



## Ninth Circuit Allows San Francisco to Impose Employer Health Mandate

*On January 9, the U.S. Court of Appeals for the Ninth Circuit stayed an injunction against the implementation of a San Francisco law that requires employers to make certain levels of health care expenditures with respect to San Francisco employees. As a result, these spending mandates went into effect on January 1, 2008, requiring immediate action by employers.*

*The summary of the requirements provided below is based on current regulations and guidance provided by San Francisco. However, we anticipate that additional guidance and regulations may be provided that could modify or clarify the requirements summarized below.*

### Background

In 2006, San Francisco became the first city to enact a law, the [Health Care Security Ordinance](#) (HCSO), requiring health care to be provided to all residents. The law requires covered employers to make health care expenditures with respect to their San Francisco employees and the San Francisco Department of Public Health to provide a health access plan funded through a combination of municipal government and private employer contributions. This plan, [Healthy San Francisco](#), has now been implemented. Covered employers may satisfy their spending mandate in several ways, including by purchasing health insurance coverage for their employees and/or by making payments to San Francisco.

Shortly after enactment of the law, the Golden Gate Restaurant Association filed suit, arguing that requiring employers to spend a minimum amount on employee health care or pay the city to fund its program violated ERISA. On December 26, 2007, U.S. District Judge Jeffrey White agreed, striking down the employer mandate. On January 9, 2008, a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit stayed that ruling, allowing the employer requirements to go into effect immediately. The full Ninth Circuit will review this decision later in 2008 and could uphold or overturn the employer spending mandate. In the meantime, “covered employers” are required to make quarterly “health care expenditures” to or for the benefit of “covered employees.”

### New San Francisco Health Law

The key provisions of the San Francisco HCSO are discussed below.

## Definition of Covered Employer

A “covered employer” generally includes any employer (except public sector employers such as the City and County of San Francisco) that employs an average of 20 or more “persons” (including full-time, part-time, seasonal and temporary workers) per week in any calendar quarter within San Francisco and elsewhere. An employer that does not maintain an office in San Francisco will still be covered if any of its employees (such as sales persons) regularly work in San Francisco an average of 10 or more hours per week.

***BUCK COMMENT.*** *As a practical matter, any national employer of 20 or more employees with even one employee in San Francisco will be subject to these requirements.*

## Definition of Covered Employee

A “covered employee” is any person entitled to the minimum wage in San Francisco who has been employed by the covered employer for at least 90 days and who works on average at least 10 hours per week in the City and County of San Francisco.

The law expressly excludes –

- managerial, supervisory or confidential employees earning more than \$76,851 annually in 2008 (indexed for future years)
- employees eligible to receive benefits under Medicare or TRICARE
- “covered employees” under San Francisco’s Health Care Accountability Ordinance (a separate statute)
- employees who are employed by a non-profit corporation for up to a year as trainees in a bona fide training program
- employees who provide an [Employee Voluntary Waiver Form](#) verifying that they are receiving health care services through another employer, either as an employee or a dependent of an employee. The form must be voluntarily signed by the employee annually.

***BUCK COMMENT.*** *Only the approved form will be effective as a waiver – a previous election to waive coverage under an annual medical enrollment will not be sufficient. This is important because employers that do not make the required health expenditures for an employee and do not procure the required form will have to pay a “health care expenditure” of up to \$3,632.64 for that employee for the year.*

## Definition of Health Care Expenditure

A health care expenditure is any amount paid by a covered employer to a covered employee or to a third party on behalf of a covered employee for medical, dental and vision care services. Administrative costs paid to a third

party are included, but administrative expenses incurred by the employer are not. Health care expenditures must be reduced to reflect employee contributions.

**BUCK COMMENT.** *Although the health care expenditure requirement only applies with respect to covered employees, expenditures with respect to their dependents can be used to meet the employer’s spending mandate.*

Qualifying health care expenditures include –

- payments made to a third party (e.g., premiums) to provide health care services
- payments made by self-insured and/or self-funded programs
- contributions on behalf of a covered employee to a health flexible spending account, a health savings account, a health reimbursement account or a medical spending account
- reimbursements of expenses incurred for health care services
- costs incurred in connection with the direct delivery of health care
- payments on behalf of a covered employee to San Francisco to fund membership in Healthy San Francisco. San Francisco has provided a [Notice to Employee of Payment to the City](#) that *must* be provided to employees by employers who use this option.

**BUCK COMMENT.** *The Ninth Circuit cited the ability of employers to satisfy the health expenditure requirement in several ways – not just through an employer benefit program – as a primary reason for granting the stay.*

### Definition of Health Care Expenditure Rate

The “health care expenditure rate” is the minimum amount of health care expenditure that a covered employer is required to make for each of its covered employees for each hour paid. The following table summarizes the minimum funding requirements for 2008 and 2009. The rates for future years are indexed.

Employer Health Care Expenditure Rate Schedule				
Business Size		January 1, 2008	April 1, 2008	January 1, 2009
Large	100+ Employees	\$1.76/hour		\$1.85/hour
Medium	50-99 Employees	\$1.17/hour		\$1.23/hour
	20-49 Employees	Not Applicable	\$1.17/hour	
Small	1-19 Employees	Not Applicable		

## Calculating and Making Health Care Expenditure

A covered employer's required health care expenditure is the sum of the required health care expenditures for each covered employee for each calendar quarter of the year, payable within 30 days after the end of the quarter. For example, the required health care expenditure for the first quarter of 2008 must be made no later than April 30, 2008.

