of legislative findings and purpose, the Ordinance should be liberally construed to effect its goals.

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Providing clear direction to employers and employees. In mandating the OLSE to promulgate regulations on the Employer Spending Requirement of the Ordinance, the Board of Supervisors intended that the OLSE provide clear direction to employers and employees upon which they could rely. (*See* S.F. Admin. Code § 14.4(a).) Accordingly, these Regulations seek to fulfill that mandate.

Giving weight to considerations of equity and practicality. Finally, in adopting the Ordinance, the Board of Supervisors intended that guidelines or regulations take into account considerations of equity and practicality, from both the employee and employer perspective. Accordingly, these Regulations are designed to be both fair and workable for employees and employers alike. One aspect of the Regulations, though not a dominant feature, is to reduce the possibility of abuses by employees and employers.

While these principles have guided the OLSE's judgment in developing these Regulations, it must be acknowledged that general principles do not always automatically yield a single, specific result with respect to a particular Regulation. Multiple and sometimes conflicting considerations come into play in the development of a Regulation. Having been authorized by the Ordinance to promulgate these Regulations, the OLSE ultimately must exercise its judgment in developing Regulations that are reasonable in light of all relevant factors, taking into account both input from the public and its own expertise as a labor standards enforcement office.

REGULATION 1: EMPLOYER SPENDING REQUIREMENT

1.1 Employer Spending Requirement

(A) Each quarter, covered employers are required to make qualifying health care expenditures:

(1) to their covered employees, or

(2) for the benefit of their covered employees.

For the definition of qualifying health care expenditures, see Regulation 4.

1.2 Definition of Quarter

A quarter shall be defined as one of four three-month periods in a calendar year. Thus, the first quarter of the year shall be defined as the period from January 1 through March 31; the second quarter shall be the period from April 1 through June 30; the third quarter, the period from July 1 through September 30; and the fourth quarter, the period from October 1 through December 31.

For timing and manner of payment of the Employer Spending Requirement, see Regulation 6.2.

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REGULATION 2: COVERED EMPLOYERS

2.1 Definition of Employer

An employer is an employing unit as defined in Section 135 of the California Unemployment Insurance Code or any person defined in Section 18 of the California Labor Code. An employer includes all members of a "controlled group of corporations" as defined in Section 1563(a) of the United States Internal Revenue Code, and the determination shall be made without regard to Sections 1563(a)(4) and 1563(a)(3)(C) of the Internal Revenue Code.

2.2 Covered Employer

(A) A "covered employer" is:

(1) any Medium-size or Large Business, as defined in subsection C below, that;

(2) engages in business within the City and is required to obtain a valid San Francisco business registration certificate pursuant to Article 12 of the Business and Tax Regulations Code.

(B) Whether an employer is physically located within the geographic boundaries of the City and County of San Francisco has no bearing on whether it meets the definition of a "covered employer." (In contrast, however, only persons who work for a covered employer within the geographic boundaries of the City and County of San Francisco may be considered "covered employees." *See* Regulation 3.)

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(C) The law defines three categories of employers:

(1) Large Business: an employer for which an average of 100 or more persons per week perform work for compensation during a quarter. This category shall include nonprofit corporations for which an average of 100 or more persons per week perform work for compensation during a quarter.

(2) Medium-size Business: an employer for which an average of 20 to 99 persons per week perform work for compensation during a quarter. This category shall include only those nonprofit corporations for which an average of 50 to 99 persons per week perform work for compensation during a quarter.

(3) Small Business: an employer for which an average of 19 or fewer persons per week perform work for compensation during a quarter.

(D) For the purposes of determining employer size, the term "persons":

(1) shall include all employees, regardless of their status or classification as seasonal, permanent or temporary, full-time or part-time, contracted (whether employed directly by

the employer or through a temporary staffing agency, leasing company, professional employer organization, or other entity) or commissioned;

(2) shall not be limited to covered employees, as defined in Regulation 3; and

(3) shall include both those who work within San Francisco and those who work outside of San Francisco.

(E) For businesses employing a fluctuating number of employees during a quarter, employer size will be determined based on the average number of persons per week performing work for compensation during the applicable quarter.

(F) Effective Dates of Coverage

(1) This law shall be effective on January 1, 2008 for all employers for which an average of 50 or more persons per week perform work for compensation during a quarter.

(2) This law shall become effective April 1, 2008 for all for-profit businesses for which an average of 20 or more persons per week perform work for compensation during a quarter.

(3) Non-profit Medium-size Businesses for which an average of 49 or fewer persons per week perform work for compensation during a quarter and all Small Businesses are exempt from the requirements of this Ordinance.

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REGULATION 3: COVERED EMPLOYEES

3.1 Covered Employees

(A) A covered employee is any person who:

(1) qualifies as an employee entitled to payment of minimum wage pursuant to the Minimum Wage Ordinance, Chapter 12R of the San Francisco Administrative Code;

(2) has been employed by his or her employer for 90 calendar days after his or her first day of work (including any period of leave to which an employee is legally entitled); and,

(3) in a particular week performs at least the number of hours of work specified below:

(a) Beginning January 1, 2008: in a particular week performs at least 10 hours of work for the employer within the geographic boundaries of the City and County of San Francisco.

(b) Beginning January 1, 2009: in a particular week performs at least 8 hours of work for the employer within the geographic boundaries of the City and County of San Francisco.

(c) For employees whose work hours fluctuate from week to week, eligibility will be determined based on the average number of hours worked per week during the applicable quarter.

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(B) 90-Calendar-Day Eligibility Period. The 90-calendar-day eligibility period need not be continuous, consecutive, nor completed in the same calendar year.

(1) For an employee who is separated from employment prior to completing the eligibility period, the prior days of employment shall count towards the eligibility period if the employee returns to work within one (1) year of the most recent separation date.

(2) An employee who is separated from employment after completing the eligibility period shall not be required to complete a new eligibility period, if the employee is rehired within one (1) year of the most recent separation date.

(C) Work Performed "Within" the City and County of San Francisco

(1) While employees who travel *through* San Francisco in the performance of their job duties shall not be considered to have performed work in San Francisco, an employee whose work requires stops in San Francisco (for example, to make pick-ups or deliveries) shall be considered to have performed work in San Francisco. For these employees, hours worked shall include travel within the geographic boundaries of the City and County of San Francisco. *See* Regulation 6.1(C)(1)(c).

(2) Work performed on city-owned or city-leased property outside the geographic boundaries of the City and County of San Francisco shall not be considered in meeting the hours requirement in Regulation 3.1(A)(3).

(3) For employees who live in San Francisco, work performed for a covered employer from the employee's own home, including telecommuting, shall qualify as work performed "within" the City and County of San Francisco.

(D) An employee's status or classification as seasonal, permanent or temporary, full-time or part-time, exempt or non-exempt, salaried or hourly, or contracted (whether employed directly by the employer or through a temporary staffing agency, leasing company, professional employer organization, or other entity) or commissioned shall not be considered in determining whether that employee is a covered employee.

(E) Employees made available to work through the services of a temporary staffing agency, leasing agency, professional employer organization, or other entity serving the same or similar function may or may not be considered employees of such entity. Both the client and the temporary staffing, leasing, professional employer, or similar entity may be considered an employer under this Ordinance, and each party shall have an obligation to ensure that the Employer Spending Requirement is met.

