

GENERAL SERVICES AGENCY

OFFICE OF LABOR STANDARDS ENFORCEMENT

DONNA LEVITT, MANAGER



Frequently Asked Questions (FAQs)
2011 Amendment to the Health Care Security Ordinance (HCSO)
Administrative Code Chapter 14

Updated: December 23, 2011

TABLE OF CONTENTS

<u>Overview</u>	3
1. Q: When was the 2011 HCSO Amendment enacted and when do the provisions take effect?	3
2. Q: What does the 2011 HCSO Amendment do?	3
3. Q: Who is impacted by the 2011 HCSO Amendment?	3
4. Q: How do I get additional information about these new provisions?	3
5. Q: Is OLSE planning to provide any additional guidance regarding the 2011 HCSO Amendment?	4
<u>Notice-Posting</u>	4
6. Q: What is the new Notice-posting requirement?	4
7. Q: Where can I get the Official OLSE Notice?	4
8. Q: Must a Covered Employer use the official OLSE Notice or may the employer draft and post a modified version?	4
9. Q: Are there requirements to post the Notice in languages other than English?	4
10. Q: What if a Covered Employer has multiple workplaces?	5
11. Q: What are the consequences of failing to post the Official Notice?	5
<u>Health Surcharges</u>	5
12. Q: What is the new rule regarding surcharges?	5
13. Q: Does this new surcharge rule apply to health surcharges collected in 2011?	5
14. Q: Is a business supposed to charge sales tax on any such health surcharge?	5
<u>Reimbursement Accounts</u>	5
15. Q: What type of health care expenditures are impacted by the 2011 HCSO Amendment?	5
16. Q: Is a Health Reimbursement Account an “account having substantially the same purpose or effect” as a health savings account?	6

17.	Q: Under what conditions does a contribution to a reimbursement account constitute a qualifying health care expenditure?	6
18.	Q: What does it mean for a contribution to be “reasonably calculated to benefit the employee”?	7
19.	Q: What does it mean for a contribution to be available to the employee for a minimum of twenty-four months from the date of the contribution?	7
20.	Q: How does it work for an employee when an employer elects to make each reimbursement account contribution available for the minimum twenty-four months?	8
21.	Q: If an employee’s reimbursement account balance is comprised of underlying contributions that expire on different dates, which individual contribution is debited when an employee is reimbursed for an eligible medical expense?	8
22.	Q: What if an employer wants to maintain a policy whereby reimbursement account contributions expire at the end of a calendar year?	8
23.	Q: Are there any specific requirements for the written summary of the contribution?	8
24.	Q: Are there any rules regarding how the employer must distribute the Contribution Summary? For example, can it be sent electronically?	9
25.	Q: Must an employer “roll-over” (i.e. continue to make available) contributions that remained outstanding in an employee’s reimbursement account at the end of 2011?	9
26.	Q: How long must these roll-over funds remaining available?	9
27.	Q: Are there any special rules or requirements when an employee “separates” from employment with a positive balance in a reimbursement account?	9
28.	Q: How should a Covered Employer handle any funds <i>earned</i> – but not yet <i>contributed</i> – as of the separation date?	10
29.	Q: Will a Covered Employer’s use of a reimbursement account to satisfy its obligation to make health care expenditures trigger additional reporting requirements?	10
30.	Q: Are Health Reimbursement Arrangements subject to COBRA continuation coverage?	11
<u>Penalties</u>		11
31.	Q: What are the new penalty provisions?	11

Overview

1. Q: When was the 2011 HCSO Amendment enacted and when do the provisions take effect?

A: The 2011 HCSO Amendment, File No. 111030, was passed by the Board of Supervisors and signed by Mayor Lee on November 22, 2011. It becomes operative on January 1, 2012.

