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MEMORANDUM OF LAW

DATE: July 28, 2016

TO: Julio Canizal, Risk Management Director

FROM: City Attorney

SUBJECT: Retiree Health Reimbursements for Health Eligible Retirees

INTRODUCTION

City of San Diego (City) retirees who retired before April 1, 2012, but after October 5, 1980, are “Health Eligible Retirees” under Chapter 2, Article 4, Division 12 of the San Diego Municipal Code (Municipal Code or SDMC). Health Eligible Retirees are eligible for a defined benefit-style health benefit. Specifically, they are eligible to be reimbursed by the City for the “actual premium cost” they incur for retiree-only health insurance premiums, up to specified monthly limits.¹ SDMC § 24.1202(b)(3). Retiree health benefits are administered by the City, and are “paid by the City, directly, from any source available to it other than the [Retirement] Plan.” SDMC § 24.1204. Unlike retirement benefits, they are not, and cannot be, paid from the Retirement System trust fund.²

The City’s Risk Management Department administers both the retiree health benefits for City retirees and the health benefits for active City employees. Risk Management staff decides which health plans will be offered to employees and retirees, selects the insurance carriers, and negotiates the City’s contracts with the carriers. And while the Board of Administration (Board) for the San Diego City Employees’ Retirement System (SDCERS) is empowered by the San Diego Charter (Charter) to make decisions regarding retirement benefit eligibility,³ the City is the sole authority and judge as to eligibility for retiree health benefits.

¹ For purposes of this Memorandum, “retiree health benefits” does not include the post-employment health benefits for eligible employees retiring after March 30, 2012, or the limited retiree health benefits for employees who retired before October 6, 1980.

² The Treasury Regulations issued under Internal Revenue Code (IRC or Code) section 401(a) state that a plan is not a qualified pension plan if it provides for the payment of benefits not customarily included in a pension plan, such as benefits for sickness, accident, hospitalization, or medical expenses. Treas. Reg. § 1.401-1(b)(1)(i). The only exception is for medical benefits described in IRC section 401(h) held in a separate trust within the retirement trust, which the City does not have.

³ San Diego Charter § 144. The San Diego City Employees Retirement System, acting through its Board of Administration, is the administrator of the City’s defined benefit retirement plan. Under San Diego Charter section 144, the Board has exclusive control over the administration and investment of the retirement trust fund, and is the “sole authority and judge” of who may receive benefits under the retirement plan, subject to ordinances adopted by the San Diego City Council.

However, SDCERS has historically helped the City process the retiree health benefits. SDCERS' responsibilities with respect to retiree health benefits are described in a Memorandum of Understanding between the City and SDCERS (MOU).⁴ These duties are limited to: (1) managing the health plan enrollments of new retirees, and surviving spouses and dependents of SDCERS Members killed in the line of duty; (2) processing retiree health insurance reimbursements; and (3) conducting the annual health insurance open enrollment for retirees.

SDCERS has recently questioned the City's direction regarding Municipal Code section 24.1202(b)(3), which states that a Health Eligible Retiree cannot be reimbursed "any more than the actual health insurance premium cost he or she incurs." SDCERS has urged the City to interpret the retiree health benefit provisions in the Municipal Code in a way that would allow SDCERS to disregard amounts paid towards the retiree's premium by the employer of the retiree's spouse, if those amounts are paid with flexible benefit credits (flex credits) through a cafeteria plan.

SDCERS has also suggested that the retiree health benefit provisions in the Municipal Code be read to allow reimbursement of a retiree's premium where there is no cost difference to the retiree's spouse between covering the retiree and children and covering only the children.⁵ This typically occurs where the retiree's spouse has been covering the couple's children under his or her employer-sponsored plan and adds the retiree to the plan for no additional cost when the retiree retires from the City. In these circumstances, SDCERS contends that the retiree should be reimbursed the difference between the premium cost for employee-only coverage and the cost of employee-plus-spouse coverage under the spouse's plan, including in situations when the retiree is actually covered under an "employee plus family" or "employee plus spouse and dependents" plan. SDCERS contends that its method of calculating reimbursements would be less expensive for the City than the current interpretation, which encourages the retiree to obtain separate coverage and be reimbursed for that premium.

Finally, SDCERS asks that the City consider waiving the collection of the overpaid health insurance reimbursements from retirees, claiming that the City has not provided "a clearly defined reimbursement process." Presumably, this request is limited to the retirees who were overpaid for one of the following reasons: (1) the retiree was reimbursed for premiums paid by the retiree's spouse's flex credits, (2) the retiree was reimbursed for the a portion of the premiums paid by the retiree's spouse where there was no additional cost to add the retiree to the policy, or (3) the retiree was reimbursed for more than the difference between the cost of an employee-plus-spouse-plus children plan and an employee-plus-children plan.

QUESTIONS PRESENTED

1. Does a Health Eligible Retiree "incur" a cost for a health insurance premium if the premium is paid by another employer through flex credits under a cafeteria plan?

⁴ The Memorandum of Understanding was approved by the City Council on June 23, 2014 by adoption of Ordinance O-20375. Copies of San Diego Ordinance O-20375 (Jun. 23, 2014) and the MOU are attached to this Memorandum as Attachments 1 and 2.

⁵ *Id.*

2. How should a Health Eligible Retiree's actual premium cost be determined where the retiree is covered by the working spouse's policy that also covers the couple's children or other dependents?

3. May the City waive collection from retirees of amounts SDCERS has overpaid in retiree health reimbursements?

SHORT ANSWERS

1. No. To the extent a retiree's health insurance premiums are paid for with flex credits under an employer-sponsored cafeteria plan, the retiree does not incur an actual cost for that premium, and cannot be reimbursed.

2. As the facts of these cases vary, creation of a blanket rule is not possible. Risk Management staff should develop procedures for apportioning the part of the working spouse's health premium that is attributable to the retiree's coverage. The procedures should ensure that the City reimburses only the premium costs that are actually paid by the retiree or his or her spouse, and are associated with the retiree's coverage only.

