

secured by an ERISA plan, private purchase, or otherwise, with the consequence that the surcharge statutes cannot be said to make ‘reference to’ ERISA plans in any manner.”).

V. Balance of Hardships

If we deny the stay and establish the expedited briefing schedule to which the City and the Association have agreed, this court will be able to hear oral arguments on the appeal in April or May at the soonest, and will issue a ruling sometime thereafter. Therefore, we consider the relative hardships during that period. If the stay were denied, implementation of the employer spending provisions for employers with fifty or more employees would be delayed for several months, and implementation of those provisions for smaller employers would also be delayed, although for a shorter period. *See* S.F. Admin. Code § 14.8.

The City estimates that approximately 20,000 uninsured San Francisco workers will become newly eligible for health benefits if and when the employer payment mandate under the Ordinance is fully implemented. Neither side has told us how many of those individuals work for employers with fifty or more employees, but it is safe to assume that a reasonable number of them work for such employers and would therefore become covered employees as of January 1, 2008 if the Ordinance is permitted to go into effect. The remainder would become covered

employees as of April 1, 2008. An undetermined number of these employees are represented by Intervenors.

It is uncontested that individuals without health coverage are significantly less likely to seek timely medical care than those with health coverage. Lack of timely access to health care poses serious health risks. The City has provided evidence that some individuals who lack health care coverage have serious, chronic health conditions that currently go untreated. It has also provided evidence that individuals who have recently enrolled in the Health Access Program established under the Ordinance have begun to receive preventive care, medication, and other treatment for previously neglected illnesses and injuries. It is clear that otherwise avoidable human suffering, illness, and possibly death will result if a stay is denied.

In addition, the City will incur some otherwise avoidable financial costs if a stay is denied, for some individuals who would otherwise be covered under the Ordinance will seek emergency treatment from San Francisco General Hospital or City health clinics.

The Association represents restaurants, as well as other culinary employers, throughout San Francisco. Many of the Association's members are covered employers under the Ordinance. At least some of the Association's members have more than fifty employees and would be required to comply with the Ordinance as

of January 1, 2008. If we were to grant a stay, those employers would be required to make at least one quarterly payment on behalf of their covered employees prior to this court’s resolution of the appeal. Those employers would also face several months of administrative burdens pending appeal. Depending on the nature of the employer’s workforce, those burdens may include maintaining records documenting current health care expenditures per employee, differentiating between hours worked inside and outside the City, calculating the percentage of paid time off attributable to time worked inside and outside the City, and determining whether particular employees are “managerial, supervisory, or confidential” under the Ordinance. *See* S.F. Admin. Code §§ 14.1(b)(2)(d), 14.3(b); RIESR Reg. §§ 3.1(C)(1), 3.2(A)(1), 6.1(C)(1), 7.1. Employers with between twenty and forty-nine employees would be required to bear these administrative burdens as of April 1, 2008, and would be required to make their first quarterly payment by the end of June.

We conclude that the balance of hardships tips sharply in favor of the City and the Intervenors. “Faced with . . . a conflict between financial concerns and preventable human suffering, we have little difficulty concluding that the balance of hardships tips decidedly” in favor of the latter. *Lopez*, 713 F.2d at 1437. When considering potential human suffering, we take into account whether “[r]etroactive

restoration of benefits would be inadequate to remedy these hardships” because the affected individuals possess limited resources and could face “economic hardship, suffering or even death” if a stay were not granted pending appeal. *Id.* While the City’s and Association’s injuries are entirely economic, the Intervenors’ injuries include preventable human suffering. Therefore, the balance of hardships tips sharply in favor of the parties seeking relief.

VI. The Public Interest

Our analysis of the public interest in a stay is in part subsumed in our analysis of the balance of hardship to the parties. That analysis, however, is necessarily narrower than a public interest analysis, for there are many employees covered by the Ordinance who are not parties to this suit. In considering the public interest, we may consider the hardship to all individuals covered by the Ordinance, not limited to parties, as well as the indirect hardship to their friends and family members, if a stay is denied. Similarly, we may consider the hardship to all covered employers, not limited to employers represented by the Association, as well as indirect hardship to those affected by hardship to the employers.

In addition, the general public has an interest in the health of San Francisco residents and workers, particularly those workers who handle their food and work in other service industries. Health care providers in San Francisco also stand to benefit

from the Ordinance, both because more individuals with health insurance will use their services, and because fewer individuals will burden their emergency care divisions. Because the Ordinance will likely increase the use of more cost-effective preventive care, as compared with more expensive emergency care, overall health care expenses may decrease.

Further, the general public has a financial interest in receiving low-cost goods and services from employers. To the extent that employers will pass along the costs of compliance to their customers, those customers will be adversely affected. It is possible that some covered San Francisco employers may elect to move elsewhere to avoid the costs of compliance, and some consumers may choose to visit restaurants and other establishments outside the City, where goods and services may be less expensive. But the degree to which these possibilities may become reality is highly speculative.

Finally, our consideration of the public interest is constrained in this case, for the responsible public officials in San Francisco have already considered that interest. Their conclusion is manifested in the Ordinance that is the subject of this appeal. The San Francisco Board of Supervisors passed it unanimously, and the mayor signed it. *See* 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2948.4, at 207 (2d ed. 1995) (“The public

interest may be declared in the form of a statute.”). We are not sure on what basis a court could conclude that the public interest is not served by an ordinance adopted in such a fashion. Perhaps it could so conclude if it were obvious that the Ordinance was unconstitutional or preempted by a duly enacted federal law, in which elected federal officials had balanced the public interest differently; but, as evidenced by our analysis above, we think the opposite is likely to be held true in this case. *See Burford v. Sun Oil Co.*, 319 U.S. 315, 318 (1943) (“[I]t is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy.” (internal quotation marks omitted)).

We therefore conclude that the public interest is served by granting a stay of the district court’s order pending the resolution of the appeal on the merits.

VII. Conclusion

There may be better ways to provide health care than to require private employers to foot the bill. But our task is a narrow one, and it is beyond our province to evaluate the wisdom of the Ordinance now before us. We are asked only whether we should stay the judgment of the district court pending resolution of the appeal on the merits. We conclude that the City and Intervenors have a probability, even a strong likelihood, of success in their argument that the Ordinance is not