



Healthy San Francisco: Ordinance Modified, But Is It Over?

LEGISLATIVE BRIEF

November 30, 2011

As we mentioned in our last Benefit Trends on November 22, 2011, the Board of Supervisors for the City and County of San Francisco, seeing an apparent loophole in its attempts to provide health care expense assistance to employees of employers in San Francisco, have debated throughout the last few months on how to assure employees get a real benefit out of employer contributions.

The Board's initial attempts centered on making the employer contribution to expense reimbursement plans non-forfeitable. Now, in compromise, the Board of Supervisors modified the Healthy San Francisco Ordinance to require employers to keep two years' worth of contributions available for employees for health care expenses. The Mayor has signed the Ordinance into law. One Supervisor believes the new rule does not go far enough and plans to prepare and circulate a ballot initiative for the next City election, presumably to require funds to remain available beyond two years.

Background

Healthy San Francisco requires San Francisco employers to contribute a fee per hour worked per employee to a City-sponsored health care services program on a quarterly basis. As an alternative, employers can establish and administer their own program for reimbursing employees for health care expenses. Insurers in California will provide insured benefits for employees working 20 or more hours per week. Many of the employers who have employees working less than 20 hours or who do not provide health insurance coverage to their employees have established self-funded Medical Expense Reimbursement Plans (MERP) to provide the required benefits.

A recent study shows that although employers were required to set aside nearly \$63 million in 2010 for benefits, their actual expenditures for reimbursements in 2010 came to \$12.4 million. Most of these MERPs have an annual "use it or lose it" (forfeiture) provision, creating a \$51 million savings for employers. The Board of Supervisors is attempting to assure more benefits for employees.

Details

1. **The Change, in General Terms.** Employers must carry over any unused contributions to a MERP made in 2011 for use in 2012. Each subsequent year, unused balances in the prior year must be made available.
2. **Employee Notice Requirement.** Employers must provide notice to all affected employees within 15 days of the date of each contribution showing:
 - The amount contributed;
 - The name, address, and phone number of the third party administering the program;
 - The date and amount of any debits or credits to the employee's account during the period following the last notice containing this type of information;
 - The current balance in the account; and,
 - Any applicable expiration date.

Presumably this notice rule will apply to the December 31, 2011 quarterly contribution period.

3. **Insurance Plans.** This change does not apply to insurance premiums (i.e. when claims experience is less than premiums paid), since premiums paid are typically not recoverable from the insurer on these size groups.
4. **The Actual Measurement.** Contributions (made quarterly) must be available for 24 months from the date the contribution is made, not just an annual event.
5. **Former Employees.** Employers must make unused balances available for a minimum of 90 days from the date of separation. Additionally, employers must provide a separate written notice to each former employee within three (3) days following separation regarding the current balance and all expiration dates. Although MERPs have COBRA requirements, former employees can recover expenses without exercising their COBRA rights.

Additional Comments

1. **No Pre-funding Requirement.** Neither the original law nor this modification requires employers to set aside from its general assets the funds necessary to meet the law's obligation (Section 14.1(b)(7)).
2. **Report to OLSE.** Employers who maintain a MERP now must also report to the Office of Labor Standards Enforcement (OLSE) the terms of such accounts, including what costs will be reimbursed. It is not clear, but presumed to be reportable with each quarterly report on a going forward basis.
3. **Penalties.** The City may impose penalties within 5 days of any quarterly due date, of up to one and one-half times the amount of the missed expenditures (with a maximum penalty of \$100 per week per employee, reduced from \$1,000 per week per employee). In addition, the City may impose a penalty of \$500 per quarter for failure to maintain records or to make the required annual report. The OLSE is in charge of enforcement.
4. **Restaurant Surcharges.** Restaurants and certain other businesses have begun to add a surcharge on customer bills. If they continue to do so, these surcharges must be used for employee health expenditures.
5. **Operative Date.** January 1, 2012

- 6. Alternative Provision.** In the event that a court of competent jurisdiction strikes down this change, the Ordinance will require funds to be available from quarter to quarter and from year to year and remain available even after employment ends.

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