

**Administrative Guidance**

**San Francisco Health Care Security Ordinance**  
**[Administrative Code Chapter 14](#)**

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## **A. Overview**

### **1. Q: What is the Health Care Security Ordinance?**

**A:** The Health Care Security Ordinance (HCSO) is a San Francisco law that:

- established several employer health care-related obligations enforced by the Office of Labor Standards Enforcement (OLSE); and
- created a Health Access Program, including [Healthy San Francisco](#) and [Medical Reimbursement Accounts](#), administered by the [San Francisco Department of Public Health](#).

### **2. Q: What does the HCSO require employers to do?**

**A:** Under the HCSO, all [Covered Employers](#) must meet the following obligations:

- Satisfy the Employer Spending Requirement (ESR) by [calculating](#) and [making](#) Required Health Care Expenditures on behalf of all [Covered Employees](#).
- [Maintain records](#) sufficient to establish compliance with the ESR.
- [Post](#) an HCSO Notice in all workplaces with Covered Employees.
- [Submit](#) an HCSO Annual Reporting Form to the OLSE by April 30<sup>th</sup> of each year.

### **3. Q: What types of expenditures can employers make to comply with the HCSO Employer Spending Requirement?**

**A:** Employers choose how to make the Required Health Care Expenditures for their Covered Employees. Common Health Care Expenditures include:

- Payments for medical, dental, and/or vision insurance;
- Payments to the [City Option](#);
- Contributions to programs that reimburse employees for out-of-pocket health care costs, subject to the limitations described in [Administrative Guidance Section F](#).

## **B. Covered Employers**

### **1. Q: Which employers are “Covered Employers”?**

**A:** An employer is covered by the HCSO for any calendar quarter if it meets the following three conditions:

- employs one or more workers within the geographic boundaries of the City and County of San Francisco;
- is required to obtain a valid [San Francisco business registration certificate](#) pursuant to Article 12 of the Business and Tax Regulations Code, and
- is a for-profit business with 20 or more persons performing work or a nonprofit organization with 50 or more persons performing work. This includes all persons working for the entity, regardless of whether they are located in San Francisco or outside of the city.

### **2. Q: Who should be counted in determining employer size?**

**A:** All persons performing work for compensation for the employer should be counted (not just Covered Employees). This includes:

- persons who work in San Francisco and those who work outside of San Francisco.
- all employees, regardless of their status or classification as seasonal, permanent or temporary, full-time or part-time, contracted (whether employed directly by the employer or through a temporary staffing agency, leasing company, professional employer organization, or other entity) or commissioned.
- owners who perform work for compensation.

### **3. Q: Are owners counted for the purpose of determining employer size?**

**A:** Owners who perform work for compensation for the business are considered “persons performing work” and must be counted as such in determining whether the business is a Covered Employer.

### **4. Q: Does it matter if the employer is based or headquartered outside of San Francisco?**

**A:** No, the employer is covered by the HCSO – regardless of its location – if it meets the criteria as a Covered Employer.

**5. Q: What if the number of persons performing work changes from week to week?**

**A:** For businesses employing a fluctuating number of persons performing work during a quarter (13 weeks), employer size is based on the weekly average number of persons performing work for compensation during that quarter.

Thus, a business that employs 5 persons during the first 6 weeks of the quarter and 20 persons during the last 7 weeks of the quarter would not be covered because it has employed an average of only 13 persons per week during that quarter:

$$[(5 \text{ persons/week} \times 6 \text{ weeks}) + (20 \text{ persons/week} \times 7 \text{ weeks})] / 13 \text{ weeks} = 13 \text{ persons/week.}$$

**6. Q: If an employer operates one business with three separate stores or locations in San Francisco, each with seven employees, is it a Covered Employer?**

**A:** Yes. For the purpose of calculating employer size, employees performing work in different locations operated by the same employer are employees of that employer. The seven employees at each of the three stores total 21 persons performing work for this employer; thus, it is covered under the HCSO.

**7. Q: What if an employer owns and operates three unrelated businesses, such as a video store, a 4aundromat, and a pizzeria, each with seven employees?**

**A:** Whether the businesses are covered by the HCSO depends on how those businesses are organized. Businesses that are a “controlled group of corporations” for purposes of income tax filing are considered one employer under the HCSO, and all employees of each entity would be counted to determine the size of the employer. If the three businesses are incorporated and not members of a “controlled group of corporations” for purposes of income tax filing, then each is considered a separate business, and the employees of each separate entity will be counted to determine the size of each employer.

Employees of businesses that are not incorporated are counted as working for one employer if the businesses are under common control. For purposes of the HCSO, “under common control” means either (a) one person (individual, estate, or trust) has at least an 80 percent ownership interest in each of the businesses, or (b) the same two to five persons hold more than a 50 percent ownership interest in each of the businesses.

The same analysis applies if one or more of the businesses is incorporated, but others are not. Note that while some corporations may be excluded from the “controlled group of corporations” analysis for income tax purposes, they are not excluded from the definition of “employer” under Section 14.1(b)(4) of the HCSO.

**8. Q: Are public sector employers covered by the HCSO?**

**A:** The HCSO does not cover public sector employers, such as the City and County of San Francisco, the San Francisco Unified School District, or the state or federal government because public sector employers are not required to register with the San Francisco Office of Treasurer & Tax Collector to do business in the City.

**9. Q: Are employers who contract with the City, including those with existing contracts, covered by the HCSO?**

**A:** Yes, City contractors are subject to the HCSO and must comply with its requirements if they meet the definition of a Covered Employer.

Note that the HCSO exempts employees who are covered by the Health Care Accountability Ordinance (HCAO); thus, City contractors who are also subject to the HCAO need not make HCSO expenditures for those employees who receive health care benefits under the HCAO (typically those working 20 or more hours per week).

However, this exemption does not change the City contractor’s HCSO obligations with respect to any employees who are not covered by the HCAO. For more information regarding the HCAO, please email [HCAO@sfgov.org](mailto:HCAO@sfgov.org), call (415) 554-4791, or visit the OLSE’s [HCAO web page](#).

**10. Q: Are employers who contract with other public agencies covered by the HCSO?**

**A:** Generally, non-City public sector contractors, such as those that contract with the Federal government or the State of California, are covered by the HCSO unless they are “instrumentalities” of the public sector agency, or doing work that is a core function of the agency. If some, but not all, of a company’s employees are instrumentalities of a public sector agency, the employer is still a Covered Employer, and employees who do not function as instrumentalities of the state may be Covered Employees.

**11. Q: Does the HCSO cover private businesses located on other public property, such as public property owned by the state or federal government, San Francisco State University, or the San Francisco Unified School District?**

**A:** It depends. The HCSO does not cover private businesses located in “federal enclaves,” such as the Presidio, Fort Mason, and the entire Golden Gate National Recreation Area (GGNRA). However, private businesses located on other public property are generally covered if they are doing work unrelated to the leasing agency. A private café, florist, or gym that is located on state or federal property, for example, would be covered by the HCSO because its services are unrelated to the governmental mission of the leasing agency.

**12. Q: Are temporary staffing agencies or professional employer organizations responsible for making Health Care Expenditures under the HCSO?**

**A:** Both the client and the temporary staffing agency, professional employer, or similar entity may be considered a Covered Employer under the HCSO, and each Covered Employer shall have an obligation to ensure that the Employer Spending Requirement has been met.

In the context of a temporary staffing agency, professional employer, or other entity serving the same or similar function, the OLSE will determine whether the entity is an employer under the HCSO by reference to the factors outlined in California Unemployment Insurance Code § 606.5. (California statutes are available [here](#).)

## **C. Covered Employees**

### **1. Q: Is an employer required to make minimum Health Care Expenditures for all of its employees?**

**A:** Not necessarily. Covered Employers are only required to make Health Care Expenditures to or on behalf of their “Covered Employees.”

### **2. Q: Which employees are “Covered Employees”?**

**A:** An employee is covered by the HCSO if s/he works for a Covered Employer and:

- is entitled to be paid the minimum wage,
- has been employed by his or her employer for at least 90 calendar days,
- performs at least 8 hours of work per week within the geographic boundaries of San Francisco, and
- does not meet one of the five [exemption criteria](#) discussed below.

### **3. Q: What if the number of hours that an employee works in San Francisco changes over the quarter?**

**A:** An employee who regularly works eight or more hours per week in San Francisco is covered by the HCSO.

For employees whose work hours in San Francisco fluctuate below eight hours per week, Covered Employers are only required to make Health Care Expenditures during those quarters in which the employee works an average of eight or more hours per week in San Francisco. For example, an employee who works an irregular schedule ranging from 5 to 11 hours per week during the quarter may be covered if the average of hours worked per week is 8 or more.

For an employee who is terminated before the end of the quarter, calculate the average by dividing the total number of hours worked during that quarter by the number of weeks employed during that quarter. An employee who averages one eight-hour day per week for the month of January is a Covered Employee for that month, even if she is not employed during the last two months of the quarter.

