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Deadline Nears for New San Francisco Minimum Healthcare Expenditure Requirements

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New minimum healthcare expenditure requirements that were effective in 2018 will require actions by employers with self-insured health plans before the February 28 deadline. The City has also released the 2019 minimum expenditure rates, annual HCSO notice and employee waiver forms.

Background

Since 2006, the San Francisco Health Care Security Ordinance (HCSO) has required covered employers to make minimum healthcare expenditures on behalf of their San Francisco employees for each hour paid for work performed in San Francisco (including paid time off, like vacation, holidays, sick leave and, more recently, paid parental leave). “Covered employers” are those with 20 or more employees in the U.S. and with at least one employee in San Francisco. A “covered employee” is one who works at least eight hours per week in San Francisco, is entitled to be paid the minimum wage, and has been employed for at least 90 days. Employers can pay for medical, dental, vision or other healthcare coverage (such as employer health savings account or health reimbursement account contributions) and/or make a payment to the city of San Francisco.

Employers are required to meet the minimum expenditure amounts each calendar quarter, with expenditures being made no later than 30 days after the end of each quarter. To determine compliance with the employer minimum spending requirement, employers use premium rates for insured health plans and, prior to 2018, COBRA rates for self-insured plans. Those rates were adjusted for employee contributions. If the minimum expenditure requirement was not satisfied for an employee, the employer can make a payment to the city on behalf of the employee within 30 days after the end of each calendar quarter.

On October 10, 2017, the San Francisco Office of Labor Standards Enforcement (OLSE) published new Health Care Security Ordinance Rules (rules) concerning the employer spending requirement. The new rules were effective in 2018 and included significant changes for self-insured health plans. Starting in 2018 100% of employer expenditures must be irrevocable to count toward the minimum spending requirement — that is, they must be payments that the employer has not retained and cannot recover, even if the employee leaves the job. (See our January 3, 2018 *For Your Information*.)

Annual Reporting

Employers are also required to complete annual reporting to the Office of Labor Standards Enforcement. The annual reporting form for 2018, which must be submitted by April 30, 2019, is usually available on the HCSO website around April 1. Employers can register with the city to receive an email notification when the form is available.

New Rules for Self-insured Plans

The most significant change in the new rules concerned the treatment of self-insured health plans. Under the prior rules, employers were allowed to determine compliance with the employer minimum spending requirement using COBRA rates for self-insured plans. Under the new rules, starting in 2018 employers can no longer use COBRA rates for self-insured plans, and instead are required to use actual claims paid, plus any third-party administrative expenses, to determine compliance with the employer spending requirement. Average claim payments can be used to determine compliance based on employees participating in a “uniform health plan” — a plan with the same benefit design for enrolled employees, “including but not limited to the same co-pay requirements, out-of-pocket maximums, deductibles, coverage tiers and eligibility criteria.” The average can be based on only “covered employees” who work in the city, or based on all employees nationwide who participate in the uniform plan. Claims paid for dependents enrolled in the plan may also be included. For self-insured plans the determination can be done after each calendar quarter, or annually with needed expenditures being made by the end of the February following the end of the calendar year. Claim expenditures must be reduced by employee contributions and any refunds received, such as prescription drug rebates or stop loss payments.

For compliance in calendar year 2018 employers with self-insured plans will need to review the actual expenditures paid in 2018, net of employee contributions, and determine if the minimum expenditure requirements were satisfied. If they were not then additional payments (“top-off payments”) will need to be made by February 28, 2019. “Top-off payments” are owed only to San Francisco employees, including former employees, even if an average expenditure was calculated using a nationwide average.

> **Buck comment.** The OLSE held a webinar on February 8 that provided additional guidance on the new requirements. The OLSE website includes links to the webinar recording, instructions for self-funded plan calculations and a sample employee letter. As special transition relief for 2018, employers can use actual expenditures from either 2017 or 2018 to determine compliance; in future years only actual expenditures in the calendar year being tested can be used.

2019 Minimum Expenditure Rates

The San Francisco Office of Labor Standards Enforcement has also released the minimum amounts for 2019:

Business Size		January 1, 2018	January 1, 2019	Percentage Change
Large	100+ employees	$2.83/hour paid	$2.93/hour paid	3.5% increase
Medium	20 – 99 employees	$1.89/hour paid	$1.95/hour paid	3.2% increase
Small	0 – 19 employees	Exempt	Exempt	Not applicable

Annual HCSO Notice

Covered employers must post an HCSO notice in all workplaces with covered employees. The 2019 notice is available and must be posted in a conspicuous location.

The HCSO notice must be posted in English, Spanish and Chinese and in any other language spoken by at least 5% of the employees at that workplace. The official notice includes English, Spanish, Chinese, Tagalog, Russian, and Vietnamese. If more than 5% of the workers speak a language other than those included in the notice, the employer must translate and post the notice in that language.

Waiver Form

Employees who sign an Employee Voluntary Waiver Form verifying that they have coverage through another employer, either as an employee or a dependent of an employee, are not subject to the minimum healthcare spending requirement. But several requirements must be satisfied:

- The HCSO waiver form must be used, with no alterations. An electronic version of the form can be used.
- The waiver is only valid for one year, after which the employee must sign a new waiver.
- The waiver form must be voluntarily completed by the employee, without pressure or coercion from the employer.

In Closing

Since the new rules are now in effect, employers with self-insured plans should review their compliance with the requirements, including posting the 2019 HCSO notice and obtaining waiver forms each year. Specific to compliance with the 2018 minimum expenditure requirements, employers should:

- Finalize the testing approach to be used; e.g., using 2017 or 2018 expenditures and using San Francisco only or nationwide expenditures
- Collect required claims and expenditure data
- Complete 2018 analysis and make any needed top-off payments to San Francisco employees by February 28, 2019
- Complete the 2018 annual reporting by April 30, 2019

The San Francisco Office of Labor Standards Enforcement has the authority to conduct investigations, monitor compliance, and obtain restitution and penalties for violations of the HCSO. All employers will need to ensure that they are using the most current expenditure rates, notice, and waiver forms in 2019.

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