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EMPLOYER'S GUIDE TO COMPLIANCE

THE SAN FRANCISCO HEALTH CARE SECURITY ORDINANCE

Updated as of December 8, 2009

I. OVERVIEW

In an effort to combat a rising population of uninsured individuals, San Francisco has followed the example of Massachusetts by passing the Health Care Security Ordinance (the Ordinance), a "pay or play" law requiring employers to make health care expenditures on behalf of certain employees. Under the Ordinance, the annual expenditure by a Covered Employer may total more than $4,000 per Covered Employee.[1] The requirements of the law took effect January 9, 2008.

Agency Involvement

The Office of Labor Standards Enforcement (OLSE) is responsible for ensuring that employers understand and comply with the Employer Spending Requirement under the Ordinance. The OLSE has the authority to conduct investigations, monitor and audit, to order corrective action for violations and to seek penalties when violations are not corrected.

The Department of Public Health (DPH) is responsible for creating the Health Access Program known as "Healthy San Francisco" and setting up Medical Reimbursement Accounts for individuals who do not qualify for the Healthy San Francisco Program. This is commonly referred to as the *City Option*, and is one way an employer may comply with the expenditure requirement.

Current Status of the Law – ERISA Preemption Litigation

The Ordinance has been the subject of much scrutiny, particularly around the issue of ERISA preemption. In November 2006, the Golden Gate Restaurant Association (GGRA) filed a lawsuit challenging the Ordinance's employer spending requirement. GGRA contends that such a requirement is preempted by the Employee Retirement Income Security Act of 1974 (ERISA).[2] For a history of the litigation, visit the OLSE's Web site www.sfgov.org/site/olse_index.asp?id=75846.

[1] Calculated based on a Large Employer, assuming the maximum of 172 hours per month at $1.96 (based on the expenditure requirement for 2010).
[2] The case is *Golden Gate Restaurant Association v. City & County of San Francisco.* For more information on the litigation, see the OLSE Web site: www.sfgov.org/site/olse_index.asp?id=75846.

This year, the 9th Circuit Court of Appeals refused GGRA's request for an *en banc* review of the 2008 decision by the three-judge panel to uphold the spending requirement.[3] In light of this unfavorable determination, GGRA filed a petition with the United States Supreme Court requesting that the Court rule on the issue. In determining whether to take the case, the Supreme Court asked the Solicitor General to file a brief expressing the federal government's views on GGRA's petition. The Supreme Court is expected to decide whether or not to hear the case in 2010.

While litigation is ongoing, the Ordinance remains in effect; therefore, employers should be in compliance with its requirements.

II. REQUIREMENTS

Covered Employers are required to make qualified health care expenditures on behalf of Covered Employees.

A. COVERED EMPLOYERS

A *Covered Employer* is a for-profit business with 20 or more employees or a non-profit organization with 50 or more employees that engages in business within the City or County of San Francisco and is required to obtain a valid San Francisco business registration certificate.[4]

The Ordinance classifies businesses as either "Large," "Medium" or "Small," and requirements vary based on size. When counting employees, all employees of the employer (regardless of classification, residence or worksite) must be counted. This includes employees working in other cities or states, seasonal, temporary, part-time, contracted and/or commissioned employees. In determining the number of employees, all employees of a control group of corporations must be counted.[5]

Large Business

A large business is an employer (for-profit and non-profit) with an average of 100 or more employees working per week for compensation during a quarter. Large businesses were required to comply with the Ordinance on January 9, 2008.

Medium-Sized Business

A medium-sized for-profit employer has an average of 20-99 employees working per week for compensation during a quarter. Non-profit employers will be considered a medium-sized business if they employ 50-99 employees per week during a quarter. Medium-sized employers were required to comply on April 1, 2008.

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[3] See www.sfgov.org/site/uploadedfiles/olse/hcso/Ninth%20Circuit%20Appeal%20Decision.PDF for a copy the ruling.
[4] Pursuant to Article 12 of the Business and Tax Regulations Code.
[5] Control group of corporation is defined in Section 1563(a) of the Internal Revenue Code, disregarding Section 1563(a)(4) and 1563(e)(3)(c).

Small Business

Small businesses are exempt from the spending requirement. A small for-profit employer is defined as having an average of 19 or fewer employees working per week during a quarter. Also, non-profits with fewer than 50 employees are excluded from the requirements.

B. COVERED EMPLOYEES

A *Covered Employee* is any person who:

- qualifies as an employee entitled to be paid the San Francisco minimum wage[6];
- has been employed by his/her employer for at least 90 calendar days[7]; and
- performs at least 8 hours of work per week within the geographic boundaries of the City and County of San Francisco.

