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Morgan Lewis Webcast: What the HCSO Means for Companies That Have Employees Working in San Francisco

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March 20, 2008

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San Francisco HCSO basics

- Activist City Government - trigger social change
 - Domestic partner benefits
 - SF Minimum Wage (\$9.36 per hour)
 - SF Paid Sick Leave
- Now: Address the problems of the medical uninsured
 - Bolster the SF health care system for SF residents
 - Increase Business Registrations and registration fees
- Variation of “Pay or Play” concept struck down in Maryland
- Requires minimum spend on health care
- Applies to a significant number of employers with SF workers

San Francisco HCSO basics (cont'd)

- Today we will address:
 - Who is covered?
 - What are the obligations?
 - What is the spending requirement?
 - What are options for employers?
 - What is the penalty?
 - Where is ERISA preemption?

Who is a covered employer?

- A Medium or Large Business
 - Large: an average of 100 or more employees per week during the calendar quarter
 - Medium:
 - “For profits” with 20-99 employees per week during the calendar quarter
 - Non-profits with 50-99 employees during the calendar quarter
- That engages in business within SF and is required to obtain a valid SF “business registration certificate”
 - "engaged in activity or caused to be engaged in activity within San Francisco for seven or more days in a year with the object of gain, benefit or advantage, whether direct or indirect, to the entity or to another or to others."
 - physical location within SF is not required

Who is a covered employer? (cont'd)

- Average number of employees per week during the calendar quarter
 - In the US (not just in SF)
 - For compensation
 - Without regard to status or classification:
 - Permanent, regular, temporary or seasonal
 - Full-time or part-time
 - Employed directly or, indirectly, through a temporary/staffing agency, leasing company, professional employer organization, commissioned

Who are covered employees?

- Without regard to status or classification
- Entitled to minimum wage under SF Minimum Wage Ordinance
 - “Qualifies as an employee entitled to payment of a minimum wage from any employer under the California minimum wage law”
- *Argument:* All employees who are exempt under CA law from the CA minimum wage requirement are not covered by the HCSO, no matter how many hours they work within SF
 - outside sales exemption, white collar exemptions, computer professional exemption

Who are covered employees?

- Employed for at least 90 calendar days after first day of work (including any period of leave to which an employee is legally entitled – law or contract)
- Rehires: If rehired and begins working within 365 days after prior separation
 - If did not previously meet 90-day employment requirement, prior employment tenure is counted
 - If previously met 90-day employment requirement, no new 90 days of employment is required

Who are covered employees? (cont'd)

- “In a particular week” performs at least ten (10) hours of work within the geographic boundaries of SF
 - Beginning 01/01/09: at least 8 hours of work within SF in a particular week
 - Telecommuting from SF home, even if for employee’s convenience
 - Includes travel time within SF to do actual work within SF
 - Excludes work on SF-owned property located outside SF (SFO airport, reservoirs)

Who are covered employees? (cont'd)

- Performs work within SF at least 10 hours per week “*on average*” during a quarter
 - Use the averaging method if the employee’s hours to be worked per week fluxuates

Who is excluded from “covered employees”?

- “Managerial employee” who are earning at least \$76,851 annually (or \$36.95 hourly) in 2008 and
 - Has authority to formulate, determine, or effectuate employer policies by expressing and making operative the decisions of the employer, and
 - Has discretion in the performance of his/her job independent of the employer's established policies

Who is excluded from “covered employees”? (cont'd)

- “Supervisory employee“ who are earning at least \$76,851 annually (or \$36.95 hourly) in 2008 and
 - Has authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or
 - Has responsibility to direct them, or to adjust their grievances, or
 - Has 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;

Who is excluded from “covered employees”?