"Hours paid" includes hours worked in San Francisco (including overtime), as well as vacation hours, paid time off, and sick leave. All hours worked will be assumed to be within San Francisco unless the employer has "clear and convincing evidence" to the contrary. The maximum hours considered are 172 in a single month and 516 in a single quarter.

***BUCK COMMENT.*** *The required health care expenditure will vary by both the size of the employer and the number of hours worked each quarter. For example, the 2008 health care expenditure required for a full-time employee (40 hours a week) working for a large employer will be \$302.72 per month (i.e., 172 hours X \$1.76 per hour) and \$114.40 per month for a part-time employee working 15 hours a week. The potential maximum annual 2008 expenditure would be \$3,632.64.*

An employer can satisfy the health care expenditure requirement by providing more than one option. For example, an employer may purchase health insurance for all full-time employees, while making payments to San Francisco for part-time employees. However, simply offering employees the opportunity to enroll in a contributory plan will not satisfy the employer's obligation – the employee must actually enroll or sign the prescribed voluntary waiver form. And, as noted above, any employee contributions reduce the employer's health care expenditure amount.

**Limited Exceptions.** Regulations issued by the [Office of Labor Standards Enforcement](#) (OLSE) provide two limited exceptions to the spending mandate described above –

- A covered employer that provides uniform coverage to some or all of its employees is deemed to comply with the spending requirement with respect to enrolled employees if the average expenditure rate per employee exceeds the required health expenditure rate. The employer has the option of only including "covered employees" in this calculation, or including all employees participating in the uniform plan, provided that all those employees receive the same coverage. Thus, if an employer offers an HMO and a PPO, the two plans cannot be aggregated for compliance.

***BUCK COMMENT.*** *While not specifically addressed in published guidance, the HCSO staff has indicated that uniform coverage also requires the same plan design. For example, if the employer offers two PPOs with different copays or deductibles, those PPOs cannot be aggregated for determining compliance. However, it is not clear if the same employee contribution level is required for uniform coverage.*

- A covered employer that provides self-funded coverage to some or all of its employees is deemed to comply with the spending requirement for the employees who participate if the preceding year's average expenditure rate meets the required health expenditure rate. As with the first limited exception, the employer has the option of only including "covered employees" in this calculation, or including all employees enrolled in the uniform coverage. If an employer offers an HMO and a PPO, those plans cannot be aggregated for compliance.

**BUCK COMMENT.** *These two limited exceptions only apply with respect to employees enrolled in the employer's medical plan. Employers must still make the required health expenditure for covered employees who waive or are ineligible for employer coverage unless they obtain the prescribed waivers. For example, if all of an employer's 100 full-time (35 hours per week) employees are enrolled in the employer's insured health plan for which the employer pays \$1500 and the employee pays \$500, the employer will satisfy the mandate. This is because the total hours worked in the quarter is 45,500 (100 employees X 35 hours X 13 weeks) and the minimum required health care expenditure is \$80,080 (45,500 hours X \$1.76), which is less than the employer's actual expenditure of \$150,000. However, if the employer also has 10 full-time employees who have elected not to participate and have not signed the waiver form, the required health care expenditure is \$8,008 (10 employees X 35 hours X 13 weeks X \$1.76). If the employer has no health care expenditures for these employees, it must pay this amount to San Francisco within 30 days of the end of the quarter – even though the employer's overall expenditure of \$150,000 exceeds the total required amount of \$88,088 (\$80,080 + \$8,008). Thus, obtaining the required forms from employees waiving coverage who have coverage with another employer would save the employer \$800.80 per employee each quarter.*

## Employer Reporting and Recordkeeping Responsibilities

Each year, employers must provide health care expenditure information to San Francisco on the HCSO Mandatory Annual Reporting Form, which will be mailed to all registered businesses and is to be returned with the employer's annual business registration submission. The first annual reporting for 2007 is due by February 29, 2008, which if not timely provided will subject violators "to penalties and other corrective action." San Francisco has provided a [sample form](#).

**BUCK COMMENT.** *Since the employer spending mandate was not effective until 2008, the instructions state that the employer should complete the form based on its voluntary business practices in 2007.*

Covered employers are also subject to recordkeeping requirements under the law. They must retain the following records for four years from the covered employees' dates of employment –

- itemized pay statements, including items such as gross wages earned, hours worked, deductions, net wages, and applicable hourly rates

- employees' addresses, telephone numbers and initial work dates
- records sufficient to establish compliance with the employer spending requirements, including records of health care expenditures, calculations of expenditures required under the law for each covered employee, and proof documenting that the expenditures were made at least quarterly
- signed employee voluntary waiver forms for every employee for which the employer is seeking an exemption from the spending requirement
- copies of the Notice to Employee of Payment to the City.

Employers may be subject to random audits and inspections by OLSE.

## Penalties

The law includes numerous penalties for noncompliance, including an assessment on employers who fail to make the required health care expenditures. The penalty is up to 1½ times the total expenditure that an employer failed to make, plus interest charges of up to 10%. OLSE can take any appropriate enforcement action needed to secure compliance, including requesting that San Francisco revoke or suspend any registration certificates, permits or licenses until the employer is in compliance.

## Conclusion

Employers must act quickly to ensure compliance because their first filing is due by the end of February. Employers should begin collecting data to determine whether they have employees covered by the new law and what, if any, additional payments will be required for the first quarter of 2008. Buck's consultants are prepared to assist in compliance with these San Francisco requirements.

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*This FYI is intended to provide general information. It does not offer legal advice or purport to treat all the issues surrounding any one topic.*