

**CITY AND COUNTY OF SAN FRANCISCO
OFFICE OF LABOR STANDARDS ENFORCEMENT**

Patrick Mulligan, Director

**PROPOSED AMENDED RULES IMPLEMENTING
THE MINIMUM COMPENSATION ORDINANCE (MCO)**

Proposed on November 21, 2019

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For specific inquiries regarding the MCO, including questions about whether the MCO covers a contract or agreement, please contact OLSE staff at mco@sfgov.org or (415) 554-7903.

INTRODUCTION

The Office of Labor Standards Enforcement (OLSE) promulgates these Rules for the Minimum Compensation Ordinance (MCO) pursuant to Section 2A.23 and Chapter 12P.6 of the San Francisco Administrative Code. The MCO, also referred to as the “Living Wage Ordinance,” is codified as Chapter 12P of the San Francisco Administrative Code. Pursuant to Chapter 12P.6(i), each Contracting Department shall cooperate fully with OLSE in the administration of the MCO.

The Board of Supervisors adopted the MCO in 2000. In 2002, the Office of Contract Administration (OCA) – the entity that was then charged with enforcing the MCO – issued Rules for administration of the MCO. In 2007, the Board of Supervisors approved an ordinance amending the MCO, which replaced OCA with OLSE as the City agency empowered to enforce the MCO. In September 2018 and again in October 2018, the Board of Supervisors amended the MCO. On [insert date], 2020, OLSE issued these amended Rules.

In developing these Rules, OLSE has been guided by the need to fulfill the legislative intent of the MCO, provide clear direction to City Contractors and their employees, and strive for equity and practicality.

For specific inquiries regarding the MCO, including questions about whether the MCO covers a contract or agreement, please contact OLSE staff at mco@sfgov.org or (415) 554-7903.

DEFINITIONS

The definitions set forth in § 12P.2 of the MCO are incorporated herein by reference. In addition, the following definitions shall apply for purposes of these Rules:

“Agreement” includes any contract, subcontract, lease, sublease, or grant.

“Complaint” means a report of an alleged violation of the MCO.

“Employer” means a Contractor who has a Contract subject to the MCO.

“Full-Time Employee” means an employee who works 40 hours per week for an Employer.

“Paid Time Off” (PTO) means “compensated time off,” as used in § 12P.3(a)(2).

“Wages” means all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation.

Rule 1. AGREEMENTS COVERED BY THE MCO

Interprets Section 12P.2(e)

Background: The MCO excludes 16 types of Agreements from the definition of “Contract” in § 12P.2(e).

Note: these exclusions are distinct from OLSE-granted waivers from MCO requirements, which are addressed in Rule 2.

Rule 1.1. Advanced OLSE Determination is Not Required for Exclusions

Upon the effective date of these Rules, OLSE advanced determination that an Agreement is excluded from the definition of Contract is no longer required. Contracting Departments determine whether an Agreement is a Contract subject to the MCO or if it is excluded under § 12P.2(e). The OCA requires Contracting Departments to submit their determination using a form that OLSE provided to OCA, with the contract.

If, during the term of an Agreement, an exclusion no longer applies and the Agreement becomes a Contract as defined in § 12P.2(d)-(e) subject to the MCO, the Contractor must comply with the MCO. Because of this, the OCA requires language in many excluded Agreements acknowledging the Contractor’s responsibility to comply with the MCO, if applicable.

Contracting Departments should contact OLSE with any questions regarding the application of these MCO exclusions.

Rule 1.2. Employee Count Threshold

Background: Pursuant to § 12P.2(e)(2)(B), the term “Contract” excludes “any Agreement with a Contractor that, together with the Employees of any Included Subcontractor and of any entity that is owned or controlled by the Contractor or which owns or controls the Contractor, has five or fewer Employees.” The five-employee threshold applies to Contracts or Contract Amendments entered into on or after October 14, 2007, the Effective Date of the Amendment specified in § 12P.2(k).

A. Employees Included in the Count. The employees in this count shall include:

- all of the Contractor’s employees, whether those employees work on the City contract or not;
- the employees of the Contractor’s parent and subsidiary entities, if any, whether those employees work on the City contract or not; and
- the employees of any Included Subcontractor, whether those employees work on the City contract or not. An individual Included Subcontractor with no employees is counted as one employee of the Contractor.