(F) Whether an employee is simultaneously employed by more than one employer shall not impact a covered employer's responsibilities under this law.

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3.2 Covered Employee Exemptions

(A) The following persons are not covered employees under the HCSO:

(1) Persons who are managerial, supervisory, or confidential employees, unless such employees earn under $74,558 annually (or $35.85 hourly) in 2007. For each year thereafter, this figure shall increase by an amount corresponding to the prior year's increase, if any, in the Consumer Price Index for urban wage earners and clerical workers for the San Francisco-Oakland-San Jose metropolitan statistical area in California. For purposes of this exemption category,

(a) "managerial employee" is defined as an employee who has authority to formulate, determine, or effectuate employer policies by expressing and making operative the decisions of the employer and who has discretion in the performance of his/her job independent of the employer's established policies;

(b) "supervisory employee" is defined as an employee who has authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend any such action, if the exercise of this authority or responsibility is not of a merely routine or clerical nature, but requires the use of independent judgment;

(c) "confidential employee" is defined as an employee who acts in a confidential capacity to formulate, determine, and effectuate management policies with regard to labor relations, or regularly substitutes for employees having such duties.

(2) Persons who are eligible to receive benefits under Medicare (as distinguished from Medicaid/Medi-Cal) or TRICARE/CHAMPUS (the federal health care and health benefits program for active duty and retired members of the uniformed services, their families, and survivors);

(3) Persons who are "covered employees" as defined in Section 12Q.2.9 of the San Francisco Administrative Code (Health Care Accountability Ordinance), if the employer meets the requirements set forth in Section 12Q.3 of the San Francisco Administrative Code for those employees;

(4) Persons who are employed by a non-profit corporation for up to one year as trainees in a bona fide training program consistent with federal law, which training program enables the trainee to advance into a permanent position, provided that the trainee does not replace, displace, or lower the wage or benefits of any existing position or employee;

(5) Persons who provide verification that they are receiving health care services through another employer, either as an employee or by virtue of being the spouse, domestic partner, or child of another person – provided that the employer obtains from those persons a voluntary written waiver of the health care expenditure requirements of the HCSO as follows. The employer must make its required health care expenditures on behalf of the employee unless all of the following requirements are met:

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(a) Employers must use the Employee Voluntary Waiver Form provided in Appendix A.

i. The form must be voluntarily completed by the employee without pressure or coercion from the employee's coworkers or the employer, including, supervisor(s), manager(s), or their agents.

ii. An employee waiver is valid for one year, at which point a new waiver must be signed.

iii. Employees reserve the right to revoke their voluntary waiver at any time; however, the revocation must be submitted in writing.

iv. Employers must provide the employee with a complete copy of the Voluntary Waiver Form.

v. An electronic copy of the Voluntary Waiver Form shall be acceptable, provided that the employee receive a hard copy of any form(s) signed by the employee and the employee is readily able to access copies of such forms.

(b) Employers must maintain in their records a Voluntary Waiver Form signed by each employee for whom the employer seeks to claim an exemption from the requirements of the HCSO, including information regarding the type and source of coverage (e.g., health insurance provided through the employer of the employee's spouse), as specified on the Voluntary Waiver Form, updated annually.

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REGULATION 4: HEALTH CARE EXPENDITURES

4.1 Definition of Health Care Expenditure

(A) A health care expenditure is any amount paid by a covered employer to its covered employees or to a third party on behalf of its covered employees for the purpose of providing health care services for covered employees or reimbursing the cost of such services for its covered employees.

(B) Health care services means medical care, services, or goods that may qualify as tax deductible medical care expenses under Section 213 of the Internal Revenue Code, or medical care, services, or goods having substantially the same purpose or effect as such deductible expenses. Qualifying medical expenses include dental treatments and fees paid to dentists for x-rays, fillings, braces, extractions, dentures, and the like; eyeglasses and contact lenses needed for medical reasons; and fees for eye examinations and eye surgery to treat defective vision.

4.2 Examples of Qualifying Health Care Expenditures

(A) Each covered employer has discretion as to the type of health care expenditure it chooses to make for its covered employees. Examples of health care expenditures include, but are not limited to:

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(1) Payments to a third party to provide health care services for a covered employee, e.g., health insurance premiums;

(2) Expenditures made by self-insured and/or self-funded insurance programs;

(3) Contributions on behalf of a covered employee to a health benefit flexible spending account, a health savings account, a health reimbursement account, a medical spending account (as defined under sections 125, 223 of the federal Internal Revenue Code and Publication 969 of the Internal Revenue Service), or to any other account having substantially the same purpose or effect without regard to whether such contributions qualify for a tax deduction or are excludable from employee income;

(4) Reimbursement to a covered employee for expenses incurred in the purchase of health care services;

(5) Costs incurred in the direct delivery of health care services for a covered employee; and,

(6) Payments on behalf of a covered employee to the City of San Francisco:

(a) to fund membership in the Health Access Program/*Healthy San Francisco*; or

(b) to establish and maintain medical reimbursement accounts for covered employees.

(B) Health care expenditures shall not include any payment made directly or indirectly to obtain workers' compensation, State Disability Insurance, Social Security, Medicare, or any other coverage required by any other local, state, or federal law.

> **(1) Prevailing Wage/Public Works Contracts.** Payment of the prevailing wage fringe benefit requirement in cash (as part of the covered employee's paycheck or otherwise) shall not satisfy the Employer Spending Requirement of this Ordinance.

(C) Employer health care expenditures shall include administrative costs paid to a third party for the purpose of providing health care services for covered employees, but shall not include administrative costs incurred by the employer, but not paid to a third party. Such costs are properly considered a business expense of the employer.

(D) Health care expenditures made on behalf of a covered employee for the benefit of his or her domestic partner, spouse, family member, or other dependent shall be included in determining whether an employer has met its required expenditure to or on behalf of the covered employee.

4.3 Other Qualifying Health Care Expenditures

Qualifying health care expenditures shall not be limited to those that qualify as tax deductible medical care expenses under Section 213 of the Internal Revenue Code and Publication 502 of the Internal Revenue Service, but may include medical care, services, or goods having substantially the same purpose or effect. Examples of qualifying expenditures include vision and dental coverage; nonprescription drugs, including, but not limited to, antacids, allergy medicines, pain relievers, and cold medicines; doctor's fees; and necessary hospital services not paid for by insurance.

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REGULATION 5: HEALTH CARE EXPENDITURE RATES

5.1 Definition of Health Care Expenditure Rate

The health care expenditure rate is the amount of health care expenditure that a covered employer is required to make for each hour paid for each of its covered employees during a quarter.

5.2 Health Care Expenditure Rates

(A) The health care expenditure rate for a covered employer is determined by that employer's size:

(1) Large Business. Beginning January 1, 2008, Large Businesses for which an average of 100 or more persons per week perform work for compensation during a quarter are required to make a health care expenditure of $1.76 per hour for each hour paid for each of its covered employees.

(2) Medium-Size Business

(a) Beginning January 1, 2008, Medium-size Businesses for which an average of 50-99 persons per week perform work for compensation during a quarter are required to make a health care expenditure of $1.17 per hour for each hour paid for each of its covered employees.

