

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

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**RULES IMPLEMENTING
THE EMPLOYER SPENDING REQUIREMENT
OF THE SAN FRANCISCO
HEALTH CARE SECURITY ORDINANCE (HCSO)**

Effective October 29, 2017

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INTRODUCTION

The Office of Labor Standards Enforcement (“OLSE”) promulgates these Rules pursuant to Chapter 2A, Article 1, Section 2A.23 and Chapter 14 of the San Francisco Administrative Code. Pursuant to Chapter 14, the San Francisco Health Care Security Ordinance (“HCSO”, “Ordinance”), OLSE is mandated to enforce the Employer Spending Requirement of the HCSO. The HCSO stands alone; these Rules are intended to supplement and clarify.

Following public hearings in 2006, these Rules were first issued in January 2007 and amended in July 2007. After Chapter 14 was amended in 2011 and 2014, the OLSE again held a public hearing regarding revisions to the Rules on September 7, 2017, and published final amended Rules on October 10, 2017.

In developing these Rules, OLSE has been guided by its understanding of the importance of fulfilling the goals of the Ordinance, providing clear direction to employers and employees, and giving weight to considerations of equity and practicality.

Fulfilling the goals of the Ordinance. In developing these Rules, OLSE has tried to be faithful to the basic goals of the Ordinance. These goals are well established. The Ordinance and its amendments include extensive statements of legislative findings and purpose, explaining the multiple rationales for the Ordinance and articulating its goals. These statements of legislative findings and purpose are found in Section 1 of the Amended Ordinance, and, as such, have the full force and effect of law. Particularly in light of the statements of legislative findings and purpose, the Ordinance should be liberally construed to effect its goals.

Providing clear direction to employers and employees. In mandating that OLSE promulgate rules on the Employer Spending Requirement of the Ordinance, the Board of Supervisors intended that OLSE provide clear direction to employers and employees upon which they could rely.

Giving weight to considerations of equity and practicality. Finally, in adopting the Ordinance, the Board of Supervisors intended that these Rules take into account considerations of equity and practicality, from both the employee and employer perspective. Accordingly, these Rules are designed to be both fair and workable for employees and employers alike.

RULE 1: DEFINITIONS

Interprets Section 14.3(a)

Rule 1.1. Definition of Quarter.

Background: Each quarter, Covered Employers are required to make qualifying Health Care Expenditures.

Rule: A quarter shall be defined as one of four three-month periods in a calendar year. Thus, the first quarter of the year shall be defined as the period from January 1 through March 31; the second quarter shall be the period from April 1 through June 30; the third quarter shall be the period from July 1 through September 30; and the fourth quarter shall be the period from October 1 through December 31.

Rule 1.2. Time for Actions.

- a. Unless otherwise specified, the time in which any act provided by these Rules is to be performed is computed by excluding the first day and including the last, unless the last day is a Saturday, Sunday, or other legal holiday, and then it is also excluded.
- b. Unless otherwise specified, when these Rules require performance of an act within a specified number of days, that number refers to calendar days, not business days.
- c. Unless otherwise specified, if the last day for the performance of any act that is required by these Rules to be performed within a specific period of time falls on a Saturday, Sunday, or other legal holiday, the period is extended to and includes the next day that is not a holiday.

RULE 2: COVERED EMPLOYERS

Interprets Section 14.1(b) “Large Business” and “Medium Sized Business”

Background: The HCSO defines three categories of employers:

1. **Large Business:** an employer for which an average of 100 or more persons per week perform work for compensation during a quarter. This category shall include nonprofit corporations for which an average of 100 or more Persons per week perform work for compensation during a quarter.
2. **Medium-size Business:** an employer for which an average of 20 to 99 persons per week perform work for compensation during a quarter. This category shall include only those nonprofit corporations for which an average of 50 to 99 persons per week perform work for compensation during a quarter.
3. **Small Business:** an employer for which an average of 19 or fewer persons per week perform work for compensation during a quarter.

A “controlled group of corporations”, as defined in Section 1563(a) of the United States Internal Revenue Code, is considered to be a single employer under the HCSO. A controlled group of businesses, as set forth in Rule 2.3, is also considered to be a single employer under the HCSO

Rule 2.1. For the purposes of determining employer size, the term “Persons”:

- a. shall include all Persons performing work for compensation during a quarter, 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;
- b. shall not be limited to Covered Employees; and
- c. shall include both those who work within San Francisco and those who work outside of San Francisco.
- d. shall include owners performing work for compensation (including money, benefits, or in-kind compensation)

Rule 2.2. For businesses employing a fluctuating number of employees during a quarter, employer size will be determined based on the average number of persons per week performing work for compensation during the applicable quarter.

Rule 2.3: All persons employed by a “controlled group of corporations”, as defined in Section 1563(a) of the United States Internal Revenue Code, will be counted to determine the size of the employer.

Rule 2.4. Employees of businesses that are not incorporated are counted as working for one employer if the businesses satisfy the definition of a “controlled group of corporations”, as defined in Section 1563(a) of the United States Internal Revenue Code, except that one or more of the businesses is not a corporation, but instead, a different type of business entity.