B. Increases in Employee Count. If, at any time during the contract period, the number of employees, as described in Rule 1.2A, increases to exceed five employees, the employee threshold exclusion will cease to apply to the Contract as well as any Included Subcontract thereof. The Contractor and any Included Subcontractor shall be required to comply with the MCO in the next calendar quarter after the number of total employees reaches or exceeds five. The calendar quarters are defined as January through March, April through June, July through September, and October through December.

Rule 1.3. Aggregate Monetary Threshold

Background: If the cumulative amount of compensation payable to a person or entity under all Agreements with a Contracting Department is less than \$25,000 in any fiscal year, those Agreements are excluded from the MCO's definition of Contract. For Agreements with Non-Profit Corporations, this monetary threshold applies to Contracts or Contract Amendments entered into on or after October 14, 2007, the Effective Date of the Amendment specified in § 12P.2(k). For Agreements entered into prior to that date and not amended since that date, the Non-Profit Corporation monetary threshold is \$50,000.

If an Agreement specifies a maximum amount to be expended, the Contracting Department shall use the maximum amount stated in the Agreement to determine whether the Agreement meets the MCO monetary threshold.

Rule 1.4. Hybrid Contracts for the Purchase of Both Goods and Services

Background: The MCO does not apply to the purchase of goods, or for guarantees, warranties, shipping, delivery, or initial installation of such goods. § 12P.2(e)(3).

If an Agreement for the purchase of both goods and services differentiates the costs for goods from the costs for services, the MCO shall apply to the services component if it meets or exceeds the \$25,000 threshold specified in § 12P.2(e)(6)(B). When the Agreement does not differentiate the budget for goods from the budget for services, the Contracting Department shall seek guidance from OLSE on whether the MCO applies.

Rule 1.5. Prevailing Wage Exclusion

Background: Agreements that require the Contractor to pay no less than the "prevailing rate of wage" ("prevailing wage") are excluded from the MCO, but only to the extent that (a) each Covered Employee is covered by the prevailing wage requirement and (b) the prevailing wage is not less than the gross hourly compensation required by the MCO. § 12P.2(e)(13).

Prevailing wage requirements in the San Francisco Administrative Code include those in Chapter 6, Chapter 21C, Chapter 23.61, and any others that may be added.

Only those employees performing work on a Contract who receive a prevailing wage that exceeds the MCO rate are excluded from the MCO. Other employees performing work on the Contract are covered by the MCO, unless they are excluded or exempt from the MCO for some other reason.

For determining whether the prevailing wage is greater than the gross hourly compensation required by the MCO, Administrative Code § 21C.7(b) defines the prevailing wage as the "rate of compensation, including fringe benefits or the matching equivalents thereof[.]" Therefore, an Agreement is excluded from the MCO with respect to any employee whose base wage and all fringe benefits under the prevailing wage requirement are greater than the MCO gross hourly compensation rate.

Rule 2. OLSE WAIVERS EXEMPTING CERTAIN CONTRACTS FROM THE MCO

Interprets Sections 12P.7 and 12P.8

Background: OLSE waives the MCO in its entirety for certain sole source, emergency, essential service, and bulk purchasing Contracts under the conditions specified in § 12P.7(a)-(d).

A Nonprofit Corporation may seek a waiver from the requirements of § 12P.3(a)(1)(B) if the highest paid managerial position in the organization earns a salary which, calculated on an hourly basis, is not more than six times the lowest wage paid by the organization to a Covered Employee. OLSE waives the hourly gross compensation requirements for Nonprofit Corporations when the Nonprofit Corporation satisfies this requirement and a Contracting Department recommends a waiver. If OLSE grants this waiver, the PTO and Unpaid Time Off requirements of the MCO still apply. Each waiver of this type is effective for up to one year. Subsequent waivers may be requested and granted. § 12P.8.

Rule 2.1. Process for OLSE Waivers

If a Contracting Department determines that a Contract qualifies for a waiver, that Contracting Department shall submit an MCO Waiver Request Form to OLSE form with the supporting documentation specified in Rules 2.2A-D and 2.3, as applicable.