3. Before the City may waive collection of the overpaid retiree health benefits, the San Diego City Council (Council) must first determine that there is a public purpose served by doing so. A public purpose is served by using public funds to settle a good faith dispute, but not to settle an invalid claim. Thus, the cases will have to be reviewed individually.

ANALYSIS

I. TO THE EXTENT A RETIREE'S PREMIUM IS PAID BY THE CITY OR ANOTHER EMPLOYER WITH CAFETERIA PLAN FLEX CREDITS, THE HEALTH ELIGIBLE RETIREE DOES NOT "INCUR" AN "ACTUAL PREMIUM COST," AND IS NOT ENTITLED TO REIMBURSEMENT.

Health Eligible Retirees may obtain health insurance under any currently available City-sponsored health insurance plan, or any other health insurance plan of their choice, and be paid or reimbursed for the premium cost of insuring the retiree, up to the retiree's applicable monthly limit.⁶ SDMC § 24.1202(a). In addition to the monthly limit, the Municipal Code states that "[a] Health Eligible Retiree will not be paid or reimbursed any more than the actual premium cost he or she incurs." SDMC § 24.1202(b)(3). Thus, a retiree cannot be reimbursed for premium amounts paid directly by his or her spouse's employer. The first question addressed in this Memorandum, however, is whether a retiree may be reimbursed for the cost of the retiree's health coverage to the extent it was paid for with a spouse's flex credits under a cafeteria plan. In other words, has a retiree "incurred" an "actual premium cost" if the retiree's spouse used flex dollars awarded by his or her employer to pay the premium?

⁶ The monthly limits are based on the Health Eligible Retiree's retirement date and the bargaining group they were in before retirement. The limits are stated in Municipal Code section 24.1202(b), subsections (5) through (7).

A. Brief Background on Cafeteria Plans, including the City's Flexible Benefits Plan.

A cafeteria plan is a separate plan maintained by an employer for its employees that meets the requirements of Code section 125, and the regulations under that section. A cafeteria plan allows participants to receive certain “qualified” benefits on a pretax basis. Participants in a cafeteria plan must be given a choice between at least one taxable benefit (such as cash) and one qualified benefit. Code § 125(d)(1)(B). In addition, the plan must be in writing, and must specifically describe the benefits and establish the rules for eligibility and elections. Code § 125(d)(1).

Many cafeteria plans, such as the City's, allow employees to cash out excess flex credits not used to purchase health insurance or other qualified benefits under the plan. The City's Flexible Benefits Plan for Fiscal Year 2017, adopted by San Diego Resolution R-310492 (Jun. 1, 2016) on May 24, 2016, allows employees to use their flex credits to purchase health, dental, vision, or life insurance under one or more of the “component plans” identified in the plan. Employees also have the option to assign flex credits to a healthcare or dependent care spending account, or to their 401(k) Plan account, as these are also component plans for the City's Flexible Benefits Plan. Any unused flex credits after an employee has made his or her benefits elections is paid to the employee as taxable income.⁷

Not all cafeteria plans operate this way. For instance, the County of San Diego's Flexible Benefits Plan does not allow participants to cash out their excess flex credits. Depending upon whether the participant waived or purchased County-sponsored health coverage, and the type of health coverage the participant chooses, any flex credits not used to purchase benefits are automatically deposited into the County's Health Savings Account, Health Reimbursement Account, or Health Care or Dependent Care Flexible Spending Accounts.⁸

Flex credit amounts under the City's Flexible Benefits Plan are set by the collective bargaining agreement between the City and each recognized employee organization, and are adopted each year along with the Flexible Benefits Plan for that year.⁹ For some bargaining groups, the flex credit amounts are identical for all bargaining unit members, regardless of whether the member waives health coverage (e.g., because they are covered by a spouse's plan), selects employee-only coverage, or elects to cover a spouse and dependents. Other bargaining groups have chosen to tier their flex credits, awarding fewer flex credits to employees who waive health coverage or purchase employee-only coverage, and more flex credits to employees who elect to cover their spouses and families.

⁷ City of San Diego Flexible Benefits Plan, Amended and Restated as of July 1, 2016, adopted by the Council on May 24, 2016, by San Diego Resolution R-310492 (Jun. 1, 2016).

⁸ http://www.sandiegocounty.gov/content/dam/sdc/hr/eBenefits/OE_Documents_Forms/Open_Enrollment_Guide.pdf (last visited May 13, 2016).

⁹ The City Council adopted the Flex Credit amounts for Fiscal Year 2017 on May 24, 2016, by adoption of San Diego Resolution R-310492 (Jun. 1, 2016).

B. A Retiree Has Not Incurred Any Actual Premium Costs Unless the Retiree Has Paid the Premiums Out-of-Pocket.

To understand what is meant by “reimbursement” and “actual cost incurred” in the context of flex benefits, the rules of statutory interpretation are applied. “When statutory language is clear and unambiguous, we need not construe its meaning.” *Howard Jarvis Taxpayers Ass’n v. County of Orange*, 110 Cal. App. 4th 1375, 1381 (2003); *Bernard v. City of Oakland*, 202 Cal. App. 4th 1553, 1560 (2012). If the meaning is unambiguous, the plain meaning governs, unless a literal interpretation would lead to an absurd result inconsistent with the legislative purpose. *Bernard*, 202 Cal. App. 4th at 1561. *People v. Cruz*, 13 Cal. 4th 764, 782-83 (1996); *Younger v. Superior Court*, 21 Cal. 3d 102, 113 (1978).