2. Q: What does the 2011 HCSO Amendment do?

A: In summary, the 2011 HCSO Amendment incorporates several new provisions into the Ordinance:

- There is a new Notice-posting requirement for all Covered Employers.
- There are new rules and requirements for employers who utilize reimbursement accounts to satisfy the obligation to make health care expenditures.
- There are new rules and requirements for employer who impose surcharges on customers to cover, in whole or in part, the costs of making health care expenditures.
- There are new rules regarding some of the administrative penalties associated with violations of the Ordinance.

Each of these new provisions is discussed in greater detail in the sections below.

3. Q: Who is impacted by the 2011 HCSO Amendment?

A: All Covered Employers and Covered Employees are impacted by the 2011 HCSO Amendment.

Covered Employers include businesses and nonprofit organizations that engage in business within San Francisco, are required to obtain a valid San Francisco business certificate, and meet the minimum-size threshold. The minimum-size threshold is 20 or more employees for businesses and 50 or more employees or nonprofit organizations.

Generally speaking, Covered Employees are persons who have been employed by their employers for at least 90 days and work eight or more hours per week in San Francisco. For an explanation of the limited exceptions to this definition, see the general HCSO FAQs, available at www.sfgov.org/olse/hcso.

4. Q: How do I get additional information about these new provisions?

A: If you do not find the answer to your question in these FAQs, you can visit our website at www.sfgov.org/olse/hcso to access additional materials about the 2011 HCSO Amendment, including the text of the 2011 HCSO Amendment and sample notices. You can also visit our

website for more general materials about the Ordinance, including the full text of the Ordinance, the underlying Regulations, and our general HCSO FAQs.

For any additional information, we encourage you to contact the HCSO hotline at (415) 554-7892 or email us at hcsosf@sfgov.org.

5. Q: Is OLSE planning to provide any additional guidance regarding the 2011 HCSO Amendment?

A: As stakeholders and interested parties raise additional questions, OLSE may release updates to these FAQs. Furthermore, some of the 2011 HCSO Amendment provisions will be the source of rulemaking in 2012. To keep informed about additional guidance, sign up for our Email Updates at www.sfgov.org/olse/hcso.

Notice-Posting

6. Q: What is the new Notice-posting requirement?

A: Every Covered Employer must post the Official OLSE Notice in a conspicuous place at any workplace or job site where any Covered Employee works.

7. Q: Where can I get the Official OLSE Notice?

A: You can download and print a PDF-version of the Official Notice from the OLSE website at www.sfgov.org/olse/hcso. For best results, print in color on legal size paper (8.5 x 14). You can also call the OLSE at (415) 554-7892 or email us at hcsosf@sfgov.org, and we'll gladly send you copies by U.S. mail.

8. Q: Must a Covered Employer use the official OLSE Notice or may the employer draft and post a modified version?

A: Covered Employers must post the Official OLSE Notice. Drafting and posting a different version will not satisfy the requirement of the law.

9. Q: Are there requirements to post the Notice in languages other than English?

A: Yes. Every Covered Employer is required to post the Official Notice in English, Spanish, and Chinese. The front of the Official OLSE Notice includes these three languages.

Every Covered Employer must also post the Official Notice in any other language spoken by at least five percent of the employees at the workplace or job site. For your convenience, the back of the Official OLSE Notice includes translations into Tagalog, Russian, and Vietnamese. If more than five percent of the workers at the workplace or job site speak any other language, the employer is responsible for translating and posting in that language.

10. Q: What if a Covered Employer has multiple workplaces?

A: Covered Employers are required to post the Official Notice at every workplace where even a single Covered Employee works.

11. Q: What are the consequences of failing to post the Official Notice?

A: The OLSE may impose administrative penalties of \$25 per day for each workplace or job site where a Covered Employer fails to post the Official Notice.

Health Surcharges

12. Q: What is the new rule regarding surcharges?

A: If a Covered Employer imposes a surcharge on its customers to cover, in whole or in part, the costs of the health care expenditure requirement, the Covered Employer will be required to report two pieces of data to the OLSE during the annual reporting process: 1) the amount of money collected from the surcharge for employee health care and 2) 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. OLSE may refer any potential cases of consumer fraud to appropriate authorities.