Subject to the exception in Rule 2.2B, Contracting Departments shall submit MCO Waiver Request Forms to OLSE prior to executing a Contract. If OLSE grants the waiver, OLSE's representative shall sign the Waiver Request Form and notify the Contracting Department of the approval. If OLSE denies a Contracting Department's request, OLSE shall notify the Contracting Department of the denial. A Contracting Department shall not execute a Contract for which it has requested a waiver until it has received approval or denial of the waiver request from OLSE.

Rule 2.2. Documentation Required for Waivers Under § 12P.7

A. Sole Source Waiver Request Documentation. For waivers requested under § 12P.7(a), if the request stems from a § 21.5(b) determination, the Contracting Department shall obtain a Sole Source Waiver from OCA prior to requesting the MCO Waiver from OLSE. If a Contracting Department receives only one bidder in a bona fide procurement, the Contracting Department may request a waiver by certifying to OLSE that the services are available only from a sole source. OLSE staff will grant the MCO Waiver upon confirming that OCA has granted a Sole Source Waiver or that the Contracting Department's certification establishes eligibility for the MCO Waiver.

B. Emergency Waiver Request Timing and Documentation. To facilitate the timely provision of emergency services, the Contracting Department may, for waivers requested under § 12P.7(b), submit the MCO Waiver Request form and supporting documentation after the execution of the Contract. The Contracting Department shall submit documentation to OLSE as soon as reasonably practicable demonstrating that the Contract met the requirements for "emergency" under Chapter 6 and Chapter 21 of the Administrative Code and that no entity that complies with the MCO and was capable of responding to the emergency was immediately available to perform the required services.

C. Essential Services Waiver Request Documentation. For waivers requested under § 12P.7(c), the Contracting Department shall submit a letter to OLSE showing that the Contract is for a service, project, or property that is "essential to the City or the public" and documenting the Contracting Department's

efforts to identify an MCO compliant bidder. The Contracting Department shall also submit letters from at least three potential bidders explaining their inability to comply with the MCO.

D. Bulk Purchasing Waiver Request Documentations. For waivers requested under § 12P.7(d), the Contracting Department shall submit copies of the bulk purchasing arrangement with documentation showing that using a bulk purchasing arrangement would substantially reduce the City's cost of purchasing such services and that the purchase would be in the best interest of the City and the public. Such documentation may include a letter from the Contracting Department explaining why the purchase would be in the best interest of the City and the public, copies of other bids for the services that show a higher price, or other materials.

Rule 2.3. Documentation Required for Nonprofit Waivers Under § 12P.8

For waivers requested under § 12P.8, the Nonprofit Corporation must provide to the Contracting Department a written statement explaining the economic hardship to the Nonprofit Corporation or the negative impact on services that would result from MCO compliance. If the Contracting Department determines that the written explanation justifies the waiver and that substantial evidence supports the written explanation, the Contracting Department shall submit the Nonprofit's written statement to OLSE, along with the Contracting Department's finding that the justification is adequate. The Contracting Department shall also submit to OLSE wage statements or payroll records showing that the highest paid managerial position in the organization earns a salary which, when calculated on an hourly basis, is not more than six times the lowest wage paid to a Covered Employee.

Rule 3. INCLUDED SUBCONTRACTS

Interprets Section 12P.2(n)

Rule 3.1. Included Subcontractors with No Employees

If an Included Subcontractor is an individual with no employees, the Included Subcontractor has no obligations under the MCO and the subcontract is not subject to the MCO. However, under § 12P.2(e)(2)(B), the individual Included Subcontractor is counted as one employee when determining whether the Contractor has more than five employees.

Rule 3.2. Multiple Tiers of Subcontracts

The MCO applies to Included Subcontracts, whether they are subcontracts of the prime Contract or of any Included Subcontract thereof.

Rule 3.3. Requirements for Contractors with Included Subcontracts

A Contractor is liable for the Included Subcontractor's violations of the MCO. A Contractor shall include the MCO requirements in any Included Subcontract, as defined in § 12P.2(n), and monitor the Included Subcontractor's compliance.

Rule 3.4. Subcontracts that May Become Included Subcontracts.