Note that the number of hours actually worked is relevant to determining whether an employee is covered by the HCSO, but “Hours Payable” (including

paid time off) is used to calculate the minimum expenditure for each Covered Employee, as described in [Section E](#).

**4. Q: Can an employer provide health benefits to an employee before that individual has been employed for 90 days?**

**A:** Yes. Nothing in the HCSO prevents an employer from providing health care benefits or spending money on Health Care Services before the employee becomes a “Covered Employee” under the San Francisco law.

**5. Q: If an employee leaves the job and is re-hired at a later date, does the employee have to wait 90 days to be covered by the HCSO?**

**A:** It depends. If the employee is rehired within one year of the last day of previous employment, s/he is not required to complete a new 90-day eligibility period. In addition, the eligibility period need not be continuous – if the employee had only completed part of the 90-day eligibility period before leaving, the prior days of employment count towards the eligibility period when s/he returns.

If the employee is rehired more than one year after the last day of her previous employment, s/he *does* have to complete a new 90-day eligibility period before s/he is covered by the HCSO.

**6. Q: Are owners considered Covered Employees under the HCSO?**

**A:** Although owners who perform work for compensation must be counted for the purpose of determining employer size, owners are not considered Covered Employees because they are not entitled to payment of the minimum wage. Thus, the business is not required to make Health Care Expenditures to or on behalf of the owner(s).

**7. Q: Does the HCSO cover undocumented employees?**

**A:** Yes. All employees who work in San Francisco who meet the definition of a Covered Employee – whether or not they are legally authorized to work in the United States – are covered by the law. The OLSE will process an employee’s claim without regard to his or her immigration status; employees filing a claim with the OLSE will not be questioned about their immigration status.

**8. Q: Does the HCSO require employers to make Health Care Expenditures for legitimate independent contractors?**

**A:** No. Employers are only obligated to make Health Care Expenditures on behalf of



employees. However, merely labeling someone an “independent contractor” does not make him or her so. See the California Division of Labor Standards Enforcement’s discussion of the topic, “[Independent Contractor vs. Employee.](#)” A fact-specific inquiry determines whether a person is an employee or an independent contractor.

**9. Q: Are any employees exempted or excluded from eligibility under the HCSO?**

**A:** Yes, there are five categories of exempt employees:

- 1) Employees who [voluntarily waive](#) their right to have their employers make Health Care Expenditures for their benefit.
- 2) Employees who qualify as [managers, supervisors, or confidential employees](#) AND earn more than the applicable [salary exemption amount](#).
- 3) Employees who are eligible for [Medicare](#) or [TRICARE](#) (the health care program serving Uniformed Service members, retirees and their families). In order to claim these exemptions, an employer must be able to document employee eligibility.
- 4) 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.
- 5) Employees who receive health care benefits pursuant to the San Francisco [Health Care Accountability Ordinance](#) (HCAO).

**10. Q: How does an employee voluntarily waive the right to Health Care Expenditures?**

**A:** If an employee is receiving health care benefits through another employer, s/he is permitted to sign an [Employee Voluntary Waiver Form](#) (PDFs available in [English](#), [Chinese](#), and [Spanish](#)). The Waiver verifies that the employee is receiving health care benefits through another employer (such as a spouse’s, domestic partner’s or parent’s employer) and that s/he knowingly and voluntarily waives the right to have his/her current employer make Health Care Expenditures on his/her behalf.

The [Employee Voluntary Waiver Form](#) developed by the OLSE is intended to ensure that the employee understands his/her rights under the HCSO, so that the waiver is a knowing and voluntary one. Other forms provided by third-party vendors and health insurance carriers cannot be used in lieu of the City’s Employee Voluntary Waiver form.

**11. Q: What makes an Employee Voluntary Waiver Form valid?**

**A:** For an Employee Voluntary Waiver Form to be valid, the employee must fully understand his/her rights under the HCSO, and the Voluntary Waiver must be voluntarily completed by the employee without pressure or coercion from coworkers, the employer, or anyone connected to the employer.

An employee waiver is effective on the date it is signed and is valid for one year. Employees who wish to waive their rights for more than one year must sign a new waiver each year when the prior form expires. Employees cannot waive their rights retroactively.

Employees have the right to revoke their voluntary waiver at any time; the revocation must be submitted in writing. Employers must maintain documentation of waivers and revocations and provide employees with complete copies of such documentation.

**12. Q: Who qualifies as a Manager, Supervisor, or Confidential Employee?**

**A:** These terms are defined as follows:

- Managerial employee: an employee who has authority to formulate, determine, or effectuate employer policies by expressing and making operative the decisions of the employer and who has discretion in the performance of his/her job independent of the employer's established policies.
- Supervisory employee: an employee who has authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend any such action, if the exercise of this authority or responsibility is not of a merely routine or clerical nature, but requires the use of independent judgment.
- Confidential employee: an employee who acts in a confidential capacity to formulate, determine, and effectuate management policies with regard to labor relations, or regularly substitutes for employees having such duties.

**13. Q: What is the earnings requirement that goes along with the Managerial, Supervisorial, or Confidential Employee exemption?**

**A:** If an employee is a Managerial, Supervisorial, or Confidential Employee **and also** earns the following annual or hourly rate or a higher rate for the applicable year, that employee is exempt from the HCSO:

Year	Annual Salary	Hourly Salary
2013	\$86,593	\$41.63
2014	\$88,212	\$42.41
2015	\$90,745	\$43.63
2016	\$92,990	\$44.71

The earnings figure represents “the regular rate of pay” as the term is defined and used by the California Labor Commissioner. In that context, the regular rate of pay includes commissions and piece rate wages, but does not include overtime wages, gifts, or most bonuses. Thus, an employee who is a manager and earns an annual base salary that is at or above this figure will be considered exempt from the HCSO even if she is not employed for the full year. Employees who are compensated on an hourly basis and fall into the managerial, supervisory, or confidential employee categories are also exempt from the HCSO if they earn more than the applicable hourly wage listed above.

*Salary figures updated - October 22, 2015*

**14. Q: What is the nonprofit trainee exemption?**

**A:** To be exempt trainees of a nonprofit for up to one year, employees must meet three criteria:

- 1) The trainee is participating in a bona fide training program consistent with Federal Law as defined in the Code of Federal Regulations, Title 29, Part 520:

*Bona fide vocational training program means a program authorized and approved by a state board of vocational education or other recognized educational body that provides for part-time employment training which may be scheduled for a part of the work day or workweek, for alternating weeks or for other limited periods during the year, supplemented by and integrated with a definitely organized plan of instruction designed to teach technical*

*knowledge and related industrial information given as a regular part of the student-learner's course by an accredited school, college, or university.*

- 2) That training program enables the trainee to advance into a permanent position.
- 3) The trainee does not replace, displace, or lower the wages or benefits of any existing position or employee.

#### **D. Calculating Required Health Care Expenditures**

##### **1. Q: How much is a Covered Employer required to spend on health care for its Covered Employees?**

**A:** The minimum Health Care Expenditure for each Covered Employee is determined quarterly by multiplying the total number of [Hours Payable](#) to the employee in the quarter by the applicable Health Care Expenditure Rate.

There are two Health Care Expenditure Rates: one for medium-size employers (those with 20-99 [persons performing work](#)) and another for large employers (those with 100 or more [persons performing work](#)). The rates increase annually.

The two rates for the current and recent years are as follows:

##### **HCSO HEALTH CARE EXPENDITURE RATES**

Year	Medium-Sized Employers	Large Employers
2012	\$1.46 / hour	\$2.20 / hour
2013	\$1.55 / hour	\$2.33 / hour
2014	\$1.63 / hour	\$2.44 / hour
2015	\$1.65 / hour	\$2.48 / hour
2016	\$1.68 / hour	\$2.53 / hour

##### **2. Q: Which Health Care Expenditure rate applies in the context of a staffing agency, Professional Employment Organization, or similar agency?**

**A:** When the employee is jointly employed by a client and another agency, such as in the context of a temporary staffing, leasing, professional employer, or other

entity serving the same or similar function, the applicable Health Care Expenditure rate will be determined by the size of the larger employer.

**3. Q: When do Health Care Expenditures have to be made?**

**A:** Health Care Expenditures must be made each quarter, within 30 days of the end of the preceding quarter. The first quarter of the year is defined as the period from January 1 through March 31; the second quarter, from April 1 through June 30; the third quarter, from July 1 through September 30; and the fourth quarter, from October 1 through December 31.

**4. Q: How do I calculate the minimum Health Care Expenditure for a new Covered Employee?**

**A:** For a new Covered Employee, the quarterly minimum Health Care Expenditure is calculated by multiplying the total number of “Hours Payable” to that employee from the first day of the calendar month following 90 calendar days after his or her first day of work through the end of that quarter.

An employee whose first day of work is January 15, 2013 will become covered by the HCSO on May 1, 2013. Thus, the required quarterly minimum Health Care Expenditure is calculated by multiplying all Hours Payable to that employee from May 1, 2013 through June 30, 2013.

