

# Restaurant surcharge only-in-S.F. fee

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"Initially, there was a fear that the surcharge method would be rejected by consumers. Our surveys seem to show that diners prefer it to a general, ongoing change in menu prices. If you see a price for a sandwich or a bowl of soup that strikes you as too much, you won't pay it. You won't order the item and you're not likely to return to the restaurant, no matter how many explanations you hear about the cost of doing business in a metropolitan economy like ours," she said.

Restaurants have learned they can get \$15 for "barrel-aged" cocktails and \$17 for all-organic hamburgers and still add a surcharge. And some have learned that, with the right wording on the surcharge notice, they can collect whatever the traffic will bear. Until 2014, when the city closed the legislative loophole, they could pay the health care costs from the surcharge largesse, and pocket the rest.

In 2008, when the city's Health Care Security Ordinance required nonprofits with 50 or more employees and for-profit businesses with 20 or more employees to pay for health care for their workers, only the restaurant industry balked.

Loudest and longest laments came from some of the city's high-profile, high-priced restaurants and their nonprofit trade group, the Golden Gate Restaurant Association, which fought the ordinance when the Board of Supervisors was writing it, then attacked the law with lawsuits and appeals, culminating in an unsuccessful attempt to persuade the state Supreme Court to overturn it.

## SCAPEGOATED THE CITY

When the litigation dust settled with the ordinance intact, many restaurants began collecting the cost of their health care obligations in the form of a surcharge on the diner's tab, shaming the city for "unfairly" compelling health care coverage. The kooky city of San Francisco required them to pay for what most industries take for granted — employee health care — so they took it out on their customers but scapegoated the city.

Some diners took the bait and griped about government bureaucracy. Others took the restaurants to task, questioning the need for a surcharge when a discreet tinkering with menu prices could have disguised the health care cost without throwing it into the diner's face and saying the city made me do it.

It eventually became clear that

some restaurants were making the surcharge a big bonus for their business. The restaurateur got to keep any money collected but unpaid on health coverage at the end of the year.

When the Wall Street Journal reported on San Francisco's restaurant surcharge, citing a \$100,000 windfall by One Market, an annual top 10 American-style restaurant at the foot of Market Street, the response came from the principal in the ownership group, Michael Dellar. He said his business collected a surcharge, not only to recover health care costs, but also to offset the city's higher minimum wage — \$9.92 hourly at that time — as well as the city's 1.5% payroll tax and requirement to provide nine days of paid sick leave annually for each employee.

When the city's Office of Labor Standards Enforcement released figures that One Market had collected \$122,515 through the menu surcharge and spent only \$14,612 toward employee health care expenses, Dellar zipped his lip.

## HERRERA OFFERS AMNESTY

But Dellar was not the only restaurateur who appeared to get more than he gave. City Attorney Dennis Herrera launched a campaign against surcharge fraud in 2013, offering amnesty to restaurants that took in more than they paid out, and promising to sue non-compliers. Herrera's point was that the law required that every cent collected under a surcharge labeled "health care costs" must be applied to employee health care. If you tell your customers you're collecting to fund health care benefits, you've got to spend it on health care benefits. If you pocket the money collected, you are defrauding the public, Herrera reasoned.

Underpinning the city attorney's carrot-and-stick offer was an Office of Labor Standards Enforcement audit that revealed some of the big-name establishments were not in compliance with the health care regulations. Fog City Diner took in more than \$103,000 in surcharges and spent but \$30,935; Wayfare Tavern took in more than \$303,000 and spent \$68,018. Squat and Gobble Café, with four locations in the city, took in more than \$160,000 and spent nothing on employee health care benefits.

The Golden Gate Restaurant Association protested, saying that any problems were the result of paperwork errors or inadvertent failures to spend the collected funds on health care within the proper time period.

By December 2013, Herrera announced the completion of his com-



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pliance campaign, claiming settlements by 38 dining establishments had resulted in health care distributions of more than \$2 million to nearly 4,000 eligible employees. Herrera didn't have to sue, and he thanked the association for its input.