Any Agreement that is excluded when it is executed must include the MCO compliance provision in any subcontract that would become an Included Subcontract if (1) the number of employees, as described in Rule 1.2A, increases to five or more employees, or (2) if the value of the Agreement meets the aggregate monetary threshold, as described in Rule 1.3.

Rule 4. COVERED EMPLOYEES: NON-PROFIT ORGANIZATION EXCLUSIONS

Interprets Section 12P.2(i)(4)(A)

Background: An employee of a Contractor that is a Nonprofit Corporation is not a Covered Employee under the MCO if that employee is:

- (A) under the age of 18 and is claimed as a dependent for federal income tax purposes and is employed as an after-school or summer employee; or
- (B) employed as a trainee in a bona fide training program consistent with federal law, and the training program enables the employee to advance into a permanent position

These exemptions apply only when the employee does not replace, displace, or lower the wage or benefits of any existing position or employee. § 12P.2(i)(4)(A).

Rule 4.1. Minor After-School or Summer Employees

To determine if this exclusion applies, a Contracting Department shall:

- Collect and retain a signed statement from the employee’s parents stating that the employee is a dependent for federal income tax purposes;
- Collect and retain documentation that the employee is under 18 and that the position is a summer or after-school position.

This exclusion ceases to apply on the date that the employee turns 18.

Rule 4.2. Trainees

For the purposes of § 12P.2(i)(4)(A), a “bona fide training program consistent with federal law” means a “Bona fide vocational training program” as defined in § 29 C.F.R. 520.300.

Rule 5. COVERED EMPLOYEE NOTIFICATION

Interprets Section 12P.5(f)

Every Contractor shall post the MCO Employee Notice poster in a conspicuous place at any workplace or job site where any Covered Employee works. Contractors shall post this notice in English, Spanish, Chinese, Filipino, and any language spoken by at least five percent of the employees at the workplace or job site.

Contractors must also provide the MCO Know Your Rights form to all Covered Employees and obtain their signature acknowledging receipt of the form. Contractors shall retain copies of the signed forms for a period of four years. The form must be provided during or immediately after the first pay period in which an employee becomes a Covered Employee. Employers may use an electronic version of the form as long as the text of the electronic form is identical to the MCO Know Your Rights form provided by OLSE. Additionally, the signature, electronic signature, or other authorization must be on the same screen as the text of the form.

Both the poster and the form are available on OLSE's website at www.sfgov.org/olse/mco.

The MCO hourly rate adjusts on July 1 of each year if the Consumer Price Index increases. When the MCO hourly wage rate changes, the Contractor must provide the MCO Know Your Rights form to Covered Employees and replace the MCO Employee Notice poster no later than 30 days after the new wage rate takes effect.

RULE 6. MCO REQUIREMENTS

Interprets Section 12P.3(a)

Rule 6.1. Paid Time Off

Background: A Contractor must provide a Covered Employee with compensated time off, or PTO, in an hourly amount that, on an annualized basis for a full-time employee, equals 12 days per year, which may be used for sick leave, vacation, or personal necessity. PTO must be paid at no less than the current MCO wage rate. § 12P.3(a)(2).

A. Accrual Rate. The PTO hourly accrual rate is 0.04615 hour of PTO for every hour the Covered Employee works for the Employer. For a full-time employee who works a 40-hour work week, or 2080 hours over the course of a year, this rate is derived as follows:

$$(12 \text{ days PTO} \times 8 \text{ hours}) / 2080 \text{ hours per year} = 0.04615 \text{ hour of PTO accrued per hour}$$

This rate is the minimum accrual rate, not a limitation. An employer may set higher accrual rates.

B. Accrual Start and Usage. PTO shall start accruing with the first Pay Period that the employee meets the MCO definition of “Covered Employee” and shall continue to accrue in any Pay Period in which the employee meets the MCO’s definition of a Covered Employee. Covered Employees may use PTO as soon as a full hour of PTO has accrued.

C. PTO Wage Rate. PTO must be paid at the employee’s current rate of pay, which must be no less than the current MCO wage rate.

