

**REPORT/RECOMMENDATION TO THE BOARD OF SUPERVISORS  
OF SAN BERNARDINO COUNTY  
AND RECORD OF ACTION**

**November 5, 2024**

**FROM**

**LEONARDO GONZALEZ, Director, Human Resources Department**

**SUBJECT**

Contract with WEX Health, Inc. d/b/a WEX for Flexible Spending Account and Dependent Care Assistance Plan Software and Technical Support

**RECOMMENDATION(S)**

Approve **Contract No. 24-1063** with WEX Health, Inc. d/b/a WEX for the Flexible Spending Account and Dependent Care Assistance Plan software license and support, including non-standard terms, for an estimated annual cost of \$27,370, based on a per-participant, per-month structure, with price reductions as enrollment milestones are met, effective retroactively beginning March 1, 2024, through February 28, 2029.

(Presenter: Leonardo Gonzalez, Director, 387-5565)

**COUNTY AND CHIEF EXECUTIVE OFFICER GOALS & OBJECTIVES**

**Operate in a Fiscally-Responsible and Business-Like Manner.**

**FINANCIAL IMPACT**

Approval of this item will not result in the use of additional Discretionary General Funding (Net County Cost). The estimated annual cost of \$27,430 and participant fees will be funded with the annual Flexible Spending Account (FSA) and the Dependent Care Assistance Plan (DCAP) forfeitures. Software application Fees are based on a per-participant, per-month structure, with price reductions as enrollment milestones are met.

**BACKGROUND INFORMATION**

The County established the FSA on July 27, 2002, and the DCAP on January 1, 1992 to allow employees to pay for qualifying medical care expenses and reimbursement for qualifying dependent care expenses on a pre-tax basis. County employees, including Board-Governed Special Districts and any entity with an agreement in place with the County, can receive the benefits of these plans.

The FSA plan is designed to meet the legal requirements of a "Cafeteria Plan" under Section 125 of the Internal Revenue Code (IRC) of 1986 (Code), as amended and follows regulations applicable to health flexible spending arrangements. This plan also qualifies as a "self-insured medical expense reimbursement plan" under Section 105(h) of the Code. Reimbursements made for Qualifying Medical Care Expenses (as defined by IRC Section 213), are excluded from Participant's gross income under IRC Section 105(b) of the Code.

The DCAP Plan is similar structured to qualify as a "Cafeteria Plan" under IRC Section 125 of the Code, and qualifies as a dependent flexible spending program under IRC Section 129,

**Contract with WEX Health, Inc. d/b/a WEX for Flexible Spending  
Account and Dependent Care Assistance Plan Software and Technical  
Support  
November 5, 2024**

which allows employees to receive tax-free reimbursement for eligible dependent care expenses.

The Human Resources Department (HR) has utilized WEX Health, Inc. d/b/a WEX (WEX) software to administer the FSA and DCAP plans since 2013, with the most recent contract expiring on February 29, 2024. After a three-bid procurement, HR selected WEX to continue providing the software to administer the FSA and DCAP plans and has been negotiating the new contract since the beginning of 2024.

Although the recommended contract (Contract) is based on the County standard template, WEX would not agree to certain County standard terms and negotiated additional non-standard terms into the Contract. The non-standard terms include the following:

1. The Contract does not include certain standard County insurance requirements, including the requirements of naming the County as an additional insured and a waiver of subrogation.
  - The County standard contract requires contractors to carry appropriate insurance at limits and under conditions determined by the County's Risk Management Department.
  - Potential Impact: Not being named as an additional insured on WEX's policy prevents the County from filing an insured claim directly with WEX's insurer. No waiver of subrogation may allow WEX's insurer to bring suit against the County, which could result in expenses that exceed the total Contract amount.
2. The County will not solicit any WEX employee with whom it has direct contact regarding the Contract during the term of the Contract and for a period of 12 months after the last such contact. In the event of a breach, the County is liable for a one-time payment to WEX equal to 50% of the employee's base salary for the most recent year.
  - The County standard contract does not include a non-solicitation/non-compete provision.
  - Potential Impact: Soliciting a WEX employee may result in breach of the Agreement and WEX may terminate the Agreement and seek any available legal remedies, including a payment of 50% of the employee's base salary, which could exceed the total Contract amount.
3. WEX's maximum liability to the County is limited to the greater of the total Contract value in 12 months prior to the claim arising or \$200,000, excluding indemnification obligations, gross negligence, willful misconduct, and violations of law.
  - The County standard contract does not include a limitation of liability.
  - Potential Impact: Claims could exceed the liability cap and the Contract amount leaving the County financially liable for the excess.
4. Payment terms are Net 60 with a 10-day grace period. If the County fails to pay fees when due, WEX may deactivate benefit cards that it has under the Contract and/or terminate the Contract.
  - County standard payment terms are Net 60 days with no interest or late payment penalties.
  - Potential Impact: County standard processing time is 60 days or more. Failing to make timely payments would allow WEX to deactivate employee benefit cards