RULE 3: COVERED EMPLOYEES

Interprets Section 14.1(b) "Covered Employee"

Background: Administrative Code Chapter 14 defines a Covered Employee as any person who:

- a.** qualifies as an employee entitled to payment of minimum wage pursuant to the Minimum Wage Ordinance, Chapter 12R of the San Francisco Administrative Code;
- b.** has performed work for compensation for his or her employer for 90 calendar days after his or her first day of work (including any period of leave to which an employee is legally entitled); and,
- c.** in a particular quarter, regularly performs at least eight hours of work per week for a Covered Employer within the geographic boundaries of the City.

The Administrative Code Chapter 14 definition of "Covered Employee" includes exemptions for the following categories:

- a.** Managerial, supervisory, or confidential employees who earned a salary equivalent to at least \$88,212 per year (or \$42.41 per hour) in 2014 and, for subsequent years, the figure set by OLSE.¹
- b.** Persons eligible to receive benefits under Medicare or TRICARE/CHAMPUS.
- c.** Employees covered by the Health Care Accountability Ordinance (see S.F. Admin Code 12Q), if the Employer meets the requirements set forth in Section 12Q.3 for those employees.
- d.** Persons employed by a nonprofit corporation for up to one year as trainees in a bona fide training program consistent with Federal law, which training program enables the trainee to advance into a permanent position, provided that the trainee does not replace, displace, or lower the wage or benefits of any existing position or employee.
- e.** Persons whose Employers verify that they are receiving Health Care Services through another Employer, either as an employee or by virtue of being the spouse, domestic partner, child, or other dependent of another person; provided that the Employer obtains from those persons a voluntary written waiver of the Health Care Expenditure requirements of this Chapter and that such waiver is revocable by those persons at any time.

¹ The earning figure for managers, supervisors and confidential employees increased through 2017 as follows:

Calendar Year	Annual Salary	Hourly Salary
2015	\$90,745	\$43.63
2016	\$92,990	\$44.71
2017	\$95,101	\$45.72

Rule 3.1. Hours Worked. An employee who regularly works eight hours or more per week in San Francisco is a Covered Employee under the HCSO. An employee “regularly works eight hours or more” if the employee works an average of eight hours per week during the entirety of the quarter or during whatever portion of the quarter the employee works for the Covered Employer.

Example 1: An employee works for a Covered Employer for a full quarter and works an irregular schedule ranging from five to 11 hours per week in San Francisco. That employee is a Covered Employee if the average number of hours worked per week in the City during that quarter is eight or more.

Example 2: An employee who has been employed for a year works for a Covered Employer for one month of a quarter and is then terminated. During that month, the employee worked an average of eight hours per week. That employee is a Covered Employee for that month.

Rule 3.2. The 90-Calendar-Day-Requirement. An employee satisfies the 90-day requirement upon completing a period of 90 calendar days of employment for the same employer. That period of employment need not be continuous, consecutive, nor completed in the same calendar year.

- a. For an employee who separates from employment prior to completing the 90-day requirement, the prior days of employment shall count towards the eligibility period if the employee returns to work within one year of the most recent separation date.
- b. An employee who separates from employment after completing the 90-day requirement and who is re-hired by the same employer within one calendar year of completing that requirement need not complete an additional 90 days.

Rule 3.3. Work Performed “Within” the City and County of San Francisco.

- a. While employees who exclusively travel through San Francisco in the performance of their job duties shall not be considered to have performed work in San Francisco, an employee whose work requires stops in San Francisco (for example, to make pick-ups or deliveries) shall be considered to have performed work in San Francisco. For these employees, hours worked shall include travel within the geographic boundaries of the City and County of San Francisco, including San Francisco Bay waters within the jurisdiction of the City and County of San Francisco.
- b. Work performed on City-owned or City-leased property outside the geographic boundaries of the City and County of San Francisco shall not be considered in meeting the hours requirement in Rule 3.1.
- c. For employees who live in San Francisco, work performed for a Covered Employer from the employee’s own home, including telecommuting, shall qualify as work performed “within” the City and County of San Francisco.

Rule 3.4. Employee Status. An employee’s status, title, or classification as seasonal, permanent or temporary, full-time or part-time, exempt or non-exempt, unionized or not unionized, salaried or hourly, or contracted (whether employed directly by the employer or through a temporary staffing agency, leasing company, professional employer organization, or other entity) or commissioned shall not be considered in determining whether that employee is a Covered Employee.

Rule 3.5. Joint Employment.

Background: An employee may be jointly employed by two or more employers. Joint employment can occur in a variety of situations, including but not limited to when a Person uses a temporary staffing agency, leading agency, professional employer organization, or other entity serving the same or similar functions. OLSE looks to California law when assessing whether an employee is jointly employed.

Rule: If an employee is jointly employed and at least one employer is a Covered Employer, each employer shall have an obligation to ensure that the Employer Spending Requirement is met. Whether an employee is jointly employed by more than one employer shall not impact a Covered Employer’s responsibilities under the HCSO.

When an employee is jointly employed, the applicable Health Care Expenditure rate will be determined by the size of the larger Covered Employer.

Rule 3.6. Exemption for Managers, Supervisors, and Confidential Employees above the Earnings Threshold.

3.6.1. Managerial, supervisory, or confidential employees are not Covered Employees under the HCSO unless such employees earned under \$88,212 annually (or \$42.41 hourly) in 2014.² On January 1 each year thereafter, this figure shall increase by an amount corresponding to the prior year’s increase, if any, in the Consumer Price Index for urban wage earners and clerical workers for the San Francisco-Oakland-San Jose metropolitan statistical area in California.