If the meaning is in doubt, the rules of statutory interpretation are used to ascertain the legislature’s intent. *Palos Verdes Faculty Ass’n v. Palos Verdes Peninsula Unified School District*, 21 Cal. 3d 650, 658 (1978); *Delaney v. Superior Court*, 50 Cal. 3d 785, 798 (1990); *Preston v. State Bd. of Equalization*, 25 Cal. 4th 197, 213 (2001); *Bernard*, 202 Cal. App. 4th at 1560. To do this, courts look to the legislative history, administrative construction, and questions of public policy. *Bernard*, 202 Cal. App. 4th at 1562; *Halbert’s Lumber, Inc. v. Lucky Stores, Inc.*, 6 Cal. App. 4th 1233, 1239 (1992). If that review does not entirely resolve the ambiguity, the court will interpret the statute to give it a reasonable and common sense meaning consistent with the apparent purpose and intent of the lawmakers and taking into consideration the consequences flowing from a particular interpretation, so that, in application, the interpretation will result in wise policy. *City of Costa Mesa v. McKenzie*, 30 Cal. App. 3d 763, 770 (1973); *Industrial Risk Insurers v. Rust Engineering Co.*, 232 Cal. App. 3d 1038, 1042 (1991). Finally, statutes are presumed to be valid, and liberal effect is given to the legislative intent when possible. Reasonable certainty under the circumstances is all that is required, not mathematical precision. *United Business Com. v. City of San Diego*, 91 Cal. App. 3d 156, 176 (1979).

In determining the lawmakers’ intent, a court will turn first to the words themselves. *Delaney*, 50 Cal. 3d at 798. Words should be given the meaning they bear in ordinary use, as reflected in a dictionary and construed in context. *See Id.*; *Bernard*, 202 Cal. App. 4th at 1560. Each word should be given its plain meaning, unless the word is specifically defined in the statute. *Cruz*, 13 Cal. 4th at 774-75; *Halbert’s Lumber, Inc.*, 6 Cal. App. 4th at 1238. The meaning of a statute may not, however, be determined from a single word or sentence. *In re Melchor P.*, 10 Cal. App. 4th 788, 792 (1992). Rather, the various parts of a statute must be harmonized. *Howard DeYoung v. City of San Diego*, 147 Cal. App. 3d 11, 18 (1983). “[I]f possible, significance should be given to every word, phrase, sentence and part of an act in pursuance of the legislative purpose.” *Cruz*, 13 Cal. 4th at 782 (citation omitted). With this background in statutory construction in mind, we now turn to the interpretation of section 24.1202(b)(3).

In ordinary parlance, “reimbursement” means “repayment” or “indemnification.” *Black’s Law Dictionary* 1476 (10th ed. 2014). “Actual” means “existing in fact; real” and “cost” is defined as: “[t]he amount paid or charged for something; price or expenditure.” *Id.* at 42, 422. Lastly, “incur” means: “to suffer or bring on oneself.” *Id.* at 885. Thus, “actual cost incurred” means an existing expenditure that one has suffered or paid.

To the extent a retiree's health insurance premium is paid by flex credits under a cafeteria plan, the retiree has not suffered an actual expenditure for which he or she can be "reimbursed." The employer sponsoring the cafeteria plan is paying the actual cost of the premiums, but giving the employee a choice of plans. The retiree may argue that "but for" the fact that flex dollars were used to purchase his or her health insurance, the retiree's spouse would have had more flex credits with which to purchase other benefits, or in some cases, to receive in cash. Nonetheless, when an employee uses flex credits to purchase health insurance, he or she is using employer money that is provided primarily (or in some cases, exclusively) for that purpose, and the retiree and his or her spouse have not incurred the expense of paying insurance premiums.

It may be, in some cases, to a Health Eligible Retiree's advantage to purchase his or her own health insurance under a City-sponsored (or other) plan, and have his or her premiums reimbursed up to the retiree's applicable monthly limit, under Municipal Code section 24.1202(a). And this may, in some cases, cost the City more than reimbursing the retiree for insurance paid for with a spouse's flex credits. The Council could amend Municipal Code section 24.1202 to allow for reimbursement of premiums paid with flex credits in these situations.¹⁰ Under the current language in section 24.1202, however, the City cannot reimburse premiums paid with flex dollars.

C. SDCERS' Mistaken Overpayments to These Retirees Does Not Bar the City from Changing Their Payments Prospectively, or From Seeking Reimbursement.

The fact that SDCERS mistakenly reimbursed retirees for health insurance premiums paid by another employer through cafeteria plan flex credits will not bar the City from changing the practice going forward, or from collecting the overpaid amounts.

Municipal Code section 24.1202(b)(3) prohibits reimbursement of a retiree for more than the actual premium cost he or she incurs. The fact that a retiree was reimbursed for costs the retiree did not incur, either due to a misapplication of the law, or the City's alleged failure to give SDCERS clear direction, would not bar the City's claims against the retirees who received the overpayments. In *Medina v. Board of Retirement, Los Angeles County Employees Retirement Ass'n*, two deputy district attorneys were erroneously classified as "safety members" entitling them to receive higher benefits. *Medina v. Board of Retirement, Los Angeles County Employees Retirement Ass'n*, 112 Cal. App. 4th 864, 867 (2003). The Court held that "principles of estoppel may not be invoked to directly contravene statutory limitations" and there was no vested right to the safety member pension when the employees were erroneously classified. *Id.* at 869, 871-72; *see also Chaidez v. Board of Administration of California Public Employees' Retirement System, et al.*, 223 Cal. App. 4th 1425, 1432 (2014).

The Court reached a similar conclusion in *City of Pleasanton v. Board of Administration*, by holding that estoppel was barred as a matter of law where a Public Employees' Retirement System statute precluded treatment of standby pay as pensionable compensation. *City of Pleasanton v. Board of Administration*, 211 Cal. App. 4th 522, 543 (2003); *City of Oakland v.*

¹⁰ Such an amendment may require meet and confer. That analysis is beyond the scope of this memorandum.

Oakland Police & Fire Retirement System, 224 Cal. App. 4th 210 (2014). As a result, “[n]either the doctrine of estoppel nor any other equitable principle may be invoked against a governmental body where it would operate to defeat the effective operation of a policy adopted to protect the public.” *San Diego City Firefighters, Local 145, AFL-CIO v. Board of Administration of San Diego City Employees’ Retirement System*, 206 Cal. App. 4th 594, 610 (2012) citing *County of San Diego v. Cal. Water etc. Co.*, 30 Cal. 2d 817, 826 (1947).

II. RISK MANAGEMENT STAFF SHOULD DEVELOP PROCEDURES TO DETERMINE, ON A CASE-BY-CASE BASIS, HOW TO APPORTION THE PREMIUM INCURRED TO COVER A RETIREE WHEN THE RETIREE’S WORKING SPOUSE IS ALSO COVERING OTHER DEPENDENTS.

