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SEP 26 2013

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MEMORANDUM

DATE: September 26, 2013

TO: Mayor and Council

THRU: Rich Dlugas, City Manager
Debra Stapleton, Director of Human Resources
Valerie Hernandez, Benefit Programs Manager

FROM: Carol Osterhaus, Benefits Analyst

SUBJECT: Recommendation for Approving and Authorizing the City of Chandler as Plan Sponsor to enter an Amended and Restated Business Associate Agreement with Payflex Systems USA, Inc – Resolution No. 4713

RECOMMENDATION: Approve Resolution No. 4713, to Amend and Restate Business Associate Agreement between the City of Chandler and Payflex Systems, USA, Inc.

BACKGROUND: In 2010, the Health Information Technology for Economic and Clinical Health Act, 42 U.SC. 3000 et seq. ("HITECH Act") required that entities sponsoring health benefits plans for their employees ("Plan Sponsor") and the entities providing health care services under the plan ("Business Associates") enter into agreements that set forth action that each shall undertake to protect the Protected Health Information (PHI) of the employees covered by the Plans.

In 2013, the HITECH Act was modified by the US Department of Health Services. To be in compliance with the Omnibus Rule, the City is required to amend our Business Associate Agreements starting in calendar year 2014. The amended agreements stipulate the requirements/steps to follow when accidental or unauthorized access, acquisition, use and/or disclosure of the City's employee patient protection health information access.

MOTION: Approve Resolution No. 4713, to Approve and Authorize City of Chandler as Plan Sponsor to enter into an Amended and Restated Business Associate Agreement with Payflex Systems, USA, Inc..

RESOLUTION NO. 4713

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF CHANDLER, ARIZONA APPROVING AND AUTHORIZING CITY OF CHANDLER AS PLAN SPONSOR TO ENTER AN AMENDED AND RESTATED BUSINESS ASSOCIATE AGREEMENT WITH PAYFLEX SYSTEMS USA, INC.

WHEREAS, the Health Information Technology for Economic and Clinical Health Act, 42 U.S.C. 3000 *et seq.* ("HITECH Act" or "The Act") requires that entities sponsoring health benefits plans for their employees ("Plan Sponsors"), and entities providing health care services under such plans ("Business Associates") must enter agreements ("Business Associate Agreements") that set forth actions that the each shall undertake to protect the personal health information ("PHI") of the employees covered by such plans as set forth in the Act; and

WHEREAS, in compliance with the HITECH Act, the City entered a Business Associate Agreement as Plan Sponsor with Payflex Systems USA, Inc. as the Plan's Business Associate as authorized by Chandler City Council Resolution No. 4440; and

WHEREAS, on January 25, 2013, the Office of Civil Rights of the U.S. Department of Health and Human Services published its final rule, entitled "Modification to the HIPAA Privacy, Security, Enforcement and Breach Notification Rules under the Health Information Technology for Economic, and Clinical Health Act and the Genetic Information Nondiscrimination Act; Other Modifications to the HIPAA Rules" (Omnibus Rule) 78 Fed. Reg. 5566; and

WHEREAS, the Omnibus Rule:

(a) finalizes modifications to the Privacy, Security, and Enforcement Rules to implement the Health Information Technology for Economic and Clinical Health (HITECH) Act, proposed in July 2010;

(b) finalizes modifications to the Privacy Rule, proposed in July 2010, to increase the workability of the Privacy Rule;

(c) modifies the Breach Notification Rule, adopted by interim final rule in August 2009; and

(d) finalizes modifications to the Privacy Rule to implement the Genetic Information Nondiscrimination Act of 2008 (GINA), proposed in October 2009; and

WHEREAS, in order to comply with this Omnibus Rule, the City of Chandler must enter an amended and restated business associate agreement with Payflex Systems USA, Inc.

and it is in the City's best interests to enter this Amended and Restated Business Associate Agreement.

NOW THEREFORE, BE IT RESOLVED, by the City Council of the City of Chandler, Arizona, as follows:

Section 1. That the following Amended and Restated Business Associate Agreement Between the City of Chandler as Plan Sponsor and Payflex Systems USA, Inc. is hereby adopted and approved.

Section 2. That the Mayor of the City of Chandler is hereby authorized to sign the above-listed Amended and Restated Business Associate Agreement on behalf of the City of Chandler.

Section 3. That the various City officers and employees of the City of Chandler be and they hereby are, authorized and directed to perform all acts necessary to give effect to this Resolution.

PASSED AND ADOPTED by the City Council of the City of Chandler, Arizona this _____ day of _____, 2013.