- “Confidential employee” who are earning at least \$76,851 annually (or \$36.95 hourly) in 2008 and
 - 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
- Earnings threshold will increase each year if there is an increase to the Consumer Price Index for urban wage earners and clerical workers for the San Francisco-Oakland-San Jose metropolitan statistical area

Who is excluded from “covered employees”? (cont'd)

- Employees who are employed by a non-profit corporation for up to 1 year as trainees in a bona fide training program consistent with federal law
- Employees who are eligible to receive benefits under
 - Medicare 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

Who is excluded from “covered employees”? (cont'd)

- Employees who are receiving health care benefits under the San Francisco Health Care Accountability Ordinance (HCAO)
 - HCAO: <http://www.municode.com/content/4201/14131/HTML/ch012g.html>
 - HCAO Regs: http://www.sfgov.org/site/uploadedfiles/olse/hcao/rules_regs.pdf
- Applies to SF contractors
- Employees who perform at least 15 hours per week on the SF contract

Who are excluded from “covered employees”? (cont'd)

- Employees who:
 - Verify they are receiving health care services through another employer (as its employee or as spouse, domestic partner, or child of an employee of that other employer)
 - and
 - Waive their rights under the HCSO in writing via a SF “Employee Voluntary Waiver” form”

<http://www.sfgov.org/site/uploadedfiles/olse/hcso/EmpVolWaiverEN.pdf>

Who are excluded from “covered employees”? (cont'd)

- “Employee Voluntary Waiver” form
 - Must be given to the employee in its entirety
 - An electronic copy of the Voluntary Waiver Form is OK
 - Employee must be able to readily access the Form
 - Employee must receive a hard copy of his/her signed Voluntary Waiver Form
 - Signed by employee without pressure/coercion from any coworker or agents of the employer
 - Signed form is valid for 1 year
 - Employee may revoke form (in writing) at any time
- Must maintain the signed SF “Employee Voluntary Waiver Form”

What obligations exist under the HCSO?

- Non-avoidance of being a covered employer
- Non-retaliation
- Non-discrimination
- Health care expenditure (HCE) for covered employees
- Record keeping
- Notice to covered employees of HCE paid - City option
- Annual reporting to SF (optional for 2007)
- Cooperate with SF OLSE investigations

What is the health care expenditure (HCE) obligation?

- Make an expenditure on health care services for covered employees at the applicable rate (beginning 01/08/08)
 - Large Business (100/+): \$1.76 “per hour paid”
 - Medium Business (20-99): \$1.17 “per hour paid”
 - 04/01/08 - Medium Non-profit Business (50-99): \$1.17 “per hour paid”
 - 01/01/09 - HCE rate will increase 5% (to \$1.85 and \$1.23, respectively)

What is the health care expenditure (HCE) obligation? (cont'd)

- Based on “hours paid” to covered employees during the quarter
 - *for time worked within SF* during weeks that the employee is a “covered employee”
 - begins 1st day of the calendar month following 90 days of employment
 - Hours paid but not worked during the quarter must be pro-rated so that some is apportioned to time worked within SF during weeks employee was “covered”
- No later than 30 days after the end of the quarter
- Paid to a third party on behalf of covered employees
- Make available to covered employees for health care services

How to calculate the HCE Hypothetical # 1

- Acme Company has 300 employees throughout the US
- It has a regional office in Oakland with 36 employees
- No office location in SF but
 - 3 employees visit Acme customers in SF, and
 - 2 other employees occasionally work from their homes in SF

Hypothetical #1 (cont'd)

- Has each been employed by Acme for at least 90 days prior to 01/09/08 ?
- Did any of them work within SF at least 10 hours during any of the 12 weeks of Jan 9-Mar 31 (Q1 2008) ?
 - If Acme did not keep records of hours worked in SF, all hours worked by these 5 employees during Q1 will be presumed to have been worked in SF so long as they performed at least 10 hour of work in SF during any week
- For weeks during which any was a “covered employee”, how many “hours paid” did s/he receive for working within SF ?
 - Only hours worked in SF
 - Hours not worked anywhere, but still paid, pro-rated for hours worked in SF during Q1 2008
 - Will never exceed 172 hours/month or 516 hours/quarter.

Hypothetical #1 (cont'd)

- *Example 1:* The 2 employees who occasionally work from their SF homes did not work at least 10 hours in SF for any week during Q1. They are not a covered employee for Q1, and no HCE is required for them for Q1.
- *Example 2:* One of the other employees who comes to SF to meet with clients reports having worked 2 days in SF during one week, but less than 10 hours in SF during all other weeks, during Q1.