13. Q: Does this new surcharge rule apply to health surcharges collected in 2011?

A: No, the new rule does not apply to health surcharges collected in 2011. It applies to health surcharges collected in 2012 and beyond.

14. Q: Is a business supposed to charge sales tax on any such health surcharge?

A: The OLSE does not enforce tax laws nor provide tax advice. However, on May 1, 2009, the State Board of Equalization issued a “Special Notice” entitled “Sales Tax Applies to the San Francisco Health Care Security Ordinance (SFHCSO) Surcharge.” You can access a copy of this Special Notice at www.boe.ca.gov/news/pdf/1224.pdf.

If you have further questions about the taxability of surcharges, please call the State Board of Equalization’s Taxpayer Information Section at 800-400-7115.

Reimbursement Accounts

15. Q: What types of health care expenditures are impacted by the 2011 HCSO Amendment?

A: Each Covered Employer has discretion regarding the type of health care expenditure it chooses to make for its Covered Employees.

The 2011 HCSO Amendment specifically addresses the following types of health care expenditures:

- Contributions to health savings accounts (as defined under section 223 of the United States Internal Revenue Code), and
- Contributions to any other account having substantially the same purpose or effect as a health savings account.

The 2011 HCSO Amendment does not address or impact other types of qualifying health care expenditures, including health insurance premiums or contributions to the Healthy San Francisco program.

16. Q: Is a Health Reimbursement Account an “account having substantially the same purpose or effect” as a health savings account?

A: Yes. A Health Reimbursement Account (also referred to as a Health Reimbursement Arrangement or HRA) is an account having substantially the same purpose or effect as a health savings account. (This is true regardless of whether the account is administered directly by a Covered Employer or administered by a Third Party Administrator on behalf of a Covered Employer.) As such, the 2012 HCSO Amendment addresses when HRA contributions constitute qualifying health care expenditures.

In the following questions, these accounts – health savings accounts and accounts having substantially the same purpose or effect – are referred to collectively as “reimbursement accounts.”

17. Q: Under what conditions does a contribution to a reimbursement account constitute a qualifying health care expenditure?

A: A contribution to a reimbursement account 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 criteria are met:

- The contribution is reasonably calculated to benefit the employee;
- The contribution remains available to the employee (and any other person eligible for reimbursement for health care expenses through the employee) for a minimum of twenty-four months from the date of the contribution;
- The employee receives a written summary of the contribution within 15 days of the date of the contribution; and
- Covered Employers must satisfy two special requirements with respect to separated employees.

Each of the above criteria, and the rules for separated employees, are discussed in greater detail in the following questions.

18. Q: What does it mean for a contribution to be “reasonably calculated to benefit the employee”?

A: Reimbursement account contributions that meet the following two criteria are “reasonably calculated to benefit the employee”:

- The contribution is available to the employee for reimbursement of all IRS-eligible medical expenses, as defined in Section 213(d) of the Internal Revenue Code. See IRS Publication 502, titled “Medical and Dental Expenses,” for more details;
- The Covered Employee is provided a minimum of 90 days, following the expiration of the funds, to submit a claim for the reimbursement of eligible medical expenses incurred prior to the expiration of the funds.

Covered Employers who make reimbursement account contributions that fail to meet either of the above criteria may be required to provide affirmative evidence that such contributions are nonetheless still reasonably calculated to benefit the employee.

This topic will likely be the subject of OLSE rulemaking in 2012.

19. Q: What does it mean for a contribution to be available to the employee for a minimum of twenty-four months from the date of the contribution?

A: Health care expenditures must be made regularly, and no later than 30 days after the end of the preceding quarter. In order for a reimbursement account contribution to qualify as a health care expenditure, the Covered Employee must be entitled to seek reimbursement from the contributed funds for any eligible medical expenses incurred during the twenty-four month period following the date of the contribution.

