

San Francisco Delays Health Care Security Ordinance Effective Date

Earlier this year, San Francisco amended its Health Care Security Ordinance (HCSO). The amendments revised the law's mandate that employers make minimum contributions toward employees' healthcare and delayed the mandate's effective date. Both the employer mandate and the amendments to it may be moot for most San Francisco employers, however, because it seems likely that a court will find that the Employee Retirement Income Security Act (ERISA) preempts these provisions.



Background

In July 2006, San Francisco adopted the HCSO, creating the Healthy San Francisco program, which is intended to help give San Francisco residents access to affordable healthcare. The HCSO also required that medium and large businesses make certain minimum contributions toward employees' healthcare. The law originally provided that, effective July 1, 2007, employers with 100 or more employees would have to pay \$1.60 per hour worked towards employees' healthcare, and those with 20-99 employees would be required to pay \$1.06. (Non-profit employers with fewer than 50 employees were exempt from the contribution requirements.) Examples of qualifying healthcare expenditures include health insurance premiums paid to insurers to provide healthcare services to employees and their dependents, amounts spent by self-insured plans, and contributions made on behalf of employees to flexible health spending accounts, health reimbursement arrangements, and health savings accounts.

Amendments to the HCSO

The amendments to the HCSO adopted by San Francisco delay the effective date for the minimum employer healthcare contributions until January 1, 2008. The amendments also change the contribution rates. The minimum rate for employers with 100 or more employees has increased to \$1.76 per hour worked. For smaller employers with at least 20 employees, the new minimum rate is \$1.17 per hour worked. The amendments also give employers with 20-49 employees additional time – until April 1, 2008 – to comply. These amounts will increase by five percent on January 1, 2009. (Non-profit employers with fewer than 50 employees remain exempt.)

Employees Entitled to Minimum Contributions

For purposes of determining the minimum contribution rate, employees are counted regardless of where they work. The actual healthcare contributions, though, need only be made for

employees who perform services in San Francisco and meet certain requirements (covered employees). A covered employee is one who has been employed by his or her employer for at least 90 calendar days, and who works at least 10 hours per week in San Francisco. (In 2009, the weekly hour requirement will decrease to eight hours.)

Employees who are not entitled to minimum contributions include those who:

- Are managerial, supervisory or confidential employees, unless earning less than \$76,870 in 2008 (the salary amount will be adjusted annually)
- Are eligible to receive benefits under Medicare or TRICARE
- Provide verification that they are receiving healthcare services through another employer, but only after signing a voluntary written waiver of the expenditure

Amount for Each Covered Employee

Required contributions for each covered employee are calculated on a quarterly basis by multiplying the applicable contribution rate by the total number of hours paid during the three-month period that starts on the first day of the first month that begins at least 90 calendar days after a covered employee's first day of work. Hours paid means those hours for which a person is paid wages or is entitled to be paid wages for work performed within the city, including paid vacation and sick leave.

The chart below summarizes the rate schedule for employer healthcare expenditures that will apply in 2008 and 2009.

| Employer Healthcare Expenditure Rate Schedule | | | |
|---|-----------------|---------------|-----------------|
| Business Size | January 1, 2008 | April 1, 2008 | January 1, 2009 |
| 100+ Employees | \$1.76/hour | | \$1.85/hour |
| 50-99 Employees | \$1.17/hour | | \$1.23/hour |
| 20-49 Employees | Not Applicable | \$1.17/hour | |
| 1-19 Employees | Not Applicable | | |
| Non-Profit Organizations with < 50 Employees | Not Applicable | | |

HCSO Challenged

In November 2006, the Golden Gate Restaurant Association (GGRA), a group that represents the interests of restaurant owners, initiated a suit against the city in federal court in an effort to stop the HCSO from going into effect. The GGRA's

lawsuit is based on a claim that the law is preempted by ERISA, an argument similar to the one used in a successful challenge to Maryland's Fair Share Health Care Act. (For additional information about that court case, please see *Willis Employee Benefits Alert*, Issue 74). The GGRA's case remains pending and no injunction is in place that would prevent the HCSO from becoming effective on schedule. However, we presume that the GGRA will seek an injunction if the case is not resolved before the law's 2008 effective date.



Given the HCSO's direct mandate that employers pay for employee healthcare, the GGRA's claim that the law is preempted by ERISA is likely to prevail. As a result, and in light of what happened to Maryland's Fair Share Health Care Fund Act, it seems probable that any provision in the HCSO that directly imposes a duty to deliver a health benefit will be struck down by the courts.

Additional information about the HCSO can be found on the San Francisco Office of Labor Standards Enforcement web site: http://www.sfgov.org/site/olse_index.asp?id=45168.

Key Contacts

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