GENERAL SERVICES AGENCY
OFFICE OF LABOR STANDARDS ENFORCEMENT
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Self-funded Insurance Plans: Calculation and 2021 Top-Off Payment Instructions

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In 2017, after a public process, OLSE made changes to the Health Care Security Ordinance's Rules. Employers who offer self-funded medical/dental/vision plans to their San Francisco employees are impacted in the following ways:

(1) As of January 2018, Employers are no longer permitted to use the COBRA premium rate to calculate their required Health Care Expenditures.
(2) For self-funded plans in which the employer pays claims as they are incurred, the employer must calculate the health care expenditures of the self-funded plan according to the instructions below;
(3) For employees enrolled in these plans, the employer is not required to comply with the quarterly expenditure deadline, and may instead calculate the *annual* spend;
(4) For employees enrolled in these plans, when the employer's annual spend falls short of the HCSO expenditure rate, the employer must make a "top-off" payment by Feb 28th of the following year.

****The quarterly expenditure requirements still apply for employees who are in fully-funded health plans, or *not* enrolled in insurance****

More information on the rules regarding self-funded health plans can be found here on the recorded webinar and associated slides on our website.

Overview of Coverage Calculations

HCSO Rule 5.8 explains how to calculate the expenditure rate for employees enrolled in uniform health plans. This rule applies to both traditional health plans and self-funded health plans.
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.

Where there is a uniform health plan, the average value is calculated by dividing the total amount of health care expenditures for employees in the plan by the total number of hours payable to all of the employees in the plan. The employer can choose whether to include the expenditures and hours for *all employees in the plan* (ie, nationwide), or only the *Covered Employees in the plan* (ie, SF e'ees).

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Examples:

Self-funded plan. Employer Acme Co. has 350 employees enrolled in the self funded plan nationwide, 300 are full-time and 50 are part-time working 20 hours/week. Acme has 25 Covered Employees in San Francisco.

Option A: Nationwide Average

Total Claims Paid by Employer	Total Payable Hours	Average Hourly Expenditure	Compliance
$1,508,000	300 FT employees (x2064 hrs) and 50 PT employees (x1032 hrs) = 670,800 hrs	$1,508,000 / 670,800 Hrs. = $2.248 per Hr. (round to $2.25)	$2.25 per hour falls short of the 2021 Large Employer rate of $3.18.
Do NOT count employee's share of premium.	Include paid vacation hours, sick time, etc. (172 Hr. /mo. maximum)	Calculation: Total Claims Paid / Total Payable Hours	Employer must make additional expenditures of $.93 per Hours Payable to each employee covered by the HCSO.

Option B: Covered Employee Only Average: 25 SF Employees enrolled in plan all covered by HCSO

Total Claims Paid by Employer	Total Payable Hours	Average Hourly Expenditure	Compliance
$120,000	25 Employees x 2064 Hrs. = 51,600 Hrs.	$120,000 / 51,600 Hrs. = $2.33 per Hr.	$2.33 does not meet the 2021 Large Employer rate of $3.18.
Do NOT count employee's share of premium.	Include paid vacation hours, sick time, etc. (172 Hr. /mo. maximum)	Calculation: Total Claims Paid / Total Payable Hours	Employer must make additional expenditures of $.85 per Hours Payable to each employee covered by the HCSO.

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Option C: Employer can't isolate SF claims, and can't match up nationwide hours with nationwide enrollment info. Employer may look at total value of claims paid, then divide it by total # employees enrolled, multiplied by 2064 hours, to get average. Here, let's use 950 employees enrolled nationwide.

Claims paid for all employees enrolled nationwide	Use 2064 annual payable hours (172/mo)	Average Hourly Expenditure	Compliance
$3,500,000 claims paid for 950 employees enrolled	950 employees enrolled x 2064 Hrs. = 1,960,800 Hrs.	$3,500,000 / 1,960,800 Hrs. = $1.78 per Hr.	$1.78 does not meet the 2021 Large Employer rate of $3.18.
*Total # employees enrolled during calendar year, regardless of length of enrollment.	*Total # employees enrolled during calendar year, regardless of length of enrollment.	Calculation: Total Claims Paid / Total Payable Hours	Employer must make additional expenditures of $1.40 per Hour Payable to each employee covered by the HCSO.

