

COMPLIANCE ALERT

SAN FRANCISCO HEALTH CARE SECURITY ORDINANCE TOP-OFF PAYMENTS DUE FEBRUARY 29, 2020

January 1, 2020

QUICK FACTS

- The San Francisco Health Care Security Ordinance (HCSO) requires covered employers to pay a certain amount – an Expenditure – toward their covered employees' health care costs.
- The HCSO provides guidance for calculating Expenditures for both level-funded plans and plans that pay claims as incurred ("pay-as-you-go" plans).
- If a covered employer does not meet the required Expenditure under a pay-as-you-go plan, it must use another permissible method – called a "top-off" payment – to make up the shortfall.
- Top-off payments are due by the end of February following the calendar year for which they apply. For 2019 Expenditures, the due date is no later than February 29, 2020.

BACKGROUND

The San Francisco Health Care Security Ordinance (HCSO) requires covered employers to pay a certain amount – a Health Care Expenditure (Expenditure) – toward their covered employees' health care costs. The San Francisco Office of Labor Standards Enforcement (OLSE) regulates the HCSO. Starting in 2018, HCSO rules provided two new methods for calculating health care Expenditures in self-funded plans.

BASIC CONCEPTS

Covered employers

An employer must comply with the HCSO for any calendar quarter if it meets the following conditions:

- employs one or more workers within the geographic boundaries of the City and County of San Francisco (City),
- is required to obtain a San Francisco business registration certificate, and
- is a for-profit business with 20 or more persons performing work at any location, or a non-profit organization with 50 or more persons performing work at any location.

COMPLIANCE ALERT

Covered employees

Generally, covered employers must make Expenditures for employees who regularly work at least eight hours per week in San Francisco and have been employed for at least 90 calendar days.

Exempt employees

The HCSO exempts:

- Employees who receive health care benefits through another employer and who have waived employer Expenditures by signing an OLSE [Employee Voluntary Waiver Form](#).
- Employees who qualify as a [manager, supervisor or confidential employee](#) and earn more than the applicable salary exemption amount.
- Employees covered by Medicare or TRICARE.
- Employees employed by a non-profit corporation for up to one year as trainees in a bona fide training program.
- Employees who receive health care benefits under the San Francisco Health Care Accountability Ordinance.

EMPLOYER EXPENDITURES

What is an Expenditure?

An Expenditure is any amount a covered employer pays to its covered employees (or to a third party on behalf of its covered employees) for the cost of health care services for covered employees and their spouses, domestic partners, children, or other dependents.

An Expenditure includes amounts paid to the City on behalf of a covered employee to enable the employee to participate in the City's health care program (the [City Option](#)).

Expenditures include:

- Payments to a third party to provide health care services for a covered employee, such as payments for medical, dental, or vision insurance, or payments to a health care provider;
- Payments on behalf of a covered employee to the City Option;
- Contributions on behalf of a covered employee to a reimbursement program (subject to certain limitations);
- Payments to a covered employee to reimburse the employee for the cost of health care services (as defined);
- Costs incurred by the employer in the direct delivery of health care services for a covered employee; and
- Any of the above made on behalf of a covered employee's spouse, domestic partner, children, or other dependents.

COMPLIANCE ALERT

Determining the minimum Expenditure

An employer determines its minimum Expenditure for each covered employee quarterly by multiplying the total number of “Hours Payable” to the employee in the quarter by the applicable Expenditure rate. Hours Payable includes both the hours for which a person is paid wages for work performed within San Francisco as well as the hours for which a person is entitled to be paid, such as for vacation time, paid time off, and paid sick leave. Hours Payable cannot exceed 172 hours per month.

The Expenditure rates and salary exemption amounts are subject to change each January 1. Below are the Expenditure and salary exemption amounts for 2019 and 2020.

2020 EMPLOYER HEALTH CARE EXPENDITURE RATES		
Business Size (Company Wide)	2020	2019
Large (100+ Employees)	\$3.08/hour	\$2.93/hour
Medium (20-99 Employees)*	\$2.05/hour	\$1.95/hour
Small (1-19 Employees)	Exempt from requirement	

2020 ANNUAL SALARY EXEMPTION		
Business Size (Company Wide)	2020	2019
Managers/Supervisors/Confidential Employees (defined by regulation)	\$104,761 (\$50.37/hour)	\$100,796 (\$48.46/hour)

CALCULATING EXPENDITURES

A covered employer must make minimum Expenditures to or on behalf of each covered employee. Expenditures for insurance premiums may be totaled and compared to the minimum Expenditure for each covered employee (and dependents) to determine if the required Expenditure has been met on a quarterly basis.