D. PTO Accrual Cap and Roll Over. Employers may cap an Employee’s PTO accrual at 96 hours. All accrued PTO must roll over from one year to the following year, unless the PTO is paid out directly to the employee. Employers may also maintain separate accrual “caps” or limits for different categories of employees as long as all Covered Employees accrue at or above the required rate and the cap for all employees is at least 96 hours.

E. Separate Accrual Banks. An employer may maintain separate banks of accrued sick time and vacation time to meet the PTO requirements as long as the combined rate of vacation and sick time accrual is at least equal to the required accrual rate for PTO.

F. Payment at Separation. If a Contractor maintains a single bank of accrued PTO, when a Covered Employee has a balance of accrued, unused PTO at the time of separation from employment, the employer shall pay the employee the full value of that PTO balance at the employee’s rate of pay at the time of separation, unless otherwise specified under a collective bargaining agreement.

If a Contractor maintains separate banks of accrued sick time and vacation time, when a Covered Employee separates from employment, the Contractor shall pay the employee the balance of the accrued, unused vacation time, or accrued unused PTO that the Covered Employee would have under the MCO had the employer maintained a single PTO bank, whichever is greater.

If a Contractor allows unlimited PTO, when a Covered Employee separates from employment, the Contractor shall pay the employee for the balance of unused PTO that the Covered Employee would have accrued with a PTO accrual rate at least equal to the MCO-required accrual rate for PTO. If the

Contractor does not track PTO use, the Contractor shall pay the employee for all of the PTO that would have been accrued with a PTO accrual rate at least equal to the MCO-required accrual rate for PTO.

G. Payment at Termination of Covered Employee Status. If an employee ceases to be a Covered Employee, the employer may choose to pay the employee the full value of the accrued but unused PTO at the employee's rate of pay at the time the employee ceased to be a Covered Employee. If the employer does not pay the employee the value of the PTO balance, the employer must maintain that PTO in accordance with the MCO.

Rule 6.2. Cash Equivalent in Lieu of PTO

Background: If a Contractor reasonably determines, in good faith, that the Contractor cannot comply with the MCO requirement for compensated time off, the Contractor shall provide the Covered Employee with a cash equivalent of such compensated time off. § 12P.3(a)(2).

A. Paid Sick Leave Ordinance (PSLO) Preemption. A cash equivalent of PTO may not be used in lieu of sick leave required under the PSLO. A cash equivalent may be used for PTO in excess of the leave required under the PSLO.

B. Cash Equivalent Notice. A Contractor that determines it is unable to provide PTO to a Covered Employee shall provide the employee written notice of its determination to pay the cash equivalent in lieu of providing PTO. The notice shall include the employee's regular rate of pay, the amount of PTO cash equivalent wage rate adjustment, and the total amount of the adjusted wage rate to be paid the Covered Employee.

The Contractor shall obtain and retain for four years a signed acknowledgment of the employee's receipt of this notice prior to the beginning of the first applicable pay period the cash equivalent is to be paid.

C. Cash Equivalent Wage Rate Calculation. The cash equivalent rate adjustment shall be the same as the accrual rate specified in Rule 5.1A, or 0.04615 times the Covered Employee's regular rate of pay. The total cash equivalent wage rate is calculated as follows:

$$\text{Regular wage rate} + (0.04615 \times \text{regular wage rate}) = \text{cash equivalent wage rate}$$

The cash equivalent wage rate must be paid for every hour the employee works for the Contractor.

Rule 6.3. Unpaid Time Off (UTO)

Background: A Contractor must provide a Covered Employee unpaid time off in an hourly amount that, on an annualized basis for a Full-Time Employee, equals 10 days per year. UTO may be used, at the employee's option, for sick leave for the illness of the Covered Employee, or of such employee's spouse, domestic partner, child, parent, sibling, grandparent, or grandchild. § 12P.3(a)(3).

A. Accrual Rate. The UTO hourly accrual rate is 0.03846 hour of UTO for every hour the Covered Employee works for the Employer. For a full-time employee who works a 40-hour work week, or 2080 hours over the course of a year, this rate is derived as follows:

$$(10 \text{ days UTO} \times 8 \text{ hours}) / 2080 \text{ hours per year} = 0.03846 \text{ UTO accrued per hour}$$

This rate is the minimum accrual rate, not a limitation. An employer may set higher accrual rates.