ATTEST:

_____ _____

CITY CLERK MAYOR

APPROVED AS TO FORM:

_____

CITY ATTORNEY CH for

CERTIFICATION

I HEREBY CERTIFY that the above and foregoing Resolution No. 4713 was duly passed and adopted by the City Council of the City of Chandler, Arizona at a regular meeting held on the ____ day of _____, 2013, and that a quorum was present thereat.

_____

City Clerk

AMENDED AND RESTATED BUSINESS ASSOCIATE AGREEMENT

This Amended and Restated Business Associate Agreement (this "Agreement") is effective as of the Effective Date (defined below), among Flexible Spending Account Plan sponsored by the City of Chandler ("Covered Entity"), the City of Chandler, Arizona ("Plan Sponsor"), and Payflex Systems USA, Inc. ("Business Associate").

RECITALS

WHEREAS Covered Entity and/or Plan Sponsor have entered into an agreement with Business Associate, "Calendar Year 2010 Amendment to the Agreement Between the City of Chandler and Payflex Systems USA, Inc., for Flexible Spending Account Administration" (the "Services Agreement"), whereby Business Associate has agreed to provide services to Covered Entity.

WHEREAS, that Services Agreement was amended and extended for Calendar Year 2011, 2012, and 2013, and the parties intend to extend that Services Agreement for Calendar Year 2014 through a subsequent amendment.

WHEREAS the parties anticipate that they will need or want to disclose certain information, some of which may constitute PHI, to each other, and to third parties, pursuant to this Agreement and to the Services Agreement.

WHEREAS, the Office for Civil Rights of the U.S. Department of Health and Human Services published the "Modifications to the HIPAA Privacy, Security, Enforcement, and Breach Notification Rules under the Health Information Technology for Economic and Clinical Health Act and the Genetic Information Nondiscrimination Act; Other Modifications to the HIPAA Rules" (hereinafter, the "Omnibus Rule"), 78 Fed. Reg. 5566, (January 25, 2013).

WHEREAS the parties intend to comply with Applicable Law, to protect the privacy of PHI disclosed to the other pursuant to this Agreement and to the Services Agreement, and to provide for the security of such PHI, and in order to comply with the Omnibus Rule, the parties must amend and restate their Business Associate Agreement that will be in effect for Calendar Year 2014.

NOW, THEREFORE, in consideration of the mutual promises below and the exchange of information pursuant to this Agreement and the Services Agreement, the parties agree as follows:

I. DEFINITIONS

A. In General. Terms used, but not otherwise defined, in this Agreement shall have the same meaning as those terms in 45 CFR § 160.103 and § 164.501. The following terms used in this Agreement shall have the same meaning as those terms in the HIPAA Rules: Breach, Data Aggregation, Designated Record Set, Disclosure, Health Care Operations, Individual, Minimum Necessary, Notice of Privacy Practices, Protected Health Information, Required By Law, Secretary, Security Incident, Subcontractor, Unsecured Protected Health Information, and Use.

B. Specific Definitions

1. "Applicable Law" shall mean any of the following items, including any amendments to any such item as such may become effective:

a. the Health Insurance Portability and Accountability Act of 1996 ("HIPAA");

b. the federal regulations regarding privacy and promulgated with respect to HIPAA, found at Title 45 CFR Parts 160 and 164 (the "Privacy Rule");

c. the federal regulations regarding electronic data interchange and promulgated with respect to HIPAA, found at Title 45 CFR Parts 160 and 162 (the "Transaction Rule");

d. the federal regulations regarding security and promulgated with respect to HIPAA, found at Title 45 CFR Parts 160 and 164 (the "Security Rule");

e. and the American Recovery and Reinvestment Act of 2009 ("ARRA"), §§ 13400-24.

2. "Business Associate shall generally have the same meaning as the term "business associate" at 45 CFR 160.103, and in reference to the party to this agreement, shall mean APS Healthcare Bethesda, Inc.

3. "Covered Entity" shall generally have the same meaning as the term "covered entity" at 45 CFR 160.103, and in reference to the party to this agreement, shall mean the City of Chandler.

4. "Effective Date" means the effective date of the Services Agreement, except as otherwise specified in this Agreement.

5. "ePHI" means electronic protected health information within the meaning of 45 CFR § 160.103, limited to the information created, received, maintained, or transmitted by Business Associate from or on behalf of Covered Entity.

6. "HIPAA Rules" shall mean the Privacy, Security, Breach Notification, and Enforcement Rules at 45 CFR Part 160 and 164.