(b) Beginning April 1, 2008, all Medium-size Businesses (including those for which an average of 20-49 persons per week perform work for compensation during a quarter), except nonprofit corporations exempt from the definition of a covered employer, are required to make a health care expenditure of $1.17 per hour for each hour paid for each of its covered employees.

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(B) Increases to Health Care Expenditure Rates

(1) For all covered businesses, the health care expenditure rate will be increased by 5% on January 1, 2009. Through 2009, the employer health care expenditure rate is as follows:

Employer Health Care Expenditure Rate Schedule				
Business Size		January 1 2008	April 1 2008	January 1 2009
Large	100+ Employees	$1.76/hour		$1.85/hour
Medium	50-99 Employees	$1.17/hour		$1.23/hour
	20-49 Employees *	Not Applicable	$1.17/hour	
Small	1-19 Employees	Not Applicable		

* Non-profits with less than 50 employees are exempt from the spending requirement.

(2) From January 1, 2010 and each year thereafter, the "health care expenditure rate" shall be determined annually based on the "average contribution" for a full-time employee to the City Health Service System pursuant to Section A8.423 of the San Francisco Charter based on the annual ten-county survey amount for the applicable fiscal year, with such average contribution prorated on an hourly basis by dividing the monthly average contribution by one hundred seventy-two (172) (the number of hours worked in a month by a full-time employee). The "health care expenditure rate" shall be seventy-five percent (75%) of the annual ten-county survey amount for the applicable fiscal year for large businesses and fifty percent (50%) for medium-sized businesses. Beginning in 2009 and in each year thereafter, the OLSE shall publish, by March 1, the adjusted expenditure rates for the upcoming calendar year

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REGULATION 6: CALCULATING & MAKING HEALTH CARE EXPENDITURES

6.1 Calculating Health Care Expenditures

(A) A covered employer's required health care expenditure is the sum of the health care expenditure that the covered employer is required to make each quarter for each of its covered employees.

(B) The required health care expenditure is calculated by multiplying the total number of "hours paid," as defined below, to each covered employee during the quarter (starting on the first day of the calendar month following 90 calendar days after a covered employee's first day of work) by the applicable health care expenditure rate specified in Regulation 5.2.

(C) The required health care expenditures are based on hours paid, which may or may not be hours actually worked. "Hours paid" includes both hours for which a person is paid wages for work performed within San Francisco and hours for which a person is entitled to be paid wages, including, but not limited to, paid vacation hours, paid time off, and paid sick leave hours, but not exceeding 172 hours in a single month or 516 hours in a single quarter.

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(1) Work Performed and "Hours Paid" within San Francisco

(a) Any work performed by covered employees within San Francisco must be tracked by the employer. Unless there is clear and convincing evidence otherwise, all hours worked by covered employees will be presumed to be for work performed within San Francisco.

(b) For covered employees who perform some work outside of San Francisco, "hours paid" that are not hours actually worked (e.g., paid vacation hours, paid time off, and paid sick leave hours) will be calculated on a pro rata basis.

(c) Employees whose work requires stops in San Francisco (for example, to make pick-ups or deliveries) shall be considered to be performing work in San Francisco, and their "hours worked" shall include travel within the City and County of San Francisco.

(d) For covered employees who live in San Francisco and perform work for a covered employer from the employee's own home, including telecommuting, "hours worked" shall include all hours worked from home.

6.2 Timing and Manner of Health Care Expenditures

(A) The required health care expenditure must be made regularly, and no later than 30 days after the end of the preceding quarter.

(1) Employers meeting the requirements of the limited exception outlined in Regulation 6.2(B)(2) shall not be required to make expenditures under such plans quarterly.

(2) Nothing in this regulation shall prevent an employer from making regular expenditures prospectively, or before the end of a quarter, in order to obtain health care or health coverage for a covered employee during such quarterly period.

(B) Subject to the following limited exceptions, covered employers must make health care expenditures to or on behalf of each covered employee. Ordinarily, payments to or on behalf of one covered employee that exceed the required health expenditure for that employee will not be included in determining whether an employer has met its total required health care expenditures for all employees. However:

(1) A covered employer that provides uniform health coverage to some or all of its covered employees shall, with respect to those employees, be deemed to comply with the spending requirement of this Ordinance if the average expenditure rate per employee meets or exceeds the applicable expenditure rate (outlined in Regulation 5) for that employer.

(2) A covered employer that provides health coverage to some or all of its covered employees through a self-funded/self-insured plan shall, with respect to those employees, be deemed to comply with the spending requirement of this Ordinance if the preceding year's average expenditure rate per employee meets or exceeds the applicable expenditure rate (outlined in Regulation 5) for that employer.

(3) The average expenditure rate shall be calculated by dividing the total amount of health care expenditures made for such employees by the total number of hours paid to such employees.

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(C) An employer may choose more than one option to satisfy its duty to make the required health care expenditures for one or more of its covered employees. An employer may, for example, choose to purchase health insurance for its full-time employees, but make payment to the City to fund part-time employees' membership in the Health Access Program/*Healthy San Francisco*.

(D) The required health care expenditure must be made in full each quarter. Thus, an employer who purchases a health insurance program with premiums that are less than the required expenditure must choose a second option to make the expenditure in full. For example, the employer may choose to pay the remainder to the City to establish and maintain medical reimbursement accounts for such employees.

(E) A covered employer that maintains a health care program that requires contributions by a covered employee shall not have satisfied its obligation to make the required health care expenditures merely by offering a covered employee the opportunity to participate in such a program. Should the employee decline to participate in such a program, the employer shall not have satisfied its obligation to make the required health care expenditures.

REGULATION 7: ADDITIONAL EMPLOYER RESPONSIBILITIES

7.1 Employer Notice to Employee of Payment to the City

A covered employer who satisfies its obligation to make the required health care expenditures by making payment to the City shall provide its covered employees with notice, using the form provided in Appendix B.

7.2 Employer Recordkeeping

(A) Covered employers shall keep, or cause to be kept, for a period of four years from the covered employees' dates of employment:

> **(1)** itemized pay statements, as mandated by California Labor Code Section 226, which requires the following: (a) gross wages earned, (b) total hours worked by the employee (unless salaried), (c) the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis, (d) all deductions, aggregated, (e) net wages earned, (f) the inclusive dates of the period for which the employee is paid, (g) the name of the employee and his or her social security number/the last four digits of his or her social security number or an employee identification number other than a social security number may be shown on the itemized statement, (h) the name and address of the legal entity that is the employer, and (i) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee;
>
> **(2)** the employee's address, telephone number, date of first day of work;
>
> **(3)** records sufficient to establish compliance with the Employer Spending Requirements of this Ordinance, including, as applicable, records of health care expenditures made, calculations of health care expenditures required under this Ordinance for each covered employee, and proof documenting that such expenditures were made at least quarterly each year;
>
> and, if applicable,
>
> **(4)** a signed Employee Voluntary Waiver Form (*see* Appendix A) for every employee for whom a covered employer seeks to claim an exemption from the Employer Spending Requirement; and
>
> **(5)** a copy of the Employer Notice to Employee of Payment to the City (*see* Appendix B).

