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Sent: Wednesday, February 01, 2012 1:10 AM
To: Karla Hartay
Subject: Amendment to the San Francisco Health Care Security Ordinance (HCSO)



Amendment to the San Francisco Health Care Security Ordinance (HCSO)

Background

On January 9, 2008, San Francisco instituted health care reform measures in the form of the San Francisco Health Care Security Ordinance ("HCSO"). HCSO was enacted to provide those individuals who work in San Francisco and qualify as an employee entitled to minimum wage with access to affordable health care by mandating the creation of a Health Access Program that provides services to the uninsured. HCSO requires "Covered Employers" (as defined below) to make reasonable health care expenditures on behalf of their "Covered Employees" (as defined below) in an amount based on the size of the employer. As of January 9, 2008, HCSO applies to all employers with fifty (50) or more employees. And as of April 1, 2008, HCSO applies to all for-profit employers with twenty (20) or more employees.

Effective January 1, 2012, HCSO was amended to provide more transparency regarding the mandatory employer-provided contributions made to reimbursement accounts (the "Amendment"). To that end, the Amendment incorporates several new provisions that are listed below and then explained in more detail.

1. The 2012 Health Care Expenditure Rates for medium- and large-sized businesses, and the 2012 Annual Salary Exemption figures, were announced.
2. All Covered Employers must post the Office of Labor Standards Enforcement's ("OLSE's") official 2012 notice (the "OLSE Notice") at every workplace or job site.
3. There are new rules and requirements for Covered Employers that impose a surcharge on customers to cover, in whole or in part, the costs of the HCSO spending requirement.
4. There are new rules and requirements for Covered Employers that utilize health reimbursement accounts to satisfy, in whole or in part, the HCSO spending requirement.
5. There are new rules regarding some of the administrative penalties associated with violations of HCSO.

Health Care Expenditure Rates

HCSO Health Care Expenditure Rates*				
Business Size (company-wide)		2012	2011	2010
Large	100+ employees	\$2.20/hour	\$2.06/hour	\$1.96/hour
Medium	20-99 employees	\$1.46/hour	\$1.37/hour	\$1.31/hour
Small	1-19 employees	Not applicable: exempt from coverage		

*Nonprofits with fewer than fifty (50) employees are exempt from the Employer Spending Requirement.

2012 Annual Salary Exemption Figures

An employee who is a manager, supervisor or confidential employee, and who earns at or above an annual salary of \$84,051 (or \$40.41/hour) in 2012, is exempt from coverage under HCSO. (The 2011 annual salary figure was \$81,450, or \$39.16/hour.)

Official Notice - Posting Requirement

All "Covered Employers"-businesses with twenty (20) or more employees and nonprofit organizations with fifty (50) or more employees-must post the 2012 OLSE Notice at every workplace or job site. Drafting and posting a different version will not satisfy this requirement. A PDF version of the OLSE Notice may be downloaded and printed from www.sfgov.org/olse/hcso and is available in six (6) different languages.

"Covered Employees" are persons who have been employed by a Covered Employer for at least ninety (90) days and work eight (8) or more hours per week (effective January 1, 2009) in San Francisco. An explanation of the limited exceptions to this definition is available at www.sfgov.org/olse/hcso.

Health Surcharges

The Amendment provides new rules and requirements for Covered Employers that impose a surcharge on customers to cover, in whole or in part, the costs of the HCSO spending requirement.

Reporting

A Covered Employer is required to report to the OLSE during the annual reporting process:

- Terms of the health reimbursement account including what expenses are eligible for reimbursement;
- The amount of money *collected* from the surcharge for employee health care; and
- The amount of money *spent* on employee health care.

If the amount collected from the surcharge is greater than the amount spent on employee health care, the Covered Employer must irrevocably pay or designate an amount equal to that difference for health care expenditures for its Covered Employees. The State Board of Equalization has issued a "Special Notice" regarding this requirement that is entitled "Sales Tax Applies to the San Francisco Health Care Security Ordinance (SFHCSO) Surcharge," which can be accessed at <http://www.boe.ca.gov/news/pdf/l224.pdf>.

Reimbursement Accounts

The Amendment provides new rules and requirements for Covered Employers that utilize reimbursement accounts to satisfy, in whole or in part, the HCSO spending requirement. Each Covered Employer has discretion regarding the type of health care expenditure it chooses to make for its Covered Employees. The Amendment, however, specifically addresses the following types of expenditures:

- Contributions to health savings accounts ("HSAs")/health reimbursement arrangements ("HRAs"); and
- Contributions **to any other account having substantially the same purpose or effect as an HSA.** (Health insurance premiums or contributions made to the Healthy San Francisco program are not addressed.)

Although interpretations of HCSO prior to the Amendment may have suggested that health care flexible spending accounts ("FSAs") were an appropriate vehicle for health care expenditures under HCSO, they are no longer viewed as viable options since the Amendment requires contributions to remain available for at least twenty-four (24) months, described in further detail below. Employers currently offering a health care FSA to comply with HCSO may want to consider offering an HRA after the end of the health care FSA plan year.