II. RIGHTS AND OBLIGATIONS OF COVERED ENTITY

A. Privacy Practices and Restrictions

1. Upon request, Covered Entity shall provide Business Associate with the notice of privacy practices that Covered Entity produces in accordance with 45 CFR § 164.520. If Covered Entity subsequently revises the notice, Covered Entity shall provide a copy of the revised notice to Business Associate.

2. Covered Entity shall notify Business Associate of any restriction to the use or disclosure of PHI that Covered Entity has agreed to in accordance with 45 CFR § 164.522. Covered Entity shall provide Business Associate with any changes in, or revocation of, permission by an Individual to use or disclose PHI, if such changes affect Business Associate's permitted or required uses and disclosures.

B. Permissible Requests by Covered Entity

1. Covered Entity shall not request Business Associate to use or disclose PHI in any manner that would not be permissible under the Privacy Rule if done by Covered Entity.

2. If Covered Entity requests PHI from Business Associate, Covered Entity will limit its request to the minimum necessary PHI required to fulfill the purpose of Covered Entity's use or further disclosure of such PHI.

III. OBLIGATIONS AND ACTIVITIES OF BUSINESS ASSOCIATE

A. Business Associate agrees to:

1. In accordance with 45 CFR 164.502(e)(1)(ii) and 164.308(b)(2), if applicable, ensure that any subcontractors that create, receive, maintain, or transmit protected health information on behalf of the business associate agree to the same restrictions, conditions, and requirements that apply to the business associate with respect to such information.

2. **Access to Books and Records by Covered Entity.** Business Associate shall make its internal practices, books, and records relating to the use, disclosure, and security of PHI available to Covered Entity, in a time and manner designated by Covered Entity, for purposes of allowing Covered Entity to confirm Business Associate's compliance with HIPAA. ***This paragraph shall be effective on and after February 17, 2010.***

3. **Access to Books and Records by Secretary.** Business Associate shall make its internal practices, books, and records available to the Secretary for purposes of the Secretary determining Covered Entity's compliance with HIPAA.

4. **Mitigation.** Business Associate shall mitigate, to the extent practicable, any harmful effect that is known to Business Associate of (a) a use or disclosure of PHI by Business Associate in violation of the requirements of this Agreement, or (b) a Security Incident.

5. **Compliance with Privacy Rule.**

   a. Business Associate shall not use or disclose PHI other than as permitted or required by this Agreement, or as required by law.

   b. Business Associate shall use appropriate safeguards, and comply with Subpart C of *45 CFR Part 164* with respect to electronic protected health information, to prevent use or disclosure of the PHI other than as provided for by this Agreement.

   c. Business Associate shall report to Covered Entity any use or disclosure of PHI, that is not provided for by this Agreement, of which it becomes aware, including breaches of unsecured PHI as required at *45 CFR 164.410,* and any security incident of which it becomes aware.

6. **Compliance with Transaction Rule.** To the extent that Business Associate, on behalf of Covered Entity or Plan Sponsor, conducts transactions that are subject to the Transaction Rule, Business Associate shall comply with the Transaction Rule. Business Associate agrees that it shall not require Plan Sponsor (or the members of its workforce) to communicate with Business Associate using the specifications set forth in the Transaction Rule.

7. **Compliance with Security Rule.**

   a. Business Associate shall implement administrative, physical, and technical safeguards that reasonably and appropriately protect the confidentiality, integrity, and availability of ePHI.

b. Business Associate shall report to Covered Entity any Security Incident of which Business Associate becomes aware.

8. Compliance with ARRA.

a. If Business Associate discovers that there has been a HIPAA Breach, Business Associate shall notify Covered Entity without unreasonable delay and in no event more than 10 business days of the discovery. Such notice shall include identification of each Individual whose PHI Business Associate reasonably believes to have been accessed, acquired, or disclosed during such HIPAA Breach. As soon as possible thereafter, and to the extent known, Business Associate shall also provide Covered Entity with a description of (i) what happened, including the date of the HIPAA Breach and the date of the discovery, (ii) the types of unsecured PHI involved in the HIPAA Breach, (iii) any steps individuals should take to protect themselves from potential harm from the HIPAA Breach, and (iv) what Business Associate is doing to investigate the HIPAA Breach, to mitigate harm to individuals, and to protect against any further HIPAA Breaches. For purposes of this paragraph, a HIPAA Breach shall be treated as discovered as of the first day on which the HIPAA Breach is known or should reasonably have been known to Business Associate (including any person, other than the one committing the HIPAA Breach, that is an employee, officer, or other agent of the Business Associate).