**5. Q: What are Hours Payable?**

**A:** Hours Payable 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, including, but not limited to, paid vacation hours, paid time off, and paid sick leave hours, but not exceeding 172 hours in a single month.

Note that Hours Payable is the figure used to calculate the expenditure required for each Covered Employee, but “[hours worked](#)” is used to determine whether an employee is covered by the HCSO.

**6. Q: Do hours worked by employees outside of the San Francisco count for purposes of calculating expenditures?**

**A:** No. Under the HCSO, Hours Payable includes only those hours during which the

employee is working within the geographic boundaries of the City and County of San Francisco.

For Covered Employees who perform some work outside of San Francisco, Hours Payable that are not hours actually worked (e.g., paid vacation hours, paid time off, and paid sick leave hours) will be calculated on a pro rata basis.

**7. Q: Do Hours Payable include overtime hours? How are Hours Payable calculated for employees exempt from overtime law?**

**A:** For employees who are not exempt from the overtime provisions of the federal Fair Labor Standards Act (FLSA) and California law, the Health Care Expenditures is calculated based on all hours worked, including overtime hours worked. Keep in mind that Hours Payable for each employee is capped at 172 hours per month.

For employees who are exempt from the overtime provisions of the FLSA and California law, OLSE will assume that the minimum Health Care Expenditures should be calculated based upon a 40-hour work week, unless there is evidence that the exempt employee's regular work week is less than 40 hours. In instances where there is evidence that the exempt employee's regular work week is less than 40 hours, that figure shall be used in calculating the minimum Health Care Expenditures.

**8. Q: Must minimum Health Care Expenditures be calculated separately for each employee?**

**A:** Yes, subject to certain exceptions described below in [Questions 9 and 10](#). The employer must make minimum Health Care Expenditures to or on behalf of each Covered Employee. Payments to or on behalf of one Covered Employee that exceed the required minimum Health Care Expenditure for that employee will not be considered in determining whether an employer has met its total required minimum Health Care Expenditures for all employees.

Note the exceptions that apply to plans providing [uniform coverage](#) to Covered Employees and [self-funded plans](#).

**9. Q: How does an employer that provides uniform coverage to Covered Employees determine if its expenditures meet or exceed the minimum Health Care Expenditure rate?**

**A:** A Covered Employer that provides uniform coverage to some or all of its Covered Employees will be deemed to comply with the spending requirement of the HCSO if the average hourly expenditure rate per employee meets or exceeds the [expenditure rate](#) required under the HCSO.

The option of averaging expenditures is limited to plans with a uniform design, i.e., the plans must have the same benefit design (same co-pay requirements, out-of-pocket maximums, deductibles, coverage tiers, eligibility criteria).

Employers shall calculate the average hourly expenditure rate by (a) dividing the total monthly premium paid for all employees covered by the uniform plan by the total number of employees covered by that plan, then (b) dividing that number by 172 hours paid (“hours paid” per employee is capped at 172 hours in a single month).

The employer has the option of including only those employees covered by the HCSO or including all employees participating in the uniform plan, provided that all such employees receive the same health coverage or product.

Aggregation of expenditures shall be limited to plans with a uniform design. Thus, an employer that offers an HMO and a PPO may aggregate expenditures for all of the employees covered by that HMO, but then it must calculate a separate average expenditure for those covered by the PPO. Similarly, an employer that offers two HMO options may not aggregate the expenditures unless the benefit design for both plans is exactly the same. Because amounts paid for dependent coverage do count towards the minimum Health Care Expenditure required under the HCSO, differences in contribution levels that correspond with different coverage tiers can be calculated using an average. However, differences in contribution levels based on other criteria, i.e., in situations where the amount an employer spends varies depending on the number of hours worked by employees, the employees' status as union/nonunion, the employees' salary, waiting periods, or work site/location, the expenditures cannot be aggregated.

If the Covered Employer's expenditure rate fails to meet or exceed the minimum expenditure rate set forth by the HCSO, that employer must spend the difference (or shortfall) within 30 days of the end of the quarter.

*Updated with minor correction - Oct. 22, 2015*

**10. Q: How does an employer with a self-funded plan determine if its expenditures meet or exceed the Required Health Care Expenditure rate?**

**A:** With respect to those employees covered by the self-funded plan, a Covered Employer will also be deemed to comply with the spending requirement of the HCSO if the preceding year's average hourly expenditure rate per employee meets or exceeds the [expenditure rate](#) required under the HCSO.

Note that for the first plan year, the employer shall receive credit toward the Employer Spending Requirement in the amount of the average actual expenditures per Covered Employee during the initial plan year (since there is no preceding year on which to base the calculation).

For both administrative ease and accuracy, employers may calculate the average hourly expenditure rate by (a) dividing the current COBRA equivalent rate (minus any administrative fees) for all employees covered by the self-funded plan by 172 Hours Payable (Hours Payable per employee is capped at 172 hours in a single month).

In using either method of determining compliance, the employer has the option of including only those employees covered by the HCSO, or including all employees participating in the self-funded plan, provided that all such employees receive the same health coverage or product.

Aggregation of expenditures shall be limited to plans with a uniform design, i.e., the plans must have the same benefit design (same co-pay requirements, out-of-pocket maximums, deductibles, coverage tiers, eligibility criteria).

If the Covered Employer's expenditure rate fails to meet or exceed the minimum expenditure rate set forth by the HCSO, that employer must spend the difference (or shortfall) within 30 days of the end of the quarter.

*(Updated with a minor correction - April 22, 2015)*

**11. Q: What if the health insurance premiums that I currently pay for my employee do not reach the minimum amount required by the HCSO?**

**A:** Employers must make the full expenditure required by law; thus, if the monthly premium paid by the employer does not meet the minimum expenditure amount, it must make up the shortfall. It is up to the employer to decide how to make up the shortfall; it may do so by reducing the employees' share of the premiums for the existing plan, choosing a more generous plan with higher premiums, complementing the existing plan with a health spending or medical reimbursement account, making payments to the [City Option](#) (which will then be used to set up a Medical Reimbursement Account for the Covered Employee), or making other expenditures that qualify as Health Care Expenditures according to the HCSO.



**12. Q: What if the premiums I pay for my employees' medical, dental, and/or vision insurance are greater than the minimum amount required by law?**

**A:** Covered Employers that are spending at or above the Required Health Care Expenditure rates have no further spending obligations under the HCSO.

**13. Q: What if I am already paying my employees health and welfare benefits pursuant to a Prevailing Wage or Public Works Contract, or other Collective Bargaining Agreement?**

**A:** If the health and welfare benefit payments required under your contract are at or above the expenditure rate required under the HCSO, you will have no further spending obligations under the HCSO. However, payment of the prevailing wage fringe benefit requirement in cash (as part of the Covered Employee's paycheck or otherwise) shall not satisfy the Employer Spending Requirement of the HCSO because the employer must ensure that the Health Care Expenditure is spent on [Health Care Services](#) for the Covered Employee.

Note that any portion of the health and welfare benefit payment that is for life insurance, death benefits, or disability payments shall not count towards the employer's minimum expenditure because such payments do not constitute Health Care Services under the Ordinance.

**14. Q: May I deduct the Health Care Expenditures from my employee's paycheck?**

**A:** No, the minimum Health Care Expenditure must be paid by the employer; thus, a deduction from the employee's earned wages for deposit in the employee's health savings or flexible spending account, for example, do not satisfy the employer's Employer Spending Requirement. Likewise, an employee's contribution towards his/her health insurance premium will not be credited towards the employer's minimum Health Care Expenditure.

## **E. Making Required Health Care Expenditures**

### **1. Q: What is a Health Care Expenditure?**

**A:** The Ordinance defines a Health Care Expenditure 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 or reimbursing the cost of Health Care Services for Covered Employees and/or their spouses, domestic partners, children, or other dependents. Health Care Expenditure also means an amount paid by a Covered Employer to the City on behalf of a Covered Employee to establish his or her eligibility to participate in the City's Health Access Program (the [City Option](#)).

Amounts paid by employees shall not count towards the Covered Employer's minimum Health Care Expenditure.

### **2. Q: What are some examples of Health Care Expenditures that meet the requirements of the HCSO?**

- A:** All of the following examples meet the requirements of the HCSO:
- Payments to a third party to provide health care services for the Covered Employee, such as payments for medical, dental, or vision insurance, or payments to a health care provider;
  - Payments on behalf of the Covered Employee to the [City Option](#);
  - Contributions on behalf of the Covered Employee to a reimbursement program (subject to the limitations in [Section F](#));
  - Payments to the Covered Employee to reimburse the employee for costs incurred in the purchase of Health Care Services; and,
  - Costs incurred by the employer in the direct delivery of Health Care Services for the Covered Employee.
  - Any of the above made on behalf of a Covered Employee's spouse domestic partners, children, or other dependents.

Payments made directly or indirectly for workers' compensation or Medicare benefits do not qualify as Health Care Expenditures.