3.6.2. The earnings figure represents “the regular rate of pay” as the term is defined in the California Division of Labor Standards Enforcement Manual. In that context, the regular rate of pay includes commissions and piece rate wages, but does not include overtime wages, gifts, or discretionary bonuses.

3.6.3. Managerial, supervisory, or confidential employees who earn an annual base salary that is at or above this figure are exempt from the HCSO even if they are not employed for the full year.

² The earning figure for managers, supervisors and confidential employees increased through 2017 as follows:

Calendar Year	Annual Salary	Hourly Salary
2015	\$90,745	\$43.63
2016	\$92,990	\$44.71
2017	\$95,101	\$45.72

3.6.4. For purposes of these exemption categories,

- a. “managerial employee” means an employee who has authority to formulate, determine, and 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.

Example 1: An employee works for a department store and has the title “display manager.” As a display manager, the employee implements the store’s policy of creating displays that highlight the store’s latest products. This employee is not a managerial employee because she is not formulating and determining store policy. The fact that she has a title with the word “managerial” is irrelevant to her status as a managerial employee.

- b. “supervisory employee” means 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;
- c. “confidential employee” means 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.

Rule 3.7. Non-Profit Training Program Exemption. Persons 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, which training program enables the trainee to advance into a permanent position, provided that the trainee does not replace, displace, or lower the wage or benefits of any existing position or employee are not Covered Employees. A program consistent with federal law means a Bona Fide Training Program as defined in 29 C.F.R §520.300.

Rule 3.8. Waiver and Other Employer Health Care Services. To verify that that an Employee is receiving Health Care Services through another Employer and to obtain a voluntary written waiver of the health care expenditure requirements, all of the following conditions must be satisfied:

- a. Except as provided in Rule 3.9, Employers must only use the HCSO Employee Voluntary Waiver Form provided on the OLSE website: www.sfgov.org/olse/hcso. Employers may not alter the form in any manner, nor may employers use other forms, including those provided by third-party vendors or health insurance carriers.

- i. The HCSO Employee Voluntary Waiver Form must be voluntarily completed in full by the employee without pressure or coercion from the employee's coworkers or the employer, including, supervisor(s), manager(s), or their agents.
- ii. The employee must complete the section of the HCSO Employee Voluntary Waiver Form pertaining to the health care services received through another employer. If the employee fails to state on the form that he/she is receiving benefits through another employer or leaves that section blank, the waiver is not valid. Coverage purchased by the employee for him or herself or that the employee is receiving through Medi-Cal or a county health program, does not constitute "benefits received through another employer." A waiver form that states the employee only has such coverage is not a valid waiver.
- iii. An HCSO Employee Voluntary Waiver Form is valid for one year (after which the employee may choose to sign a new voluntary waiver). Employees may choose the date on which the one-year waiver period starts, as long as that date is after the date the waiver is signed and within four months of the date of signing.
- iv. Employees may revoke their voluntary waiver at any time. The revocation must be in writing and be submitted to the employer.
- v. Employers must provide the employee with a complete copy of the signed HCSO Employee Voluntary Waiver Form.

Rule 3.9. Electronic Version of HCSO Employee Voluntary Waiver Form. To verify that that an Employee is receiving Health Care Services through another Employer and to obtain a voluntary written waiver of the health care expenditure requirements, Employers may use an electronic version of the HCSO Employee Voluntary Waiver Form. For such a waiver to be valid, all of the conditions described in Rule 3.8 must be satisfied, as well as the following conditions:

- a. The text of the electronic form must be identical to the HCSO Employee Voluntary Waiver Form;
- b. The signature, electronic signature, or other authorization must be on the same screen as the text of the form, such that the employee can view the entirety of the form at the same time as the employee provides an electronic signature or authorization;
- c. The website containing the form may not state or imply that the employee is required to sign the form.

Rule 3.10. Retention of Waiver Forms. Employers must maintain all signed HCSO Employee Voluntary Waiver Forms for at least four years.

RULE 4: CALCULATING HEALTH CARE EXPENDITURES

Interprets Sections 14.1 and 14.3

Background: The required Health Care Expenditure is calculated by multiplying the total number of Hours Payable, to each Covered Employee during the quarter, by the applicable Health Care Expenditure rate.

The required Health Care Expenditures are based on Hours Payable, which may or may not be hours actually worked. Hours Payable includes both hours for which a person is paid wages for work performed within San Francisco and hours for which a person is entitled to be paid wages, including, but not limited to, paid vacation hours, paid holidays, paid parental leave, paid time off, and paid sick leave hours, but not exceeding 172 hours in a single month or 516 hours in a single quarter.

Examples of Health Care Expenditures include, but are not limited to:

- a. Payments to a third party to provide health care services for a covered employee, such as health, dental, or vision insurance premiums;
- b. Expenditures made by self-insured and/or self-funded insurance programs;
- c. Expenditures made to a union trust fund, counting only the part contributed for healthcare;
- d. Irrevocable contributions to medical reimbursement accounts, such as a health savings account;
- e. Costs incurred in the direct delivery of health care services for a Covered Employee; and
- f. Payments on behalf of a Covered Employee to the City Option:

An employer may choose more than one option to satisfy its duty to make the required Health Care Expenditures for one or more of its Covered Employees. An employer may, for example, choose to purchase health insurance for its full-time employees, but make payments to the City Option for their part-time employees.