Work Performed "Within" the City and County of San Francisco

Employees who *travel through* San Francisco in the performance of their job duties are not considered to have performed work in San Francisco. However, employees whose work requires stops in San Francisco (e.g. make pick-ups or deliveries) are considered to perform work in San Francisco. For such individuals, hours worked includes travel time within the City and County of San Francisco.

For employees who live in San Francisco, work performed for a Covered Employer from the employee's home (including telecommuting) qualifies as work performed within San Francisco.

Certain Employees Excluded from the Definition of Covered Employee

The following individuals are not considered Covered Employees under Ordinance; therefore, no health expenditure is required:

- For 2009 and 2010, employees who are a manager, supervisor, or confidential employee and earn an annual salary of $80,397 ($38.65 hourly) or above;
- Individuals eligible for Medicare or TRICARE/CHAMPUS;
- Employees who receive health care benefits under the Health Care Accountability Ordinance pursuant to Section 12Q.2.9 of the San Francisco Administrative Code;
- Persons employed by a non-profit corporation for up to one year as trainees in a bona fide training program consistent with federal law; and
- Persons who provide verification that they are receiving health care services through another employer, either as an employee or by virtue of being a spouse,

[6] Pursuant to the minimum wage ordinance, Chapter 12 R of the San Francisco Administrative Code.

[7] Special rules apply to rehires when calculating the 90-day requirement. For an employee who separates from employment before completing the 90-day eligibility period and is rehired within one year of their separation date, the employer should count prior days of employment toward satisfaction of the 90-day eligibility period. The 90-day eligibility period will not need to be satisfied by an employee who had previously satisfied the requirement prior to their separation from employment and is rehired within one year of the most recent separation date.

domestic partner or child of another person. The employer must obtain a Voluntary Waiver Form from the employee waiving coverage in order to rely on this exception (*see below for more information on voluntary written waiver forms).*

C. QUALIFIED HEALTH CARE EXPENDITURES

A *health care expenditure* is defined as:

- any amount paid by a Covered Employer,
- to its Covered Employees (or to a third party on behalf of its Covered Employees),
- for the purpose of providing health care services for Covered Employees or reimbursing the costs associated with such services.

Health care services are medical, dental or vision care, goods or services that may qualify as a deductible medical expense under Internal Revenue Code Section 213(d); or any such expenses having substantially the same purpose or effect as an otherwise eligible Section 213(d) expense.

Examples of qualified health care expenditures include:

- Payments to a third party to provide health care services for a Covered Employee (e.g. health insurance premiums);
- Expenditures made under a self-insured/self-funded program;
- Contributions made to the Covered Employee's health FSA, HSA, HRA, or medical spending account;
- Reimbursement to a Covered Employee for expenses incurred in the purchase of health care services;
- Costs incurred in the direct delivery of health care services for the Covered Employee; and
- *The City Option:* Payment on behalf of the Covered Employee made to the City of San Francisco to fund membership in the Health Access Program (*Healthy San Francisco),* or to establish and maintain a medical reimbursement account for the Covered Employee.

City Option

Employers electing to make health care expenditures under the City Option are required to provide Healthy San Francisco with a list of employees who will benefit from their contributions when they make quarterly payments. For more information on the City Option, see www.healthysanfrancisco.org.

D. AMOUNT OF THE EXPENDITURE

A Covered Employer is required to make a health care expenditure on behalf of Covered Employees at a certain rate, known as the *applicable health expenditure rate.* The applicable health expenditure rate is designated in the regulations and determined based on whether the employer is a Large Business or a Medium-Sized Business. Small employers and non-profits with fewer than 50 employees are not subject to the spending requirement.

2009

Beginning January 1, 2009, the applicable health expenditure rate for Large Employers was $1.85 per hour paid for each Covered Employee. Medium-Sized Employers needed to spend $1.23 per hour paid per Covered Employee.

2010

Beginning January 1, 2010, the applicable health expenditure rate for Large Employers increases to $1.96 per hour paid for each Covered Employee. Medium-Sized Employers will need to spend $1.31 per hour paid per Covered Employee.

E. CALCULATING THE HEALTH CARE EXPENDITURE

The total health care expenditure is calculated quarterly by multiplying the total number of "hours paid" to each Covered Employee during the quarter (starting 90 days after a Covered Employee's first day of work) by the applicable health care expenditure rate (listed above).