Consider the following example. If an employer makes a contribution to an 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 the Ordinance. In other words, the employee can seek reimbursement from the account for eligible medical expenses incurred anytime between April 15, 2012 and April 15, 2014.

In order to qualify as health care expenditures, subsequent contributions made to the reimbursement account 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.

20. Q: How does it work for an employee when an employer elects to make each reimbursement account contribution available for the minimum twenty-four months?

A: Under this scenario, at any given time, the employee may have an account balance comprised of various underlying contributions, each with different expiration dates.

For example, an employee could have a reimbursement account balance of \$5,000.00, where \$800.00 is set to expire in one month, \$500.00 is set to expire in four months, etc.

21. Q: If an employee's reimbursement account balance is comprised of underlying contributions that expire on different dates, which individual contribution is debited when an employee is reimbursed for an eligible medical expense?

A: In order for reimbursement account contributions to qualify as health care expenditures, any disbursement for eligible medical expenses must be debited from the oldest contribution first (i.e. the one set to expire soonest). This is true regardless of the number or size of the underlying contributions that make up the total balance in the reimbursement account.

22. Q: What if an employer wants to maintain a policy whereby reimbursement account contributions expire at the end of a calendar year?

A: In order for reimbursement account contributions to qualify as health care expenditures, contributions must be made available for a minimum of twenty-four months from the date of the contribution. An employer is permitted to make contributions available for more than twenty-four months. So, for example, an employer could establish a plan whereby all 2012 contributions – regardless of when they were made during the year – remained available to the Covered Employee until the end of 2014. Similarly, 2013 contributions could be available until the end of 2015, and so on. This is an example of a plan design where contributions expire at the end of each calendar year (rather than quarterly throughout the year).

23. Q: Are there any specific requirements for the written summary of the contribution?

A: Yes. Employers are required to provide written summaries of reimbursement account contributions ("Contribution Summaries") to Covered Employees within 15 days of the date of the contribution. Furthermore, the Contribution 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 balance in the account, and
- Any applicable expiration dates for the funds in the account.

OLSE developed a sample “Contribution Summary,” which Covered Employers are *permitted*, but not *required*, to use as a model. The sample Contribution Summary is available at www.sfgov.org/olse/hcso.

24. Q: Are there any rules regarding how the employer must distribute the Contribution Summary? For example, can it be sent electronically?

A: The distribution of Contribution Summaries is not limited to any particular method, but it is the Covered Employer’s obligation to ensure that the Contribution Summaries are, in fact, *provided* to employees. Moreover, Covered Employers are obligated to keep all records necessary to establish compliance with the Ordinance.

25. Q: Must an employer “roll-over” (i.e. continue to make available) contributions that remained outstanding in an employee’s reimbursement account at the end of 2011?

A: In order for reimbursement account contributions in 2012 and beyond to constitute qualifying health care expenditures, the employee’s reimbursement account must commence 2012 with an amount equal to the positive balance in the employee’s account on December 31, 2011.

26. Q: How long must these roll-over funds remaining available?

A: A Covered Employer has two options with respect to the availability of roll-over funds.

The Covered Employer may treat these roll-over funds as a single new contribution made on January 1, 2012. This new roll-over contribution must remain available for the employee to seek reimbursement for eligible medical expenses incurred anytime before December 31, 2013 (i.e. twenty-four months from the January 1, 2012 contribution date).

Alternatively, the Covered Employer may make any roll-over funds available for twenty-four months from the date they were originally contributed in 2011 (or earlier).

Either way, the Covered Employer must comply with the requirement to provide a Written Summary of any contributions, as described in Question #23 above. The first Written Summary of 2012 should specify the expiration date of any roll-over funds.

27. Q: Are there any special rules or requirements when an employee “separates” from employment with a positive balance in a reimbursement account?