The required Health Care Expenditure must be made in full each quarter. Thus, an employer who purchases a health insurance program with premiums that are less than the required expenditure must choose a second option to make the expenditure in full. For example, the employer may choose to pay the remainder to the City Option.

Rule 4.1. First Day of Health Care Expenditures. If an employee's 90th day of employment is any day other than the first of the month, then the employer may wait until the first day of the following month to begin calculating Health Care Expenditures and making Health Care Expenditures on that employee's behalf.

Rule 4.2. Hours Payable. A Covered Employee’s Hours Payable for a quarter shall include the hours worked or the leave taken during that calendar quarter (rather than the earnings paid to the Covered Employee on paydays during the quarter).

Rule 4.3. Work Performed and Hours Payable within San Francisco.

- a. Covered Employers shall keep records sufficient to determine whether work performed by their employees was performed within San Francisco or outside of San Francisco. When an Employer fails to maintain such records, it shall be presumed that all work performed by employees was performed within San Francisco, absent clear and convincing evidence to the contrary.
- b. For Covered Employees who perform some work outside of San Francisco, “Hours Payable” that are not hours actually worked in San Francisco (e.g., paid vacation hours, paid time off, and paid sick leave hours) will be calculated on a pro rata basis for the current quarter.

Example 1: For a quarter, a Covered Employee works 20 hours per week in San Francisco and 20 hours per week outside of San Francisco for the same Covered Employer. The Covered Employee has accrued 40 hours of paid time off. When the employee uses any paid time off, half of those hours shall count as Hours Payable under the HCSO.

- c. Employees whose work requires stops in San Francisco (for example, to make pick-ups or deliveries) shall be considered to be performing work in San Francisco, and their “hours worked” shall include travel within the City and County of San Francisco. However, employees who drive through San Francisco without making stops in San Francisco shall not be considered to be performing work in San Francisco.
- d. For Covered Employees who live in San Francisco and perform work for a Covered Employer from the employee’s own home, including telecommuting, “Hours Payable” shall include all hours worked from home, regardless of where the Covered Employer is located.

Rule 4.4. Partially Paid Leave.

Background: This rule addresses the Health Care Expenditure requirement when a Covered Employee is out on paid parental leave to bond with a new child and is entitled to supplemental compensation under the City’s Paid Parental Leave Ordinance (“PPLO”) (S.F. Police Code, Article 33H). The PPLO generally requires employers to pay employees supplemental compensation in an amount such that the total of the California Paid Family Leave compensation the employee receives and the supplemental compensation provides, but does not exceed, 100% of the employee’s current normal gross weekly wage.

Rule: When a Covered Employee is on paid parental leave and is entitled to supplemental

compensation under the PPLO, the employer shall make a Health Care Expenditure that corresponds to the percentage of the employee's normal gross weekly wages that the employer must provide as Supplemental Compensation.

Example 1. A Covered Employer is paying a Covered Employee 45% of the employee's normal gross weekly wages under the PPLO while the employee is on leave to bond with a new child. The employee normally works 40 hours per week. The employer shall be required to make Health Care Expenditures for 45% of the employee's weekly hours, or 18 hours.

RULE 5: MAKING HEALTH CARE EXPENDITURES

Interprets Sections 14.1 and 14.3

Rule 5.1. Payments to Employees. Financial remuneration and/or wages paid to Covered Employees do not constitute Health Care Expenditures. Financial incentives to “opt out” of employer health benefits do not count as Health Care Expenditures.

5.2. Timing of Expenditures. The required health care expenditure must be made regularly, and no later than 30 days after the end of the preceding quarter.

- a. Employers meeting the standards outlined in Rule 5.9 shall not be required to make expenditures under such plans quarterly.
- b. Nothing in this regulation shall prevent an employer from making regular expenditures prospectively, or before the end of a quarter, in order to obtain health care or health coverage for a covered employee during such quarterly period.

Rule 5.3. Declined Offers of Coverage. A Covered Employer that maintains a health plan that meets the spending requirement and that requires contributions by a Covered Employee shall not have satisfied its obligation to make the required Health Care Expenditures merely by offering a Covered Employee the opportunity to participate in such a program. Should the employee decline to participate in such a program, the Covered Employer shall not have satisfied its obligation to make the required Health Care Expenditures.

Rule 5.4. Payments Required by Federal, State, or Local Law. The HCSO states that Health Care Expenditures “shall not include any amount otherwise required to be paid by Federal, State, or local law.” Such amounts include but are not limited to payments made directly or indirectly to obtain workers’ compensation, State Disability Insurance, Social Security, and Medicare.

Rule 5.5. The Affordable Care Act. Health Care Expenditures shall include payments for Health Care Services made by a Covered Employer, including health insurance purchased to avoid Employer Shared Responsibility tax payments. . However, tax payments made to the Internal Revenue Service to comply with the Employer Shared Responsibility provisions of the ACA do not constitute Health Care Expenditures under the HCSO, as such tax payments do not provide Health Care Services for the Covered Employer’s Covered Employees.

Rule 5.6. Prevailing Wage/Public Works Contracts. 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 this Ordinance.

Rule 5.7. Administrative Costs. Employer Health Care Expenditures shall include administrative costs paid to a third party for the purpose of providing Health Care Services for Covered Employees, but shall not include administrative costs incurred by the employer, but not paid to a third party. Such costs are properly considered a business expense of the employer.

