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Ninth Circuit Court Of Appeal Upholds Enforceability Of San Francisco Ordinance Mandating Employer Spending for Health Care

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Last year, San Francisco enacted its Health Care Security Ordinance ("HCSO") in an effort to ensure that all individuals who live or work in San Francisco have access to affordable healthcare. The HCSO was to become effective in January 2008. The fate of the HCSO became uncertain when, on December 26, 2007, a U.S. district court held that the HCSO was preempted by ERISA and issued an injunction prohibiting its enforcement. *Golden Gate Rest. Ass'n v. San Francisco*, 535 F. Supp. 2d 968 (N.D. Cal. 2007). On January 9, 2008, however, the Ninth Circuit Court of Appeal stayed the injunction, allowing the HCSO to be enforced until it could make a final determination regarding ERISA preemption. *Golden Gate Rest. Ass'n v. San Francisco*, 512 F.3d 1112 (9th Cir. 2008). In granting the stay, the Ninth Circuit indicated that the HCSO would likely be found to be valid and enforceable.

True to its prediction, on September 30, 2008, the Ninth Circuit issued its decision that the HCSO was valid, despite the arguments of the U.S. Department of Labor, which had joined the plaintiffs in arguing that the HCSO violated federal law. *Golden Gate Rest. Ass'n v. San Francisco*, D.C. No. CV-06-06997-JSW (9th Cir. 2008). In so holding, the Ninth Circuit found that the HCSO did not create or have an impermissible relation or connection to an ERISA plan. Because the Court had granted a stay allowing the HCSO to be enforced pending its decision, covered employers have been complying with the HCSO since the Ninth Circuit granted the stay in early 2008. Based on the September 30 ruling, that required compliance

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remains unchanged. Below is a description of the HCSO's requirements.

The HCSO requires San Francisco employers to make quarterly Health Care Expenditures ("HCEs") on behalf of their covered employees. HCEs are monies paid by an employer for the purpose of either providing health care services to employees or reimbursing the cost of such services for employees. Examples of HCEs include payments to health care coverage providers, payments to the City of San Francisco, payments from self-insured or self-funded plans, and direct reimbursement for health care expenses.

Employers are subject to the HCSO if they meet both of the following requirements:

- The employer employs an average of 20 or more "persons" per week. "Persons" includes full- and part-time workers, seasonal workers, and contract workers.
- The employer engages in business in the city of San Francisco and is required to obtain a valid San Francisco business registration certificate. An employer does not have to be physically located in the city of San Francisco to meet this requirement.

The HCSO requires that the employers make HCEs for "covered employees." A covered employee is any person who:

- Is entitled to be paid the San Francisco minimum wage,
- Has been employed by his or her employer for at least 90 calendar days, and
- Performs an average of at least 10 hours of work per week during the applicable quarter within the city of San Francisco.

Employees not covered by the HCSO include managers, supervisors, and contractors who earn at least \$76,851 annually; employees who waive coverage because they receive health benefits from another employer; employees covered by Medicare; and some volunteers.

Employers with 100 employees or more must make an HCE of \$1.76 per hour for each hour paid to covered employees during the quarter. For employers with 20 – 99 employees, the HCE requirement is \$1.17. "Hours paid" includes hours worked, paid vacation hours, paid time off, and paid sick leave hours. Salaried employees' hours paid are calculated based on a 40-hour workweek. For all employees the hours paid are capped at 176 hours per month.

In addition to the HCE requirement, the HCSO also has annual reporting, notice, and recordkeeping requirements. Information regarding the HCSO can be found at the City of San Francisco's Office of Labor Standards Enforcement Web site: www.sfgov.org/olse/hcso.

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