HCSO Rule 5.9 explains how the above calculations are done when the uniform plan is self-funded. If the employer pays monthly premiums, follow 5.9(a) and does not need to use the annual calculation above. Most self-funded plans, in which the employer pays claims as they are incurred, will follow the instructions in 5.9(b).

5.9(b) states that to be compliant, the employer must demonstrate that *the preceding year's* average hourly expenditures meet or exceeds *that year's* expenditure rate."

OLSE interprets Rule 5.9(b) to mean that a self-funded or self-insured uniform health plan may comply when the employer pays claims as they are incurred, and that calendar year's average hourly expenditures meet or exceed that calendar year's expenditure rate for that employer.

For example, in early 2022, when an employer is assessing the cost of its 2021 health plan, the employer must determine whether the 2021 average hourly expenditures meet or exceed the 2021 expenditure rate. In 2023, when an employer assesses the cost of its 2022 health plan, the employer must determine whether the 2022 average hourly expenditures meet or exceed the 2022 expenditure rate.

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Please note the following regarding expenditures:

- Count only claims **paid** in 2021 (not claims incurred)
- Some types of reasonable fees, such as stop loss insurance, may be included as expenditures in the calculations.
- If employer received a refund or credit for a "good claims year," that amount may not be included in the expenditure calculation.

Top-off payments:

Rule 5.10(3) requires that where the calculations show that the employer's average expenditures for a self-funded plan fall short of the $3.18/hr expenditure requirement, the employer must make a "top-off" payment by the end of February 2022. **Remember that the top-off payment is NOT part of the claims and is not counted towards the value of the plan.**

Example:

Nationwide, Acme Employer has 200 full-time employees and 50 employees who all work 20hrs per week. 10 full-time employees and 5 part-time employees work in San Francisco and are covered by the HCSO.

After completing the calculation above, Acme determines that its nationwide average hourly expenditure in 2021 was $2.25/Hr. This is $0.93 less than the $3.18/hr expenditure requirement for Large Employers in 2021.

	Payable Hrs in 2021 per Employee	**Shortfall**	**Employees in SF covered by the HCSO**	**Total Due**
Part time	86 x 12 = 1032	$0.93/hr x 1032 hrs = $959.76/person	5	5 x $959.76 = $4,798.80
Full time	172 x 12 = 2064	$0.93/hr x 2064 hrs = $1,919.52/person	10	10 x $1,919.52 = $19,195.20
			Total	**$23,994.00 in top off payments**

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Who to make top-off payments for:

- Only employees covered by the HCSO are entitled to a top-off payment. For example, if the employer calculated by utilizing a nationwide average, and the plan fell 10 cents short of the required expenditure, employer must make a top-off payment of 10 cents per hour for its San Francisco employees only.
- For employees entitled to a top-off payment, the payment shall be made on a pro-rata basis based on the number of hours worked by that employee during the year. This ensures that full-time employees and part-time employees get a proportionate percentage of the top-off and that employees who worked the full year receive more than employees who separated from employment during the year.

How to make top-off payments:

- Payments that can count toward the HCEs for 2021 include:
  (1) Deposits to the employee's Health Savings Account; or
  (2) Deposits to the SF City Option program on behalf of the employee; or
  (3) Any other type of irrevocable health care expenditure.
- Employers must ensure that the top-off payments can be distinguished, via recordkeeping, from other HSA/City Option payments made for the employee to comply with the HCSO in 2021.
- Regarding the SF City Option program, please note:
  - It may be utilized for former employees.
  - Employees enrolled in the employer's health insurance plan will be eligible for the Medical Reimbursement Account (MRA) program and can use your payment to offset their costs for premiums and other out of pocket medical expenses.