A: Yes. In order for a reimbursement account contribution to qualify as a health care expenditure, the following two conditions must be met with respect to separated employees (e.g. employees who quit, are fired, etc.):

First, any remaining balance in the account at the time of separation must remain available to the employee (and any other person eligible for reimbursement for health care expenses through the employee) for a minimum of ninety days from the date of separation.

Second, the employee must receive, within three days following the separation, a written notice (“Separation Notice”), which shall include the balance in the account and any applicable expiration dates for the funds in the account.

OLSE developed a sample “Separation Notice,” which Covered Employers are *permitted*, but not *required*, to use as a model. The sample Separation Notice is available at www.sfgov.org/olse/hcso.

28. Q: How should a Covered Employer handle any funds *earned* – but not yet *contributed* – as of the separation date?

A: A Covered Employee may be entitled to health care expenditures for the quarter in which the employee separates from employment (based upon the hours paid prior to the separation).

The Covered Employer may satisfy this obligation by making a reimbursement account contribution at the time of separation, in which case an accounting of this contribution must be included in the Separation Notice.

Alternatively, the Covered Employer may satisfy this obligation by making a *post-separation* reimbursement account contribution (or otherwise making the health care expenditure) no later than 30 days after the end of the quarter. If the Covered Employer elects to make this final health care expenditure *after* the separation, the following three criteria must be met:

- 1) The Separation Notice must indicate that the Covered Employee is entitled to a final health care expenditure (to be made prior to thirty after the end of the quarter),
- 2) The separated employee must be provided a Contribution Summary within fifteen days of the post-separation contribution, and
- 3) The post-separation contribution must remain available to the separated employee for at least 90 days from the date of the contribution.

29. Q: Will a Covered Employer’s use of a reimbursement account to satisfy its obligation to make health care expenditures trigger additional reporting requirements?

A: Yes. If a Covered Employer uses a reimbursement account to satisfy its obligation to make health care expenditures for any of its Covered Employees, the Employer will be required to report to OLSE, on an annual basis, the terms of such accounts, including what medical expenses are eligible for reimbursement. OLSE will provide specific guidance and instructions on this reporting requirement during the annual reporting process, which typically occurs in the April.

30. Q: Are Health Reimbursement Arrangements subject to COBRA continuation coverage?

A: The OLSE does not provide advice regarding compliance with federal laws, including COBRA. For an overview of some of the rules regarding the administration of HRAs, you may want to review IRS Notice 2002-45, which is available at www.irs.gov/pub/irs-drop/n-02-45.pdf. Section 7 of this Notice is entitled “COBRA Continuation Coverage,” and provides, in part, “An HRA is a group health plan generally subject to the COBRA continuation coverage requirements.”

Penalties

31. Q: What are the new penalty provisions?

A: There are three new penalty provisions.

First, OLSE is now *required* to impose administrative penalties upon Covered Employers who fail to make the required health care expenditures on behalf of their employees within five business days of the quarterly due date (which is 30 days after the conclusion of each quarter). The maximum penalty for this type of violation is now \$100 for each employee for each quarter that the required expenditures were not made within five business days of the quarterly due dates. This maximum penalty amount will increase each year for inflation.

Second, the penalty for failing to maintain or retain accurate and adequate records has increased to \$500 per quarter that the violation occurs.

Third, the penalty for failing to submit the annual reporting information to the OLSE has also increased to \$500.00 for each quarter that the violation occurs.

If you do not find the answer to your question in these FAQs, you can visit our website at www.sfgov.org/olse/hcso to access additional materials about the 2011 HCSO Amendment, including the text of the 2011 HCSO Amendment and sample notices. You can also visit our website for more general materials about the Ordinance, including the full text of the Ordinance, the underlying Regulations, and our general HCSO FAQs).

For any additional information, we encourage you to contact the HCSO hotline at (415) 554-7892 or email us at hcso@sfgov.org.