Subject to certain requirements, a contribution constitutes a "qualifying health care expenditure" if the contribution is irrevocably paid to a third party on behalf of an employee, OR

ALL OF THE FOLLOWING FACTORS ARE MET:

- **The contribution is reasonably calculated to benefit the Covered Employee.** The contribution must be available to the Covered Employee for reimbursement of all Section 213(d) medical expenses. AND, the Covered Employee must be provided a minimum of ninety (90) days following their termination of employment to incur expenses and submit claims.
- **The contributions remain available to the Covered Employee (and any other person eligible for reimbursement) for a minimum of twenty-four (24) months from the date of the contribution.**

Example: If a Covered Employer makes a contribution to a Covered Employee's reimbursement account on April 15, 2012 (based on the hours "worked by" or "paid to" the employee in the first quarter of 2012), the contribution must *remain available* to the Covered Employee until *at least* April 15, 2014, in order to qualify as a health care expenditure under HCSO.

Subsequent contributions made in July 2012 (for the second quarter), October 2012 (for the third quarter) and January 2013 (for the fourth quarter) must remain available for reimbursement of eligible medical expenses incurred until July 2014, October 2014 and January 2015, respectively. Under this scenario, at any given time, the Covered Employee may have an account balance comprised of various underlying contributions, each with different expiration dates.

Example: A Covered Employee could have a reimbursement account balance of \$5,000, in which \$800 is set to expire in one (1) month, \$500 is set to expire in four (4) months, etc. Any disbursement for eligible medical expenses must be debited from the *oldest* contribution first (i.e., the contribution with the earliest expiration).

As an alternative plan design, the Covered Employer may make contributions available for more than twenty-four (24) months, whereby contributions expire at the end of each calendar year, rather than quarterly throughout the year. For example, the Covered Employer's plan may allow all 2012 contributions to remain available to the Covered Employee until the end of 2014, regardless of when they were made during the year. Similarly, 2013 contributions could be available until the end of 2015. This type of plan design may help to simplify the reporting process, if an employer chooses this option.

- **Covered Employers are required to provide and distribute written summaries of the contribution within fifteen (15) days of the date of the contribution.** (A sample Contribution Summary is available at www.sfgov.org/olse/hcso.) The summary must include the following information:
 - The name, address, and telephone number of any third party to whom the contribution was made;
 - The date and amount of the contribution;
 - The date and amount of any other debits or credits to the account since the most recent Contribution Summary provided to the employee;
 - The account balance; and
 - Any applicable expiration dates for the funds in the account.
- **A Covered Employer must make available on January 1, 2012, contributions** in an amount equal to the positive balance in the account on December 31, 2011. The roll-over funds must be available for a minimum of twenty-four (24) months following the date funds were rolled over.
- **Covered Employers must satisfy special requirements for separated employees.**
 - Any remaining account balance at the time of separation must remain available

to the former employee for a minimum of ninety (90) days from the date of separation.

- The employee must receive, within three (3) days following the separation, a written notice ("Separation Notice"), which shall include the balance of the account and any applicable expiration dates for the funds in the account. The following sample "Separation Notice" available at www.sfgov.org/olse/hcso MAY be used (but is not required to be used).
- If there are any funds EARNED, but not yet CONTRIBUTED, as of the separation date, the Covered Employer may either make a reimbursement account contribution at the time of separation, OR make a **post-separation** reimbursement account contribution no later than thirty (30) days after the end of the quarter.

Penalties

The Amendment provides new rules regarding some of the administrative penalties associated with the violations of the Ordinance.

- Restitution to employees where appropriate.
- The OLSE may impose administrative penalties of \$25 per day for each workplace or job site where a Covered Employer fails to post the OLSE Notice.
- The OLSE is *required* to impose administrative penalties upon Covered Employers who fail to make the required expenditures within five (5) business days of the quarterly due date (which is thirty (30) days after the conclusion of each quarter). The maximum penalty shall be up to one-and-one-half times (150%) the total expenditures that a Covered Employer failed to make, but shall not exceed the new amount of \$100 for each Covered Employee for each quarter in which the required expenditures were not made.
- A penalty of \$25 as to each worker whose records are not made available.
- The penalty for failing to maintain or retain accurate and adequate records has increased to \$500 per quarter in which the violation occurs.
- The penalty for failing to submit the annual reporting information to the OLSE has increased to \$500 for each quarter in which the violation occurs.

WageWorks' Action Plan for Compliance

For Covered Employers that choose to utilize an HRA as a spending vehicle to comply with HCSO, WageWorks' customized HRA plan design will ensure that the HRA contributions are available to Covered Employees for a minimum of twenty-four (24) months, and that any balance on December 31, 2012, is available on January 1, 2013. WageWorks system enhancements are currently underway that will provide Covered Employers with the ability to provide their Covered Employees with statements that maintain contribution amounts and availability. Covered Employers may also want to review their current HRA Plans for compliance with HCSO, as amended.

Please contact independent legal counsel to ensure that you are in compliance with the requirements of HCSO, as amended.

Additional information, including the text of the 2011 Amendment to HCSO, sample notices, and the HCSO FAQ regarding these new provisions may be found at www.sfgov.org/olse/hcso.

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