(B) Employers meeting the requirements of the limited exception outlined in Regulation 6.2(B)(2) shall not be required to demonstrate that expenditures under such plans were made quarterly.

(C) All records necessary to establish compliance with the Employer Spending Requirements of this Ordinance shall be made accessible by covered employers to the OLSE.

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(D) Where an employer does not maintain or retain adequate records documenting the health care expenditures made, or does not allow the OLSE reasonable access to such records, it shall be presumed that the employer did not make the required health care expenditures for the quarter for which records are lacking. This presumption shall be rebutted only by clear and convincing evidence.

7.3 Employer Reporting

Covered employers shall provide information to the City regarding its health care expenditures on an annual basis. Such information shall be provided on the HCSO Mandatory Annual Reporting Form, which shall be mailed to all registered businesses and returned with the employer's annual business registration submission to the City, as mandated by Article 12 of the Business and Tax Regulations Code. Additional copies of the HCSO Mandatory Annual Reporting Form may be obtained from the OLSE.

7.4 Employer Cooperation with OLSE Investigation & Enforcement

All covered employers shall cooperate fully with the OLSE in connection with any investigation of an alleged violation of this Ordinance or with any audit or inspection conducted by the OLSE.

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7.5 Prohibition against Actions or Attempts to Avoid Employer Coverage

(A) It is unlawful for any employer to reduce the number of employees in order to:

(1) avoid being considered a covered employer, or to

(2) be subject to a lower health care expenditure rate.

(B) In the event of an investigation on a claim based on Section 14.4(c) of the Ordinance, the employer shall be required to demonstrate that such reduction in staffing was for a valid business reason.

7.6 Prohibition against Retaliation

(A) It shall be unlawful for any employer to deprive or threaten to deprive any person of employment, take or threaten to take any reprisal or retaliatory action against any person, or directly or indirectly intimidate, threaten, coerce, command or influence or attempt to intimidate, threaten, coerce, command or influence any person because such person has cooperated or otherwise participated in an action to enforce, inquire about, or inform others about the requirements of this Ordinance.

(B) Taking adverse action against a person within ninety (90) days of the person's exercise of rights protected under this Ordinance shall raise a rebuttable presumption of having done so in retaliation for the exercise of such rights.

7.7 Prohibition against Discrimination

It shall be unlawful for any employer to refuse to hire, employ, or select for a training program leading to employment; to discharge from employment or from a training program leading to employment; or to discriminate against a person in compensation or in terms, conditions, or privileges of employment, based on whether s/he possesses health insurance coverage.

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REGULATION 8: OLSE ENFORCEMENT

8.1 OLSE Investigation & Enforcement

(A) The OLSE has the authority to conduct investigation and monitoring and to seek, for violations of this Ordinance, all of the penalties imposed by this Ordinance in order to further its purposes. The Labor Standards Enforcement Officer and other City employees and agents or designees authorized to assist in the administration and enforcement of the requirements of this Ordinance shall have the right to engage in random inspections of employment sites; to have access to workers and other witnesses; and to conduct audits of employer records as reasonably deemed necessary to determine compliance with this Ordinance, including, but not limited to, employee time sheets, payroll records, employee paychecks, and other documents described in Regulation 7.2.

(B) Where prompt compliance is not forthcoming, the OLSE may take any appropriate enforcement action to secure compliance, including initiating a civil action, and/or, except where prohibited by state or federal law, requesting that City agencies or departments revoke or suspend any registration certificates, permits, or licenses held or requested by the employer or person until such time as the violation is remedied.

Cited in Golden Gate Restaurant v. City and County of San Francisco, No. 07-17370, archvied on January 11, 2008

8.2 Administrative Complaint Procedure

(A) The OLSE shall have sole authority over the administration of the following complaint procedure. This procedure shall include, but need not be limited to, the following:

(1) Any person may file a complaint alleging one or more violations of this Ordinance;

(2) Before beginning to investigate the complaint, the Labor Standards Enforcement Officer shall determine if the allegations of the complaint are sufficient and, based on that assessment, shall determine either to dismiss it or to proceed with an investigation;

(3) If the Labor Standards Enforcement Officer determines at any time that the allegations contained in the complaint are without merit, the Labor Standards Enforcement Officer shall notify the complainant; and

(4) If the Labor Standards Enforcement Officer finds that any allegations in the complaint have merit, the Labor Standards Enforcement Officer shall investigate the matter.

(B) This complaint procedure shall not preclude the Labor Standards Enforcement Officer from initiating or proceeding with an investigation on his or her own authority.

8.3 Notice of Violation

(A) If the OLSE determines that an employer may have violated or is not in compliance with this Ordinance, the OLSE shall issue written notification to the employer mandating compliance within no fewer than ten (10) calendar days from the date of the notification.

(B) The OLSE may, at its discretion, allow the employer additional time beyond the ten (10) calendar days to make the corrections should the OLSE determine that the employer is making a good faith effort to comply.

(C) If, after ten (10) days of the Notice of Violation to the employer by the OLSE, the violation or failure to comply continues and no resolution is imminent, the OLSE may issue a Determination of Violation.

8.4 Determination of Violation

(A) The Determination of Violation shall include:

(1) a description of the violation;

(2) a citation of the provisions of the law violated;

(3) a description of the corrective action required and a timeline within which the action(s) must be completed;

(4) the amount of administrative penalty imposed for the violation(s) and a timeline for payment of such penalty, if applicable;

(5) a description of the process for appealing the Determination of Violation, including the deadline for filing such an appeal; and

(6) the name and signature of the Director of the OLSE or his/her designee.

Cited in Golden Gate Restaurant v. City and County of San Francisco, No. 07-17370, archived on January 11, 2008

8.5 Service

(A) Service of a Notice of Violation or Determination of Violation may be accomplished as follows:

(1) The OLSE may obtain the signature of the employer or a representative of the employer responsible for the violation to establish personal service of the document; or

(2) The OLSE may post the document by affixing the document to a surface in a conspicuous place on the employer's place of business or the fixed location within the City from or at which the employer conducts business in the City; or

(3) The OLSE may serve the document by first class mail as follows:

(a) The document shall be mailed to the employer by first class mail, postage prepaid, with a declaration of service under penalty of perjury; and

(b) A declaration of service shall be made by the person mailing the document, show the date and manner of service by mail, and recite the name and address of the employer to whom the Notice of Violation or Determination of Violation is issued.

Service of the document by mail in the manner described above shall be effective on the date of the mailing.

Cited in Golden Gate Restaurant v. City and County of San Francisco,
No. 07-17370, archvied on January 11, 2008

REGULATION 9: CORRECTIVE ACTION AND ADMINISTRATIVE PENALTIES

9.1 Corrective Action

The OLSE may order employers who violate this Ordinance to take appropriate corrective action to address violations of this Ordinance. The OLSE shall not be limited to ordering the actions described below, but may order any other actions it deems necessary to correct the violation(s) committed. Where the OLSE has reason to believe that a violation has occurred, it may order any appropriate temporary or interim relief to mitigate the violation or maintain the status quo, pending completion of a full investigation or hearing.

