

Compliance Alert



New SF HCSO Waiver Form Updated November 1

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The San Francisco Office of Labor Standards Enforcement (OLSE) has posted a new [Employee Voluntary Waiver Form](#) for use on or after November 1, 2017. The form permits employees to voluntarily waive their right to employer health care expenditures under the San Francisco Health Care Security Ordinance (HCSO).

HCSO Basics

Under the HCSO, employers with 20 or more employees (50 or more for non-profits) are required to make a minimum level of health care expenditures for certain employees performing work in San Francisco.

[The new 2018 rates:](#)

Employer Size	2017 Rate	2018 Rate
Large: 100+ Employees	\$2.64/hour payable	\$2.83/hour payable
Medium: Business w/ 20-99 Nonprofit w/ 50-99	\$1.76/hour payable	\$1.89/hour payable
Small: Business w/ 0-19 Nonprofit w/ 0-49	Exempt	Exempt

More information on all of these requirements is available on the [OLSE's HCSO website](#). Also, see our ABD Office Hours webinar [The Health Care Security Ordinance: A](#)

[Refresher Course in the HCSO Basics for SF Employers](#) (full recording link on the title slide) for a complete overview of the HCSO requirements for employers.

What Does the New Waiver Require?

The updated Employee Voluntary Waiver Form is designed to meet the [new HCSO rules that took effect October 29, 2017](#). The new rules require that all of the following conditions be satisfied for the waiver to be valid:

- 1) The exact [Employee Voluntary Waiver Form](#) must be used. Employers may not change the form in any way, and no other form qualifies.

ABD Comment: Don't change a comma, don't change the font, don't get creative. Simply print and provide. And needless to say, an employee's waiver of the employer's group health plan is not a waiver of the employer's health care expenditure requirements under the HCSO.

- 2) The employee must voluntarily complete the form without any pressure or coercion from the employee's coworkers or the employer (including supervisor, manager, agents, etc.).

- 3) The employee must complete the section of the form stating how the employee is covered under another employer-sponsored group health plan (e.g., spouse, domestic partner, parent).

ABD Comment: This is a new requirement under the new HCSO rules.

- 4) The form is valid for a period of one year. After that one-year period, the employee may voluntarily choose to sign a new waiver. Employees may choose the date that the one-year waiver period starts, provided it is after the date the waiver is signed and within four months of the date of signing.

ABD Comment: These timing requirements are much more specific than the previous rules.

- 5) Employees may revoke their voluntary waiver at any time. The revocation must be in writing and submitted to the employer.

- 6) Employers must provide the employee with a complete copy of the signed form.

Electronic Versions of the Form Permitted

Employers may use an electronic version of the form as long as it satisfies all of the following conditions:

- a) The text of the electronic form is identical.
- b) The employee can view the entire form when signing electronically.
- c) The website containing the form does not state or imply that the employee is required to provide the form.

These new electronic waiver requirements are a major difference from the previous HCSO rules.

Record Retention

As with other HCSO documents, employers are subject to a four-year record retention requirement for all completed Employee Voluntary Waiver Forms.

Why Would Employees Complete the HCSO Waiver Form?

This is an enduring question in the HCSO world.

The HCSO health care expenditure requirement for covered employers is best conceptually thought of as an addition to the minimum wage in San Francisco. It is hard to conceive of any employee voluntarily waiving the right to some portion of the minimum wage. Yet many employees do choose to voluntarily waive their right to health care expenditures under the HCSO.

By contrast, an ALE subject to the ACA employer mandate pay or play rules is required only to offer coverage (meeting certain requirements) to a full-time employee to avoid potential pay or play penalties. As long as the employee was offered the effective opportunity to enroll, the employee's waiver ends the employer's compliance requirements.

This is not the case with the HCSO. Unlike the ACA offer requirement, the HCSO is a spending requirement. If an employee declines coverage under the company's health plan, the employer still must make the required health care expenditure for the employee (assuming no other exemption applies). In almost all cases, the employer will satisfy the HCSO spending requirement by making contributions to the City Option on the employee's behalf.

Contributions to the City Option are in almost all cases going to be routed to an account referred to by the City as a Medical Reimbursement Account (MRA). These MRAs essentially operate as a City-sponsored HRA—permitting the individual to reimburse any out-of-pocket medical, dental, and vision expenses.

The MRA funds are available to the employee even after the period of employment. Theoretically, the individual will have access to the MRA into perpetuity for health expense reimbursement as long as there is a claim at least once every two years for the account to remain open (and the \$2.75/month administrative fee does not exhaust the assets).

Which raises the question: Who would voluntarily waive the right to receive MRA contributions (again, akin to a super HRA) on their behalf by the employer?

The uncomfortable answer is probably that in most cases employees do not understand what they are waiving. Although the Employee Voluntary Waiver Form highlights the irrationality of signing the form in many ways through capital letters, bold and red font, and boxed-off items, many employees simply ignore the text and assume they are performing the same function as waiving the employer's group health plan.

An employee's decision to waive the employer's group health plan in most cases turns down a large employer contribution to the plan. However, this is generally because the employee has considered the calculus that the employee-share of the premium is not worth the price of admission. In other words, even though the employee is foregoing a significant portion of compensation by declining the employer-share of the premium to the plan, the employee is still better off by enrolling in coverage through a spouse, domestic

partner, or parent (or potentially going uninsured) than paying the required employee-share of the premium.

Waiving the HCSO turns down a large employer contribution to an MRA (up to \$2.83/hour payable) even though it would cost nothing for the employee to receive it. In other words, employees are performing nearly the same function as voluntarily waiving some portion of their wage or salary. It is very likely that most employees who are fully aware of this decision would decline to complete the HCSO waiver.

Note that employers have no responsibility to educate employees on their decision to complete the HCSO Employee Voluntary Waiver Form other than to follow the rules set forth above. It is up to employees to read and understand the text of the form when waiving their right to HCSO health care expenditures.

Action Items

The best practice approach to administering the HCSO Employee Voluntary Waiver Form:

- I. Provide the HCSO Employee Voluntary Waiver Form to new hires if they waive the employer's group health plan.
- II. Provide the new HCSO Employee Voluntary Waiver Form annually at open enrollment for employees who waive the employer's group health plan (per above, the form must be renewed annually to remain effective).
- III. If the HCSO Employee Voluntary Waiver Form will be provided electronically, follow the new electronic distribution rules above.

Employers must make quarterly contributions to the City Option (generally routed to an MRA) for any employees who waive the employer's group health plan but do not complete the HCSO Employee Voluntary Waiver Form (and for whom no other exemption applies). Contributions are due within 30 days of the end of the preceding quarter.

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