**3. Q: What qualifies as “Health Care Services”?**

**A:** Health Care Services means medical care, services, or goods that may qualify as tax deductible medical care expenses under Section 213 of the Internal Revenue Code, or medical care, services, or goods having substantially the same purpose or effect as such deductible expenses.

Examples of qualifying expenditures include vision and dental coverage; nonprescription drugs, including, but not limited to, antacids, allergy medicines, pain relievers, and cold medicines; doctor’s fees; and necessary hospital services not paid for by insurance. Qualifying medical expenses include dental treatments and fees paid to dentists for x-rays, fillings, braces, extractions, dentures, and the like; eyeglasses and contact lenses needed for medical reasons; and fees for eye examinations and eye surgery to treat defective vision.

**4. Q: As an employer, do I have to choose only one of the options listed above for making Health Care Expenditures?**

**A:** No, an employer may choose more than one option to satisfy its obligations. An employer may, for example, pay for health coverage for its full-time employees while making contributions to the [City Option](#) for its part-time employees.

**5. Q: Does the HCSO require employers that already provide health insurance to their employees to spend more money on their employees?**

**A:** Not necessarily. The premiums that a Covered Employer pays for medical insurance for its Covered Employees count toward its Required Health Care Expenditures, so if that amount meets the minimum required under the HCSO, the Covered Employer will have no further obligations.

However, if the amount spent does not meet the minimum expenditure amount set by the HCSO, the Covered Employer must decide how it will spend the difference. The employer could choose a health insurance plan that provides more comprehensive benefits, such as dental and visions benefits, or increase its contribution towards the health care premiums while decreasing the portion paid by the employee. Another way to spend the remainder of the minimum spending requirement is to contribute to the City Option to create a Medical Reimbursement Account for the Covered Employees.

**6. Q: I currently provide benefits to all full-time employees, but only provide benefits to part-time employees who work more than 20 hours per week. Does the HCSO require me to do more?**

**A:** Probably. Employers are required to make minimum Health Care Expenditures for all Covered Employees working at least eight hours per week in San Francisco.

**7. Q: What if my employees have other insurance? Am I still required to make Health Care Expenditures for those employees?**

**A:** Possibly. Covered Employees who already have health care benefits through another employer may voluntarily waive their right to Health Care Expenditures under the HCSO by signing the OLSE's [Employee Voluntary Waiver Form](#). An employer will not be required to make Health Care Expenditures for employees that choose to sign this form. Keep in mind, however, that the waiver will not be valid unless the health care benefits are provided either by another employer of the Covered Employee or by the employer of that Covered Employee's spouse, domestic partner, parent, or guardian. If a Covered Employee has health care benefits that are not provided by another employer, the employer is still required to make the minimum Health Care Expenditures for that employee.

**8. Q: What if my employees choose not to participate in the health plan that I offer?**

**A:** A Covered Employer that establishes or maintains a health insurance program that requires contributions by a Covered Employee must do more than offer the Covered Employee an opportunity to participate in such a program. If the employee declines to participate in such a program, the employer must satisfy its Employer Spending Requirement in some other manner.

**9. Q: If an employer makes payments to satisfy its obligations under the Employer Shared Responsibility provisions of the federal Affordable Care Act (ACA), do those payments also count toward the Employer Spending Requirement under the HCSO?**

**A:** The answer depends on whether the employer's payments also fall within the definition of Health Care Expenditures, which are generally amounts actually paid for Health Care Services for Covered Employees or their spouses or dependents. For example, if the employer satisfies its ACA obligations by offering health insurance, the premiums it pays for those employees who enroll in the insurance program are Health Care Expenditures that count

toward the Employer Spending Requirement.

On the other hand, if the employer satisfies its ACA obligations by paying additional taxes (sometimes referred to as “penalties”), those payments do not count toward the Employer Spending Requirement because they are not Health Care Expenditures.

The amount paid for Health Care Expenditures that satisfy the ACA may not *fully* satisfy the Employer Spending Requirement of the HCSO. For example, if the amount actually spent on health insurance for a Covered Employee to satisfy the ACA is less than the Required Expenditures under the HCSO, the employer will have to make additional Health Care Expenditures to comply with the HCSO.

**10. Q: What should I do if a Covered Employee stops working for me before I’ve made the quarterly Health Care Expenditure?**

**A:** Covered Employers must comply with the Employer Spending Requirement for all Hours Payable to a Covered Employee, even if the employment relationship is terminated before the end of the quarter. Covered Employers that have not yet made the quarterly Health Care Expenditure for a Covered Employee may make the expenditure in the same manner as was done in the immediately preceding quarter. Where an employer has chosen to purchase health insurance for its Covered Employees, COBRA payments to continue health insurance coverage shall also qualify as valid Health Care Expenditures. The Covered Employer may also comply by making payments to the City Option, even if the employer had previously complied with the Employer Spending Requirement in some other manner.

If a Covered Employer meets the Employer Spending Requirement by making “Revocable Expenditures,” as defined in [Section F](#), there are [additional rules](#) that apply when a Covered Employee leaves the business.

## **F. Revocable & Irrevocable Health Care Expenditures**

### **1. Q: What is an Irrevocable Expenditure?**

**A:** An Irrevocable Health Care Expenditure is a Health Care Expenditure that has not been retained by and cannot at any time be recovered by or returned to the employer. This means that the employer cannot recover any portion of the funds, even if the employee leaves the job or if the business ceases to operate.

A few examples of Irrevocable Expenditures include:

- Payments to an insurance provider for medical, dental, or vision insurance premiums;
- Contributions to the City Option; and
- Contributions to Health Savings Accounts or Medical Savings Accounts, or other irrevocable reimbursement accounts.

### **2. Q: What is a Revocable Health Care Expenditure?**

**A:** A Revocable Health Care Expenditure is a Health Care Expenditure that the employer has “allocated for use by a Covered Employee but not actually paid to the employee, or any amount actually paid to a third party administrator that could revert to the employer at any point.” None of money actually has to revert to the employer for the Health Care Expenditure to be revocable. Rather, the entire expenditure is considered revocable if there is the possibility that any or all of it could be returned to the employer.

Employer contributions to a revocable Health Reimbursement Account (also referred to as a Health Reimbursement Arrangement or HRA) are the most common type of Revocable Health Care Expenditures. An expenditure made to an HRA is considered revocable if the employer allocates the funds as a debit on its books, but does not actually pay the allocated funds into a separate account on the employee’s behalf within 30 days of the end of each quarter. An HRA is also considered revocable if any amount of the employer’s Health Care Expenditure could be returned to the employer at any point, such as when the employee leaves the job or an employer contribution “expires.” HRAs can also be structured to be irrevocable, provided they do not have either of these features.

Please note that the federal Affordable Care Act placed significant restrictions on the use of stand-alone HRAs effective January 1, 2014. Please see [Section O, Question 1\(a\)](#).

**3. Q: Can an employer choose whether to make Revocable or Irrevocable Expenditures?**

**A:** Yes, but only in part, and only for Hour Payable through January 1, 2017. The San Francisco Board of Supervisors amended the HCSO in July 2014 to phase out Revocable Health Care Expenditures by 2017.

- a. For 2015, at least sixty percent (60%) of the required amount of Health Care Expenditures for each Covered Employee must be made as Irrevocable Expenditures.
- b. For 2016, at least eighty percent (80%) of the required amount of Health Care Expenditures for each Covered Employee must be made as Irrevocable Expenditures.
- c. For Hours Payable on and after January 1, 2017, only Irrevocable Health Care Expenditures shall be counted toward the Employer Spending Requirement.

As an example, if a Covered Employee of a Large Employer was paid for 516 Hours Payable in the first quarter of 2015, the Required Health Care Expenditure would be 516 x \$2.48 (the applicable rate for Large Employers), or \$1,279.68.

The employer could choose to spend 60% of the Required Expenditures, or \$767.81, on health insurance premiums paid to an insurance company (an Irrevocable Expenditure). The employer could then make revocable allocations to an integrated HRA with the remaining 40%, or \$511.87 (subject to the limitations of the federal Affordable Care Act and in accordance with the description [below in Question 4](#)).

**4. Q: Are there any other limitations on counting Revocable Health Care Expenditures toward the Employer Spending Requirement in 2015 and 2016?**

**A:** Yes. A Revocable Health Care Expenditure only counts towards the Required Expenditures if all of the following four requirements are also met:

- 1) The expenditure is reasonably calculated to benefit the employee (see [Section F, Question 5](#), [Section O, Question 3\(f\)](#); and [Section P, Question 2](#)); and
- 2) No portion of the expenditure can be returned to the employer before a specified amount of time has elapsed (typically 24 months, see [Section F, Question 6](#)); and
- 3) The Covered Employee receives an expenditure summary notice within 15 days of the employer's expenditure, including all of the information described in [Section F, Question 8](#); and

- 4) The Covered Employee that separates from employment receives a separation notice within 3 days that includes all of the information described in [Section F, Question 10](#).