9.2 Administrative Penalties

(A) If corrective action is not taken, the OLSE may impose administrative penalties upon employers who violate this Ordinance, including, but not limited to, the violations described below. All penalties may be assessed by means of a Determination of Violation issued by the Director of the OLSE or his/her designee.

Cited in Golden Gate Restaurant v. City and County of San Francisco, No. 07-17370, archvied on January 11, 2008

VIOLATION	CORRECTIVE ACTION	ADMINISTRATIVE PENALTY
Failure to make the required health care expenditures (Admin. Code §§ 14.3(a) & 14.4(e)):	The party shall be ordered to make the required health care expenditure on behalf of each employee or person whose rights under this Ordinance was violated, and/or to reimburse the individual for any and all out-of-pocket medical expenses incurred by that individual for the period during which the employer was in violation of this Ordinance, up to the amount of the required health care expenditure. This payment shall be made retroactively, from the date the expenditure was due, and continuing until the case is resolved to the satisfaction of the OLSE.	The penalty assessed shall be up to one-and-one-half times the total expenditures that a covered employer failed to make, plus interest of up to ten (10) percent on all due and unpaid health care expenditures, from the date payment should have been made. The total penalty for this violation shall not exceed $1,000 for each employee for each week that such expenditures were or are not made.
Failure to cooperate with the OLSE or otherwise impeding the OLSE's ability to conduct an audit or investigation (Admin. Code §§ 14.3(b) & 14.4(e)):	The party shall be ordered to cooperate with the OLSE, effective immediately.	The penalty assessed shall be $25 per day for each day that the violation occurred or occurs.
Failure to allow reasonable access to records of health care expenditures (Admin. Code §§ 14.3(b) & 14.4(e)):	The party shall be ordered to provide the OLSE with reasonable access to records of health care expenditures.	The penalty assessed shall be $25 for each worker whose records are at issue for each day that the violation occurred or occurs.

Failure to maintain or retain accurate and complete records, including destruction of relevant evidence (Admin. Code §§ 14.3(b) & 14.4(e); Regulation 7.2):	The party shall be ordered to produce the records and documents outlined in Regulation 7.2 and to cooperate with the OLSE in reconstructing the records it should have maintained.	The penalty assessed shall be $500.
Failure to satisfy the annual reporting requirement (Admin. Code §§ 14.3(b) & 14.4(e)):	The party shall be ordered to satisfy its annual reporting requirement.	The penalty assessed shall be $500.
Reduction of the number of employees in order to **(1)** avoid being considered a covered employer, or to **(2)** be subject to a lower health care expenditure rate (Admin. Code § 14.4(c); Regulation 7.5):	The party shall demonstrate that such reduction was not done for the purpose of evading the obligations of this Ordinance, but for a valid business reason, or shall be in violation of this Ordinance. If unable to do so, the party shall be ordered to make the required health care expenditure on behalf of each employee or person whose rights under this Ordinance was violated, and/or to reimburse the individual for any and all out-of-pocket medical expenses incurred by that individual for the period during which the employer was in violation of this Ordinance, up to the amount of the required health care expenditure. This payment shall be made retroactively, from the date the expenditure was due, and continuing until the case is resolved to the satisfaction of the OLSE.	The penalty assessed shall be $25 per day for each day that the violation occurred or occurs.
Retaliation, including harassment, and/or discrimination in violation of the Ordinance (Admin. Code § 14.4(d); Regulations 7.6-7.7):	The party shall be ordered to cease, or cause to cease, any and all retaliatory and/or discriminatory actions and, if applicable, to reinstate or otherwise compensate an employee whose rights under this Ordinance was violated.	The penalty assessed shall be $100 for each worker or person whose rights under this Ordinance was violated for each day that the violation occurred or occurs.

Cited in Golden Gate Restaurant v. City and County of San Francisco, No. 07-17370, archvied on January 11, 2008

(B) Payment of the penalty shall not excuse the failure to correct the violation, nor shall it bar any further enforcement action by the OLSE.

(C) If penalties and/or costs are the subject of administrative appeal or judicial review, then the accrual of such penalties and/or costs shall be stayed until the determination of such appeal or review is final.

9.3 Payment of Penalties and Interest

(A) All administrative penalties shall be made payable to the City and County of San Francisco, be due within thirty (30) days from the date of the Determination of Violation, and be deposited in the City's General Fund when collected.

(B) All interest owing on unpaid health care expenditures shall be made payable to the employee on whose behalf the expenditures should have been made and be due within thirty (30) days from the date of the Determination of Violation.

9.4 Collection of Penalties; Civil Enforcement

(A) The failure of any employer to pay a penalty assessed by Determination of Violation within the time specified on the Determination of Violation constitutes a debt to the City.

(B) The City Attorney may bring a civil action or pursue any other legal remedy to recover civil penalties for the violations set forth in subsections 14.4 (e)(1&2) of this Ordinance in the same amounts set forth in those subsections, and to recover the City's enforcements costs, including attorneys' fees. Enforcement costs shall not count toward any maximum penalty amount set forth in these regulations.

(C) The City may create and impose liens against any property owned or operated by an employer who fails to pay a penalty assessed by the Determination of Violation. The procedures provided for in Article XX of Chapter 10 of the San Francisco Administrative Code shall govern the imposition and collection of such liens.

Cited in Golden Gate Restaurant v. City and County of San Francisco, No. 07-17370, archived on January 11, 2008

REGULATION 10: ADMINISTRATIVE APPEALS

10.1 Administrative Appeals

(A) Persons receiving a Determination of Violation may appeal it within fifteen (15) days from the date the document is served. The appeal must:

(1) be in writing and specify the basis for the appeal in detail,

(2) indicate a return address,

(3) be accompanied by the penalty amount,

(4) be filed with the Controller's Office, and

(5) be filed with a copy to the OLSE.

The failure of any person to file an appeal in accordance with the provisions of this Section shall constitute concession to the assessment, and the Determination of Violation shall be deemed final upon expiration of the 15-day period.

(B) Within fifteen (15) days of receiving a proper request for appeal, the Controller or his or her designee shall appoint a hearing officer (who shall not be employed in the Office of Labor Standards Enforcement) to hear and decide the administrative appeal and shall so advise the OLSE and the appellant.

Cited in Golden Gate Restaurant v. City and County of San Francisco, No. 07-17370, archvied on January 11, 2008

(C) The hearing officer shall promptly set a date, time and place for a hearing on the appeal. Written notice of the time and place for the hearing may be served by first class mail.

(1) Service of the notice must be made at least ten (10) days prior to the date of the hearing to the appellant.

(2) The failure of any person to appear at the hearing shall constitute concession to the assessment,

(3) Except as otherwise provided by law, the failure to receive a properly addressed notice of the hearing shall not affect the validity of any proceedings under this Ordinance.

(D) The hearing must commence no later than thirty (30) days after service of notice of the hearing and conclude within seventy-five (75) days of such notification, unless that time is extended by mutual agreement of all parties.

(E) No later than five (5) days prior to the hearing, the appellant and the OLSE shall submit to the hearing officer, with simultaneous service on the opposing party, written information including, but not limited to, the following: the statement of issues to be determined by the hearing officer and a statement of the evidence to be offered and the witnesses to be presented at the hearing.

