

UNIVERSAL HEALTHCARE COUNCIL 2013 OCTOBER 24, 2013 MEETING MINUTES

October 24, 2013 | 10 -12 PM | 25 Van Ness Avenue, Room 610

1. Co-Chair Remarks and Agenda Review

The Co-Chairs briefly reviewed the finalized UHC principles.

Ms. Garcia noted that the presentation materials do not constitute legal opinion or advice, but rather, the City's current understanding of the impact of the ACA on City laws and programs. She acknowledged that members of the Council may have differing views or interpretations; however, the goal of the meeting is not to resolve all issues, but to relay as much helpful information as possible.

Dr. Hernandez invited UHC members to offer recommendations, which would take into account potential scenarios and keep in mind that the federal government is continuing to issue guidance. She reminded members that the recommendations need not all align or show consensus.

2. Presentation on ACA Shared Responsibility Provision in Depth

Ms. Chawla presented on the HCSO in-depth, ACA market reforms relevant to HCSO compliance, and the intersection of the HCSO and ACA.

Major discussion themes during the presentation are highlighted below and centered on the uncertainty of health reimbursement account (HRA) arrangements moving forward into 2014. Answers to requests for follow-up are included at the end of this document.

- Status of stand-alone HRAs
- Status of HRAs with carryover balances in to 2014
- Whether HRA funds qualify as minimum essential coverage (MEC)
- City MRA as viable option for continued HCSO payments
- HRA reimbursement rates
- Value of HRA balances to employees and employers
- Impact of employee insurance take-up rates on businesses ability to offer coverage
- Recommendations and potential solutions moving forward

3. Public Comment

Samantha Ehlen, an insurance broker noted that California law only allows insurers to contract with businesses to provide coverage for employees working 20-30 hours per week or more, and insurers generally have participation requirements in terms on how many employees must sign-up. She recommended that the council should work toward finding solutions for insuring those who are eligible (working 20+ hours/week).

4. Closing Comments and Next Steps

Upcoming Council Meeting Dates:

DATE	TIME	LOCATION
November 7, 2013	10AM-12PM	25 Van Ness Ave, Room 610
November 14, 2013	10AM-12PM	25 Van Ness Ave, Room 610

Members Present:

- Rob Black
- Eddie Chan
- Steve Fields
- Gordon Fung
- Estela Garcia
- Barbara Garcia
- John Gressman
- Keven Grumbach
- Scott Hauge
- Steve Heilig
- Sandra Hernandez
- Ken Jacobs
- Perry Lang
- Jim Lazarus
- Ian Lewis
- Sonia Melara
- Rebecca Miller
- Wade Rose
- Amor Santiago
- Ron Smith
- Abby Snay
- John Stead-Mendez
- Laurie Thomas
- Richard Thomason
- Ana Valdes
- Chris Wright
- Lucien Wulsin, Jr
- Jim Wunderman
- Brenda Yee
- Emily Webb (Observing for Warren Browner)
- Jim Illig (Observing for Christine Robisch)
- Noelle Simmons (Observing for Trent Rhorer)
- Barbara Hendricks (Observing for Fred Naranjo)
- Ana Guzina (Observing for Bob Muscat)
- Michael Wylie (Observing for Ben Rosenfield)

Materials Distributed:

- Meeting Agenda
- October 23, 2013 Meeting Minutes
- Finalized "Mission, Goals, Principles, and Structure"
- "HCSO in Depth, ACA Market Reforms, and the Intersection of HCSO and ACA"
- FAQs from the Office of Labor Standards Enforcement

Follow-up information requested at 10.24.13 Universal Healthcare Council meeting

Sent via email:

1. How many individuals and employers have penalties under OLSE for HCSO noncompliance?

- Individuals do not have any obligations under the HCSO
- After conducting investigations and audits, OLSE has found 95 employers in violation of the HCSO Employer Spending Requirement. To date, OLSE investigations have resulted in recovery of over \$9.5 million in health care expenditures (cash payments to workers, contributions to the "City Option", and allocations to reimbursement accounts) from 95 employers on behalf of 7,739 San Francisco workers. OLSE has issued official Determinations or reached settlement agreements in 21 additional cases – which are on appeal, in default, or subject to payment plans – representing an additional \$4.7 million in health care expenditures owed to 2,168 workers. OLSE has also recovered over \$436,000 in penalties from employers who failed to make required health care expenditures.