**Note: Even if all of the above conditions are met, Revocable Expenditures can only comprise 40% of Required Expenditures for a given employee for Hours Payable in each quarter of 2015, and 20% for Hours Payable in each quarter of 2016.**

**5. Q: How does the OLSE determine whether a Revocable Health Care Expenditure is “reasonably calculated to benefit the employee”?**

- A:** If an employer chooses to make Revocable Expenditures to an “excepted benefits Health Reimbursement Account,” described in [Section O](#), the expenditure must satisfy the criteria outlined in that section to be “reasonably calculated to benefit the employee.”

For other types of Revocable Health Care Expenditures, the OLSE will conduct a fact-specific assessment of the expenditure to determine whether it is reasonably calculated to benefit the employee. Among other factors, OLSE may consider whether the benefit meaningfully improves access to Health Care Services and the extent to which employees actually used the benefit.

**6. Q: What is the minimum length of time a Revocable Expenditure needs to be available before the employer can reclaim unused funds?**

- A:** Revocable Expenditures count toward the Employer Spending Requirement provided the employer does not reclaim any part of the expenditure before the earliest of:
- a) 24 months from the date of the expenditure; or
  - b) 90 days after the employee separates from employment; or
  - c) For Revocable Expenditures made for Hours Payable prior to January 1, 2014, the date that the Covered Employee knowingly, voluntarily, and permanently waives in writing the unused portion of such expenditure. (See [Question 7 in this section](#) for more information about employee waivers).

Consider the following example: If the employer makes a Revocable Health Care Expenditure to an HRA on April 15, 2014, and the employee on whose behalf the employer made the contribution remains employed, then no portion of the contributed funds can be reclaimed by the employer before April 15, 2016, or else that expenditure will not count toward the Employer Spending Requirement. In other words, the funds must remain available to the employee to seek reimbursement from those funds for eligible expenses incurred anytime



between April 15, 2014 and April 15, 2016.

To count toward the Employer Spending Requirement, Revocable Expenditures must be provided to the employee on a “first-in-first-out” basis. For example, if an employee has access to revocable funds in an HRA, any reimbursement must be debited from the oldest contribution first (i.e., the one set to expire soonest).

**7. Q: Can an employee waive Revocable Expenditures allocated to an HRA?**

**A:** Generally no, with one limited exception. Beginning July 26, 2014, an employee may permanently waive the unspent balance of any HRA funds that the employer contributed prior to January 1, 2014. The employee must use the OLSE’s [Employee Voluntary HRA Opt-Out Form](#) (PDF) to ensure that the employee understands his/her rights under the HCSO and that the waiver is a knowing and voluntary one. Other forms cannot be used in lieu of the City’s Employee Voluntary HRA Opt-Out Form.

The Employee Voluntary HRA Opt-Out Form is only valid if the form is completed by the employee without pressure or coercion from coworkers, the employer, or anyone connected to the employer.

**8. Q: Are there any specific requirements for the written summary of the Revocable Expenditure?**

**A:** Yes. Employers are required to provide written summaries of Revocable Health Care Expenditures (“Expenditure Summaries”) to Covered Employees within 15 days of the date the employer makes the expenditure. The Expenditure Summary must include the following information:

- The name, address, email address, and telephone number of any third party to whom the expenditure was made; and
- The date and amount of the expenditure; and
- The account balance if the benefit is a revocable HRA; and
- A summary of how the benefit may be used, including types of Health Care Services available; and
- Restrictions on using the revocable benefit; and
- The date on which any portion of this benefit may be revoked.

OLSE developed a [sample Revocable Expenditure Summary](#) for an HRA with revocable contributions, which Covered Employers are permitted, but not *required*, to use as a model. If an employer maintains a medical HRA (that reimburses a range of medical expenses) as well as an [excepted benefits](#) HRA,

the summary must indicate which funds are part of each plan.

**9. Q: Are there any rules regarding how the employer must distribute the Revocable Expenditure Summary? For example, can it be sent electronically?**

**A:** The distribution of Revocable Expenditure Summaries is not limited to any particular method, but it is the Covered Employer’s obligation to ensure that the Revocable Expenditure Summaries are provided to employees. Moreover, Covered Employers are obligated to [keep all records](#) necessary to establish compliance with the HCSO, including copies of the Revocable Expenditure Summaries.

**10. Q: Are there any special rules or requirements when an employee “separates” from employment and has unused Revocable Expenditures?**

**A:** Yes. In order for a Revocable Expenditure to qualify as a Health Care Expenditure, the following two conditions must be met when an employee leaves the job:

First, any unused portion of a Revocable Expenditure must remain available for at least ninety days after the date of separation.

Second, the employee must receive, within three days following the separation, a written notice (“Separation Notice”) that includes:

- a) a summary of how the benefit may be used, including types of Health Care Services available; and
- b) the account balance if the benefit is a revocable HRA allocation; and
- c) restrictions on using the Revocable Expenditure; and
- d) the date(s) on which the remaining portion(s) of the benefit will be revoked.

OLSE developed a [sample Separation Notice](#) (PDF), which Covered Employers are *permitted*, but not *required*, to use as a model. If an employer maintains a medical HRA (that reimburses a range of medical expenses) as well as an [excepted benefits](#) HRA, the Separation Notice must indicate which funds are part of each plan.

**11. Q: How should a Covered Employer using Revocable Expenditures handle a Health Care Expenditure that the separating employee has earned, but the employer has 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 Payable prior to the separation.

The Covered Employer may satisfy this obligation in two ways. First, the Covered Employer may make the unmade contribution at the time of separation, in which case an accounting of this contribution must be included in the Separation Notice.

Second, the Covered Employer may make a *post-separation* contribution on its usual schedule, which must be 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:

- a) The Separation Notice must indicate that the Covered Employee is entitled to a final Health Care Expenditure and when it will be made; and
- b) The separated employee must be provided a Revocable Expenditure Summary within fifteen days of the post-separation contribution, and
- c) The post-separation contribution must remain available to the separated employee for at least 90 days from the date of the contribution.

**12. Q: Will a Covered Employer's use of Revocable Expenditures to satisfy the Employer Spending Requirement trigger additional reporting requirements?**

**A:** Yes. If a Covered Employer makes Revocable Expenditures to 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.

For 2014, employers who make contributions to revocable excepted benefits HRAs for more than an average of 20 hours per week will also be required to complete an addendum to the Annual Reporting Form, described in [Section P, Question 4](#). OLSE will provide specific guidance and instructions with the Annual Reporting Form, which is typically released in March and is due on April 30<sup>th</sup> of each year.

**13. Q: Do employer contributions to a Flexible Spending Arrangement count as Health Care Expenditures under the HCSO?**

**A:** No. Funds contributed to a Flexible Spending Arrangement (also known as a Flexible Spending Account or FSA) only remain available to the employee for one calendar year. In order to qualify as a Health Care Expenditure under the HCSO, a Revocable Expenditure cannot be revoked for a minimum of twenty-four months (if the Covered Employee remains employed).

## **G. Contributing to the City Option**

### **1. Q: What do my employees receive if I contribute to the [City Option](#) on their behalf?**

**A:** The City Option allows you to contribute to the City's public benefit program on behalf of your employees.

Based on the information you provide, your employees will be provided one of two health benefits:

- Medical Reimbursement Accounts (MRAs) – The employer's contribution is deposited in an irrevocable reimbursement account. Employees can obtain reimbursements from their MRAs for a full range of medical, dental, vision expenses, including reimbursements for the cost of insurance premiums.
- Healthy San Francisco – If an employee is eligible for Healthy San Francisco (HSF), the employer's payment may be applied towards the Employee's HSF enrollment, and the employee may receive a discount on Healthy San Francisco program participation fees. To be eligible for HSF, the employee must live in San Francisco, s/he must be uninsured, and s/he must not qualify for public health insurance programs (such as Medi-Cal).

As of November 1, 2014, any City Option employee with contributions assigned to Healthy San Francisco but not used for Healthy San Francisco enrollment fees may choose to have those contributions transferred to an MRA.

### **2. Q: Are City Option contributions irrevocable?**

**A:** Yes, contributions to the City Option never return to the employer and are therefore irrevocable.

The contributed funds remain available to the employee, and the employee may seek reimbursements for health care expenses from their remaining MRA balance at any time.

### **3. Q: Are there any special notice requirements for employers that contribute to the City Option?**

**A:** Yes. A Covered Employer that satisfies its obligation to make the Required Health Care Expenditures by making payment to the City Option must provide its Covered Employees with an [Employee Health Care Payment Confirmation](#), which is available in [English](#), [Chinese](#), and [Spanish](#).

**4. Q: How do I obtain more information about the City Option?**

**A:** Please visit the [City Option website](#).

Employers may also contact City Option Program Management at [employerservices@sfcityoption.org](mailto:employerservices@sfcityoption.org) or (415) 615-4492.

Employees may contact the City Option at (415) 615-4555 or [info@sfcityoption.org](mailto:info@sfcityoption.org).

