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For San Francisco employers, another new ordinance imposes challenging health care requirements. The San Francisco Health Care Security Ordinance (HCSO) mandates spending requirements for employee health care. The ordinance is effective January 1, 2008 for employers with 50 or more employees and April 1, 2008 for employers with 20-49 employees.

California Edition

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Another New Headache for Employers: San Francisco's Health Care Security Ordinance

By Nancy L. Ober

Hard on the heels of San Francisco's paid sick leave law (Proposition F), which became effective February 5, 2007, employers will face another challenge in 2008, when employer health care spending mandates found in the San Francisco Health Care Security Ordinance ("HCSO") go into effect - unless the courts intervene. A decision in a year-old lawsuit by a restaurant employers' association to block the ordinance on ERISA preemption grounds is expected before the end of 2007.

The ordinance became law on August 4, 2006, and was amended on April 2, 2007. In a nutshell, the HCSO creates a City-sponsored Health Access Program ("HAP"), dubbed "Healthy San Francisco," and it requires covered employers to make minimum health care expenditures for their employees, which they may do through their own health plans and programs or by paying into the HAP. Final regulations issued by the City's Office of Labor Standards Enforcement ("OLSE") in July 2007 clarify many aspects of the new law.

Covered Employers

To be covered under the law, an employer must be doing business in the City and subject to the City's business registration requirements. For-profit employers must have an average of 20 or more employees per week during a calendar quarter, and non-profits must have at least 50 employees to be covered. Employers with fewer than 20 employees (and non-profit employers with fewer than

50 employees) are exempt. The number of employees is determined on a control group basis (counting affiliates) and includes employees working outside San Francisco. All employees are counted, including part-time, temporary, seasonal and employees contracted through an agency.

Health Care Spending Rate

The amount the employer is required to spend for health care depends on the employer's size. Employers with 100 or more employees must spend \$1.76 per hour for each covered employee effective January 1, 2008. Employers with 50-99 employees must spend \$1.17 per hour, effective the same date. Employers with 20-49 employees must also spend \$1.17 per hour, but have a delayed implementation date of April 1, 2008. These rates increase on January 1, 2009 to \$1.85 per hour for employers with 100 or more employees and \$1.23 per hour for employers with 20-99 employees. After 2009, required health care expenditures will be determined annually based upon the average contribution for a full-time employee to the City health service system.

Covered Employees

The employer spending requirement only applies to employees covered by the City's minimum wage law who have been employed for 90 calendar days (which need not be continuous) and who work a minimum number of hours per week within the geographical limits of the City of San Francisco. In 2008 the

weekly minimum is 10 hours, decreasing to 8 hours per week effective January 1, 2009. For employees whose hours fluctuate, eligibility is determined based on the average number of hours worked per week during the calendar quarter. The employee's status as part-time, temporary, seasonal or contract is immaterial.

The law exempts managerial, supervisory or confidential employees who earn at least \$74,558 annually in 2007 (to be adjusted in future years by the OLSE based on increases in the consumer price index); employees eligible to receive benefits under Medicare or TRICARE/CHAMPUS (federal health program for military); employees of City contractors and subcontractors covered by a separate law, the Health Care Accountability Ordinance; employees of a nonprofit corporation employed for up to one year as trainees as in a bona fide training program consistent with federal law; and employees who provide verification that they are receiving health care services through another employer, either as employee or as spouse, domestic partner or child, and who give a voluntary and revocable written waiver (good for no more than one year) using the City's waiver form.

How the Money Can Be Spent

An employer may satisfy its spending requirement in a variety of ways, including:

- providing a group health insurance program;
- making contributions to a health savings account or an account with "substantially the same purpose or effect";
- contributing to a flexible spending account or a health reimbursement account on behalf of its employees;
- reimbursing employees for their health care expenses;
- paying a third party to provide health care services to its employees; and/or
- making payments to the City to fund

the employee's membership in the Health Access Program (open to City residents only) or to establish and maintain medical reimbursement accounts (available to both residents and nonresidents working in the City) from which employees may obtain reimbursement of health care expenditures.