Risk Management staff should develop written procedures for determining the actual cost incurred for a retiree’s health insurance premium where the retiree is covered under his or her working spouse’s health insurance policy that also covers the couple’s children or other dependents. The procedure should ensure that retirees are reimbursed only for expenses actually incurred by the couple to purchase health coverage for the retiree only.

Among other things, the procedures should require documentation showing payments were deducted from the spouse’s paycheck or otherwise paid by the retiree or his or her spouse. In addition, the procedures should ensure that retirees are not being reimbursed for premiums for the retiree’s spouse, children, or dependents.

In a case where the retiree’s spouse has been covering the couple’s children for some time, and the retiree is added to the spouse’s policy at no additional cost, it is clear that the retiree incurs no actual premium cost. If there is a cost to add the retiree, then the retiree’s actual premium cost would be the difference between the premium cost before and after the retiree is added to the policy.

Where the working spouse’s health plan offers only employee and employee-plus-family coverage, Risk Management staff should apply a reasonable and consistent methodology to apportion the cost attributable to the retiree’s coverage. This could be simply dividing the total premium by the number of persons covered to arrive at a per person cost. Alternatively, staff could ask the insurer whether it offers an “employee plus spouse” option (possibly to other employers), and then subtract the cost of employee coverage from the cost of employee-plus-spouse coverage to arrive at the cost of the retiree’s coverage. The key is that Risk Management staff have a reasonable policy that is written and regularly followed.

III. THE CITY COUNCIL MAY AGREE TO WAIVE COLLECTION FROM RETIREES OF THE AMOUNTS SDCERS OVERPAID IN RETIREE HEALTH BENEFITS, IF THE COUNCIL DETERMINES THERE IS A PUBLIC INTEREST SERVED BY DOING SO AND IT IS NOT A GIFT OF PUBLIC FUNDS.

No provision in the Charter or Municipal Code expressly prohibits the City from waiving collection of overpaid retiree health reimbursements. The Charter does, however, prohibit the giving of “credit . . . to or in the aid of any individual, association or corporation.” San Diego

Charter § 93. This provision is consistent with article XVI, section 6 of the California Constitution, which prohibits the gift of public funds. Generally, there must be a public purpose established by the legislative body to justify the use of public resources in a specified manner. *See Tevis v. City & County of San Francisco*, 43 Cal. 2d 190, 197 (1954) (charter provision defining gift of public funds prevails over constitutional provision); *City & County of San Francisco v. Patterson*, 202 Cal. App. 3d 95, 103-04 (1988).

The determination of a public purpose lies with the legislative body; the concept is liberally construed and the legislative action is upheld unless it is totally arbitrary. *Mannheim v. Superior Court*, 3 Cal. 3d 678, 691 (1970); *Community Memorial Hosp. v. County of Ventura*, 50 Cal. App. 4th 199, 207 (1996). In determining whether a public purpose exists, only the legal propriety of the expenditure should be examined, not economic or governmental wisdom. *City of Oakland v. Oakland Raiders*, 32 Cal. 3d 60, 73 (1982).

To waive collection from retired employees of health insurance reimbursements they were not entitled to under the Municipal Code, and interest on those amounts, the Council must first determine that there is a public purpose served by paying these expenses.

It is appropriate to use public funds to settle a good faith dispute, but not public service is served by compromising an invalid claim. *Page v. Mira Costa Comm. College Dist.*, 180 Cal. App. 4th 471, 495 (2009).

In cases where SDCERS mistakenly reimbursed retirees for health insurance premiums they did not incur – either because they were paid for by another employer through flex credits, or there was no increase in premiums to add the retiree to a spouse’s plan – the City has a strong claim to repayment of the funds. These retirees were reimbursed for costs they did not incur, in direct violation of Municipal Code section 24.1202(b)(3). The fact that the overpayments were caused by a mistake, or that the City allegedly failed to give SDCERS clear direction, would not bar the City’s claims against the retirees who received the overpayments.

These cases must be individually reviewed, and any recommendation to waive recovery must be approved by the Council.

CONCLUSION

Retirees should not be reimbursed for premiums that were paid for by the City or another employer, either directly or with flex dollars under a cafeteria plan, because in these instances, the retiree has not incurred an actual premium cost for his or her health insurance.

Risk Management staff should develop consistent procedures for determining the premium cost of the retiree’s coverage in cases where a retiree is covered under a spouse’s plan that also includes children or other dependents.

Finally, before the City may waive amounts overpaid to retirees for health insurance reimbursements, the Council must find that there is a public purpose served by doing so, such as the resolution of a good faith dispute over whether the reimbursement was owed to the retiree.

JAN I. GOLDSMITH, CITY ATTORNEY

By /s/ Roxanne Story Parks
Roxanne Story Parks
Deputy City Attorney

RSP:cm
ML-2016-13
Doc. No. 1329648
Attachments (2)

ATTACHMENT 1

56
6/10/14
(O-2014-21)
~~# 55~~
~~5-13-14~~

ORDINANCE NUMBER 0-20375

DATE OF FINAL PASSAGE JUN 23 2014

AN ORDINANCE APPROVING A MEMORANDUM OF UNDERSTANDING BETWEEN THE CITY OF SAN DIEGO AND THE SAN DIEGO CITY EMPLOYEES' RETIREMENT SYSTEM REGARDING SDCERS' CONTINUED PROCESSING OF THE CITY'S RETIREE AND POST-EMPLOYMENT HEALTH BENEFITS, AND AUTHORIZING THE MAYOR TO SIGN THE MEMORANDUM OF UNDERSTANDING.