2. How much does DPH have on the books in MRAs?

- In 2011, San Francisco General Hospital received the \$3.387 million that were aggregated from the closing of 5,244 inactive MRAs
- As of the end of September 2013, approximately \$73.1 million in unused MRA funds are in a non-interest bearing account managed by the San Francisco Health Plan

3. What are the total numbers of employers and employees taking the MRA option?

- Employers and employees do not have an option to choose an MRA. The employer chooses to pay into the City Option, and from there, the City allocates funds depending on the employee's eligibility for Healthy San Francisco or an MRA. As of September 2013, there are approximately 41,000 open MRAs; this estimate includes duplicate accounts (i.e. an employee may have accounts from multiple employers).

4. Link to 9th Circuit 2008 ruling on GGRA vs. CCSF:

<http://cdn.ca9.uscourts.gov/datastore/opinions/2008/09/29/0717370.pdf>

5. A description of preventive services covered under the ACA can be found here:

<https://www.healthcare.gov/what-are-my-preventive-care-benefits/#part=1>

6. Request that City's correspondence with federal government regarding HRA and MRA guidance be made available

- As relayed at the meeting, all contact with the federal government has been verbal. There is no correspondence to be made public.

7. To what extent are individuals between 400%-500% FPL enrolled in Healthy San Francisco?

- Currently, 429 Healthy San Francisco enrollees (<1% of all enrollees) have incomes between 400-500% FPL
- Thirty-six (.08%) enrollees have incomes above 500% FPL.

8. Request for additional information on HRAs and City Option/MRA, and Employer Payment Plan/Other Options

- **HRAs:** In what instances are stand alone HRAs allowed under ACA? Are carryover balances considered MEC and therefore prohibit employees from subsidy eligibility under Covered California?
 - Stand-alone HRAs are allowed if integrated with group health coverage that the beneficiary is enrolled in. Details can be found in the September 2013 Department of Labor [technical release](#).
 - The City is seeking federal guidance on the issue of carryover balances.

- **Employer Payment Plan/Other Options:** Is this permissible under ACA pre/post tax or both/neither?
 - The September 2013 Department of Labor [technical release](#) addresses this issue.

- **City Option/MRA:** Is this considered a group health plan and therefore satisfy employer shared responsibility and employee MEC?

The following information is the City's best current understanding of outstanding questions related to the City Option/MRA. However, please be reminded that the federal government continues to issue new guidance about the Affordable Care Act that could affect the City's understanding of these issues.

A City MRA is a benefit provided by a public benefits program.

The Health Care Security Ordinance (HCSO), San Francisco Administrative Code Chapter 14, has two prongs. Section 14.3 imposes an hourly minimum health care expenditure requirement on some employers, and section 14.2 establishes a related but separate government benefits program comprised of Healthy San Francisco (HSF) and Medical Reimbursement Accounts (MRAs). The HCSO allows covered employers to meet their employer spending requirements in a number of ways, including "payments by a covered employer to the City to be used on behalf of covered employees." §14.1(7)(a).

Once an employer pays the City, the funds belong to and are unilaterally controlled by the City, not the employer or the employee. § 14.2(h). The City currently uses them to provide certain benefits to covered employees, either as a discount on HSF participation fees or as a fund available to reimburse health care expenses, and to support Healthy San Francisco generally. See §§ 14.1(7)(a), 14.2(h). But the City is free to change the eligibility criteria and extent of these benefits by amending its HCSO regulations, and the Board of Supervisors could amend the HCSO to provide entirely different types of benefits instead of, or in addition to, HSF discounts and MRAs. In contrast, the employer has no control over the levels and kinds of benefits the City chooses to provide; it cannot choose which of its employees will receive which benefits; and it can make no assurances to its employees in regard to any benefits they may receive.

As the Ninth Circuit Court of Appeals has explained, these are all hallmarks of a public benefits program, not an employee benefit plan, even when the City uses an

employer's payment to help support the program and the employer's covered employees are among the benefit recipients. See *Golden Gate Restaurant Assoc. v. City and County of San Francisco*, 546 F.3d 639, 653-54 (9th Cir. 2008) (available at <https://www.casetext.com/case/golden-gate-restaurant-v-san-francisco/>.)

City MRAs are not a "group health plan" subject to the ACA requirements for group health plans.