While local turmoil was bubbling, the nation was grappling with the implications of universal health care insurance and Obamacare, the Patient Protection and Affordable Care Act, that became law in 2010.

The federal mandates on certain employers and what health benefits they must provide employees have been pushed back several times. Republicans keep trying to kill Obamacare and the Supreme Court this month will hear arguments challenging the federal health insurance funding rules.

But the future life or sudden death of Obamacare won't affect the city's health ordinance. For starters, city requirements have lower thresholds than the federal law. Employers' coverage requirements kick in at 20 employees, not 50, and, unlike the federal program, requires coverage for both full-time and part-time employees — work eight hours a week and you're covered.

## 1 RESTAURANT PER 238 PEOPLE

In 2013 the Department of Public Health tallied more than 3,500 restaurants in the city, a number that raised San Francisco to No. 1 in the nation in restaurants per capita. That's a restaurant for every 238 people.

Most don't have 20 employees, so they're not required to offer health care benefits. Will restaurants that do now remove the surcharge? Ellen Love, senior administrative analyst for the city Office of Labor Standards Enforcement, thinks not.

"We've seen changes in the wording that some restaurants use to define the surcharge for their customers, saying the surcharge covers health care in part and other costs as well," Love said. "Our office only asks that the business report the amount collected for health care. We track compliance. The amount collected for health care and the amount expended on health care benefits must match."

Love acknowledged that other costs collected in the surcharge drag-net are not divulged under the city's self-reporting rules. Since 2009 the State Board of Equalization has treated surcharges as subject to sales tax, 8.75% in San Francisco.

An informal review of restaurant surcharges reveals a range of menu notices identifying various reasons for the additions to your dining check. Some-time restaurants under the same ownership express different rationales.

Diners at Bix, a North Beach mainstay since 1988, are advised that a 4% surcharge is added to all food and beverage sales "to offset costs of San Francisco ordinances." Doug Biederbeck heads the group that owns Bix as well as the Ferry Building's MarketBar and Pacific Heights bistro Florio. At MarketBar and Florio, the menus' surcharge notice is a bit more inclusive, although the percentage remains steady at 4%, added to "offset S.F. City and County ordinances, taxes & fees," letting customers know that City Hall is to blame.

## BOULEVARD, WAYFARE TAVERN

Boulevard, Nancy Oakes' signature spot in the landmark Audiffred Building, adds a 4% surcharge "for San Francisco employer mandates including Healthy San Francisco." Oakes was announced last month as a semifinalist for a James Beard Foundation award as Outstanding Chef.

Wayfare Tavern adds a "4% surcharge to assist in complying with San Francisco mandates."

As robust as the surcharge is in the local restaurant scene, no national trend is noted. Christin Fernandez, media director for the National Restaurant Association, reports that among the 300,000 members of her group surcharging is not a favored method of offsetting costs of doing business.

"From a public relations perspective, surcharging is probably not the best option," Fernandez said. "In our group we see surcharging most often when the restaurant doesn't have a fully developed HR infrastructure. Remember, too, that 90% of our members have fewer than 50 employees. They won't be subject to the Obamacare regulations, and they won't be compelled to pay health care benefits."

The California Restaurant Association, a 22,000-member nonprofit trade group, doesn't see surcharging growing statewide.

"I don't think restaurants throughout California are moving in that direction yet. It could be an option given the federal requirements, but we haven't heard of any trends suggesting that is becoming the norm," spokeswoman Janna Haynes said.

In the end, consumers may determine the fate of the surcharge in San Francisco. Does that grilled cheese and bowl of pea soup go down easier if the menu price is slightly higher, or will the flat-out extra dollars at the bottom line of the bill prevail?

Or, if the tip becomes added automatically to the bill at 18% or more — a growing trend in the city — will restaurants keep the S.F. surcharge?

If they do, will the amount be calculated before — or after — the tip? ■

## CENTRAL CITY

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