

SAN FRANCISCO MANDATES HEALTH CARE EXPENDITURES BY EMPLOYERS

The Health Care Security Ordinance (the Ordinance) is a San Francisco law that imposes a spending requirement on employers to make minimum health care expenditures to, or on behalf of, their Covered Employees.

The following provides a general overview of the Ordinance and highlights some compliance considerations for employers.

Legal Update

Currently, the spending requirement of the Ordinance is the subject of litigation. The Golden Gate Restaurant Association (GGRA) filed a lawsuit in Federal Court challenging the employer spending requirement imposed by the City, claiming that it is preempted by the Employee Retirement Income Security Act (ERISA). In November 2007, the district court granted summary judgment in favor of the GGRA. After the ruling, the City of San Francisco sought an Emergency Motion for a Stay Pending Appeal, asking the court to allow the spending requirement to go into effect. Despite the prior courts ruling, the 9th Circuit Court of Appeals granted City's motion which allowed the Ordinance to go into effect on January 9, 2008, pending the City's appeal.

Who is a Covered Employer?

The Ordinance applies to Large (100 or more employees) and Medium ("for-profit" 20-99 employees) employers.¹ This definition includes employers outside of the City or County of San Francisco, when employees work in the area.²

Non-profits with fewer than 50 employees and Small employers (fewer than 20 employees) are exempt from this law.³

To determine whether an employer classifies as Large, Medium or Small, ALL persons performing work for the employer must be counted, regardless of whether the persons work in San Francisco.⁴

Who is a Covered Employee?

A Covered Employee is a person who⁵:

- Qualifies as an employee entitled to payment of minimum wage pursuant to the Minimum Wage Ordinance, Chapter 12R of the San Francisco Administrative Code⁶,

¹ Regulation 2.2(A);

² Regulation 2.2(B); FAQ #13

³ Regulation 2.2(C)(2)

⁴ Regulation 2.2(D)(3);

⁵ Regulation 3.1(A)

- is employed by an employer for at least 90 days,
- is working at least 10 hours or more per week,⁷ and
- works within the boundaries of the City or County of San Francisco.

There are five categories of employees that are excludable for purposes of the Ordinance⁸:

- Employees who waive the right to have their employer make Health Care Expenditures when another employer provides health insurance coverage⁹,
- Managers, supervisors and confidential employees earning more than \$76,851 annually (\$36.95 hourly) in 2008,
- Employees covered by Medicare or TRICARE/CHAMPUS,
- Employees who are employed by a non-profit corporation for up to one year as trainees in a bona fide training program consistent with Federal Law, or
- Employees who receive health care benefits pursuant to the San Francisco Health Care Accountability Ordinance.

The Spending Requirement - Health Care Expenditures

The Ordinance imposes a spending requirement on an employer, where for each quarter; the Covered Employer must make a health care expenditure for Covered Employees. A health care expenditure is 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, or reimbursing the cost of health care services for Covered Employees.¹⁰

Examples of a Health Care Expenditure include the following¹¹:

- Payments to a third party to provide health care services; this includes paying health insurance premiums;
- Expenditures made by self-insured or self-funded programs;
- Contributions to an employee's health FSA, HRA or HSA;
- Payments to the City to fund membership in the Health Access Program;
- Reimbursements to Covered Employees for expenses incurred in the purchase of health care services; and
- Costs incurred in the direct delivery of health care services to the Covered Employee.

The spending requirement is effective January 9, 2008 for all employers with 50 or more employees and April 1, 2008 for most employers with 20 or more employees.

Calculating Health Care Expenditures

Subject to certain exceptions (described below), the required minimum health care expenditure is calculated separately for each Covered Employee by multiplying the total number of "hours paid"

⁶ FAQ #18 – Owners are not considered Covered Employees for purposes of the health care expenditure, as they do not qualify for payment of the minimum wage. Thus businesses are not required to make a health care expenditure to or on behalf of the owners(s). However, an employer must include owners who work for compensation in determining the employer size (see FAQ #12).

⁷ The hours worked requirement will drop to 8 hours per week on January 1, 2009

⁸ Regulation 3.2(A)

⁹ Regulation 3.2(5) Employer must use the voluntary waiver form in order to rely on this exception Waiver form available at

<http://www.sfgov.org/site/uploadedfiles/olse/hcso/Employee%20Voluntary%20Waiver%20Form.pdf>

¹⁰ Regulation 4.1(A)

¹¹ Regulation 4.2

to each individual Covered Employee during the quarter by the applicable health care expenditure rate.¹²

The applicable expenditure rates are based on the size of the employer.¹³

Business Size		January 9, 2008	April 1, 2008	January 1, 2009
Large	100 + Employees	\$1.76/hour		\$1.85/hour
Medium*	50-99 Employees	\$1.17/hour		\$1.23/hour
	20-49 Employees	N/A	\$1.17/hour	
Small	1-19 Employees	N/A		

* Non-profits with fewer than 50 are exempt from the requirements.

