



For your information

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San Francisco Changes Rules for Employers Using Health Reimbursement Accounts To Satisfy Expenditure Requirements

Since 2008, the City of San Francisco has required that employers make minimum health care expenditures for employees who work in San Francisco, California. One way employers can meet the expenditure requirement is by using HRAs. In response to concerns about the abuse of this option by some employers, San Francisco amended the law to add new requirements that will have a significant impact on existing programs.

Background

In 2006, San Francisco enacted the Health Care Security Ordinance (HCSO), which requires covered employers to make health care expenditures with respect to their San Francisco employees. Employers can satisfy this requirement by providing health insurance coverage for their employees or by making payments to San Francisco. The HCSO defines a covered employer as any employer with 20 or more employees in the United States that has employees in San Francisco. (See our [January 24, 2008](#) and [March 31, 2009](#) issues of *For Your Information*.)

The 2012 minimum health care expenditure for employers with 100 or more employees is \$2.20 per hour for employees who work at least eight hours per week. Some employers chose to satisfy this requirement by contributing to a health reimbursement account (HRA). Typically, any unused amounts in an HRA are forfeited to the employer when the employee terminates or, in some cases, at the end of each year.

HCSO Amendments

Recently, San Francisco [amended](#) the HCSO to limit how HRAs can be used to satisfy the HCSO's expenditure requirements. In addition, the HCSO was amended to provide for [new notice](#) requirements (discussed below) and revisions to the penalties for noncompliance.

New HRA Requirements

Starting in 2012, employer contributions to an HRA will be considered "health care expenditures" under the HCSO only if they meet all of the following requirements:

- The contribution is reasonably calculated to benefit the employee,
- The employer contribution remains available to the employee for at least 24 months from the date of the contribution,
- Within 15 days of each contribution, the employer provides the employee with a written summary listing contributions, expenditures, account balance, and expiration dates for funds in the HRA,
- The employer provides a terminated employee with written notice of the balance in his or her HRA within three business days of termination, and any amount in the HRA remains available to the employee for 90 days following termination, and
- The employer reports the terms of the HRA, including what expenses are eligible for reimbursement, to the City.

Employers offering HRAs to comply with the HCSO that want to continue to do so in 2012 must allow any unused amounts in an employee's account at the end of 2011 to carry over to 2012.

COMPLIANCE ALERT: Employers that use HRAs to satisfy the expenditure requirements will need to make significant plan design and administrative changes. Employers should immediately review their current plans and administrative practices.

INSIGHT

Although the Ninth Circuit Court of Appeals previously found that the HCSO was not preempted by the Employee Retirement Income Security Act (ERISA), these HRA changes could result in a new ERISA challenge.

Notice Requirement

By December 1 of each year, the San Francisco Office of Labor Standards Enforcement (OLSE) will publish and make available a notice with respect to employees' rights and the employer's obligations under the HCSO. The OLSE must publish the notice in all languages spoken by more than 5% of the San Francisco workforce.

Annually, every covered employer is required to post the notice in a conspicuous place. The notice must be posted in English, Spanish, Chinese, and any other language spoken by at least 5% of the employees at the San Francisco workplace or job site. The amended HCSO does not specify when the notice must be published, but OLSE indicated that employers must post the notice for 2012 by January 1, 2012.

COMPLIANCE ALERT: Covered employers must post the OLSE notice by January 1, 2012. The current OLSE notice is in English, Spanish, Chinese, Tagalog, Russian, and Vietnamese. Covered employers also should determine whether there is any other language spoken by at least 5% of the employees at each San Francisco workplace or job site. If a language other than those in which the OLSE notice was issued is spoken by more than 5% of employees, the notice must be translated into that language and posted.

Conclusion

Employers that use HRAs to comply with the HCSO requirements will have to make significant changes in a short time to bring their plans into compliance. Buck can assist in implementing these changes, evaluating alternative compliance approaches, and complying with the new notice posting requirements.

Buck Can Help

- Ensure compliance with the HCSO expenditure and reporting requirements
- Implement the required changes for employers that currently use HRAs to comply with the HCSO
- Evaluate alternative strategies for satisfying the San Francisco expenditure requirements
- Determine whether additional translations of the OLSE notice are needed and assist with the translations