(F) The hearing officer appointed by the Controller or the Controller's designee shall conduct all appeal hearings under this Ordinance. The hearing officer may accept evidence on which persons would commonly rely in the conduct of their serious business affairs, including, but not limited to, the following:

(1) A valid Determination of Violation shall be prima facie evidence of the violation;

(2) The hearing officer may accept testimony relating to the violation and/or to the appropriate means of correcting the violation by declaration under penalty of perjury;

(3) The person responsible for the violation, or any other interested person, may present testimony or other evidence concerning the violation and the means and time frame for correction.

10.2 Burden of Proof

The appellant shall have the burden of proving that the basis for the Determination of Violation is incorrect.

10.3 Hearing

Cited in Golden Gate Restaurant v. City and County of San Francisco, No. 07-17370, archived on January 11, 2008

(A) Hearing Record. The hearing shall be open to the public and shall be tape-recorded. Any party to the hearing may, at his or her own expense, cause the hearing to be recorded and transcribed by a certified court reporter. The hearing officer may continue the hearing and request additional information from either party prior to issuing a written decision.

(B) Findings and Decision. The hearing officer shall make findings based on the record of the hearing and issue a written decision based on such findings within fifteen (15) days of conclusion of the hearing. The hearing officer's decision may:

(1) uphold the issuance of a Determination of Violation and penalties stated therein,

(2) dismiss a Determination of Violation, or

(3) uphold the issuance of the Determination of Violation but reduce, waive or conditionally reduce or waive the penalties stated in a Determination of Violation or any late fees assessed if mitigating circumstances are shown and the hearing of officer finds specific grounds for reduction or waiver in the evidence presented at the hearing.

The hearing officer may impose conditions and deadlines for the correction of violations or the payment of outstanding civil penalties.

(C) Finality of Hearing Officer's Decision. The decision of the hearing officer shall be final. If the hearing officer concludes that the violation(s) charged did not occur or that the person charged in the Determination of Violation was not the responsible party, the OLSE shall refund or cause to

be refunded the penalty amount to the party that deposited such amount. The hearing officer's decision shall be served on the appellant and the OLSE by certified mail.

(D) Writ of Mandate. The sole means of review of the hearing officer's decision shall be made by filing in the San Francisco Superior Court a petition for a writ of mandate under Section 1094.5 of the California Code of Civil Procedure.

Cited in Golden Gate Restaurant v. City and County of San Francisco,
No. 07-17370, archvied on January 11, 2008

EMPLOYEE VOLUNTARY WAIVER FORM

Effective 2008, San Francisco law requires your employer to make health care expenditures on your behalf. A health care expenditure is an amount of money paid by your employer to you or to a third party for the purpose of providing you with access to health care services. For example, your employer may:

- make payments to enroll you in a health insurance program,
- reimburse you for the costs of health care services you get on your own,
- make payments on your behalf to the City's new *Healthy San Francisco* program, or
- establish and maintain a reimbursement account for your health care expenses.

You have been asked to complete this Voluntary Waiver Form because your employer is requesting a waiver from the legal requirement described above. Your employer may obtain a waiver from this legal requirement if you are currently receiving health care services through another employer, either as an employee of that other employer or by virtue of being the spouse, domestic partner, or child of a person employed by that employer. To support a waiver request, your employer must obtain a new signed Voluntary Waiver Form from you each year, updated as necessary to reflect any changes to the information provided.

Even if you receive health care services through another employer, you are entitled to receive health care services from this employer. If you sign this form, your employer may stop making a mandatory health care expenditure to you or on your behalf. If you want your employer to provide you with access to health care services, do **not** sign this form. It is illegal for your employer to force or to pressure you to sign this form.

You have the right to cancel or revoke this voluntary waiver at any time. Your revocation must be submitted in writing. If you revoke this waiver, your employer will be required to make health care expenditures to you or on your behalf.

Employee Name _____
Employee Address _____

Name of Employer Requesting Waiver: _____
Employer Address: _____
Employer Contact Person: _____
Employer Telephone No.: _____

I hereby certify that I receive health care services through another employer or through my spouse, domestic partner, or parent(s), as indicated below:

If you receive health care services through another employer whom you work for and wish to provide a waiver to the employer listed above, please provide the information below:

Name of Employer Providing Health Care Services:
_____
Employer Address: _____
Employer Contact Person: _____
Employer Telephone No.: _____

Type of Coverage Provided to You:
□ health insurance (*provide name of provider below*)
_____
□ SF Health Access Program/*Healthy San Francisco*
□ reimbursement/direct payment of health care expenses
□ other (*describe*) _____

If you receive health care services through the employer of your parent, spouse, or domestic partner and wish to provide a waiver to the employer listed above, please provide the information below:

Name of Person Whose Coverage Extends to You:
_____
His/Her Relationship to You: _____
Name of His/Her Employer _____
His/Her Employer Address: _____
Employer Contact Person: _____
Employer Telephone No.: _____

Type of Coverage Provided to You:
□ health insurance (*provide name of provider below*)
_____
□ SF Health Access Program/*Healthy San Francisco*
□ reimbursement/direct payment of health care expenses
□ other (*describe*) _____

I hereby waive the right to the health care expenditures described above, made to me or my behalf by the employer listed above.

_____ Employee's Signature

_____ Today's Date

If you have any questions about your employer's obligations under the Health Care Security Ordinance, please call 554-7892 or visit www.sfgov.org/olse/hcso.

Para asistencia en Español, llame al 554-7892.
需要中文幫助，請電 554-7892.

Complete this section ONLY if you wish to revoke a Voluntary Waiver Form that you have signed and provided to your employer. *If you wish to waive your right to health care expenditures made to you or on your behalf by my employer, do NOT complete the portion below.*

REVOCATION OF VOLUNTARY WAIVER FORM

I no longer wish to waive the right to health care expenditures made to me or my behalf by my employer, pursuant to the San Francisco Health Care Security Ordinance.

_____ Employee's Signature

_____ Today's Date

Cited in Golden Gate Restaurant v. City and County of San Francisco No. 07-17370, archvied on January 11, 2008

NOTICE TO EMPLOYEE OF PAYMENT TO THE CITY

Employee Name: _____
Employee Address: _____

Employer Name: _____
Employer Address: _____
Employer Contact Person: _____
Employer Telephone No.: _____
Employer Tax ID#: _____

Effective 2008, San Francisco law requires your employer to make health care expenditures on your behalf. A health care expenditure is an amount of money paid by your employer to you or to a third party for the purpose of providing you with access to health care services.

For example, your employer may:

- make payments to enroll you in a health insurance plan,
- reimburse you for the costs of health care services you get on your own,
- make payments to the City so that the City may enroll you in its health care program.

Your employer has provided this Notice to inform you that it has chosen to make its required health care expenditures by making payments on your behalf to the City, so that the City may:

(1) enroll you in *Healthy San Francisco*, a program that provides participants with comprehensive health care services, or

(2) establish and maintain a Medical Reimbursement Account, which will reimburse you for medical expenses. For more information on *Healthy San Francisco* and the Medical Reimbursement Account, visit www.sfhp.org/HealthySanFrancisco. [NOTE: Website may change in 9/2007]

Cited in Golden Gate Restaurant v. City and County of San Francisco, No. 07-17370, archived on January 11, 2008

To receive these health care benefits, you <u>must</u> enroll in the City's program. You will receive a separate packet of information from *Healthy San Francisco* with instructions on how to enroll in this program. Be sure to:

(1) enroll as soon as possible, and

(2) bring this notice with you when you enroll.