**H. Employer Notice-Posting Requirement**

**1. Q: What is the 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.

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@sf.gov](mailto:hcsosf@sf.gov) to request a hard copy sent by U.S. mail.

**2. 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.

**3. 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.

**4. 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.

**5. Q: What if an employer does not control the location where Covered Employees work (e.g. employees working from home, employees outsourced to a third party, etc.)?**

**A:** In the case where a Covered Employer does not control the work location of its Covered Employees, the employer must ensure that each employee working in locations outside the employer's control is provided a copy of the Official OLSE Notice.

**6. 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.

**I. Employer Recordkeeping Requirements**

**1. Q: What records do all employers need to retain to be in compliance with the HCSO?**

**A:** Covered Employers must keep, for a period of four years from each Covered Employee's dates of employment, the following records:

- a) itemized pay statements, as mandated by California Labor Code Section 226, which require 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;

- b) the employee's address, telephone number, date of first day of work;
- c) 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;
- d) documentation supporting the exemption of an employee from coverage, such as a signed Employee Voluntary Waiver Form for each employee for whom the employer is claiming an exemption from the Employer Spending Requirement; and
- e) Covered Employers must also demonstrate that the Required Health Care Expenditures were made quarterly, unless they meet the requirements of the exception for [self-funded plans](#).

**2. Q: What additional records are required if an employer makes Health Care Expenditures by contributing to the City Option?**

**A:** The employer must retain copies of the [Employee Health Care Payment Confirmations](#) provided to employees.

**3. Q: What additional records are required if an employer makes Revocable Expenditures?**

**A:** The employer must retain copies of:

- [Revocable Expenditure Summary](#) (for each quarter);
- [Separation Notices](#); and
- Copies of any [Employee Voluntary HRA Opt-Out Form](#) for contributions made prior to January 1, 2014.

**J. Employer Reporting Requirements**

**1. Q: Are there any reporting requirements under the HCSO?**

**A:** Yes; Covered Employers must submit an Annual Reporting Form to the OLSE by April 30<sup>th</sup> of each year. Covered Employers who fail to make a timely submission will be in violation of the HCSO and shall be subject to penalties.



Employers are strongly encouraged to review the Instructions for the Annual Reporting Form to ensure compliance with this reporting requirement. To receive an email notification each year when the Annual Reporting Form is available, please sign up for the [HCSO Email List](#).

## **K. Health Surcharges**

### **1. Q: What is a health care surcharge?**

**A:** Some San Francisco businesses have elected to impose a surcharge (i.e. an extra fee or cost) on the goods or services they sell to customers to cover, in whole or in part, the expense of complying with the Health Care Security Ordinance.

### **2. Q: Does the City of San Francisco require employers to impose surcharges? Or prohibit employers from doing so?**

**A:** Neither. Employers impose such surcharges at their discretion. The City neither requires nor prohibits them.

### **3. Q: If an employer elects to impose such a surcharge, does the HCSO establish any standards or requirements?**

**A:** Yes. A surcharge provision – along with several other changes – was added to the HCSO by the Board of Supervisors and the Mayor in late 2011 and took effect on January 1, 2012.

### **4. Q: To whom does this provision apply?**

**A:** The provision applies to any [Covered Employer](#) who “imposes a surcharge on its customers to cover in whole or in part the costs of the Health Care Expenditure requirement” of the HCSO. The Health Care Expenditure requirement provides that Covered Employers must make Health Care Expenditures to or on behalf of their Covered Employees each quarter.

### **5. Q: What does the provision do?**

**A:** The provision has two parts.

First, any Covered Employer who “imposes a surcharge on its customers to cover in whole or in part the costs of the Health Care Expenditure requirement” must report two pieces of information to the OLSE on an annual basis :

- the amount collected from the surcharge for Covered Employee health care, and
- the amount spent on Covered Employee health care.

Employers submit this information to OLSE on the HCSO Annual Reporting Form, which all Covered Employers are required to submit by April 30th of each year.

Second, if the amount collected from the surcharge is greater than the amount spent on Covered Employee's health care, the employer must irrevocably spend or irrevocably designate the excess surcharges on health care for these Covered Employees.

**6. Q: How does an employer "irrevocably" spend or irrevocably designate these funds for its Covered Employees?**

**A:** Please see the description of [Irrevocable Expenditures](#) in Section F.

**7. Q: Is there a deadline by which employers must irrevocably spend these funds for its Covered Employees?**

**A:** Yes. The OLSE is providing employers with a full calendar year to irrevocably spend excess surcharges collected. Be aware that an employer must spend the excess surcharge funds in the following year *in addition to spending any health care surcharge funds collected in that year.*

For example, if an employer collected \$50,000 in health care surcharges in 2012, but spent just \$40,000 on Covered Employee health care during the year, the employer is required to spend the \$10,000 difference on health care for Covered Employees (in addition to spending any health care surcharges collected in 2013) by December 31, 2013.

**8. Q: Should my business stop collecting a health care surcharge?**

**A:** It remains at the discretion of any business to decide whether to impose a health care surcharge or not. However, if your business collected excess health care surcharges in a particular year, you may want to consider reducing or eliminating your health care surcharge in the following year to help ensure that you can irrevocably spend the excess surcharges collected in the prior year.

**9. Q: How will the OLSE determine whether my business satisfied the obligation to irrevocably spend excess surcharges for my Covered Employees in the following year?**

**A:** The OLSE will make this determination based on the information your business provides on the Annual Reporting Form you submit to our office by April 30<sup>th</sup> of each year plus any supplemental information we may request.

**10. Q: Are businesses 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](#) (PDF) entitled "Sales Tax Applies to the San Francisco Health Care Security Ordinance (SFHCSO) Surcharge."

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.

## **L. Retaliation Prohibited**

**1. Q: Is it unlawful to fire someone who refuses to sign an Employee Voluntary Waiver Form, even if that person is already receiving health insurance somewhere else?**

**A:** Yes, it is unlawful for an employer to discipline, discharge, demote, suspend, or take any other adverse action against an employee for exercising his/her rights under this law. One employer's obligation to make a Health Care Expenditure for its Covered Employee is not affected by any other employer's obligations; thus, it is illegal for an employer to fire an employee who does not wish to waive his or her right to the mandatory Health Care Expenditures, even if that employee is already receiving health insurance coverage from another employer.

**2. Q: Is it illegal to refuse to hire someone who does not have health insurance?**

**A:** Yes, it is unlawful for any employer to refuse to hire, to fire, or to discriminate against a person based on whether s/he possesses health insurance coverage.

## **M. Filing a Complaint**

### **1. Q: What do I do if I think my employer has violated the HCSO?**

**A:** If you have any questions regarding your rights under the HCSO, call (415) 554-7892 or email [hcsosf@sfgov.org](mailto:hcsosf@sfgov.org).

If you believe that your employer has violated the HCSO, you may submit an [HCSO Complaint Form](#) (available in [English](#), [Chinese](#), and [Spanish](#)) and you will be contacted by an OLSE investigator.

### **2. Q: Will my complaint be kept confidential?**

**A:** Yes, the Office of Labor Standards Enforcement will keep your name and identity confidential to the maximum extent provided by law.

### **3. Q: What does the OLSE do upon receipt of a complaint?**

**A:** Upon receipt of a complaint, the OLSE shall determine if the allegations of the complaint are sufficient and either dismiss the complaint or proceed with an investigation.

If the OLSE proceeds with an investigation, the OLSE has the right to engage in random inspections of employment sites, to have access to workers and other witnesses, and to conduct audits of employer records. Employers are required to cooperate with OLSE investigations.

### **4. Q: What happens if the OLSE determines that an employer violated the HCSO?**

**A:** The OLSE may order employers who violate the HCSO to take appropriate corrective actions, including payment of Required Health Care Expenditures that an employer failed to make. Where prompt compliance is not forthcoming, the OLSE may take any appropriate enforcement action to secure compliance, including initiating a civil action, and requesting that City agencies or departments revoke or suspend any registration certificates, permits, or licenses held or requested by the employer or person until such time as the violation is remedied.

The OLSE may also assess administrative penalties.

**N. Penalties**

**5) Q: What are the administrative penalties for failing to comply with the HSCO?**

**A:** The maximum administrative penalties for failing to comply with the following HCSO provisions are:

Violation of the HCSO	Maximum Administrative Penalty
Failure to make the required minimum Health Care Expenditures within five business days of the quarterly due date (30 days after the conclusion of each quarter)	\$100.00 for each employee for each quarter that the violation occurred. This maximum penalty will increase each year for inflation
Failure to submit the Annual Reporting Form	\$500.00 for each quarter that the violation occurs
Retaliation against employees	\$100.00 for each person who is the target of the prohibited action for each day the violation occurs
Refusing to allow OLSE access to employer records	\$25.00 for each worker whose records are not provided for each day the violation occurs
Failure to maintain or retain accurate and complete records	\$500.00

## **O. HCSO and the Affordable Care Act**

The Affordable Care Act (ACA) is a federal statute signed into law by President Obama on March 23, 2010. Many provisions of the ACA went into effect on January 1, 2014. The OLSE is publishing this set of FAQs to address some of the most common questions we are receiving from San Francisco employers and employees regarding the ACA's impact on the San Francisco Health Care Security Ordinance.