B. PTO in Place of UTO. A Contractor may offer additional days of PTO in place of UTO, provided that the combined number of paid and unpaid days off equals at least the total required under the MCO (22 days for a Full-Time Employee).

C. UTO Accrual Start and Usage. UTO shall start accruing with the first Pay Period that the employee meets the MCO's definition of "Covered Employee" and shall continue to accrue in any Pay Period in which the employee meets the MCO's definition of a Covered Employee. Covered Employees may use UTO as soon as a full hour of UTO has accrued.

D. UTO Accrual Cap and Roll Over. Employers may cap an Employee's UTO accrual at 80 hours. All accrued UTO must roll over from one year to the following year.

Rule 6.4. Written Policy Required for PTO and UTO

The Contractor must establish a written policy outlining how PTO and UTO accrues, is administered, and how employees request it.

Rule 6.5. Sick Leave

Where applicable, employers must abide by the PSLO, Administrative Code Chapter 12W, and the MCO. PTO and UTO used as sick leave under the MCO must be administered in accordance with OLSE's [implementing Rule 1](#) regarding employee notification of Paid Sick Leave use and Rule 2 regarding employer verification of paid sick leave use.

Rule 6.6. Wage Rate for Employees Covered by the San Francisco International Airport's Quality Standards Program (QSP)

Contractors covered by both the [QSP](#) and the MCO must comply with both. The QSP requires Contractors to pay a wage above the MCO rate to employees in certain job classifications, generally those related to safety and security. Covered Employees in job classifications not subject to the QSP are entitled to the MCO wages and benefits.

RULE 7. RECORDKEEPING

Interprets Section 12P.5(g)

Background: The MCO requires Contractors to “maintain employee payroll records in compliance with the California Labor Code and Industrial Welfare Commission orders. Where a Contractor does not maintain or retain such records, or does not allow OLSE reasonable access to such records, it shall be presumed that the Contractor paid no more than the minimum wage required under State law. The Contractor shall have the burden of overcoming the presumption by clear and convincing evidence.” § 12P.5(g).

Rule 7.1. Required Records

The employer must retain records required under California Labor Code Sections 226 and 2810.5. In addition, the employer must maintain records of employees’ names, employee unique identification numbers or Social Security numbers, addresses, telephone numbers, occupations, dates of hire, and dates of termination. The employer shall maintain payroll records showing the hours worked each day and the wages paid to each employee.

The employer must maintain records of PTO and UTO accrued and used by each employee as well as statements of PTO provided to the employee. Where an employer permits unlimited PTO, the employer shall maintain records demonstrating MCO compliance.

The Employer must retain employee handbooks or policy manuals.

Rule 7.2. Retention Period

The Employer shall maintain and keep all records specified in Rule 7 until at least three years after the termination of the Contract.

Rule 7.3. Included Subcontractors

These same recordkeeping requirements apply to Included Subcontractors.

RULE 8. OLSE INVESTIGATION AND ENFORCEMENT PROCESS

Interprets Section 12P.6 and Section 12P.6.2(a)

Rule 8.1. Administrative Complaint Procedure

Any person may file a Complaint alleging one or more violations of the MCO. OLSE has sole authority to investigate any report of a possible violation of the MCO and may conduct random audits.

If a Contractor fails to produce requested documentation, fails to allow access to the work site or to its employees, or otherwise unreasonably fails to cooperate with the OLSE, the OLSE may consider the Contractor to be out of compliance with the MCO.

Each Contractor is responsible for its Included Subcontractors' MCO compliance. The OLSE may investigate Included Subcontractor compliance and may pursue the remedies against the Contractor for the Included Subcontractor's failure to comply.

If OLSE determines that the allegations in a Complaint are without merit, OLSE shall dismiss the Complaint and notify the complainant.

Rule 8.2. Notice of Preliminary Determination

Upon determining that a Contractor may have violated the MCO, and consequently the terms of a Contract requiring MCO compliance, the OLSE sends written notice to the Contractor and the Contracting Department, which shall:

- Describe the preliminary finding including a summary of the evidence on which it is based.
- Provide an initial assessment of proposed corrective action, as described in Rule 8.3
- Advise the Contractors of its right to respond by submitting pertinent documents and other information.
- Notify the Contractor that the OLSE is authorized to direct the Controller to withhold payment otherwise due to the Contractor

OLSE shall allow the Contractor at least 30 days to respond and/or correct the violation.