b. Business Associate shall not receive remuneration, either directly or indirectly, in exchange for PHI, except as may be permitted by ARRA § 13405(d). ***This paragraph shall be effective 180 days after issuance of final regulations implementing ARRA § 13405.***

c. Business Associate shall not make any fundraising communication on behalf of Covered Entity or to Covered Entity's "participants and beneficiaries," "patients," etc. ***This paragraph shall be effective on and after February 17, 2010.***

d. Pursuant to the Privacy Rule, made applicable to Business Associate by ARRA, Business Associate shall adopt, implement, and follow privacy policies and procedures in the same manner and to the same extent as if it were a Covered Entity. ***This paragraph shall be effective on and after February 17, 2010.***

e. Pursuant to the Security Rule, made applicable to Business Associate by ARRA, Business Associate shall adopt, implement, and follow security policies and procedures in the same manner and to the same extent as if it were a Covered Entity. ***This paragraph shall be effective on and after February 17, 2010.***

B. Obligations Relating to Individual Rights.

1. **Restrictions on Disclosures.** Upon request by an Individual, Covered Entity shall determine whether an Individual is entitled to a restriction on disclosure of the PHI pursuant to 45 CFR § 164.522. If Covered Entity determines that an Individual is entitled to such a restriction, Covered Entity will communicate the decision to Business Associate. Business Associate will restrict its disclosures of the Individual's PHI in the same manner as would be required for Covered Entity. If Business Associate receives an Individual's request for restrictions, Business Associate shall forward such request to Covered Entity within 5 business days. ***This paragraph shall be effective on and after February 17, 2010.***

2. **Access to PHI.** Upon request by an Individual, Covered Entity shall determine whether an Individual is entitled to access his or her PHI pursuant to 45 CFR § 164.524. If Covered Entity determines that an Individual is entitled to such access, and that such PHI is under the control of Business Associate, Covered Entity will communicate the decision to Business Associate. Business Associate shall provide access to the PHI in the same manner as would be required for Covered Entity. Business Associate shall make available protected health information in a designated record set to the individual or the individual's designee as necessary to satisfy covered entity's obligations under 45 CFR 164.524. If Business Associate receives an Individual's request to access his or her PHI, Business Associate shall forward such request to Covered Entity within 5 business days.

3. **Amendment of PHI.** Upon request by an Individual, Covered Entity shall determine whether any Individual is entitled to amend his or her PHI pursuant to 45 CFR § 164.526. If Covered Entity determines that an Individual is entitled to such an amendment, and that such PHI is both in a designated record set and under the control of Business Associate, Covered Entity will communicate the decision to Business Associate. Business Associate shall provide an opportunity to amend the PHI in the same manner as would be required for Covered Entity. If Business Associate receives an Individual's request to amend his or her PHI, Business Associate shall forward such request to Covered Entity within 5 business days.

4. **Accounting of non-EHR Disclosures.** Upon request by an Individual, Covered Entity shall determine whether any Individual is entitled to an accounting pursuant to 45 CFR § 164.528. If Covered Entity determines that an Individual is entitled to an accounting, Covered Entity will communicate the decision to Business Associate. Business Associate will provide information to Covered Entity that will enable Covered Entity to meet its accounting obligations under 45 CFR 164.528. If Business Associate receives an Individual's request for an accounting, Business Associate shall forward such request to Covered Entity within 5 business days.

5. To the extent the business associate is to carry out one or more of covered entity's obligation(s) under Subpart E of 45 CFR Part 164, business associate shall comply with the requirements of Subpart E that apply to the covered entity in the performance of such obligation(s).

C. Permitted Uses and Disclosures by Business Associate

Except for the specific uses and disclosures set forth below business associate may not use or disclose protected health information in a manner that would violate Subpart E of 45 CFR Part 164 if done by covered entity.

Except as otherwise limited in this Agreement or by Applicable Law, Business Associate may:

1. Use or disclose PHI to perform functions, activities, or services for or on behalf of Covered Entity, as specified in the Services Agreement between the parties and in this Agreement, *provided that* such use or disclosure is consistent with Covered Entity's Notice of Privacy Practices, *and provided that* such use or disclosure would not violate HIPAA or the Privacy Rule if done by Covered Entity;

2. Use PHI for the proper management and administration of Business Associate or to carry out the legal responsibilities of Business Associate;

3. Disclose PHI for the proper management and administration of Business Associate, *provided that* (i) Business Associate obtains reasonable assurances from the person to whom the information is disclosed that it will remain confidential and used or further disclosed only as Required By Law or for the purpose for which it was disclosed to the person, and the person notifies the Business Associate of any instances of which it is aware in which the confidentiality of the information has been breached or (ii) the disclosures are Required By Law; and

4. Use PHI to provide Data Aggregation services to Covered Entity as permitted by 42 CFR § 164.504(e)(2)(i)(B).

5. Business associate may not use or disclose protected health information in a manner that would violate Subpart E of 45 CFR Part 164 if done by covered entity.

