

Significant Changes to San Francisco Health Care Security Ordinance Require Immediate Employer Action; ERISA Preemption Controversy Reopened

November 28, 2011

Last week, San Francisco Mayor Ed Lee signed legislation that significantly revises parts of the city's Health Care Security Ordinance (Ordinance). In particular, the revised Ordinance imposes detailed design and administrative requirements on accounts established to satisfy the employer healthcare expenditure requirement. Because these new requirements directly relate to the operation of such accounts, there is a strong likelihood that the requirements will reopen the long-simmering debate about whether the Employee Retirement Income Security Act of 1974, as amended (ERISA), preempts some or all of the revised Ordinance.

Background

The Ordinance, first applicable in 2008, requires most employers with employees in the City of San Francisco to spend a minimum amount on health benefits. This spending requirement applies to employees who work at least eight hours per week. As one method of complying with the Ordinance, employers can contribute \$2.06 per hour (\$2.20 in 2012) to a reimbursement account. In response to perceived abuses associated with forfeitures and eligible expenses under these accounts, the revised Ordinance imposes new design and administration requirements.

New Requirements

Beginning in 2012, the revised Ordinance requires employers that use such an account to do the following:

- Keep employer contributions available for at least 24 months after the date of the contribution.
- Provide a detailed written account summary to the employee (including the account balance and any applicable forfeiture rules) 15 days after each quarterly contribution.
- Allow reimbursements from the account for at least 90 days after termination of employment.
- Provide a written notice (including the balance in the account and any applicable forfeiture rules) within three days after termination of employment.
- Annually report account terms to the city (including which expenses are eligible for reimbursement under the account).

- Annually post a new city-provided notice addressing employee rights and employer obligations under the Ordinance.

Further, the Ordinance requires employers to “roll over” any December 31, 2011 account balance to January 1, 2012 in order to ensure that participants start 2012 with an account balance.

Administrative Implications

Any employer that uses an account to meet the requirements of the Ordinance will have to quickly review and significantly change the operation of its account to meet the revised requirements. As many current accounts forfeit balances more frequently than now permitted (and few have a rolling 24-month contribution tracking structure) employers should ensure that their account administrators can handle the revised Ordinance requirements by December 31. Employers should also review (and will likely have to significantly enhance) the notices associated with their accounts.

ERISA Preemption

Prior litigation determined that the original Ordinance was not preempted by ERISA. However, the revised Ordinance now both narrows the types of accounts that can be used to satisfy the Ordinance and dictates detailed rules about the design and administration of reimbursement accounts. These new requirements squarely relate to an employee benefit plan that is subject to ERISA and, as such, are likely preempted by ERISA.

The revised Ordinance anticipates and attempts to discourage such an ERISA challenge. The Ordinance imposes even more rigid requirements (tantamount to fully vested, nonforfeitable, and funded account contributions to a third party) if the Ordinance is struck down through a lawsuit brought by or on behalf of a covered employer.

It remains to be seen whether a covered employer will challenge the revised Ordinance or possibly even refuse to comply with its revised terms in order to prompt enforcement action to test the validity of the revised Ordinance under federal law.

If you would like additional information on the Ordinance (including changes for employers that impose surcharges on customers to pay for the Ordinance and revised penalty provisions) or if you have any questions about the issues discussed in this LawFlash, please contact any of the following Morgan Lewis attorneys:

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