Uniform plans

Alternatively, an employer that provides a uniform health plan to some or all of its covered employees may comply with the spending requirement if the average hourly Expenditure rate per employee covered under the plan meets or exceeds the required Expenditure rate. Each uniform plan must be assessed separately to determine if the required Expenditure has been paid

COMPLIANCE ALERT

WHAT'S A UNIFORM PLAN?

A uniform health plan is one with the same benefit design for each enrolled covered employee, including, but not limited to, the same copays, out-of-pocket maximums, deductibles, coverage tiers, and eligibility criteria. Age-banded plans may be averaged.

Calculating the average hourly Expenditure rate

The average hourly Expenditure rate is calculated by dividing the total amount of required Expenditures for employees in the plan by the total number of hours payable to each of the employees in the plan during that quarter. An 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.

An employer that offers an HMO and a PPO may average hourly Expenditures for all of the employees covered by the HMO, and must calculate a separate hourly average Expenditure for those covered by the PPO. Similarly, an employer that offers two HMO options may not average the Expenditures between the two HMOs unless the benefit design for both HMOs is exactly the same.

Contributions for employees with dependents can be averaged with contributions for employees without dependents. However, if differences in the employer's contribution levels are based on other criteria such as the number of hours worked, employees' status as union or nonunion, salaries, waiting periods, or work location, Expenditures cannot be averaged.

If a covered employer's Expenditure rate fails to meet or exceed the minimum Expenditure rate set by the HCSO, the employer must spend the difference (or shortfall) within 30 days of the end of the quarter. The employer may decide how to make up the shortfall: by reducing the employees' share of premiums for the existing plan, choosing a more generous plan with higher premiums, complementing the existing plan with a health savings or irrevocable medical reimbursement account, making payments to the [City Option](#) (which establishes a city-administered Medical Reimbursement Account for the covered employee), or making other qualified Expenditures.

Special calculation rules for self-funded plans

Covered employers who sponsor self-funded health plans may comply with the HCSO by providing a self-funded plan under one of the following conditions:

1. **Level-funded plans.** The employer pays premiums and/or fees to a third party administrator (TPA) and no portion of the premiums or fees are returned to the employer, and the premiums and fees paid for a calendar quarter meet or

COMPLIANCE ALERT

exceed the Expenditure for each covered employee for that quarter. Amounts over the spending requirement may be returned to the employer.

- Premiums, TPA fees, and stop-loss insurance premiums count as Expenditures.
 - The required Expenditure must be made no later than 30 days after the end of the preceding quarter.
2. **Pay-as-you-go plans.** The employer pays claims as they are incurred and the preceding year's average hourly Expenditures meet or exceed that year's Expenditure rate for that employer. This is a calendar year calculation.
- This option is limited to uniform health plans, as defined above.
 - The employer receives credit toward the spending requirement in the amount of the average actual Expenditures per covered employee.
 - The employer looks at the total spend for employees (and dependents) under the plan for the calendar year and divides that number by the total hours payable for covered employees to determine the average hourly Expenditure for the year. If the amount is equal to or exceeds the required Expenditures during the calendar year, the employer is in compliance.
 - All employees of the employer may be included in the calculation, not just HCSO-covered employees. This may be more practical for some employers.
 - Premiums, TPA fees, and stop-loss insurance premiums count as Expenditures.
 - If the employer has not met the required Expenditure, the employer may use another permissible method for the top off payment (such as contributions to the City Option or employees' Health Savings Accounts,)
 - Top off payment are due by the end of February following the prior calendar year and reported in the Annual Reporting Form for the applicable year.

PAY-AS-YOU-GO: LARGE EMPLOYER EXAMPLE

Number of covered employees in 2019	100
Total spending on self-insured health plan for covered employees in 2019	\$650,000
Total Hours Payable for covered employees in 2019	206,400
Average Hourly Expenditure	$\$650,000/206,400 = \3.14 Exceeds the 2019 rate of \$2.93 (no additional Expenditures required for 2019)

Employers using the annual calculation to determine self-funded plan Expenditures are advised to clearly communicate the approach to covered employees to prevent complaints from being filed with the OLSE, and avoid potential audit.

