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Retail Detail

The Affordable Care Act Makes Retailers' Compliance with San Francisco Health Care Law a Bit More Complicated

The cost of doing business in San Francisco may increase for many retailers in 2014 as a result of the Affordable Care Act (ACA). This is because San Francisco retailers will be limited in their ability to utilize a Health Reimbursement Arrangement (HRA) to provide employees the required coverage under the San Francisco Health Care Security Ordinance (the "Ordinance").

What is the San Francisco Health Care Security Ordinance?

Generally, the Ordinance requires covered employers to spend a minimum amount per hour on health care for their employees who work at least eight (8) hours per week in San Francisco. Employers must contribute based on the hours worked by each employee. Currently, the expenditure rate for large employers (those companies with 100 or more employees anywhere in the world, not just in San Francisco) is $2.33 per hour. That rate will increase to $2.44 per hour in 2014. For a medium-size, for-profit business (those with 20 to 99 employees), the current hourly rate is $1.55, which will rise to $1.63 next year. Employers with fewer than 20 employees are not covered by the Ordinance.

The Ordinance does not require that employers provide health insurance to all of their San Francisco employees to satisfy the health care expenditure requirement. Employers may provide group health plan coverage to some employees (e.g., those working full time), and make contributions to HRAs to satisfy the requirement for part-time employees who do not work enough hours to be covered by the employer's health insurance. Employers may also make a direct payment to the City of San Francisco for its employees to use in the so-called "City Option," also known as "Healthy San Francisco."

A stand-alone HRA, i.e., an HRA that is not integrated with coverage through a group health plan, was an attractive choice for many employers in San Francisco to comply with the Ordinance because the employers could take advantage of low utilization rates by the employees who were provided this benefit, and have unused funds revert to the employer upon the employee's termination. This fact was not lost on the local politicians. As noted in its analysis of employer reporting forms from 2011, the City of San Francisco observed that a "total of 743 employers allocated $65 million to HRAs and reimbursed only $11 million (17%). Half of these employers reimbursed less than 10% of funds allocated." In 2012, the Ordinance was amended to require that funds be available to the employee for a minimum of twenty-four months. This change effectively precluded employers from using Flexible Spending Accounts (or FSAs) to satisfy the Ordinance as funds accumulated in FSAs generally must be used in one calendar year. The amendment to the Ordinance also imposed new reporting obligations on employers that use HRAs. Nevertheless, HRAs continued to be permitted provided that funds were available for reimbursement of medical expenses for at least twenty-four months.

What Effect Does the Affordable Care Act Have on San Francisco Employers?

The ACA generally prohibits annual dollar limits on essential health benefits. On January 24, 2013, the DOL, HHS and IRS (the "Departments") issued answers to Frequently Asked Questions (FAQs) which discussed the viability of HRAs in connection with the ACA prohibition on annual dollar limits. See *http://www.dol.gov/ebsa/faqs/faq-aca11.html*. These FAQs make clear that a stand-alone HRA (e.g., one used solely to purchase coverage on the individual market) will violate the ACA. Additionally, the FAQs state that an employee may not be offered an integrated HRA where the corresponding group health plan coverage

is declined. The Departments have not issued any further guidance or clarification regarding HRAs since the January 24th FAQs. Seyfarth's Health Care Management Alert #50 discusses in more detail how HRAs can co-exist with employer provided coverage. See *http://www.seyfarth.com/publications/HCRMA012813.*

Many San Francisco employers are questioning what they can do if they cannot continue to use HRAs.

First, employers may pay directly into the City Option for all employees to comply with the Ordinance. Second, employers with stores or operations in San Francisco also may consider offering some low level type of minimum essential coverage to employees who work at least 8 hours per week in San Francisco. Even if this coverage does not meet the minimum value or affordability tests to avoid the lesser of the two employer mandate penalties under the ACA, it may meet the requirement to provide minimum essential coverage, thus avoiding the larger of the two penalties. And, even if the employer has fewer than 50 full-time employees (and full-time equivalents) for the purposes of the ACA, there is no exception for small employers to the requirement to remove annual limits. Therefore, under the current guidance, HRAs are not an option for any employer, small or large.

If I Comply with the Affordable Care Act, Do I Need to Worry About the Ordinance?

Compliance with the ACA does not preempt compliance with the Ordinance. The ACA reads: "Nothing in this title shall be construed to preempt any State law that does not prevent the application of the provisions of this title." And, compliance with the Ordinance does not ensure compliance with the ACA. The Ordinance itself contains an anti-preemption clause ("Nothing in this Chapter shall be interpreted or applied so as to create any power, duty or obligation in conflict with, or preempted by, any Federal or State law"). Therefore, in practice, employers who do business in San Francisco must be prepared to comply with both.

The ACA requires only that coverage be provided to all "full-time" employees, which is defined as those working on average at least 30 hours per week. Therefore, no coverage needs to be offered at all to those working between 8 and 30 hours per week under the ACA. However, that result would not be in compliance with the Ordinance.

The January 24th FAQs states that the Departments anticipate that future guidance will be forthcoming regarding amounts credited in HRA accounts and how HRAs interact with the requirement that no annual limit may apply to essential health benefits. It is also unclear how an employee's participation in an HRA or the Healthy San Francisco program will impact the employee's eligibility for a tax credit or subsidy on the marketplace exchanges and, therefore, the potential for the employer to be assessed a penalty under the Employer Mandate. It remains to be seen how this will all play out, but it bears mentioning that the Ordinance is otherwise unconcerned that an employee may be receiving health care through other sources. See, e.g., *http://sfgsa.org/index.aspx?page=6105#outsideinsurance* (answering FAQs, the City notes that employees who receive health coverage through another employer (or through his/her spouse, domestic partner, or parent) may, but are not required to, sign a voluntary waiver form). Absent an employee's voluntary waiver (or an exemption from the Ordinance), the employer's obligation under the Ordinance is absolute.

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