Rule 5.8. Uniform Health Plans.

Background: Chapter 14, Section 14.3 (a) provides that “Health Care Expenditures to on or behalf of a Covered Employee that exceed the Required Health Care Expenditure for that Covered Employee shall not be counted toward the Employer Spending Requirement except as expressly permitted by OLSE.”

Rule: OLSE permits a Covered Employer to comply with its Health Care Expenditure requirement by providing some or all of its Covered Employees with a “uniform health plan,” as that term is defined below, so long as the average hourly Health Care Expenditure for employees in that uniform health plan meets or exceeds that employer’s applicable Health Care Expenditure Rate.

- a. For purposes of this Rule, a “uniform health plan” means a plan with the same benefit design for each enrolled Covered Employee, including but not limited to the same co-pay requirements, out-of-pocket maximums, deductibles, coverage tiers, and eligibility criteria.
- b. The average Hourly Health Care Expenditure for employees in a uniform health plan shall be calculated by dividing the total amount of required Health Care Expenditures for employees in the plan by the total number of Hours Payable to each of the employees in the plan during that quarter.
- c. The employer has the option of including only Covered Employees in this calculation, or including all employees participating in the uniform plan, provided that all such employees receive the same health coverage or product.

Example: A Medium-sized Employer has 22 full-time (40 hrs/week) Covered Employees in San Francisco in 2017 and no part-time Covered Employees. The employer provides a uniform health plan for all Covered Employees, and the rates for employees are “banded” by age. The number of employees and age-banded rates are as follows:

Age Range	# of Employees in uniform health plan	Employer Health Insurance Spending/Month
20-30	7	\$200
30-40	6	\$300
40-50	4	\$400
50-60	4	\$500
60-70	1	\$600

The employer’s total monthly spending for all employees is \$7,400, and the average per employee is \$336.36. Because all employees are full time and the maximum number of Hours Payable per month is 172, the average hourly expenditure per employee is $\$336.36/172$, or \$1.96. This exceeds the Health

Care Expenditure rate for Medium-sized Employers of \$1.76/hour in 2017, so the employer satisfies the spending requirement of the HCSO.

- d. If the Covered Employer’s hourly expenditures fail to meet 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. Such expenditures shall be divided equally among Covered Employees participating in the uniform health plan.

Example: A Medium-sized Employer has 22 full-time (40 hrs/week) Covered Employees in San Francisco in 2017 and no part-time Covered Employees. The employer provides a uniform health plan for all Covered Employees, and the rates for employees are “banded” by age. The number of employees and age-banded rates are as follows:

Age Range	# of Employees in uniform health plan	Employer Health Insurance Spending/Month
20-30	7	\$200
30-40	6	\$200
40-50	4	\$200
50-60	4	\$300
60-70	1	\$350

The employer’s total monthly spending for all employees is \$4,950, and the average per employee is \$225. Because all employees are full time and the maximum number of Hours Payable per month is 172, the average hourly expenditure per employee is $\$225/172$, or \$1.31.

This spending level of \$1.31/hour falls \$0.45 short of the Health Care Expenditure rate for Medium-sized Employers of \$1.76/hour in 2017. The amount still owed for each person is \$0.45, multiplied by 172 hours, or \$77.72. The employer must spend an additional \$77.72 for each employee for Health Care Services for the month, or \$233.16 for the quarter ($\77.72×3 months).

Rule 5.9. Self-Insured and Self-Funded Plans Calculation. A Covered Employer may comply with the HCSO by providing a self-funded or self-insured uniform health plan to some or all of its Covered Employees, so long as that plan satisfies one of the following conditions:

- a. The employer pays premiums and/or fees to a third party to administer the self-funded/self-insured plan; no portion of those premiums or fees are returned to the employer; and the premiums and fees paid for a calendar quarter meet or exceed the Required Health Care Expenditure for each Covered Employee for that quarter;
- b. The employer pays claims as they are incurred, and the preceding year’s average hourly expenditures meet or exceeds that year’s expenditure rate for that employer.

- i) This option of averaging Health Care Expenditures shall be limited to uniform health plans, meaning the plan must have the same benefit design for all covered employees, including co-pay requirements, out-of-pocket maximums, deductibles, coverage tiers, and eligibility criteria). The employer has the option of including only Covered Employees in this calculation, or including all employees participating in the uniform plan, provided that all such employees receive the same health coverage or product.
- ii) The average hourly Health Care Expenditure for employees in a uniform health plan shall be calculated by dividing the total amount of required Health Care Expenditures for employees in the plan by the total number of Hours Payable to each of the employees in the plan during that quarter.
- iii) The employer shall receive credit toward the Employer Spending Requirement in the amount of the average actual expenditures per Covered Employee.

Because Health Care Expenditures must all be made irrevocably for 2017 and future years, amounts that are not irrevocably spent cannot be considered in determining whether a self-funded plan complies with the HCSO. The COBRA-equivalent rate for a health care plan may not be used to determine whether a Covered Employer has satisfied the spending requirement of the HCSO; Health Care Expenditures must reflect amounts irrevocably paid to third parties.

Rule 5.10. Timing of Self-Funded/Self-insured Plan Expenditures. In all cases except those described below, required Health Care Expenditure must be made regularly, and no later than 30 days after the end of the preceding quarter.