Hours Paid

The term "hours paid" includes both hours for which the employee is paid wages for work performed in San Francisco and hours for which the employee is entitled to be paid wages, including paid vacation hours, PTO, and paid sick leave. The hours paid are capped at 172 hours per month or 516 hours in a single quarter.

Generally, the Covered Employer must calculate the covered expenditure for each Covered Employee. If an employer makes expenditures on behalf of one employee that exceeds the required expenditure for that employee, such excess is not considered in determining whether the employer met its total expenditure requirement for all Covered Employees. Also, any amount the employer contributes toward dependents (e.g. spouse, domestic partner, child) of a Covered Employee may be included as part of the health care expenditure made on behalf of that employee.[8] The OLSE provides a calculator to assist employers is determining whether expenditures are sufficient under the Ordinance. The calculator and instructions are available on the OLSE Web site at www.sfgov.org/site/olse_index.asp?id=45168.

However, there are special exceptions that apply when dealing with plans that provide uniform health coverage (meaning coverage in the same health plan) or a self-insured arrangement.

[8] Reg. 4.2(D): Health care expenditures made on behalf of a covered employee for the benefit of his or her domestic partner, spouse, family member, or other dependent shall be included in determining whether an employer has met its required expenditure to or on behalf of the covered employee.

Uniform Health Coverage & Self Insured Plans[9]

If the average employer expenditure per employee under a uniform health plan meets or exceeds the required expenditure under the Ordinance, the employer is deemed to comply with the expenditure requirement for all Covered Employees.

For a self-insured plan, if the preceding year's average expenditure rate per employee meets or exceeds the applicable expenditure rate under the Ordinance, the employer is deemed to comply.

In determining whether the average expenditure satisfies the spending requirement, the OLSE has approved the following methods:

- Calculate the actual average hourly expenditure rate by dividing the total amount of health care expenditures made by the employer for employees by the total number of hours paid to such employees; or
- Divide the monthly premium (or COBRA equivalent rate less the administrative fee) minus any employee contributions by 172 hours.

In calculating the average expenditure, the employer has the option of including only those employees covered by the Ordinance or including all employees participating in the plan, provided that all such employees receive the same health coverage. If an employer provides for different plan options (e.g. a choice between a PPO, HDHP and HMO plan), the average expenditure must be calculated based on each plan option.

Adjusting Deficient Contributions

Once the calculation is completed, if the Covered Employer determines that its contribution is greater than or equal to the applicable health expenditure rate, the employer is deemed to have satisfied the spending requirement. However, if the contribution is below the threshold, the employer will need to make up the difference. Options available for correcting the deficit include funding the City Option, providing an HRA or making an employer contribution to a health FSA or HSA.

F. Timing of Health Care Expenditures

The expenditure must be made regularly, no later than 30 days after the end of the preceding quarter. Employers are free to make expenditures earlier than the end of the quarter.

G. Ineligible Employees and Employees Waiving Coverage – Voluntary Waiver Form

For Covered Employees electing to waive coverage (or are not eligible for coverage) under an employer-sponsored group health plan, the Covered Employer remains

[9] See FAQ 39-40 for more information on determining the average expenditure under a uniform health plan or self-insured health plan.
www.sfgov.org/site/uploadedfiles/olse/hcso/HCSO%20FAQs,%20released%202009-4-22.pdf

obligated to make the required expenditure on their behalf unless the Covered Employee provides a Voluntary Waiver Form. Without a Voluntary Waiver, the employer may need to consider alternatives for making the required expenditure (e.g. change the eligibility provisions under the group health plan, make payments under the City Option, seed a health FSA, or provide an HRA).

Provided the Covered Employer receives a written Voluntary Waiver Form from the Covered Employee, the employer is not required to make a health care expenditure on behalf of that individual. The Voluntary Waiver Form provides verification that the otherwise eligible individual is receiving health care services through another employer, either as the employee, spouse/domestic partner, or child of another person.

In order to rely on the exemption, all of the following must be met:

- The form must be voluntarily completed by the employee without pressure or coercion from the employee's co-workers or the employer (including managers, supervisors or their agents).
- An employee waiver is valid for one year, at which point a new waiver must be signed.
- Employees reserve the right to revoke their voluntary waiver at any time; however, the revocation must be submitted in writing.
- The employer must provide the employee with a complete copy of the Voluntary Waiver Form.
- An electronic copy of the Voluntary Waiver Form shall be acceptable provided the employee receives a hard copy of any forms signed by the employee and the employee is readily able to access copies of such forms.