Refunds

- If employer receives a refund or credit for a "good claims year," the amount refunded **may not** be included in the expenditure calculation. How should the employer handle this?
- If employer receives the refund (or confirmation from the carrier of what the refund amount will be) prior to the end of February, the employer may:
  - Choose not to accept the refund/credit;
  - If the employer accepts the refund/credit, it must subtract that amount from the "claims" amount.
- If the employer receives the refund (or confirmation from the carrier of what the refund amount will be) *after* it's done its February calculations, it must do a **second round of top-off payments** to the HCSO-covered employees.
  - Employer should complete the second round of calculations and top-offs within thirty days of getting confirmation of the amount from the carrier.

- Example of top-offs with refunds:
    - In February 2022, Acme Co. calculated a $.83/hr shortfall for its 2021 plan and made its top-offs accordingly. However, in May 2022, Acme received a refund from its carrier. Acme recalculated the value of its self-funded plan in 2021 and determined that the true shortfall was actually $.93/hr.
    - Employer must now pay an additional $.10/hr to the same employees it topped off in February.

Records of Compliance

- The HCSO requires employers to keep records of compliance for a four-year period. Self-funded employers should keep records of the backup data used to perform the calculations of the hourly expenditures (record of claims paid, enrollment records, etc) as well as the calculation method. These will be requested by OLSE in the event of an audit. The employer should also keep record of the top-off payments made and the calculations for the individual employees who receive those payments.

Best practices:

- **Communicate with employees!**
    - Notify employees (current and former employees) of the top-off payment. Tell employees what the employer's spending was on the self-funded plan, the dollar amount of the top-off payment, and where the payment will be made.
    - If the payment is being made to the SF City Option program, inform employees that:
        - They will need to fil out a Program Finder Form before they can access the funds; and
        - There can be a processing time of 2-4 weeks between the payment being made and employees being able to see and utilize the funds in their accounts.
    - Employers are encouraged to use the Sample Letter to Employees Regarding HCSO Top-Off Payments developed by OLSE.
    - During open enrollment, let employees know which plans are self-funded at what that means regarding the other benefits they may or may not receive during the year.
    - **If employees are not aware of your top off, they may believe that the employer did not comply with the HCSO.**
- **Have a knowledgeable point person who can answer inquiries from employees and OLSE!**
    - Both employees who receive a top-off payment and employees who do not receive a top-off payment are likely to have questions regarding why they are/are not getting a payment, and how it was calculated.
    - If employees cannot get their questions answered by their employer or benefits administrator, they are likely to contact OLSE. If OLSE also cannot get questions answered in a timely manner, the employer is likely to be audited.
- **Be proactive next year by making top-off payments in advance, if the employer anticipates a shortfall**

- For example, if an employer has employees who are enrolled in a self-funded dental plan only, the employer has the full calendar year to calculate the value of its plan. However, the employer knows it will have a large shortfall resulting in a large lump sum payment due in February. The employer can choose to distribute that expense throughout the year by making quarterly City Option payments throughout the year.

Example: annual required spend in 2021 for a FT employee is $6,563.52. The employee is enrolled *only* in the employer's self-funded dental plan, the value of which is TBD during 2021. Employer makes a $1500 City Option payment in Q1, Q2, and Q3 for a total of $4,500 in advance top-off payments made. At the end of 2021, employer values its dental plan at an average of $.53 cents/hr or $1,102.40 spent on that employee's dental plan throughout the year ($.53 cents times 2080 hours). $6,563.52 - $4500 - $1,102.40 = **$961.12** top off payment owed by end of February 2022.

Although the employer is permitted by Rule 5.10 to wait until the end of February 2022 to address the shortfall, if it chose to do so without making additional contributions throughout the year, the employer would then be required to make a significant top off payment of $5,461.12 ($6,563.52 - $1,102.40). Advance payments are not required, but many employers find that they help spread the cost throughout the year and also benefit employees during the calendar year.