WHEREAS, the City of San Diego is the plan sponsor of the defined benefit retirement plan established under San Diego Charter section 141 through 149 (Retirement Plan); and

WHEREAS, the San Diego City Employees' Retirement System (SDCERS) is the administrator of the Retirement Plan; and

WHEREAS, SDCERS has a fiduciary duty to ensure that the trust funds it administers are used only to pay retirement benefits to the SDCERS members and beneficiaries, and reasonable expenses related to administering those benefits; and

WHEREAS, the City's retiree health benefits (for eligible members who retired before April 1, 2012) and post-employment health benefits (for eligible members who retire on or after April 1, 2012) are not "retirement benefits" under the Retirement Plan; and

WHEREAS, SDCERS therefore cannot use retirement trust funds to pay the costs of administering the City's retiree health and post-employment health benefits; and

WHEREAS, SDCERS bills the City separately for all administrative costs it incurs in processing the retiree health and post-employment health benefits; and

WHEREAS, SDCERS has requested that the City enter into a Memorandum of Understanding (MOU) covering SDCERS' processing of the City's retiree health and post-employment health benefits; and

WHEREAS, SDCERS has requested that the MOU also cover SDCERS' provisions of information to the City, which enable the City to identify employees as they reach retirement eligibility, thus triggering the City's obligation to fund the retiree medical trust accounts of employees who elected Option C under the post-employment health program; and

WHEREAS, the MOU proposed by SDCERS provides that the City will defend and indemnify SDCERS if SDCERS receives a claim, is sued, or has a judgment rendered against it as a result of its actions in processing the City's retiree health and post-employment health benefits; and

WHEREAS, this indemnity provision is necessary, because SDCERS is legally prohibited from using retirement trust funds to defend against a claim or pay a judgment arising from its processing of non-Retirement Plan benefits, such as the City's retiree health and post-employment health benefits; NOW, THEREFORE,

BE IT ORDAINED, by the Council of the City of San Diego, as follows:


Section 1. That the Council of the City of San Diego (City Council) approves the Memorandum of Understanding (MOU) between the City and SDCERS, regarding SDCERS' processing of the City's retiree health and post-employment health benefit programs, and the enrollment of retirees into City-sponsored health insurance plans, under the terms set forth in the MOU on file in the Office of the City Clerk as Document No. 00 - 20375.

Section 2. That the City Council authorizes the Mayor or his designee to sign the MOU.

Section 3. That a full reading of this ordinance is dispensed with before its passage, a written or printed copy having been made available to the City Council and the public before the day of its passage.

Section 4. That this ordinance will take effect and be in force on the thirtieth day after its final passage.

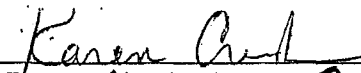
APPROVED: JAN I. GOLDSMITH, City Attorney

By 
Roxanne Story Parks
Deputy City Attorney

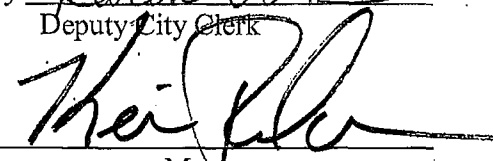
RSP:ccm
07/08/2013
Or.Dept:Risk Management
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I certify that the foregoing Ordinance was passed by the Council of the City of San Diego, at this meeting of JUN 10 2014

ELIZABETH S. MALAND
City Clerk

By 
Deputy City Clerk

Approved: 6/19/2014
(date)


Mayor

Vetoed: _____
(date)

Mayor

Passed by the Council of The City of San Diego on JUN 10 2014, by the following vote:

Councilmembers	Yeas	Nays	Not Present	Recused
Sherri Lightner	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Ed Harris	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Todd Gloria	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Myrtle Cole	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Mark Kersey	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Lorie Zapf	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Scott Sherman	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
David Alvarez	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Marti Emerald	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Date of final passage JUN 23 2014

AUTHENTICATED BY:

KEVIN L. FAULCONER
Mayor of The City of San Diego, California.

(Seal)

ELIZABETH S. MALAND
City Clerk of The City of San Diego, California.

By Mary Hernandez, Deputy

I HEREBY CERTIFY that the foregoing ordinance was not finally passed until twelve calendar days had elapsed between the day of its introduction and the day of its final passage, to wit, on

JUN 13 2014, and on JUN 23 2014.

I FURTHER CERTIFY that said ordinance was read in full prior to passage or that such reading was dispensed with by a vote of five members of the Council, and that a written copy of the ordinance was made available to each member of the Council and the public prior to the day of its passage.

(Seal)

ELIZABETH S. MALAND
City Clerk of The City of San Diego, California.

By Mary Hernandez, Deputy

Office of the City Clerk, San Diego, California

Ordinance Number O- **20375**

ATTACHMENT 2

ORIGINAL

**MEMORANDUM OF UNDERSTANDING
BETWEEN
THE CITY OF SAN DIEGO
AND
THE BOARD OF ADMINISTRATION OF THE
SAN DIEGO CITY EMPLOYEES' RETIREMENT SYSTEM
REGARDING SDCERS' MANAGEMENT OF THE CITY OF SAN DIEGO'S RETIREE
HEALTH BENEFITS**

THIS MEMORANDUM OF UNDERSTANDING ("MOU"), between the City of San Diego ("City") and the Board of Administration ("Board") of the San Diego City Employees' Retirement System ("SDCERS") regarding the provisions of services by SDCERS related to assistance to the City for management of the City's health insurance benefits for City retirees is entered into this 13th day of May, 2014.