Employers must retain the Voluntary Waiver Form signed by each employee receiving the exemption from the spending requirement. The Form must include information regarding the type and source of the employee's other coverage (e.g. health insurance provided by the employee's spouse). These records must be maintained for 4 years.

A copy of the Employee Voluntary Waiver Form is available at
www.sfgov.org/site/uploadedfiles/olse/hcso/EmpVolWaiverEN.pdf.

H. OTHER EMPLOYER RESPONSIBILITIES

Mandatory Annual Reporting Requirement

Annually, Covered Employers shall report to the City of San Francisco information regarding the health care expenditures made on behalf of Covered Employees. The City of San Francisco will send the Mandatory Annual Reporting Form to all registered businesses at the end of January 2010. Employers subject to the Ordinance will need to complete the form and return it to the City.

A sample of the 2008 form is available online at:
www.sfgov.org/site/olse_page.asp?id=99346.

Recordkeeping

Employers must retain records for 4 years and allow OLSE to access those records.

The records must include the following:

- Itemized pay statements, as mandated by California Labor Code Section 226[10];
- The employee's address, telephone number, date of first day of work;
- Records of health care expenditures made, including calculations of health care expenditures required under the law for each Covered Employee and proof documenting that such expenditures were made each quarter of each year;

  and, if applicable,

- A signed Employee Voluntary Waiver Form for every employee for whom the employer is claiming an exemption from the Employer Spending Requirement; and/or
- A copy of the Notice to Employee/Employee City Option Deposit Confirmation.

Records of quarterly health care expenditures are not required if the employer is relying on the self-insured exception outlined in Regulation 6.2(B)(2) (for self-insured plans).

Notice to Employee/City Option Deposit Confirmation

Employers satisfying the spending requirement by making a payment to the City must provide Covered Employees with the Notice of the Payment provided to the City. OLSE has a model notice that may be used. A copy is available at: www.sfgov.org/site/uploadedfiles/olse/hcso/NotcEEPayCity.pdf.

Cooperation with OLSE Investigations and Audits

All Covered Employers must cooperate with the OLSE in connection with any investigation of an alleged violation of the Ordinance, or with any audit or inspection.

Penalties for Noncompliance

There are significant penalties for noncompliance with the requirements of the Ordinance. In particular, the failure to make minimum expenditures on behalf of Covered Employees may result in a penalty of up to one-and-one-half times the total expenditures that a Covered Employer failed to make, plus up to 10% interest on all due and unpaid health care expenditures from the date payment should have been made.

[10] Which requires the following: (a) gross wages earned, (b) total hours worked by the employee (unless salaried), (c) the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis, (d) all deductions, aggregated, (e) net wages earned, (f) the inclusive dates of the period for which the employee is paid, (g) the name of the employee and his or her social security number (the last four digits of his or her social security number or an employee identification number other than a social security number may be shown on the itemized statement), (h) the name and address of the legal entity that is the employer, and (i) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee.

A complete list of the penalties and corrective actions is contained in Regulation 9. You can access the regulations at:
www.sfgov.org/site/uploadedfiles/olse/hcso/HCSO_Final_Regulations.pdf.

Anti-Retaliation Provision

It is unlawful for an employer to discipline, discharge, demote, suspend or take any other adverse action against an employee for exercising his or her rights under the Ordinance.

III. COMPLIANCE STEPS

- Determine if you are a Covered Employer.
- Determine whether you have Covered Employees and what applicable spending requirement applies.
- If you have Covered Employees, review current benefit plan provisions to determine whether you are currently making sufficient health care expenditures on behalf of all Covered Employees.
    - ***Part-Time Employees:*** Many part-time employees are not eligible for the group health plan sponsored by the employer. However, these part-time employees may be Covered Employees under the Ordinance and the employer may be obligated to make a health care expenditure on their behalf.
- Monitor your health care contributions on behalf of Covered Employees on a quarterly basis. You will be asked to report this information annually.
- Provide Annual Reporting to the City.
- If electing to make contributions to the City, provide Covered Employees with proper notice of such contributions.
- Retain proper documentation for 4 years.
- Do not retaliate against employees exercising rights under the Ordinance.

Additional resources available at the following sites:

Health Care Ordinance site:
www.sfgov.org/site/olse_index.asp?id=45168

Ordinance:
www.municode.com/content/4201/14131/HTML/ch014.html

Regulations:
www.sfgov.org/site/uploadedfiles/olse/hcso/HCSO_Final_Regulations.pdf

FAQs: (updated 4.22.09)
www.sfgov.org/site/uploadedfiles/olse/hcso/HCSO%20FAQs,%20released%202009-4-22.pdf

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