If you do not receive your information packet, please contact *Healthy San Francisco* at (415) [INSERT TELEPHONE #, available 9/2007].

If you have any questions about your employer's obligations under the Health Care Security Ordinance,
please call 554-7892 or visit <u>www.sfgov.org/olse</u>.

Para asistencia en Español, llame al 554-7892.
需要中文幫助，請電 554-7892.

APPENDIX C: HEALTH CARE SECURITY ORDINANCE, as amended April 2, 2007

CHAPTER 14
SAN FRANCISCO ADMINISTRATIVE CODE
HEALTH CARE SECURITY ORDINANCE

Section 1: DECLARATION OF LEGISLATIVE FINDINGS AND INTENT

All San Francisco residents should have quality, affordable health care. Currently, approximately 82,000 adult San Francisco residents are uninsured, even though more than half of those individuals are employed. San Francisco taxpayers bear the cost of paying for emergency room visits and other unnecessarily expensive health care for the uninsured. By establishing a Health Access Program for uninsured San Francisco residents with an emphasis on preventive care and by requiring businesses to make reasonable health care expenditures on behalf of their employees depending on the businesses' ability to pay, the burden on San Francisco taxpayers for providing health care for the uninsured can be reduced. At the same time, San Francisco can offer uninsured individuals the choice to enroll in a system that provides quality health care for an affordable price and offer employers the choice to enroll their employees in that system. San Francisco also has a vital interest in preventing a "race to the bottom" in which employers stop paying for employee health care to remain competitive and instead shift those costs to San Francisco taxpayers.

Cited in Golden Gate Restaurant v. City and County of San Francisco, No. 07-17370, archived on January 11, 2008

(Added by Ord. 218-06, File No. 051919, App. 8/4/2006)

With the passage of Ordinance 218-06, the City and County of San Francisco ("City") enacted the San Francisco Health Care Security Ordinance ("HCSO"), the findings of which are incorporated herein by reference. The HCSO mandates the creation of a comprehensive health care reform program to address the current health care crisis in San Francisco. The HCSO seeks to ensure that all San Francisco residents, and all non-San Francisco residents who work in San Francisco, have access to affordable health care. The reforms required by the HCSO are further intended to alleviate the demands placed on San Francisco's emergency health care system by its 82,000 uninsured residents, as well as the uninsured non-San Francisco residents who work in San Francisco and utilize emergency health care services in San Francisco. Essential to the successful operation of this system is the HCSO's requirement that employers make minimum health care expenditures on behalf of employees covered by the Ordinance, whether the employers choose to satisfy the requirement by providing for health care benefits themselves in a manner of their choosing, or by making payments to the City and County of San Francisco, so that the City may provide for the health care needs of the employees who have not been provided benefits by their employers.

During the initial implementation phases of this program, the Department of Public Health determined that it would be better equipped to administer a comprehensive health care delivery system for uninsured San Francisco residents and uninsured

nonresidents who work in San Francisco if it were authorized to use employer expenditures directed to the City to establish and maintain reimbursement accounts from which employees covered by the Ordinance, including employees who are not San Francisco residents, could obtain reimbursement for health care expenditures. The Department of Public Health has further determined that compliance with the expenditure mandate would be made easier for employers if they were permitted to make payments to the City and County of San Francisco on behalf of their employees who live outsides of San Francisco, rather than merely on behalf of their employees who are San Francisco residents. The Board finds that these amendments, by making compliance easier for employers, and by improving the ability of the Department of Public Health to create and administer an effective, comprehensive health care system, will further effectuate the purposes of the Health Care Security Ordinance.

(Added by Ord. 69-07, File No. 070255, App. 4/2/2007)

Section 2: The San Francisco Administrative Code is hereby amended by adding Chapter 14, Sections 14.1 through 14.8, to read as follows:

SEC. 14.1. SHORT TITLE; DEFINITIONS.

Cited in Golden Gate Restaurant v. City and County of San Francisco, No. 07-17370, archvied on January 11, 2008

(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:

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

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

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

(d) The term "employee" shall not include persons who are managerial, supervisorial, or confidential employees, unless such employees earn annually under $72,450 or in 2007 and for subsequent years, the figure as set by the administering agency;

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

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

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

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

Cited in Golden Gate Restaurant v. City and County of San Francisco, No. 07-17370, archived on January 11, 2008

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

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

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

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

(7) "Health care expenditure" means any amount paid by a covered employer to its covered employees or to a third party on behalf of its covered employees for the purpose of providing health care services for covered employees or reimbursing the cost of such services for its covered employees, including, but not limited to (a) contributions by such employer on behalf of its covered employees to a health savings account as defined under section 223 of the United States Internal Revenue Code or to any other account having substantially the same purpose or effect without regard to whether such contributions qualify for a tax deduction or are excludable from employee income; (b) reimbursement by such covered employer to its covered employees for expenses incurred in the purchase of health care services; (c) payments by a covered employer to a third party for the purpose of providing health care services for covered employees; (d) costs incurred by a covered employer in the direct delivery of health care services to its covered employees; and (e) payments by a covered employer to the City to be used on behalf of covered employees. The City may use these payments to: (i) fund membership in the Health Access Program for uninsured San Francisco residents; and (ii) establish and maintain reimbursement accounts for covered employees, whether or not those covered employees are San Francisco residents. Notwithstanding any other provision of this subsection, "health care expenditure" shall not include any payment made directly or indirectly for workers' compensation or Medicare benefits.

Cited in Golden Gate Restaurant v. City and County of San Francisco, No. 07-17370, archived on January 11, 2008

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

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

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

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

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

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

Cited in Golden Gate Restaurant v. City and County of San Francisco, No. 07-17370, archived on January 11, 2008

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

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

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

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

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

(Added by Ord. 218-06, File No. 051919, App. 8/4/2006; Ord. 69-07, File No. 070255, App. 4/2/2007)

SEC. 14.2. SAN FRANCISCO HEALTH ACCESS PROGRAM AND REIMBURSEMENT ACCOUNTS.

(a) The San Francisco Department of Public Health shall administer the Health Access Program. Under the Health Access Program, uninsured San Francisco residents may obtain health care from a network consisting of San Francisco General Hospital and the Department of Public Health's clinics, and other community non-profit and private providers that meet the program's quality and other criteria for participation. The Health Access Program is not an insurance plan for Health Access Program participants.

(b) The Department of Public Health shall coordinate with a third party vendor to administer program operations, including basic customer services, enrollment, tracking service utilization, billing, and communication with the participants.

(c) The Health Access Program shall be open to uninsured San Francisco residents, regardless of employment status. Eligibility criteria shall be established by the Department of Public Health, but no person shall be excluded from the Health Access Program based on a pre-existing condition. Participants may enroll themselves as individuals, with the terms of enrollment to be determined pursuant to Section 14.4(a).