The ACA regulates "group health plans" and requires them to comply with the market reforms described in the meeting materials. Some council members have raised the question whether MRAs qualify as a regulated "group health plan" under the ACA. The meeting materials took the position that they do not.

Section 5000A of the Internal Revenue Code defines "group health plan" as "a plan (including a self-insured plan) of, or contributed to by, an employer" to provide health care to its employees. 26 U.S.C. § 5000A(b)(1). The regulations to that section further specify that this definition of "group health plan" has the same meaning as in section 2791(a) of the Public Health Service Act. See 26 C.F.R. § 1.5000A-1(d)(7), released August 30, 2013 at 78 Fed. Reg. 53646, 53650. Section 2791(a), in turn, adopts the ERISA definition of "employee welfare benefit plan," which is limited to "any plan, fund, or program which . . . was established or is maintained by an employer or by an employee organization, or by both." 29 U.S.C. § 1002(1).

MRAs do not appear to fit that definition for two reasons. First, as discussed above, MRAs are a component of a public benefits program established and maintained by the City, a public entity, not a group health plan established and maintained by employees or employers. Second, employers that pay the City instead of providing health care benefits do not "contribute to" MRAs. The City uses employer payments to help support its benefits program, but the City decides how to allocate the funds, which may not go to an MRA at all. And even though an employer may be able to predict how the City will use the funds to the benefit of its employee (if it knows the laws and regulations that govern the program and has sufficient information about its employee), knowing how the City spends its public funds is different than making a "contribution" to that use.

A City MRA is not "minimum essential coverage," so it does not affect an employee's entitlement to federal premium assistance.

Some council members have asked for additional information explaining why the City believes that having a City MRA will not affect the recipient's eligibility for federal premium assistance.

Internal Revenue Code section 36B provides that individual taxpayers whose household incomes are at or below 400% of the federal poverty line are eligible for premium assistance tax credits for insurance purchased on Covered California unless they are eligible for or enrolled in "minimum essential coverage." 26 U.S.C. § 36B(c)(2)(B). One definition of "minimum essential coverage" is "[g]overnment sponsored programs." 26 U.S.C. § 5000A(f)(1)(A). That term is also defined and means coverage under any one of seven federal programs listed in section 5000A(f)(1)(A)(i)-(vii). No local government-sponsored programs are on the list, including the City's program, so City MRAs are not considered minimum essential coverage as a "government sponsored program."

The definition of minimum essential coverage also includes "employer-sponsored plans." 26 U.S.C. §§ 5000A(f)(1)(B). That term is further defined to include a "governmental plan (within the meaning of section 2791(d)(8) of the Public Health Service Act)." 26 U.S.C. § 5000A(f)(2)(A). Section 2791(d)(8), in turn, references a section of ERISA that defines "governmental plan" as an employee benefit plan established by a federal, state or local government entity for its employees. 29 U.S.C. § 1002(32). Because MRAs are not an employee benefit plan for City employees, they do not qualify as an employer-sponsored plan.

MRAs do not fit under any definition of minimum essential coverage, so they do not disqualify an employee who has a City MRA from receiving federal premium assistance if they otherwise qualify.

A City MRA can be used to reimburse insurance premium payments, including on Covered California.

Insurance premiums are health care expenses that are eligible for reimbursement under the terms of the City's MRA. Some council members have expressed concern that this may be impermissible if the benefits recipient is buying insurance on Covered California, particularly if he or she receives a premium assistance tax credit. They point out that the IRS has prohibited this sort of "double-dipping" in regard to employer plans and does not permit employees to use pre-tax dollars to purchase coverage on an Exchange.

Here, too, the City's position reflects the fact that public benefits and employee benefits are subject to different legal rules. Unlike for employee benefit programs, the City is not aware of restrictions on using government benefits – whether in the form of a general assistance check or a disaster relief subsidy or something else – to buy insurance on an Exchange. In the absence of guidance to the contrary, the City believes the same is true of MRA benefits.

To be discussed at next meeting, 11.7.2013

- Employees between 20-30 hours/week
- Employers w/ 20-49 employees
- "cost" of HRAs not reverting to employer
- Employer Considerations: Small businesses have to take into consideration the eligibility requirement and uptake rate requirement of insurers prior to choosing a plan
- Employer Affordability/Costs: Impact on small business sustainability
- Scenarios outlining implications of not having HRAs and/or City Option in place