RECITALS

- A. SDCERS was created by ordinance pursuant to Section 141 of the San Diego City Charter ("Charter"); and
- B. SDCERS is administered by a 13 member Board of Trustees ("Board") pursuant to Charter Section 144; and
- C. SDCERS has historically provided certain services to assist the City related to management of the health insurance benefits for retirees of the City which services have included managing and coordinating enrollment of new retirees into their chosen health plans, processing retiree health insurance claims and reimbursements, and conducting the annual health insurance Open Enrollment for existing retirees; and,

D. The City wants SDCERS to continue to perform those services, for both existing retirees under the pre-April 1, 2012 plans ("the Old Plan") and prospectively for new retirees who have elected Option A, B or C under the new post-employment health benefit effective April 1, 2012 ("the 2012 Plan"); and,

E. The City wants SDCERS to provide it with ongoing data to assist the City's administration and funding of employees' retiree medical trust accounts under Option C under the 2012 Plan; and,

F. The City and the Board agree that both the Old Plan and the 2012 Plan are benefits provided by the City and are not pension benefits "under" the Retirement System; and,

G. The Board's fiduciary duty requires that it ensure that SDCERS expend trust funds solely for the purpose of providing and administering pension benefits under the System; and,

H. Pursuant to instructions from the Internal Revenue Service ("IRS") the Board has determined that it cannot incur any expenses out of the trust fund for purposes of managing health insurance benefits for City retirees; and,

I. The Board has determined that it is in the best interests of SDCERS that it continue to assist the City with the management of its retiree health benefits, provided the City and SDCERS enter into an Agreement whereby the Board agrees to continue to provide the services referenced in this MOU, and any other incidental services required to assist the City in managing its retiree health benefit, and the City agrees to reimburse SDCERS directly for all expenses incurred and to hold harmless, defend and indemnify SDCERS for any claims, losses and liabilities alleged against SDCERS arising out of its management of the City's retiree health benefits, whether such claims are alleged as a result of SDCERS' negligence or otherwise.

J. The Parties acknowledge that all employees of SDCERS are City employees.

K. The City recognizes that it is in the City's best interest to have SDCERS continue to assist the City with the management of its retiree health benefits and that any negligence attributable to SDCERS as a result of performance under this agreement can only be vicarious liability for allegedly negligent acts committed by City employees assigned to work at SDCERS.

L. In consideration of the above-stated premises, the terms, covenants and conditions set forth in this MOU, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

MEMORANDUM OF UNDERSTANDING

1. **Agreement:** This Memorandum of Understanding ("MOU") is entered into as of May 13, 2014 ("Effective Date") by and between the City of San Diego ("City") and the Board of Administration of the San Diego City Employees' Retirement System ("Board") whereby SDCERS will provide services relating to the City's retiree health plans.

2. **Scope of Services:**

A. **Responsibility for Enrollment of New Retirees:** SDCERS is responsible for counseling and enrolling Health Eligible Retirees and retirees eligible for post-employment health benefits under the 2012 Plan, at retirement, in the applicable retiree health benefit pursuant to the terms of the applicable retiree health plan and the Municipal Code, including but not limited to San Diego Municipal Code ("SDMC") sections 24.1201, *et. seq.* ("the Old Plans"), and 29.0101, *et. seq.* ("the 2012 Plan").

B. **Responsibility for Processing Reimbursements for the Limited Retiree Health Benefit:** SDCERS is responsible for counseling and processing reimbursement claims for retirees who are eligible for the Limited Retiree Health Benefit (SDMC section 24.1203).

C. Responsibility for Enrollment of Surviving Spouses and Dependents of SDCERS Members Killed in the Line of Duty: SDCERS is responsible for counseling and enrolling eligible Surviving Spouses and Dependents of SDCERS Members Killed in the Line of Duty (SDMC section 29.0201).

D. Responsibility for Annual Open Enrollment: SDCERS is responsible for preparing, distributing, and processing the annual Open Enrollment materials for existing retirees, their eligible dependents and survivors, and eligible Surviving Spouses and Dependents of SDCERS Members Killed in the Line of Duty.

E. City's Responsibility to Provide Data: The City agrees to compile and provide SDCERS with any data in its possession that SDCERS requires to perform its responsibilities under this MOU.

F. SDCERS' Responsibility to Provide Data Relating to Implementation of Retiree Health Benefits: SDCERS agrees to compile and provide the City with any data in SDCERS' possession that the City requires regarding SDCERS' implementation of the City retiree health benefits. The City is solely responsible for informing SDCERS what data the City requires. SDCERS will comply with any requests for data within a reasonable time.

G. Responsibility for Payment of Monthly Premiums to Health Insurance Carriers. SDCERS is responsible for transmitting the monthly premiums on behalf of retirees to the City's health insurance carriers.

3. **SDCERS' Responsibility to Provide Data Relating to City's Implementation of Option C of the 2012 Plan:** SDCERS agrees to compile and provide the City with any data in SDCERS' possession that the City requires to implement its funding obligations under Option C of the 2012 Plan. The City is solely responsible for informing SDCERS what data it requires.

SDCERS is not required to submit this data more frequently than every two weeks. SDCERS has no obligation to monitor the City's funding obligations or ensure that the City is properly funding the accounts of the employees who have chosen or are eligible for Option C of the 2012 Plan. The City acknowledges that the integrity of SDCERS' data is dependent upon the timing of the City's request for data as well as the accuracy of data provided to it by the City or its Members, and agrees that SDCERS makes no warranty that the data SDCERS provides is accurate or complete.

4. **Auditing:** The City retains the ability to audit and monitor SDCERS' implementation of its retiree health benefits and any payments made by SDCERS to ensure that payments are authorized by law, including the San Diego City Charter and Municipal Code, and to ensure that appropriate controls and auditing functions are in place.

5. **Compensation:** The City agrees to advance sufficient funds to compensate and reimburse SDCERS directly for all expenses of any nature, including staff time, administrative expenses, consultant fees, attorneys' fees and defense costs, if applicable, or any other expenses incurred by SDCERS at its sole discretion as a result of its performance under this Agreement. SDCERS agrees to obtain City approval before incurring expenses for outside consultants or outside attorneys. SDCERS will invoice the City for all such fees and expenses. The City will pay the invoiced fees within 30 days of its receipt of the invoice.

6. **Indemnification and Defense:** The City agrees to indemnify, defend and hold harmless the Trustees of the Board, SDCERS, its agents, officers, employees, directors and assigns against any loss, cost, claim, suit, damage, liability or expense, including reasonable attorneys' and expert fees and defense costs, arising (a) out of any audit, investigation, subpoena, investigative demand action, action, proceeding, liability, judgment, settlement or inquiry or

action of any other department of the City, any other government agency or entity or any other person or entity relating to SDCERS' performance under this Agreement; or (b) from any inaccurate or incomplete data provided or any non-compliance with the provisions of the Municipal Code or the Charter or retiree health plans relating to SDCERS' performance under this Agreement. The rights provided in this paragraph will survive termination of the MOU.