(d) The Health Access Program may be funded from a variety of sources, including payments from covered employers pursuant to Section 14.3, from individuals, and from the City. Funding from the City shall prioritize services for low and moderate income persons, with costs based on the Health Access Program participant's ability to pay.

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(e) The Health Access Program shall use the "Medical Home" model in which a primary care physician, nurse practitioner, or physician assistant develop and direct a plan of care for each Health Access Program participant, coordinate referrals for testing and specialty services, and monitor management of chronic conditions and diseases. Health Access Program participants shall be assigned to a primary care physician, nurse practitioner, or physician assistant.

(f) The Health Access Program shall provide medical services with an emphasis on wellness, preventive care and innovative service delivery. The Program shall provide medical services for the prevention, diagnosis, and treatment of medical conditions, excluding vision, dental, infertility, and cosmetic services. The Department of Public Health may further define the services to be provided, except that such services must, at a minimum, include: professional medical services by doctors, nurse practitioners, physician assistants, and other licensed health care providers, including preventive, primary, diagnostic and specialty services; inpatient and outpatient hospital services, including acute inpatient mental health services; diagnostic and laboratory services, including therapeutic radiological services; prescription drugs, excluding drugs for excluded services; home health care; and emergency care provided in San Francisco by contracted providers, including emergency medical transportation if needed.

(g) The Department of Public Health shall also be authorized to use payments made to the City by employers to satisfy their expenditure requirements as set forth in Section 14.3 to establish and maintain reimbursement accounts from which covered employees may obtain reimbursement of health care expenditures.

(h) The City Controller shall ensure any required health care expenditures made by an employer to the City are kept separate and apart from general funds and shall limit use of the expenditures to the Health Access Program or to the establishment and maintenance of reimbursement accounts from which covered employees may obtain reimbursement of health care expenditures. If any covered employee fails to enroll in the Health Access Program or establish a reimbursement account with the Department of Public Health within a reasonable time, as determined by the Department of Public Health, the City may use the funds paid to the City and County of San Francisco on behalf of that employee for the benefit of the health care programs created by this Ordinance, but the City may not transfer these funds to the City's general fund.

(Added by Ord. 218-06, File No. 051919, App. 8/4/2006; Ord. 69-07, File No. 070255, App. 4/2/2007)

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SEC. 14.3 REQUIRED HEALTH CARE EXPENDITURES.

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

(b) Additional Employer Responsibilities. A covered employer shall: (i) maintain accurate records of health care expenditures, required health care expenditures, and proof of such expenditures made each quarter each year, and allow OLSE reasonable access to such records, provided, however, that covered employers shall not be required to maintain such records in any particular form; and (ii) provide information to the OLSE, or the OLSE's designee, on an annual basis containing such other information as OLSE shall require, but OLSE may not require an employer to provide information in violation of State or federal privacy laws. Where an employer does not maintain or retain adequate records documenting the health expenditures made, or does not allow OLSE reasonable access to such records, it shall be presumed that the employer did not make the required health expenditures for the quarter for which

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

(Added by Ord. 218-06, File No. 051919, App. 8/4/2006; Ord. 69-07, File No. 070255, App. 4/2/2007)

SEC. 14.4 ADMINISTRATION AND ENFORCEMENT.

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

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

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

(d) It shall be unlawful for any employer or covered employer to deprive or threaten to deprive any person of employment, take or threaten to take any reprisal or retaliatory action against any person, or directly or indirectly intimidate, threaten, coerce, command or influence or attempt to intimidate, threaten, coerce, command or influence any person because such person has cooperated or otherwise participated in an action to

enforce, inquire about, or inform others about the requirements of this Chapter. Taking adverse action against a person within ninety (90) days of the person's exercise of rights protected under this Chapter shall raise a rebuttable presumption of having done so in retaliation for the exercise of such rights.

(e)(1) The City shall enforce the obligations of employers and covered employers under this Chapter, and may impose administrative penalties upon employers and covered employers who fail to make required health care expenditures on behalf of their employees. The amount of the penalty shall be up to one-and-one-half times the total expenditures that a covered employer failed to make plus simple annual interest of up to ten (10) percent from the date payment should have been made, but in any event the total penalty for this violation shall not exceed $1,000 for each employee for each week that such expenditures are not made.

(2) For other violations of this Chapter by employers and covered employers, the administrative penalties shall be as follows: For refusing to allow access to records, pursuant to Section 14.3(b), $25 as to each worker whose records are in issue for each day that the violation occurs; for the failure to maintain or retain accurate and adequate records pursuant to Section 14.3(b), and for the failure to make the annual report of information required by OLSE pursuant to Section 14.3(b), $500; for violation of Section 14.4(d) (retaliation), $100 as to each person who is the target of the prohibited action for each day that the violation occurs; and for any other violation not specified in this subsection (e)(2), $25 per day for each day that the violation occurs.

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

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

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

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

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

(Added by Ord. 218-06, File No. 051919, App. 8/4/2006; Ord. 69-07, File No. 070255, App. 4/2/2007)

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SEC. 14.5. SEVERABILITY.

If any section, subsection, clause, phrase, or portion of this Chapter is for any reason held invalid or unconstitutional by any court or Federal or State agency of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision and such holding shall not affect the validity of the remaining portions thereof. To this end, the provisions of this ordinance shall be deemed severable.

(Added by Ord. 218-06, File No. 051919, App. 8/4/2006)

SEC. 14.6. PREEMPTION.

Nothing in this Chapter shall be interpreted or applied so as to create any power, duty or obligation in conflict with, or preempted by, any Federal or State law.

(Added by Ord. 218-06, File No. 051919, App. 8/4/2006)

SEC. 14.7. GENERAL WELFARE.

By this Chapter, the City is assuming an undertaking only to promote the general welfare and otherwise satisfy its obligations to provide health care under applicable law. This Chapter should in no way be construed as an expansion of the City's existing obligations to provide health care under State and Federal law, and the City shall set all necessary criteria for enrollment consistent with its legal obligations. The City is not assuming, nor is it imposing on its officers and employees, an obligation forereach of

which it is liable in money damages to any person who claims that such breach proximately caused injury. To the fullest extent permitted by law, the City shall assume no liability whatsoever. To the fullest extent permitted by law, any actions taken by a public officer or employee under the provisions of this Chapter shall not become a personal liability of any public officer or employee of the City.

(Added by Ord. 218-06, File No. 051919, App. 8/4/2006; Ord. 69-07, File No. 070255, App. 4/2/2007)

SEC. 14.8. OPERATIVE DATE.

This Chapter shall become operative in three phases. The day this Chapter becomes effective, implementation of the Chapter shall commence. The Health Access Program shall become operative on July 1, 2007. Any requirements on employers for which an average of fifty (50) or more persons per week perform work for compensation during a quarter shall become effective on January 1, 2008. Any requirements on employer for which an average of from twenty (20) to forty-nine (49) persons per week perform work for compensation during a quarter shall become operative on April 1, 2008. This Chapter is intended to have prospective effect only.

(Added by Ord. 218-06, File No. 051919, App. 8/4/2006; Ord. 72-07, File No. 070354, App. 4/2/2007)

Cited in Golden Gate Restaurant v. City and County of San Francisco, No. 07-17370, archvied on January 11, 2008