- (1) Employers complying with the HCSO using the method outlined in Rule 5.9(b) shall not be required to make expenditures under such plans quarterly.
- (2) Nothing in this Rule shall prevent an employer from making regular expenditures prospectively, or before the end of a quarter, in order to obtain health care or health coverage for a covered employee for that quarterly period.
- (3) If an employer with a self-funded/self-insured plan fails to make the required Health Care Expenditures during a calendar year, that employer shall have until the last day of February of the following calendar year to “top off” the expenditures and find another way to spend the required amount on behalf of the Covered Employees.

Rule 5.11. Other Qualifying Health Care Expenditures. Qualifying Health Care Expenditures shall not be limited to those that qualify as tax deductible medical care expenses under Section 213 of the Internal Revenue Code and Publication 502 of the Internal Revenue Service, but may include medical care, services, or goods having substantially the same purpose or effect.

RULE 6: HEALTH CARE SURCHARGES

Interprets Subsection 14.3(g)

For purposes of Rule 6, a “Health Care Surcharge” means any amount added to the price, whether as a percentage of the total or as a fixed amount, to cover in whole or in part the costs of the Health Care Expenditure requirement. The HCSO neither requires nor prohibits Health Care Surcharges.

Rule 6. If the amount a Covered Employer collects from a Health Care Surcharge exceeds the amount spent on Health Care Services on behalf of Covered Employees in any calendar year, the employer must irrevocably spend the excess surcharges on Health Care Services for those Covered Employees within 30 days of the end of the following calendar year in addition to any Health Care Expenditures due for that calendar year.

RULE 7: ADDITIONAL EMPLOYER RESPONSIBILITIES

Interprets Subsections 14.3(e) and 14.3(f)

Rule 7.1. Employer Notice to Employee of Payment to the City Option.

A Covered Employer who satisfies its obligation to make its required Health Care Expenditures by making payments to the City shall notify each Covered Employee using the form provided by the City Option within 15 days of making the payment. The employer is not required to provide this notice more than once.

Rule 7.2. Employer Recordkeeping.

- a.** Covered Employers shall keep, for each Covered Employee, the following documents for a period of four years:
 - i.** itemized pay statements, as mandated by California Labor Code Section 226. Each itemized pay statement must include 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;
 - ii.** the employee's address, telephone number, date of first day of work, and email address if the employer has it;
 - iii.** records sufficient to establish compliance with Employer Spending Requirements, Health Care Expenditures made, calculations of Health Care Expenditures, and proof establishing that such expenditures were made at least quarterly each year;
 - iv.** records establishing separation from employment, such as a Notice of Change in Relationship (as required by California Unemployment Insurance Code Section 1089), or other documentation.
 - v.** any signed HCSO Employee Voluntary Waiver Forms; and
 - vi.** a copy of any Employer Notices to Employee of Payment to the City Option.

- vii. records establishing the amount, if any, of Health Care Surcharges collected from customers.

(b) Employers making Health Care Expenditures using the calculation method set forth in Rule 5.9(b) for self-funded/self-insured plans shall not be required to demonstrate that expenditures under such plans were made quarterly.

(c) Where an employer does not maintain or retain adequate records documenting its compliance with the HCSO, or does not make such records promptly available to OLSE upon request, it shall be presumed that the employer has violated the HCSO for the period for which records are lacking or were not provided. This presumption shall be rebutted only by clear and convincing evidence.

Where an employer does not maintain or retain adequate records documenting employee hours, or does not allow the OLSE reasonable access to such records, OLSE may rely upon other evidence—including but not limited to employee testimony—to estimate employee hours and based on those, required Health Care Expenditures.

Rule 7.3. Employer Reporting. Covered Employers shall provide information to the City regarding their Health Care Expenditures on an annual basis. Such information shall be provided on the Employer Annual Reporting Form, which shall be posted on the OLSE website, and notice of which shall be sent to registered businesses.

Rule 7.4. Employer Cooperation with OLSE Investigations & Enforcement. Employers shall cooperate fully with OLSE investigations, including but not limited to providing OLSE with requested documents within the time frame identified by OLSE. OLSE may send a Notice of Non-Cooperation to an employer who fails to provide OLSE with requested documents within the identified time frame. Such notices may assess penalties of up to \$25 per day as to each worker whose records have not been timely provided. The employer shall have 14 days to pay such penalties.

Rule 7.5.

Background: Section 14.4(c) of the HCSO prohibits any employer from reducing the number of employees in order to avoid being considered a Covered Employer or to be subject to a lower Health Care Expenditure Rate

Rule: In the event that OLSE is investigating an employer for violating Section 14.4(c) of the HCSO, the employer is required to demonstrate that such reduction in staffing was for a bona fide business reason.

RULE 8: ENFORCEMENT PROCEDURES

Establishes Procedures Pursuant Section 14.4

OLSE has the authority to conduct investigations, monitor compliance, and obtain restitution and penalties for violations of the HCSO. As part of this authority, OLSE may examine employer records, conduct inspections of employment sites, speak with workers and other witnesses, and conduct audits.

Investigation Procedure

Upon making a preliminary determination that an employer has violated the HCSO, OLSE will send the employer a Notice of Potential Violation (“NOPV”). For all alleged violations other than an allegation of retaliation, the employer shall have 30 days to respond. If one of the alleged violations is retaliation, the employer shall have ten days to respond.

