Employers Must Comply with Changes to San Francisco Health Care Mandate Beginning January 1, 2012

By Deverie J. Christensen and Joseph J. Lazzarotti

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San Francisco's Health Care Security Ordinance has been amended to require more of certain employers with workers in the City and County of San Francisco. The amendments will take effect **January 1, 2012**.

The Ordinance requires many employers to spend a specified minimum amount toward certain health care expenses for their employees working in the City and County of San Francisco. (For more information on the Ordinance, see our article, San Francisco Health Care Law Survives ERISA Preemption .)

Employers and the group health plans some employers use to comply with the Ordinance will have additional compliance requirements under key changes to the Ordinance. While these changes again raise federal Employee Retirement Income Security Act (ERISA) preemption concerns, barring a challenge (which seems unlikely), the Ordinance's new requirements will go into effect. Employers, particularly those using a health reimbursement account plan (HRA) or a health savings account (HSA) plan, should consider compliance preparations with the assistance of legal counsel.

Following are key changes:

- A contribution (i.e., employer funded payment) to an HRA or HSA that is not paid irrevocably to a third party will not qualify as a health care expenditure under the Ordinance, *unless*:
  - the contribution is reasonably calculated to benefit the employee;
  - the contribution remains available to the employee for reimbursement for at least two years after the employer funds the contribution;
  - any unused balance from the 2011 account carries over to the 2012 account;
  - the employee receives a notice within 15 days after the contribution is made that provides: (i) name, address and telephone of any third party to whom the contribution was made; (ii) the date and amount of the contribution; (iii) changes to the account balance since the last account summary was provided; (iv) the current balance in the account; and (v) the applicable expiration dates of the funds in the account.
- If an employee voluntarily or involuntarily terminates employment and has a positive balance in his or her account: (i) any balance available for reimbursement must remain available for *at least 90 days* after termination, and (ii) within three days after termination, the employer must notify the employee of the current account balance and the applicable expiration dates of the funds in the account.
- Employers that use an HRA to comply with the Ordinance must report to the San Francisco Office of Labor Standards Enforcement (OLSE) the terms of the HRA, including the expenses eligible for reimbursement.
- Covered employers must conspicuously post a notice at any workplace or jobsite where covered employees work, informing them of employees' rights and employers' obligations under the Ordinance. This notice must be available in English, Spanish, Chinese and any other language spoken by at least five percent of the employees at the worksite. The OLSE will make such notice available each December 1.
- Employers that impose a surcharge on customers to cover any part of the health care expenditures under the Ordinance must file an annual report with the OLSE. In addition, if the amount a covered employer collects from the surcharge exceeds the amount spent on health care, the employer must pay or designate the difference for health care expenditures for its covered employees. This payment or designation is irrevocable.
- Finally, some administrative enforcement and penalty provisions were amended.

The Ordinance creates a number of challenges for employers who have employees working in San Francisco. Jackson Lewis attorneys are available to provide more information on the amended Ordinance

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