Rule 8.3. Corrective Action

The Notice of Preliminary Determination includes an initial assessment of corrective action, which may include restitution to employees and liquidated damages. The OLSE reserves the right to pursue additional rights or remedies available to the City under the terms of the Contract or applicable law.

A. Restitution to Covered Employees. OLSE may order Contractors to pay restitution as follows:

- The difference between the wage rate required by § 12P.3(a)(1) and compensation actually provided to each Covered Employee, plus simple annual interest of ten percent of such amount from the date payment was due. § 12P.6(c)(1).
- Reimbursement for any leave taken but not compensated as required by § 12P.3(a)(2), and any accrual of PTO not paid to the employee at separation, plus simple annual interest of ten percent on such amounts from the date payments were due. § 12P.6(c)(1).

- Crediting each current Covered Employee with PTO and UTO balances calculated in accordance with Rules 6.1 and 6.3, respectively, and paying each former Covered Employee for PTO balances calculated in accordance with Rule 6.1.
- Reinstatement of any employee terminated in violation of § 12P.5(d) and payment of any wages lost because of a Contractor's action, plus simple annual interest of ten percent from the date wages would have been paid. § 12P.6(c)(4).

Interest is discretionary, and in assessing interest OLSE shall give due consideration to the size of the Contractor's business, the Contractor's good faith, the gravity of the violation, and any previous violations.

B. Liquidated Damages.

Background: The MCO provides that for failure to provide the minimum wage rate or required PTO and UTO, OLSE may assess liquidated damages of up to \$100 per week for each employee for whom the Contractor has not provided the required compensation. § 12P.6.1(d). For failure to provide employee and payroll reports or other pertinent records, or failure to cooperate with any OLSE audit, inspection or investigation, OLSE may assess liquidated damages of up to \$1,000 for each violation. § 12P.6.1(e).

Liquidated damages are discretionary, and in assessing them the OLSE shall give due consideration to the size of the Contractor's business; the Contractor's good faith; the gravity of the violation; previous violations; any failure to comply with record keeping, reporting and anti-retaliation requirements; and the extent to which the imposition of liquidated damages would undermine the purpose of the MCO by imposing unreasonable financial burdens on the Contractor, thereby restricting its ability to fulfill its obligation under the MCO.

Rule 8.4. Determination of Violation

If, after providing the Contractor with the opportunity to respond to the Notice of Preliminary Determination, the OLSE makes a determination that a violation has occurred, OLSE shall issue a Determination of Violation (DOV). The DOV shall specify the corrective action the Contractor is required to take to remedy the violation.

RULE 9. APPEAL

Rule 9.1. Filing an Administrative Appeal

Interprets Section 12P.6.2(b)-(d)

A. Filing Requirements. Contractors may file an appeal requesting a hearing before a neutral hearing officer appointed by the Office of the Controller. The appeal must be submitted in person or by U.S. mail to the Office of the Controller at City Hall, Room 316; 1 Dr. Carlton B. Goodlett Place; San Francisco, CA 94102 and must:

- Be in writing;
- Briefly state the basis for the appeal. This is a brief statement only; the parties will have the opportunity to submit full written briefs later as part of the appeal hearing process;
- Include a return address; and
- Be received by the Controller's Office within 15 calendar days from the date on the Proof of Service accompanying the Determination of Violation. If the fifteenth calendar day falls on a Saturday, Sunday, or Federal Holiday, then the appeal must be received on the following regular business day.

A copy of the appeal must be delivered to the OLSE by mail, in person, or by email to email of the Compliance Officer listed on the Determination of Violation.

B. Failure to File Appeal. The failure to file an appeal with the Controller's Office shall constitute concession to the assessment, and OLSE's determination shall be deemed a final and binding administrative decision upon expiration of the appeal deadline.