7. **Limitation of Liability:** SDCERS will not be liable to the City for any loss, cost, suit, claim, damage, liability or expense, including reasonable attorneys' fees, arising from inaccurate or incomplete information provided to the City by SDCERS or from SDCERS' non-compliance with the requirements of the City Charter, San Diego Municipal Code or the City Charter relating to SDCERS' performance under this contract. SDCERS will not, under any circumstances, be liable for indirect, consequential, special or punitive damages. The City should not consider information SDCERS provides to the City to be advice, legal or otherwise, regarding the City's compliance with its retiree health plan, the City Charter or San Diego Municipal Code, and SDCERS will not be liable, in whole or in part, for the City's reliance on such information. The City acknowledges that all assets SDCERS holds are held in trust for the benefit of its Members, Beneficiaries and Participants, and City waives the right to collect damages of any amount or nature from SDCERS, regardless of any negligence that could be imputed to SDCERS' because of the acts committed by City employees, including those City employees assigned to work at SDCERS, or acts committed by subcontractors retained by SDCERS, and approved by the City, to assist SDCERS in the performance of this MOU. The rights provided in this paragraph will survive termination of the MOU.

8. **Standard of Care:** SDCERS is not the Administrator of the City's Old Plan or the 2012 Plan (jointly referred to as "the Retiree Health Plans") and does not act as a fiduciary to

the Plans. Any fiduciary obligations with respect to the Retiree Health Plans remain with the City. In satisfying its obligations under this MOU, SDCERS may use, obtain or provide data it receives from the City, SDCERS' Members, or third-party sources. SDCERS does not warrant or assume responsibility for the accuracy of this data. The Parties recognize that SDCERS' existing data sources were not designed for the purposes of the Plans and thus SDCERS does not guarantee the accuracy of such information and data.

9. **Cooperation:** The Parties recognize that they must mutually cooperate to perform the services required under this Agreement and that SDCERS is not responsible if it is unable to complete any of its responsibilities or tasks under this Agreement because the City, or any third party contracted by the City, fails to meet its obligations, including providing data required by SDCERS to comply with its responsibilities.

10. **HIPAA Compliance:** The Parties acknowledge and agree that this Agreement may involve the use and disclosure of HIPAA-protected health information and that they have included specific provisions regarding such protected information in their policies and procedures. The Parties therefore agree that all uses and disclosures of HIPAA-protected health information pursuant to this Agreement will be undertaken in compliance with all applicable HIPAA requirements. The Parties agree that this Agreement satisfies the requirements of 45 C.F.R. §149.35(b)(2). SDCERS will provide HIPAA-protected health information directly to the City only if the City certifies in writing that it has taken all steps required by HIPAA to protect the confidentiality of HIPAA-protected health information and all other steps required by HIPAA in order to legally receive such protected health information.

11. Term and Termination:

A. Term: The term of this MOU will begin on the Effective Date and will continue until terminated by one of the Parties as set forth in this section.

B. Termination of MOU: Either party may terminate this MOU in its entirety, with or without cause, at any time upon 60 days' prior written notice to the other party.

C. Transition Requirements: If this MOU is terminated by either Party, the Parties agree to cooperate in developing and implementing a detailed plan to minimize disruption and arrange for transfer of services to the City's designee. SDCERS will continue to provide services in accordance with this MOU for a reasonable transition period, unless the reason for termination is due to the City's non-payment as required under Paragraph 5 of this MOU. If that termination of this MOU is due to the City's non-payment of SDCERS' invoice, SDCERS will immediately stop providing services under this MOU, will immediately turn over all records and information necessary for the City to administer the Plans, and will have no further obligation to perform. The City will ensure that any payments due under this MOU will be made promptly following termination of this MOU, including any amounts due to SDCERS for services performed during the Transition Period. Termination of this MOU will not terminate the rights or liabilities of either Party arising out of the period before the effective date of termination.

12. Miscellaneous Provisions:

A. Amendments: All amendments to this MOU must be agreed to in writing by the Parties.

B. Assignment: This MOU may not be assigned by either Party to an unrelated third party without the prior written consent of the other Party.

C. Subcontracting: If SDCERS desires to use subcontractors for any services described in this MOU, it must obtain prior written approval from the City's Human Resources Department, which approval will not be unreasonably withheld. The Parties understand that under the Meyers-Milias-Brown Act, the City is obligated to "meet and confer" with its recognized employee organizations in good faith before contracting out any bargaining unit work.

D. Entire Agreement: The specific terms and conditions of this MOU supersede any and all other agreements, either oral or written, between the Parties, and no other agreement, statement or promise relating to the subject matter of this MOU will be valid or binding.

E. Governing Law: The laws of the State of California govern the validity of this MOU, the construction of its terms, and the interpretation of the rights and duties of the Parties under the MOU.

F. No Third Party Beneficiary: Nothing in this MOU creates any rights or remedies in any third party including, the City's active and retired employees (and their dependents) relating to SDCERS' performance under this MOU.

G. Notice: Any notice given relating to this MOU must be in writing and either hand-delivered, or sent by U.S. mail, postage prepaid (receipt will be deemed to be one day after postmark date), or overnight courier, addressed as follows:

SDCERS:

San Diego City Employees' Retirement System
Attn: Elaine W. Reagan, General Counsel
401 West A Street, Suite 400
San Diego, CA 92101

CITY OF SAN DIEGO:

City of San Diego
Attn: Risk Management Director
Civic Center Plaza
1200 Third Ave., Suite 1000
San Diego, CA 92101

Notices given under this MOU will be deemed given upon receipt. The addresses to which notices are to be sent may be changed by written notice given in accordance with this section.

H. Severability: If any provision of this MOU is rendered invalid or unenforceable by any local, state or federal law, rule or regulation, or declared null and void by any court of competent jurisdiction, the remainder of this MOU will remain in full force and effect.

I. Relationship Status: Nothing in this MOU creates any relationship between SDCERS and the City, other than that legal relationship which exists regardless of this MOU.