The employer’s response shall explain, in detail, the reasons why the employer believes it has not violated the provisions of the HCSO listed in the NOPV. The employer may provide supporting evidence to prove compliance. OLSE may, in its discretion, grant an employer an extension of time to respond. Any request for an extension must be in writing and must state the reason for the requested extension.

If an employer fails to respond to the NOPV by the date specified, OLSE may issue a Notice of Non-cooperation and impose penalties of up to \$25 per employee per day. Such penalties must be paid within 14 days.

After reviewing the employer’s response to the NOPV, OLSE will decide whether to issue a Determination of Violation (“DOV”) or conclude the investigation. During this time, OLSE may conduct further investigation of the alleged violation. The issuance of a DOV constitutes OLSE’s final determination that an employer has violated the HCSO.

A DOV will include: (1) a list of all HCSO provisions the employer has violated; (2) an explanation of why OLSE has concluded that that the employer has violated the specified provisions; (3) the corrective actions the employer must take to remedy its violations. An example of such an action includes payment to employees in the amount of the Health Care Expenditures the employer was required but failed to make; (4) the amount of the administrative penalty imposed for the violation(s) and a timeline for payment of such penalty, if applicable; and (5) the procedure for appealing the DOV and the deadline for filing the appeal.

Service

OLSE may serve NOVs, DOVs, and Notices of Non-cooperation in the any of the following manners:

- personal service upon the employer or legal representative;
- posting the document in a conspicuous place on the employer’s place of business or the fixed location within the City from or at which the employer conducts business in the City;

- email, so long as the employer has consented in writing to service by email; or
- first class mail, with postage prepaid and a declaration of service under penalty of perjury by the person mailing the document.

If OLSE affects service by mail, service is effective on the date of the mailing.

RULE 9: CORRECTIVE ACTION AND ADMINISTRATIVE PENALTIES

Establishes Procedures Pursuant to Section 14.4

OLSE may order employers to pay restitution to employees and to take other corrective actions. OLSE may make such orders at the conclusion of an investigation or on a temporary, interim basis. OLSE may also impose administrative penalties.

The following chart sets forth the corrective actions and administrative penalties authorized by the HCSO:

VIOLATION	CORRECTIVE ACTION	ADMINISTRATIVE PENALTY
Failure to fully and timely make required Health Care Expenditures (Admin. Code §§ 14.3(a),(b), and (c) & 14.4(e))	The Covered Employer may be ordered to pay restitution, which shall be up to the full amount of the HCEs not made plus interest, in a manner prescribed by OLSE.	The total penalty for this violation shall be up to 1.5 times the total Health Care Expenditures that the Covered Employer failed to make. But that penalty shall not exceed \$100 for each employee for each quarter that the required expenditures were not made within five business days of the quarterly due date.
Failure to cooperate with the OLSE or otherwise impeding OLSE's ability to conduct an audit or investigation (Admin. Code §§ 14.4(e))	The Covered Employer may be ordered to immediately cooperate with OLSE.	The maximum penalty shall be up to \$25 per worker per day for each day that the violation occurs.
Failure to allow reasonable access to records of health care expenditures (Admin. Code §§ 14.3(f) & 14.4(e))	The Covered Employer may be ordered to provide OLSE with reasonable access to records of Health Care Expenditures.	The maximum penalty shall be up to \$25 for each employee whose records are at issue for each day that the violation occurs.
Failure to maintain or retain accurate and complete records, including destruction of relevant evidence (Admin. Code §§ 14.3(f) & 14.4(e))	The Covered Employer may be ordered to produce the records and documents outlined in Rule 7 and to cooperate with OLSE in reconstructing the records it should have maintained.	The maximum penalty shall be up to \$500 for each quarter that the violation occurs.
Failure to satisfy the annual reporting requirement (Admin. Code §§ 14.3(f) & 14.4(e))	The Covered Employer may be ordered to satisfy its annual reporting requirement.	The maximum penalty shall be up to \$500 for each quarter that the violation occurs.
Reduction of the number of employees in order to (1) avoid being considered a covered employer, or to	The Covered Employer shall demonstrate that such reduction was done for a bona fide business reason, and not to evade the obligations of the HCSO	The maximum penalty assessed shall be up to \$25 per day for each day that the violation occurs.

(2) be subject to a lower health care expenditure rate (Admin. Code § 14.4(c);):		
Retaliation, including harassment, and/or discrimination in violation of the Ordinance (Admin. Code § 14.4(d))	The Covered Employer may be ordered to cease, or cause to cease, any and all retaliatory and/or discriminatory actions and, if applicable, to reinstate with back pay or otherwise compensate an employee whose rights under the HCSO was violated.	The maximum penalty shall be up to \$100 for each worker or person whose rights under the HCSO was violated for each day that the violation occurs.
Any other violation not specified in Administrative Code §§ 14.4(e), including, but not limited to, the failure to post a Notice as required by Administrative Code § 4.3(b)(2).	The Covered Employer may be ordered to correct the violation.	The maximum penalty shall be up to \$25.00 per day for each day that the violation occurs.

If penalties and/or costs are the subject of administrative appeal or judicial review, then the accrual of such penalties and/or costs shall be stayed until final determination of such appeal or review.

Payment of Restitution and Administrative Penalties

All administrative penalties shall be made payable to the City and County of San Francisco and be due within 30 days from the date of the DOV. OLSE shall deposit all administrative penalties into the City’s General Fund.