### **1. Questions from Employers**

**a) Q: Has the Affordable Care Act changed federal rules and requirements regarding the use of stand-alone medical Health Reimbursement Accounts (HRAs)?**

**A:** Yes. On January 1, 2014, the Affordable Care Act made significant changes to federal regulations and guidance regarding Health Reimbursement Accounts that may impact the permissibility of such contributions under federal law. Employers may wish to consult these federal resources and proper counsel when deciding whether Health Care Expenditures to a particular HRA comply with the ACA:

- [Preamble to the Interim Final Rules Implementing PHS Act Section 2711](#), PDF (75 FR 37188, at 37191, June 28, 2010);
- [FAQs about Affordable Care Act Implementation Part XI](#) (January 24, 2013);
- [IRS Notice 2013-54](#), PDF (September 14, 2013).

**b) Q: Does the ACA affect my ability to contribute to the “City Option” as a means of complying with the Employer Spending Requirement?**

**A:** No. You can continue to contribute to the City Option as a means of complying with the Employer Spending Requirement, just as before. See [Section G](#) for more information.

### **2. Questions from Employees**

**a) Q: What obligations do I have under the Affordable Care Act?**

**A:** Under the “Individual Mandate” of the Affordable Care Act (ACA), everyone must: 1) have health benefits that satisfy the standard of “minimum essential health coverage;” or 2) qualify for an exemption

(based on income or other factors); or 3) pay a federal tax penalty.

Please note that receiving a health benefit from your employer does not necessarily meet the condition of having “minimum essential health coverage.” Please consult the following resources for more information:

- the [Questions and Answers on the Individual Shared Responsibility Provision](#) page maintained by the IRS;
- the "[Requirement to Buy Coverage under the ACA](#)" flowchart from the Kaiser Family Foundation.

**b) Q: Do the benefits provided by my employer under the HCSO satisfy my obligations to have “minimum essential health coverage” under the ACA?**

**A:** That depends on what benefits your employer provides. Employer-sponsored medical insurance generally constitutes minimum essential coverage and satisfies your individual responsibility under the ACA. Having access to funds in a stand-alone medical Health Reimbursement Account (HRA), i.e., one that can be used for most kinds of medical expenses (not just dental and vision), is also considered minimum essential coverage.

The following benefits do not satisfy your obligation to have “minimum essential coverage” under the ACA:

- the City Option - includes Healthy San Francisco and Medical Reimbursement Accounts or MRAs;
- excepted benefits Health Reimbursement Accounts (HRAs) – employer-sponsored accounts that reimburse you for your out-of-pocket costs for a limited range of expenses, including vision and dental expenses. (See [Section O, Question 3\(b\)](#) for more information);
- dental insurance; and
- vision insurance.

If your employer only provides you with the types of benefits above that do not constitute minimum essential coverage, you still need to get coverage elsewhere that satisfies the requirements of the ACA (or pay the penalty).

**c) Q: Can I use remaining stand-alone medical HRA funds to purchase health insurance through Covered California?**

**A:** Yes, unless your employer’s HRA plan explicitly prohibited reimbursements for health insurance premiums as of January 1, 2014. If the HRA plan did not have that limit at that time, then you may use their remaining pre-2014 HRA funds to reimburse the cost of health insurance premiums. It does not matter where you purchase the health insurance.

**d) Q: Are there any federal tax consequences if I have a balance remaining in a stand-alone medical HRA?**

**A:** Yes. If you have a balance in a medical HRA (i.e. an HRA that covers more than just the limited excepted benefits discussed in [Section O, Question 3\(a\)](#) below), the Internal Revenue Service considers you to have “Minimum Essential Health Coverage.” Because the Affordable Care Act requires each individual taxpayer to have Minimum Essential Health Coverage or pay a tax penalty, you will not be subject to this penalty.

Please note, however, that if you have Minimum Essential Health Coverage because you have a balance in a medical HRA, you are not eligible for federal premium assistance tax credits (subsidies) when purchasing insurance through Covered California for any month in which the medical HRA funds remain available. This is true regardless of whether you use the HRA funds to buy insurance through the exchange, use them for other reimbursable expenses, or do not use the funds at all.

**e) Q: If I waive the remaining balance in a stand-alone medical HRA, will I be eligible for federal premium assistance tax credits to assist with purchasing health insurance through Covered California?**

**A:** Yes, if you meet the federal eligibility criteria. If you voluntarily elects to waive your rights to any remaining pre-2014 medical HRA funds, meet certain residency, citizenship and income requirements, and do not have another source of Minimum Essential Health Coverage, you should be able to receive federal premium assistance tax credits in the following month. See [Section F, Question 7](#) for more information about waiving pre-2014 medical HRA funds.

**f) Q: Where can I get more information about obtaining affordable health insurance for myself and/or my family?**

**A:** The ACA provides new opportunities to get high-quality, affordable health



insurance. More individuals and families now qualify for Medi-Cal, which provides comprehensive medical and mental health services at no cost. Others may qualify for federal insurance subsidies to help offset the cost of health insurance purchased through Covered California, the state's Health Insurance Exchange. For more information, please check the following resources:

- the Covered California website at <https://www.coveredca.com/>;
- the City's Health Care Reform page at <http://healthcarereformsf.org/>.

### **3. The HCSO and "Excepted Benefits" under the ACA**

#### **a) Q: What are "excepted benefits"?**

**A:** "Excepted benefits" is a term used in the Affordable Care Act to describe certain kinds of health benefits that are "excepted" from some of the requirements that the ACA places on other group health plans with more comprehensive medical coverage. Excepted benefits are not "minimum essential coverage" and do not affect an employee's eligibility to receive a premium assistance tax credit when buying insurance on Covered California. Employers can provide excepted benefits whether or not they also provide health insurance.

Section 9832(c) of the Internal Revenue Code and its accompanying regulations contain the full list of excepted benefits and place some limits on how they can be offered. But only some of those excepted benefits also qualify as "Health Care Services" under the HCSO. Those benefits are:

- dental benefits limited to treatment of the mouth;
- vision benefits limited to treatment of the eye;
- medical indemnity insurance;
- long-term, nursing home, home health, or community-based care; and
- coverage limited to a specific disease or illness, such as cancer insurance.

Employers can provide excepted benefits to employees directly, through insurance, or by providing health reimbursement accounts (HRAs) that reimburse employees for these services.

**b) Q: Do employer payments for excepted benefits insurance premiums count as Health Care Expenditures under the HCSO?**

**A:** Yes, as long as the insurance is for excepted benefits that are also Health Care Services (see [Question \(a\)](#) above). For example, dental insurance and vision insurance premium payments count towards an employer's Required Expenditures.

**c) Q: Does an employer's spending on a self-insured excepted benefits plan qualify as a Health Care Expenditure under the HCSO?**

**A:** Yes. Expenditures for self-insured health plans, including self-insured plans that only provide excepted benefits, qualify as Health Care Expenditures under the HCSO.

**d) Q: Do an employer's Revocable Expenditures to an excepted benefit HRAs count as Health Care Expenditures that satisfy the Employer Spending Requirement under the HCSO?**

**A:** Yes, but only if the expenditures a) satisfy the HCSO's additional requirements for Revocable Expenditures outlined in Section F Question 4, and b) are "reasonably calculated to benefit the employee," as discussed [below](#).

Note: Even if all of the above conditions are met, Revocable Expenditures can only comprise 40% of Required Expenditures for a given employee for Hours Payable in each quarter of 2015, and 20% for Hours Payable in each quarter of 2016.

**e) Q: How will the OLSE determine whether a revocable contribution to an excepted benefits HRA is "reasonably calculated to benefit the employee?"**

**A:** The OLSE considers an employer's revocable contribution to an excepted benefits HRA to be reasonably calculated to benefit the employee when the contribution meets the following criteria:

- 1) Subject to the federal tax rules for HRAs, the contribution may be used without restriction for full reimbursement of all excepted benefits that are also qualifying Health Care Expenditures" under the HCSO; and

- 2) The employee has at least a 90-day grace period after a contribution expires to submit claims for reimbursable expenses that the employee incurred before the contribution expired.

For calendar year 2014, the OLSE will consider an employer's revocable allocations to an excepted benefits HRA that do not exceed the employer's spending requirement for an employee who works an average of 20 hours per week to be reasonably calculated to benefit the employee, provided that the contributions meet the criteria above. See [Section P](#) on Expenditures and Enforcement in 2014 for more information.