- 2 days (8 hours) = 16 hours worked in SF during Q1

Employee also took 3 paid holidays (24 hours) during Q1

- Pro-rate 24 paid holiday hours to % of time worked in SF during Q1. Assume total hours worked during Q1 is based on 40 hours/week for total of 456 hours (480 hours – 24 hours). $16 \div 456 = 3.5\%$
3.5% of 24 hours = 0.8 hours. $16 + 0.8 = 16.8$ “hours paid”

16.8 hours x \$1.76 = \$29.57 HCE for Q1

Uniform Health Coverage

- Employers with uniform coverage or a self-insured plan can average cost to determine spend
- Calculate average by total spend over hours
- Optional calculation of COBRA rate over hours
- Must disregard employee contributions

What are the HCE options?

- Paying health insurance premiums
- Expenditures made by self-insured and/or self-funded health care plan/program
- Payments to “City Option”
 - To fund the covered employee’s membership in the SF Health Access Program if s/he qualifies (SF residency is one requirement), or
 - To fund a medical reimbursement account for the covered employee

What are the HCE options? (cont'd)

- Contributions on behalf of the covered employee to a health spending account, such as a health reimbursement arrangement, a flexible spending account, or a medical/health savings account
- Cash reimbursements to the covered employee for health care expenses incurred
- Directly paying health care providers for health care services rendered to covered employee

What are the HCE options? (cont'd)

- Any of the above for the benefit of the covered employee's spouse, domestic partner, family member or other dependent
- **Not** included among the options:
 - Workers' compensation insurance
 - Paid sick time
 - Disability insurance coverage or payments
 - Social Security and Medicare expenses/contributions
 - Unconditional payments to covered employees
 - The HCE must be spent on health care services

How to respond?

- Determine if covered, if “spend” sufficient, if anyone is not eligible for benefits
- Consider extending down coverage for a few individuals or top-up spend
- Consider offering medical expense reimbursement or HRA (if administration cost-effective)
- Last resort would be to pay City

What are the potential liabilities under the HCSO?

- Failure to meet HCE is 1.5 times shortfall plus 10% interest
 - Capped at \$1,000 per employee per week
- Failure to make records available \$25 PEPD
- Failure to file annual report \$500
- Retaliatory action \$100 PEPD
- Enforced by OLSE/individual complaints

How about ERISA preemption?

- The Golden Gate Restaurant Association (“GGRA”) sued the City & County of San Francisco in U.S. District Court seeking an order preventing the City from implementing the HCSO on the ground that ERISA preempted the HCSO

How about ERISA preemption? (cont'd)

- GGRA argued HCSO preempted by ERISA because:
 - It interferes with an employer's ability to have a nationally uniform employee benefits plan
 - Its provisions refer to, are designed to act upon, and cannot operate successfully without the existence of employee benefit plans

How about ERISA preemption? (cont'd)

- On December 26, 2007, the District Court enjoined the City from implementing the HCSO on the ground that it was preempted by ERISA because it affected the administration of ERISA-governed employee benefit plans. *See Golden Gate Rest. Assoc. v. San Francisco*, 2007 WL 4570521 (N.D. Cal. Dec. 26, 2007)

How about ERISA preemption? (cont'd)

- The City filed an emergency action in the Ninth Circuit Court of Appeals seeking an order staying the entry of the District Court's order
- On January 9, 2008, the Ninth Circuit granted the City's request and entered a temporary stay. *See Golden Gate Rest. Assoc. v. San Francisco*, 512 F.3d 1112 (9th Cir. 2008)

How about ERISA preemption? (cont'd)

- The Ninth Circuit found that the HCSO was likely **not** preempted by ERISA because:
 - The HCSO does not require an employer to have, create, or alter an ERISA-governed employee benefit plan because an employer can comply with the HCSO by paying the required sum to the City
 - The HCSO does not require an employer to provide certain benefits. It only requires employers to make certain levels of health care payments

How about ERISA preemption? (cont'd)

- Supreme Court declined on February 21 to end temporary stay
- The parties have submitted their briefs and oral argument is scheduled for April 17
- It is unknown whether the case will be assigned to the same judges who entered the temporary stay or a new set of judges
- All of the briefing and orders in the case can be found on the GGRA's website at www.ggra.org

How about ERISA preemption? (cont'd)

- Many predict a win for the City, which would create a split between the Ninth and Fourth Circuits. See *Retail Indus. Leaders Assoc. v. Fielder*, 475 F.3d 180 (4th Cir. 2007) (Wal-Mart Case)
- A circuit split could drive the Golden Gate case to the Supreme Court

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