IV. TERM AND TERMINATION

A. Term. The term of this Agreement shall begin on the Effective Date, and shall end upon the termination of the Services Agreement, or upon termination for cause as set forth in the following paragraph, whichever is earlier.

B. Termination for Cause. Upon Covered Entity's knowledge of a material breach of this Agreement by Business Associate, Covered Entity and Plan Sponsor shall have the following rights:

1. If the breach is curable, Covered Entity shall provide an opportunity for Business Associate to cure the breach or end the violation. Alternatively, or if Business Associate fails to cure the breach or end the violation, Covered Entity and/or Plan Sponsor may terminate this Agreement and the Services Agreement.

2. If the breach is not curable, Covered Entity and/or Plan Sponsor may immediately terminate this Agreement and the Services Agreement.

3. If termination is not feasible, Covered Entity shall report the problem to the Secretary.

C. Effect of Termination.

1. Except as provided in the following paragraph, upon termination of this Agreement, for any reason, Business Associate shall return or destroy all PHI within its possession or control, and all PHI that is in the possession or control of Business Associate's subcontractors or agents. Business Associate shall retain no copies of the PHI.

2. If Business Associate determines that returning or destroying the PHI is infeasible, Business Associate shall provide to Covered Entity notification of the conditions that make return or destruction infeasible. Upon mutual agreement of the Parties that return or destruction of PHI is infeasible, Business Associate shall extend the protections of this Agreement to such PHI and limit further uses and disclosures of such PHI to those purposes that make the return or destruction infeasible, for so long as Business Associate maintains such PHI.

V. INDEMNIFICATION

Business Associate agrees to indemnify and hold Covered Entity and Plan Sponsor harmless from any and all liability, damages, costs (including reasonable attorneys' fees and costs) and expenses imposed upon or asserted against Covered Entity arising out of any claims, demands, awards, settlements or judgments relating to use or disclosure of PHI contrary to the provisions of this Agreement or applicable law by Business Associate, by any health care plan or plan sponsor to which Business Associate provides services (other than Covered Entity and Plan Sponsor), or by Business Associate's directors, officers, employees, agents, contractors, business associates, or trading partners.

VI. MISCELLANEOUS

A. **Electronic Health Record.** Business Associate shall not maintain any "electronic health record" or "personal health record," as those terms are defined in ARRA, for or on behalf of Covered Entity.

B. **Regulatory References.** A reference in this Agreement to a section in any Applicable Law means the section in effect or as amended, and for which compliance is required.

C. **Amendment.** The Parties agree to take such action as is necessary to amend this Agreement from time to time as is necessary for compliance with the requirements of the HIPAA Rules and any other Applicable Law. All amendments to this Agreement, except those occurring by operation of law, shall be in writing and signed by both parties.

D. **Survival.** The respective rights and obligations of Business Associate under Section IV.C. of this Agreement shall survive the term and termination of this Agreement.

E. **Interpretation.** Any ambiguity in this Agreement shall be resolved in favor of a meaning that permits Covered Entity to comply with Applicable Law.

F. **No Third Party Beneficiaries.** Nothing express or implied in this Agreement is intended to confer, nor shall anything herein confer upon any person, other than Covered Entity, Business Associate and their respective successors or assigns, any rights, remedies, obligations or liabilities whatsoever.

G. **Effect on Agreement.** Except as specifically required to implement the purposes of this Agreement, or to the extent inconsistent with this Agreement, all other terms of the underlying Services Agreement shall remain in force and effect.

H. **Counterparts.** This Agreement may be executed in counterparts, each of which may be deemed an original.

IN WITNESS WHEREOF, the parties have executed this Agreement on the dates indicated below.

Flexible Spending Account Program Sponsored by the City of Chandler

By: _____

Print Name: _____

Print Title: _____

Date: _____

Payflex Systems, USA, Inc.

By: _____

Print Name: Brandon Wood

Print Title: COO

Date: 5-9-13

CITY OF CHANDLER, ARIZONA

By: _____

Print Name: _____

Print Title: _____

Date: _____

APPROVED AS TO FORM:

_____ CA for

City Attorney