**f) Q: What if my company's revocable allocations to an excepted benefits HRA plan do not meet the criteria in Section O, Question 3(f)? Will the OLSE still count my contributions toward satisfying my Employer Spending Requirement?**

- A:** Possibly. The HCSO does not control the terms and conditions the employer places on an excepted benefits HRA, nor does it place any limit on the dollar amount of contributions an employer can make on behalf of its employees. Employers retain complete discretion over those decisions regardless of the HCSO. Accordingly, the OLSE anticipates that some employers will choose to make contributions to excepted benefits HRAs under different terms than those described in Section O, Question 3(e). The OLSE will credit such contributions toward the Employer Spending Requirement as follows:

To receive credit under the HCSO for revocable contributions to an excepted benefits HRA that does not meet the criteria in [Section O, Question 3\(e\)](#), the employer must request credit at the end of the calendar year and provide supporting documentation showing that its contributions were reasonably calculated to benefit the employee. The OLSE will presume that the contributions were reasonably calculated to benefit the employee if the reimbursement rate for the plan meets or exceeds the average reimbursement rate for excepted benefits HRAs that do comply with the criteria in Section O, Question 3(e). That presumption is rebuttable, and the OLSE retains discretion to consider other factors, such as employee complaints, employer restrictions on reimbursable expenses, the employer's compliance with employee notification and reporting requirements, and other indicators of the employer's good faith. Reliance on advice from trade associations, brokers, or other private market actors will not be considered in determining employer good faith. If the OLSE determines that the employer has not made the minimum Required Health Care Expenditures, it will require the employer to make

remedy payments in the amount of the unmade Health Care Expenditures and will assess penalties for noncompliance.

**g) Q: What happens if an employer makes Revocable and Irrevocable Expenditures to excepted benefits HRAs in 2015 and 2016?**

**A:** If an employer opts to make both Revocable and Irrevocable Expenditures to excepted benefits HRAs, the employer must ensure that:

- 1) The Irrevocable Expenditures have been paid to a third party administrator and are not “retained” by the employer (See [Section F, Question 2](#));
- 2) All reimbursements actually paid to the Covered Employee are deducted from the available Revocable Expenditures before any reimbursements are deducted from the Irrevocable Expenditures;
- 3) The employer’s Revocable Expenditure Summaries explain that an employee has a limited time period to use Revocable Expenditures and unlimited amount of time to use Irrevocable Expenditures;
- 4) The employer’s Revocable Expenditure Summaries include the amount of the Revocable Expenditures available to the Covered Employee as well as the amount of Irrevocable Expenditures available (see [Section F, Question 8](#) for more information on notifications);
- 5) The employer or administrator maintains records regarding the balance of Irrevocable Expenditures made to an excepted benefits HRA for as long as there is a positive balance of funds in the account and provides information on the balance and the types of expenses that will be reimbursed to the employee (or former employee) upon request.

## **P. Expenditures and Enforcement Guidance for 2014**

*The following guidance addresses questions regarding HCSO compliance in 2014. Some answers are relevant for calendar year 2015 as well. Please contact the OLSE at 415-554-7892 if you have additional questions about HCSO compliance or reporting for 2014.*

*Published October 24, 2014*

*Updated January 29, 2015*

**1. Q: Given that new contributions to stand-alone medical HRAs are no longer permitted by the federal Affordable Care Act as of January 1, 2014, and given that funds contributed to a revocable HRA must remain available to employees for a minimum of 24 months to count as Health Care Expenditures under the HCSO, what can employers do with unexpired funds remaining in the pre-2014 accounts?**

- A:** To have these prior HRA allocations remain valid Health Care Expenditures that count toward the Employer Spending Requirement of the HCSO, there are three acceptable scenarios:
- a) The employer can maintain the HRAs (without making any new contributions) and keep funds allocated prior to January 1, 2014 available to Covered Employees for a minimum of 24 months from the date of contribution.
  - b) The employer can close the HRAs and make replacement Health Care Expenditures on behalf of the affected Covered Employees in the amount of any unused HRA funds that had not been available for 24 months from the date of contribution.
  - c) As of July 26, 2014, an amendment to the HCSO provides that a Covered Employee may “knowingly, voluntarily, and permanently waive in writing the unused portion” of a Revocable Expenditure made before January 1, 2014. If the employee waives the balance in the account, the employer may now close the HRA without making additional Health Care Expenditures equivalent to the amount of unused funds. On or after the date of this guidance, a waiver is only effective for if the employee chooses to sign the [Employee Voluntary HRA Opt-Out Form](#). The form is available on the [OSLE HCSO website](#).

**2. Q: What factors will OLSE consider when determining whether a Revocable Expenditures to an excepted benefits HRA are “reasonably calculated to benefit the employee” in 2014?**

- A:** OLSE considers an employer’s revocable contributions to an excepted benefits HRA to be reasonably calculated to benefit the employee if:
- a) The expenditures do not exceed the employer’s Spending Requirement for an employee who works an average of 20 hours per week;
  - b) Subject to the federal tax rules for HRAs, the contribution may be used without restriction for full reimbursement of all excepted benefits that are also qualifying Health Care Expenditures” under the HCSO (see Section O, Question 3(a) for a list of those excepted benefits); and
  - c) The employee has at least a 90-day grace period after a contribution expires to submit claims for reimbursable expenses that the employee incurred before the contribution expired.

**3. Q: What happens if an employer makes Revocable Expenditures to an employee’s excepted benefits HRA account that exceed the Required Health Care Expenditures for a 20-hour-per-week employee? Will the OLSE still count those expenditures toward the Employer Spending Requirement?**

- A:** Excess contributions will be credited toward the Employer Spending Requirement in the amount that the employee actually uses the excess contributions. To receive credit for excess contributions, the employer must request credit by April 30, 2015 and provide supporting documentation of the employee’s actual use. See [Section J](#) for more information about the reporting requirements. Take the following example:

*A Medium-Sized employer allocated Revocable Expenditures for 30 Hours Payable per week to an excepted benefits HRA for all of calendar year 2014. The total amount allocated is:*

$$\mathbf{\$1.63 \text{ expenditure rate} \times 30 \text{ hours} \times 52 \text{ weeks} = \$2,542.80}$$

*During the calendar year, the employee receives reimbursements for qualifying excepted benefits in the amount required for 22 Hours Payable (\$1.63 x 22 hours x 52 weeks, or \$1,864.72).*

In this scenario, the OLSE would count the full amount for an average of 22 Hours Payable per week, or \$1,864.72, as valid Health Care Expenditures. Unless the employer makes another kind of Health Care Expenditures for the remaining

8 average Hours Payable per week (\$588.08), the employer will be required to make remedy payments and be subject to penalties.

**4. Q: What reporting does the OLSE require if an employer chooses to make revocable contributions to an employee's excepted benefits HRA account in excess of an average of 20 hours per week for 2014?**

**A:** If an employer makes revocable contributions to an excepted benefits HRA for more than an average of 20 hours per week for any of its Covered Employees, the OLSE will require that employer to answer additional questions on the 2014 HCISO Annual Reporting Form. Employers will be required to provide aggregate information on allocations, reimbursements, and "true-up" spending, if applicable.

*Underlined text updated January 29, 2015*

**5. Q: If an employer makes revocable contributions to an excepted benefits HRA in excess of 20 hours per week, and the employee does not use the full amount allocated by the end of calendar year 2014, can that employer make additional expenditures to "true up" at the end of the year?**

**A:** Yes, for calendar year 2014 only, these employers may make additional Health Care Expenditures in the manner described below to "true up" by April 10, 2015.

If, at the end of calendar year 2014, an employee has not used the full amount of revocable contributions to an excepted benefits HRA, and those contributions exceeded the Required Health Care Expenditures for an employee working on average 20 hours per week, the employer may make replacement Health Care Expenditures equivalent to the unused amount in excess of 20 hours. Replacement Health Care Expenditures must be made by April 10, 2015 for the OLSE to count those expenditures toward the 2014 Employer Spending Requirement.

If the employer does not make sufficient replacement expenditures, the employer will not satisfy its Employer Spending Requirement for 2014, and penalties will apply.

Take the following example:

*A Medium-Sized employer allocated Revocable Expenditures for 30 Hours Payable per week to an employee's excepted benefits HRA account for all of calendar year 2014. The total allocated is:*

**$\$1.63 \text{ expenditure rate} \times 30 \text{ hours} \times 52 \text{ weeks} = 2,542.80$**

*The employer only reimburses the employee the amount required for 15 Hours Payable:*

**$\$1.63 \text{ rate} \times 15 \text{ hours} \times 52 \text{ weeks} = \$1,271.40$**

*The employee did not “actually use” any of the funds allocated in excess of 20 hours per week.*

In this scenario, the employer would be required to make replacement Health Care Expenditures on behalf of the employee for all hours in excess of 20 hours per week. Thirty hours per week allocated minus 20 hours per week assumed to be “reasonably calculated to benefit the employee” results in an excess of 10 hours per week.

**$10 \text{ per week remaining} \times \$1.63 \times 52 \text{ weeks} = \$847.60$**

The replacement Health Care Expenditures of \$847.60 must be made by April 10, 2015, to be counted toward the employer’s 2014 Spending Requirement.

Underlined text updated January 29, 2015