COMPLIANCE ALERT

CITY OPTION

If an employer makes no Expenditure or an insufficient Expenditure towards a covered employee's health coverage, it may pay into the City Option to comply with the HCSO. An employer must pay any such Expenditure to the City within 30 days after the applicable calendar quarter, and provide notice of such payments to employees.

The City administers the following programs under the City Option:

- **Medical Reimbursement Account (MRA).** The City deposits an employer's contribution in an irrevocable reimbursement account from which employees may be reimbursed for medical, dental, and vision expenses, including reimbursement of insurance premiums.
- **Healthy San Francisco (HSF).** If an employee is eligible for HSF, the employer may apply its payment towards the employee's HSF enrollment, and the employee may receive a discount on HSF participation fees. To be eligible for HSF, the employee must live in San Francisco, be uninsured, and must not qualify for a public health insurance program such as Medi-Cal (i.e., Medicaid).

ANNUAL REPORTING FORM (ARF)

Covered employers must file an ARF by April 30 to disclose the number of employees eligible for employer Expenditures and the amounts contributed towards the Expenditure for the prior calendar year.

OLSE VOLUNTARY WAIVER FORM

If an employee wishes to waive employer Expenditures, the employee must sign an OLSE [Employee Voluntary Waiver Form](#). The waiver form verifies that the employee has health care benefits through another employer and that the individual knowingly and voluntarily waives the right to have Expenditures made on his or her behalf by the covered employer.

An employee waiver is effective on the date it is signed, and employees cannot waive their rights retroactively. The form is valid for one year or until an employee revokes it. Employees who wish to waive their rights for more than one year must sign a new waiver annually. Employers must maintain waivers and revocations and provide employees with complete copies of these documents.

NOTICE TO EMPLOYEES

Employers must post a current notice in all workplaces or job sites where any covered employees work. Here is the [2020 poster](#).

COMPLIANCE ALERT

PENALTIES FOR NONCOMPLIANCE

The following chart sets forth the administrative penalties authorized by the HCSO. In addition to penalties, corrective actions, such as restitution to employees, may be imposed by the OLSE.

Violation	Maximum Penalty
Failure to make the required minimum Expenditure within five business days of the quarterly due date (30 days after the end of quarter)	1.5 times the total required Expenditure not to exceed \$100 for each employee for each quarter that the violation occurs
Failure to cooperate with the OLSE or otherwise impeding OLSE's ability to conduct an audit or investigation	\$25 for each worker per day for each day the violation occurs
Failure to allow access to records of health care Expenditures	\$25 for each employee whose records are at issue for each day the violation occurs
Failure to satisfy the ARF requirement or to maintain or retain accurate and complete records	\$500 for each quarter that the violation occurs
Reduction of the number of employees in order to avoid being considered a covered employer, or to be subject to a lower health care Expenditure rate	\$25 per day for each day that the violation occurs
Retaliation against employees, in violation of HCSO	\$100 for each person retaliated against for each day the violation occurs
Any other violation of HCSO, including failure to post the official HCSO Notice	\$25 per day for each day the violation occurs

COVERED EMPLOYER CHECKLIST

- Covered employers can ensure compliance with the HCSO as follows:
- Make required health care Expenditures on behalf of covered employees.
- Comply with the new calculation methods for self-funded plans, if applicable. If the annual calculation is used, clearly communicate the method of making Expenditures to covered employees to prevent complaints to the OLSE.
- Submit quarterly payments for the City Option (if required) and notify affected employees of such payments.
- Maintain records sufficient to establish HCSO compliance.
- Post the required HCSO notice in all San Francisco workplaces.
- When obtaining annual waivers of coverage, use only the HCSO waiver form.

COMPLIANCE ALERT

- Submit the ARF to the OLSE by April 30. The 2019 form will be available in April 2020.
- Audit internal processes for tracking hours worked, recordkeeping, submitting quarterly payments (if required), and reporting.
- Register on the [OLSE email list](#) to receive updates regarding the annual ESR, notices, forms, deadlines, and other important news.
- Refer to the [HCSO website](#) for the most current guidance, information and forms.

The OLSE will conduct a [free webinar](#) on January 10, 2020, during which it will address many HCSO issues including how to calculate top-off payments.

EPIC Employee Benefits Compliance Services

For further information on this or any other topics, please contact your EPIC benefits consulting team.

EPIC offers this material for general information only. EPIC does not intend this material to be, nor may any person receiving this information construe or rely on this material as, tax or legal advice. The matters addressed in this document and any related discussions or correspondence should be reviewed and discussed with legal counsel prior to acting or relying on these materials.