Rule 9.2. Administrative Hearing

The MCO requires the Controller to appoint a hearing officers and to notify OLSE and the Contractor within 15 days after receiving the appeal. The MCO states that the hearing shall start within 45 days of the notification of the appointment of the hearing officer and conclude within 75 days of such notification unless all parties agree to an extended period. The OLSE bears the burden of providing evidence and of proving that the Contractor has violated the MCO.

The MCO specifies that the Controller's or hearing officer's failure to comply with the time requirements for the administrative appeal does not cause the Controller or hearing officer to lose jurisdiction of the appeal.

Rule 9.3. The Hearing Officer's Decision

The MCO states that the hearing officer shall issue a decision affirming, modifying, or vacating the OLSE's determination within 30 days of the conclusion of the hearing.

A. Modification of Liquidated Damage Awards. The hearing officer's jurisdiction to modify OLSE's assessment is limited and the following procedures apply. If the hearing officer modifies the OLSE's determination, the hearing officer shall transmit this decision to OLSE, which shall within five business days modify the assessment of liquidated damages consistent with the hearing officer's decision and transmit the modified assessment to the hearing officer. Upon receiving it, the hearing officer shall within three business days issue a final decision, which shall include the amount of liquidated damages assessment as modified by OLSE.

B. Final Determination. The hearing officer's decision is final. The Contractor shall take the corrective action including the payment of liquidated damages, if any, within 14 days of receiving the hearing officer's decision. When a Contractor fails to take corrective action within the time required by this provision, the City may immediately pursue all available remedies against the Contractor.

C. Writ of Mandate. The Contractor may seek review of the hearing officer's decision only by filing in the San Francisco Superior Court a petition for a writ of mandate under California Code of Civil Procedure § 1094.5.

RULE 10. ADDITIONAL CONTRACT AND LEGAL REMEDIES FOR MCO VIOLATIONS

Interprets Section 12P.6(c)-(e) and Section 12P.6.2(e)

Rule 10.1. Withholding Contract Payments During the Administrative Process

After issuing a Determination of Violation and informing a Contractor of its appeal rights, OLSE may direct the Contracting Department and the Controller to deduct from the payments otherwise due to the Contractor the amounts that OLSE has determined the Contractor must pay as restitution and/or liquidated damages. The Controller shall withhold these funds until OLSE authorizes the release under the following conditions:

- a) When the time for filing an administrative appeal has lapsed and the Contractor has either not filed an appeal or has filed and withdrawn it, the Controller shall release the funds consistent with the OLSE's determination of the amount due to the Covered Employees and to the City's General Fund as liquidated damages.
- b) When the Contractor files an administrative appeal, the hearing officer determines that the Contractor does not owe all or any portion of the amount withheld, and the determination is no longer subject to judicial review, the Controller shall release to the Contractor the amount that the hearing officer determined is not owed.
- c) When the Contractor consents to the use of the funds to pay the corrective action that the OLSE or the hearing officer found due, the Controller shall release the funds consistent with that consent.
- d) When the Contractor files an administrative appeal, the hearing officer upholds the OLSE's determination, and the determination is no longer subject to judicial review, the Controller shall release the funds consistent with the OLSE's determination of the amount due to the Covered Employees and to the City's General Fund as liquidated damages.
- e) When OLSE authorizes the release of withheld payments upon its determination that the continued withholding poses a substantial risk of endangering public health or safety, interfering with a service or project that is essential to the City, or having an unreasonable adverse financial impact on the City, the Controller shall release the funds to the Contractor consistent with that authorization.

Rule 10.2. Additional Contract Remedies

The MCO provides the Contracting Department the discretion to terminate the Contract or Lease in whole or in part. The Contracting Department and the OLSE additionally have the authority to bar a contractor from contracting with the City for three years.

Rule 10.3. Other Legal Remedies

The City may bring a civil action against a Contractor to pursue remedies provided by the MCO and any other applicable laws. The prevailing party shall be entitled to all cost and expenses, including reasonable attorney's fees.

Each of the authorities described in Rule 8.3 and in Rule 10 may be exercised individually or in combination with any other rights or remedies available to OLSE and/or the City.

Rule 10.4. Settlements and Compromises

The OLSE may compromise and settle unlitigated claims against Contractors for violations of the MCO.