J. Force Majeure: Neither Party will be liable for its failure to perform any obligation under this MOU because of contingencies beyond its reasonable control, including, for example, strikes, riots, war, fire, acts of God, disruption or failure of electronic or mechanical equipment or communication lines, telephone or other interconnections, unauthorized access, theft, or acts in compliance with any law or government regulation.

K. Headings: The headings in this MOU are included solely for reference and have no force or effect in interpreting its provisions.

L. Counterparts: This MOU may be executed in counterparts, any of which need not contain the signature of more than one party, but all of which taken together will be one and the same agreement.

M. Survival: The provisions of the Sections entitled "Term and Termination," "Indemnification and Defense," "Limitation of Liability," "HIPAA Compliance," and "Miscellaneous Provisions" will survive the expiration or termination of the MOU for any reason.

The duly-authorized representatives of the City and the Board execute this Memorandum of Understanding this 17th day of July, 2014.

City of San Diego

By: 

Scott Chadwick

Title: Chief Operating Officer

Date: 17 JUL 14

San Diego City Employees' Retirement System

By: 

Mark Hovey

Title: Chief Executive Officer

Date: 6-30-14

0-20375

56
6/10/14
(O-2014-21)
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5-13-14

ORDINANCE NUMBER 0-20375

DATE OF FINAL PASSAGE JUN 23 2014

AN ORDINANCE APPROVING A MEMORANDUM OF UNDERSTANDING BETWEEN THE CITY OF SAN DIEGO AND THE SAN DIEGO CITY EMPLOYEES' RETIREMENT SYSTEM REGARDING SDCERS' CONTINUED PROCESSING OF THE CITY'S RETIREE AND POST-EMPLOYMENT HEALTH BENEFITS, AND AUTHORIZING THE MAYOR TO SIGN THE MEMORANDUM OF UNDERSTANDING.

WHEREAS, the City of San Diego is the plan sponsor of the defined benefit retirement plan established under San Diego Charter section 141 through 149 (Retirement Plan); and

WHEREAS, the San Diego City Employees' Retirement System (SDCERS) is the administrator of the Retirement Plan; and

WHEREAS, SDCERS has a fiduciary duty to ensure that the trust funds it administers are used only to pay retirement benefits to the SDCERS members and beneficiaries, and reasonable expenses related to administering those benefits; and

WHEREAS, the City's retiree health benefits (for eligible members who retired before April 1, 2012) and post-employment health benefits (for eligible members who retire on or after April 1, 2012) are not "retirement benefits" under the Retirement Plan; and

WHEREAS, SDCERS therefore cannot use retirement trust funds to pay the costs of administering the City's retiree health and post-employment health benefits; and

WHEREAS, SDCERS bills the City separately for all administrative costs it incurs in processing the retiree health and post-employment health benefits; and

WHEREAS, SDCERS has requested that the City enter into a Memorandum of Understanding (MOU) covering SDCERS' processing of the City's retiree health and post-employment health benefits; and

WHEREAS, SDCERS has requested that the MOU also cover SDCERS' provisions of information to the City, which enable the City to identify employees as they reach retirement eligibility, thus triggering the City's obligation to fund the retiree medical trust accounts of employees who elected Option C under the post-employment health program; and

WHEREAS, the MOU proposed by SDCERS provides that the City will defend and indemnify SDCERS if SDCERS receives a claim, is sued, or has a judgment rendered against it as a result of its actions in processing the City's retiree health and post-employment health benefits; and

WHEREAS, this indemnity provision is necessary, because SDCERS is legally prohibited from using retirement trust funds to defend against a claim or pay a judgment arising from its processing of non-Retirement Plan benefits, such as the City's retiree health and post-employment health benefits; NOW, THEREFORE,

BE IT ORDAINED, by the Council of the City of San Diego, as follows:


Section 1. That the Council of the City of San Diego (City Council) approves the Memorandum of Understanding (MOU) between the City and SDCERS, regarding SDCERS' processing of the City's retiree health and post-employment health benefit programs, and the enrollment of retirees into City-sponsored health insurance plans, under the terms set forth in the MOU on file in the Office of the City Clerk as Document No. 00 - 20375.

Section 2. That the City Council authorizes the Mayor or his designee to sign the MOU.

Section 3. That a full reading of this ordinance is dispensed with before its passage, a written or printed copy having been made available to the City Council and the public before the day of its passage.

Section 4. That this ordinance will take effect and be in force on the thirtieth day after its final passage.

APPROVED: JAN I. GOLDSMITH, City Attorney

By 
Roxanne Story Parks
Deputy City Attorney


RSP:ccm
07/08/2013
Or.Dept:Risk Management
#720312.docx

I certify that the foregoing Ordinance was passed by the Council of the City of San Diego, at this meeting of JUN 10 2014.

ELIZABETH S. MALAND
City Clerk

By 
Deputy City Clerk

Approved: 6/19/2014
(date)


Mayor

Vetoed: _____
(date)

Mayor

Passed by the Council of The City of San Diego on June 10, 2014, by the following vote:

YEAS: LIGHTNER, HARRIS, COLE, KERSEY, ZAPF, SHERMAN,
ALVAREZ, EMERALD:
NAYS: NONE.
NOT PRESENT: GLORIA.
RECUSED: NONE.

AUTHENTICATED BY:

KEVIN L. FAULCONER

Mayor of The City of San Diego, California

ELIZABETH S. MALAND

City Clerk of The City of San Diego, California

(Seal)

By:  Deputy

I HEREBY CERTIFY that the above and foregoing is a full, true and correct copy of ORDINANCE NO. O-20375 (New Series) of The City of San Diego, California.

I FURTHER CERTIFY that said ordinance was not finally passed until twelve calendar days had elapsed between the day of its introduction and the day of its final passage, to wit, on May 13, 2014, and on June 23, 2014.

I FURTHER CERTIFY that said ordinance was read in full prior to passage or that such reading was dispensed with by a vote of five members of the Council, and that a written copy of the ordinance was made available to each member of the Council and the public prior to the day of its passage.

ELIZABETH S. MALAND

City Clerk of The City of San Diego, California

(SEAL)

By:  Deputy