“Hours paid” includes both the hours for which a person is paid wages for work performed within San Francisco and the hours for which a person is entitled to be paid wages.¹⁴ Thus, an employer needs to account for paid vacation hours, paid time off, and paid sick leave. Under the ordinance, hours paid will not exceed 172 hours in a single month or 516 hours in a single quarter.¹⁵

Exceptions

Uniform Coverage

A Covered Employer that provides for uniform health coverage to some or all of its employees shall be deemed to comply with the spending requirement if the average expenditure rate per employee meets or exceeds the applicable expenditure rate for that employer.¹⁶ Uniform coverage means the employees are provided with the same coverage, e.g. they are all covered under an insured health plan such as a Blue Shield HMO, or Kaiser, or HealthNet PPO.¹⁷

Self-Insured

With respect to those employees covered by a self-funded plan, a Covered Employer will be deemed to comply with the spending requirement if the preceding year’s average expenditure rate per employee meets or exceeds the expenditure rate required under the Ordinance based on the size of the employer.¹⁸

The average expenditure rate shall be calculated by dividing the total amount of health care expenditures made for such employees by the total number of hours paid to such employees.¹⁹

An employer needs to determine the average expenditure on a per plan basis if more than one plan is offered. For example, an employer offering a dual choice PPO and HMO will need to calculate separate aggregate expenditures based on each plan.²⁰

¹² Regulation 6.1(B)

¹³ Regulation 5.2(B)

¹⁴ Regulation 6.1(C)

¹⁵ Regulation 6.1(C)

¹⁶ Regulation 6.2(B)(1)

¹⁷ Informal comments of Joannie Chang, Office of Labor Standard Enforcement.

¹⁸ Regulation 6.2(B)(2)

¹⁹ Regulation 6.2(B)(3)

Employer Notice, Recordkeeping, and Reporting Obligations²¹

Employer Record Keeping

The employer must keep records for four years sufficient to establish compliance with the spending requirements under the Ordinance. This includes:

- records of the health expenditures made,
- calculation of the expenditure for each covered employees, and
- documentation that the expenditures were made at least quarterly.

Also, the employer must keep any signed Employee Voluntary Waiver Form that was relied upon to claim an exemption from the spending requirement.

Employer Reporting

Annually, the Covered Employer will be required to report their health care expenditures to the City.

Employer Notice to Employees of Payment to the City

If an employer makes a payment to the City for the required health care expenditure, the employer must provide Covered Employees notice using the form located on the Office of Labor Standards Enforcement Web Site http://www.sfgov.org/site/olse_index.asp?id=45168.

What Should Employers Do?

- **Are you covered?**
 - Determine whether they are covered by the Ordinance
 - Do you have employees working in San Francisco who 1) have been employed at least 90 days, and 2) work at least 10 hours a week?
 - Are you a Large employer (100 or more employees)? Medium employer (20-99) employees?
 - Nonprofits with 50 or fewer employees are exempt for the ordinance.
 - Small employers with fewer than 20 employees are exempt from the ordinance.
- **Compliance Deadline**
 - If you are an employer with 50 or more employees, you are required to make health care expenditures for the first quarter of calendar year 2008.
 - If you are an employer with 20-49 employees, you are required to make health care expenditures for the second quarter of calendar year 2008.
- **Are you currently making expenditures? Are they enough?**
 - If you are an employer who is subject to the Ordinance then:
 - If no health care expenditures are currently being made, begin making expenditures in accords with the above requirements of the Ordinance.

²⁰ FAQ 39 – “When determining the average expenditure rate, aggregation of expenditures shall be limited to those employees with the same type of coverage, i.e., expenditures for employees covered by an HMO may be aggregated, but expenditures for employees covered by a PPO may not be aggregated with the expenditures for employees covered by the HMO.”

²¹ Regulation 7 – Additional Employer Responsibilities

- Do you have part-time Covered Employees who currently do not receive benefits under your health care program? If so, you may need to make health care expenditures on behalf of these employees.
 - If health care expenditures are currently being made, determine whether the current contributions are sufficient to satisfy the spending requirements of the Ordinance.
 - Calculate the minimum expenditure rate for each Covered Employee or if a self-insured or uniform coverage plan, calculate the average rate.
 - If the amount of actual expenditure per Covered Employee is greater than the minimum requirement, the employer has satisfied its contribution requirement.
 - If the amount of actual expenditure per Covered Employees is less than the minimum requirement, the employer will need to use one of the methods outlined above to satisfy the minimum spending requirement.
- **Record Keeping & Notifications**
 - Develop record keeping process and satisfy annual reporting requirements.

RESOURCES:

- Health Care Security Ordinance, Administrative Code Chapter 14
http://www.sfgov.org/site/olse_index.asp?id=45168
- Final Regulations
http://www.sfgov.org/site/uploadedfiles/olse/hcso/HCSO_Final_Regulations.pdf
- Office of Labor Standards Enforcement – HCSO
 - Home page http://www.sfgov.org/site/olse_index.asp?id=45168
 - FAQ
<http://www.sfgov.org/site/uploadedfiles/olse/hcso/HCSO%20FAQs,%20released%2012-7-2007.pdf>
 - Notice to Employer of the Requirements
http://www.sfgov.org/site/uploadedfiles/olse/hcso/HCSO_EmployerNotice04-07Revised.pdf

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