**Contract with WEX Health, Inc. d/b/a WEX for Flexible Spending Account and Dependent Care Assistance Plan Software and Technical Support**  
**November 5, 2024**

and may result in a material breach of the Contract, which could allow WEX to terminate the Agreement and seek other legal remedies, which could exceed the Agreement amount.

5. WEX does not agree to provide appropriate liability insurance coverage under the Business Associate Agreement Addendum.
  - The County standard Business Associate Addendum requires the Contractor to provide appropriate liability insurance coverage to cover claims and demands made for loss to any person arising from the breach of security, privacy, or confidentiality obligations of the Contractor under the Business Associate Agreement and under HIPAA provisions.
  - Potential Impact: The County has no assurance that WEX will be financially responsible for claims that may arise under the Business Associate Addendum, which could result in expenses to the County that exceed the total amount of the Contract.

HR began negotiating contract terms with WEX in January 2024. HR was unable to reach an agreement with the vendor on contract terms, resulting in the continuation beyond the current contract's expiration date. Since HR continued using the WEX software, a retroactive begin date is recommended to ensure that there is no gap in the license coverage. HR recommends approval of this contract, effective retroactively March 1, 2024, including the non-standard terms, as it will authorize WEX to continue as the software provider for FSA and DCAP. There are no financial implications to the County for making this contract with WEX retroactively effective March 1, 2024, as monthly fees are funded with FSA/DCAP annual forfeitures.

**PROCUREMENT**

HR performed an informal three-bid procurement to purchase software for the FSA and DCAP plan administration.

<b><u>Vendor</u></b>	<b><u>Annual Cost</u></b>
DataPath	\$36,000
HealthEquity, Inc.	\$75,620
WEX, Inc.	\$27,370

HR received bids from WEX, DataPath, and HealthEquity. After reviewing submitted bids and live demonstrations, HR recommends entering a new contract with WEX. The contract term for this software purchase will be from March 1, 2024, through February 28, 2029.

**REVIEW BY OTHERS**

This item has been reviewed by County Counsel (Bonnie Uphold, Supervising Deputy County Counsel, 909-387-5455) on September 10, 2024; Purchasing (Jessica Barajas, Supervising Buyer, 387-2065) on September 10, 2024; Risk Management (Loretta Acuña, Staff Analyst II, 386-9039) on September 10, 2024; Finance (Ivan Ramirez, Administrative Analyst, 387-4020) on October 11, 2024; and County Finance and Administration (Paloma Hernandez-Barker, Deputy Executive Officer, 387-5423) on October 21, 2024.

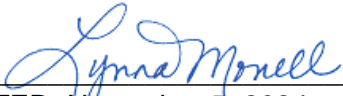
**Contract with WEX Health, Inc. d/b/a WEX for Flexible Spending  
Account and Dependent Care Assistance Plan Software and Technical  
Support  
November 5, 2024**

Record of Action of the Board of Supervisors  
San Bernardino County

**APPROVED (CONSENT CALENDAR)**

Moved: Joe Baca, Jr. Seconded: Curt Hagman  
Ayes: Col. Paul Cook (Ret.), Jesse Armendarez, Dawn Rowe, Curt Hagman, Joe Baca, Jr.

Lynna Monell, CLERK OF THE BOARD

BY   
DATED: November 5, 2024



cc: HR - Wakcher w/agree  
Contractor - c/o HR w/agree  
File - w/agree  
CCM 11/7/2024