The employer may choose more than one option to meet its expenditure requirement. Any expenditure must be for medical care, services or goods that qualify as tax deductible medical expenses under section 213 of the Internal Revenue Code, or for medical care, service or goods having "substantially the same purpose or effect."

How the Required Amount Is Determined

The amount the employer is required to spend is determined on a calendar quarter basis and is the sum of the employer's required expenditure for each covered employee. The amount for each employee is determined by multiplying the employee's total number of hours paid in San Francisco, not to exceed 172 hours in a month or 516 hours in a single quarter, by the applicable health care expenditure rate. Exempt employees are deemed to work 40 hours per week. Vacation, PTO and paid sick hours are counted as hours worked. An employer cannot use expenditures in excess of the required rate for one employee to meet its total spending requirement for all employees. However, if the employer provides uniform health coverage or health coverage under a self-funded/self-insured plan, under the OLSE regulations it will be deemed to meet the spending requirement if its average expenditure per employee meets the employer's applicable expenditure rate.

When the Expenditures Must Be Made

Health care expenditures must be made on a quarterly basis for each covered employee, no later than 30 days after the end of the calendar quarter. The employer may make the expenditures before the

deadline, however, in order to secure health care coverage or services for its employees during the quarter.

Employer Recordkeeping Requirements

The HCSO imposes recordkeeping requirements on all covered employers. Employers must maintain for a period of four years itemized pay statements showing wages earned and hours worked, employee's address, telephone number and first days of work, and records of health care expenditures for each covered employee, together with proof documenting that such expenditures were made at least quarterly. Each year covered employers must provide information to the City regarding their health care expenditures on an HCSO Mandatory Annual Reporting Form.

Enforcement and Penalties

The Office of Labor Standards Enforcement (OLSE) has enforcement authority and may assess administrative penalties for noncompliance. Failure to make the required health care expenditure is subject to a penalty of up to \$1,000 for each employee for each week that such expenditures were not made, plus interest of up to 10%. The City Attorney may also bring a civil action or pursue other legal remedies to recover civil penalties.

The ordinance makes it unlawful for an employer to reduce the number of employees who avoid being considered a covered employer or to be subject to a lower health care expenditure rate, or to retaliate against persons who act to enforce or inquire about the ordinance, or discriminating against any person based on whether that person possesses health insurance coverage.

Health Access Program

The Health Access Program (HAP) is not insurance but a network of health care providers administered by the Department of Public Health to deliver medical services to San Francisco residents with an emphasis on primary care, prevention and wellness. Membership fees are means-

tested, and employees enrolled by their employer receive a 75% discount on fees.

The City will contract with a third party vendor to set up and administer medical reimbursement accounts through the HAP for employees working in San Francisco. Employer contributions to the HAP on behalf of covered employees may only be used for the HAP or medical reimbursement accounts and cannot be pooled with the City's general funds.

Employers who satisfy their spending obligation by making payments to the City must give notice to their employees, using the City's notice form.

Effective Dates

The ordinance is effective on January 1, 2008, for all employers with 50 or more employees, and on April 1, 2008, for all for-profit businesses with 20-49 employees.

What Employers Should Do Now

Employers should immediately determine whether and when the law will apply to them and their applicable spending rate, and begin planning how they will comply with the spending requirement. This process includes several steps:

- Determine if the employer is a covered employer:
 - business activities and required business registration in San Francisco
 - employees working in San Francisco (including telecommuters)
 - average 20 or more employees per week (50 or more for non-profits) in the applicable calendar quarter - includes employees outside San Francisco and affiliated businesses:
- Determine applicable 2008 spending rate and effective date
 - 100+ employees: \$1.76 effective January 1, 2008

- 50-99 employees: \$1.17 effective January 1, 2008
- 20-49 employees: \$1.17 effective April 1, 2008
- Determine number of covered employees:
 - at least 10 paid hours per week in San Francisco
 - includes paid time off as well as working time
- Determine whether the employer already meets the spending requirement for some or all of its covered employees
- Determine the strategy for compliance if health care expenditure rate is not met

More Information

More information about the HCSO is posted on the OLSE website. Littler will also continue to monitor the pending lawsuit by the restaurant employers' association challenging the ordinance. However, until then, employers with employees in San Francisco will need to comply with the HCSO's requirements.

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