An amount equivalent to all unpaid Health Care Expenditures plus interest shall be made payable to the employee on whose behalf the expenditures should have been made and shall be due within 30 days from the date of the DOV.

Collection of Restitution and Penalties

The failure of an employer to pay restitution or penalties within the time specified on the DOV constitutes a debt to the City.

Enforcement costs shall not count toward any maximum penalty amount set forth in these Rules.

Actions that may be taken by OLSE and/or other City agencies to collect unpaid amounts from employers for HCSO violations include but are not limited to:

- a civil action;
- imposition of liens on property owned by the employer. The procedures in Article XX of Chapter 10 of the San Francisco Administrative Code shall govern the imposition and collection of such liens;
- revocation of licenses and permits; and
- referral to state regulatory, licensing, permitting, or other collections agencies.

RULE 10: ADMINISTRATIVE APPEAL PROCEDURES

Establishes Procedures Pursuant to Section 14.4

Filing an Appeal

A person or entity who receives a Determination of Violation (“DOV”) and wishes to appeal must file the appeal with the Controller’s Office, no later than 15 days after the date the DOV is served. OLSE shall state the date of service on the proof of service accompanying the DOV.

The appeal must: 1) be in writing; 2) state the basis for the appeal; 3) include a return address; and 4) include a check or bond payable to the City and County of San Francisco for the full penalty amount.

The appeal must be submitted in person, by U.S. mail, or by other delivery service such as FedEx or UPS, to the Office of the Controller at City Hall, Room 316, 1 Dr. Carlton B. Goodlett Place, San Francisco, CA 94102. A copy of the appeal, including a copy of the check or bond for the penalty amount, must also be submitted to OLSE in one of the following ways: in person, by U.S. mail, by other delivery service such as FedEx or UPS, at City Hall, Room 430, 1 Dr. Carlton B. Goodlett Place, San Francisco, CA 94102, or by email to the compliance officer listed on the DOV.

The Controller’s Office must receive the appeal and the check or bond for the penalty amount on or before the day of the appeal deadline by close of business (5:00 p.m.). OLSE must also receive the copy of the appeal on or before the day of the appeal deadline by close of business (5:00 p.m.).

The failure to file an appeal that complies with this Rule shall constitute concession to the assessment, and the DOV shall be final upon expiration of the appeal deadline.

Setting a Hearing Date

Within 15 days of receiving a properly filed appeal, or as soon thereafter as is practicable, the Controller or his or her designee shall appoint a neutral hearing officer (who shall not be employed by OLSE) to hear and decide the administrative appeal. The Controller’s Office shall advise OLSE and the appellant of the appointment of the hearing officer.

The hearing officer shall promptly set a date, time, and place for a hearing on the appeal. The Controller’s Office shall serve by first class mail to the address listed on the appeal and by email (if the appellant has included an email address on the appeal) a written notice of the time and place for the hearing.

Except as otherwise provided by law, the appellant’s failure to receive a properly served notice of the hearing shall not affect the validity of any proceedings under the HCSO.

Pre-Hearing Procedures

No later than ten days prior to the hearing, the parties shall submit the following documents to the hearing officer, with simultaneous service on all other parties: a statement of issues to be decided by the hearing officer, a list all witnesses (other than for impeachment or rebuttal) likely to be called, a list describing each piece of evidence to be offered at the hearing, and any other information or documents requested by the hearing officer.

If a hearing is continued to a later date, a party may request permission to submit an amended witness or exhibit list. Such requests must be made in writing and submitted to the hearing officer and the opposing party at least 15 days before the new hearing date. Such requests shall not be granted unless the hearing officer determines that there is good cause to allow the party to call the new witness or submit the new evidence.

Failure to Appear

An appellant's failure to appear at the hearing shall constitute concession to the assessment in the DOV and a withdrawal of the appeal.

Evidence

A DOV shall constitute *prima facie* evidence of all violations set forth in the DOV.

Absent good cause, and other than impeachment or rebuttal witnesses, a witness who does not appear on the witness list described above may not be called at the hearing.

Absent good cause, an employer may not present evidence at a hearing that it failed to provide to OLSE in response to a request before the issuance of a DOV.

Burden of Proof

The appellant shall have the burden of proving compliance with the HCSO.

Hearing Record

The hearing shall be open to the public and shall be tape-recorded. Any person or entity or OLSE may retain a certified court reporter to record and transcribe the hearing.

Findings and Decision

The hearing officer may continue the hearing and request additional information from either party prior to issuing a written decision. The hearing officer shall make findings based on the record of the hearing and issue a written decision based on such findings within 20 days of the conclusion of the hearing. The hearing officer may affirm or reject any part of the DOV in whole, or in part. The hearing officer may also impose conditions and/or deadlines to correct violations or pay restitution or penalties. OLSE will promptly post the hearing officer's decision on its website.

Finality of Hearing Officer's Decision

The decision of the hearing officer shall be final. The sole means of review of the hearing officer's decision shall be by filing in the San Francisco Superior Court a petition for a writ of mandate under Section 1094.5 of the California Code of Civil Procedure. If the hearing officer concludes that the violation(s) set forth in the DOV did not occur or that the party was not the responsible party, OLSE shall refund the penalty amount to the party that deposited such amount. The hearing officer's decision shall be served on the appellant and OLSE by certified mail.