Fox Rothschild LLP
ATTORNEYS AT LAW

GUIDE TO SAN FRANCISCO EMPLOYMENT LAWS

Revised November 2013

Tyreen Torner | ttorner@foxrothschild.com | 415.364.5540

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1. SAN FRANCISCO MINIMUM WAGE ORDINANCE:

San Francisco has established a minimum wage higher than that required by California and federal law. Effective January 1, 2013, the San Francisco minimum wage is **$10.55**. Starting January 1, 2014, San Francisco's minimum wage will be **$10.74**.

(a) **Applicable Statute:** San Francisco Administrative Code, Chapter 12R

(b) **Covered Employees:** Employees are entitled to the San Francisco minimum wage if they work more than 2 hours per week within the boundaries of the City and County of San Francisco (including on a part-time or temporary basis) and are not exempt from overtime provisions under federal and California law.

(c) **Retaliation Prohibited:** Employers cannot retaliate against employees for exercising their rights under the Ordinance. Taking adverse action against an employee within 90 days of the person's exercise of rights under the Ordinance raises a "rebuttable presumption" that the action was retaliatory.

(d) **Required Poster:** Employers must display in each workplace a poster in six languages describing the current minimum wage. A downloadable version is also available on the San Francisco Office of Labor Standards Enforcement's (OLSE) website.

(e) **Required Notice:** Employers must provide each Employee at the time of hire the employer's name, address and telephone number in writing.

(f) **Required Documentation:** Employers must retain employee payroll records for four years, and must allow the City to access such records.

(g) **Enforcement and Liability:**

(i) The Ordinance is enforced by the San Francisco Office of Labor Standards Enforcement (OLSE). The OLSE is authorized to settle, request an administrative hearing, or initiate a civil action to enforce the Ordinance.

(ii) Employers being investigated by the OLSE must post or otherwise notify employees of the investigation.

(iii) The OLSE may order reinstatement; payment of back wages; payment of penalties in the amount of $50 to each aggrieved employee for each day the violation occurred or continued; and revocation or suspension of the employer's registration certificates, permits or licenses.

(iv) Additional Administrative Penalties:

Failure to maintain or retain payroll records	$500.00
Failure to allow inspection of payroll records	$500.00
Retaliation – per employee	$1,000.00
Failure to post notice of minimum wage rate	$500.00
Failure to provide notice of investigation to employees	$500.00
Failure to post notice of violation to public	$500.00
Failure to provide employer's name, address and telephone number in writing	$500.00

The penalties increase cumulatively by 50% for each subsequent violation of the same provision by the same employer or person within a three-year period. The maximum penalty that may be imposed in a calendar year for each type of violation listed above is $5,000, or $10,000 if a citation for retaliation is issued. The OLSE may also assess enforcement costs, including reasonable attorneys' fees, that do not count toward the annual maximums.

(h) **Minimum Wage Ordinance References:**

(i) San Francisco Administrative Code, Chapter 12R, available at: http://www.amlegal.com/library/ca/sfrancisco.shtml.

(ii) San Francisco Office of Labor Standards Enforcement's Website: http://sfgsa.org/index.aspx?page=391.

2. PAID SICK LEAVE ORDINANCE (PSLO)

Effective February 5, 2007, San Francisco requires employers to provide sick leave to all employees who work within the City and County of San Francisco.

(a) **Applicable Statute:** San Francisco Administrative Code, Chapter 12W

(b) **Employers and Employees Covered by the PSLO**

(i) **Covered Employers:** The PSLO applies to any employer who directly or indirectly (including through a temporary services or staffing agency) employs a person who works within the geographic boundaries of the City and County of San Francisco. The employer need not have a minimum number of employees to be subject to the PSLO.

(ii) **Covered Employees:** All employees who perform work in San Francisco, including on a part-time or temporary basis, accrue paid sick leave for those hours worked in San Francisco, regardless of where their employer is located and the number of hours worked.

(iii) **Employees Not Covered by PSLO:**

(1) Employees covered by a collective bargaining agreement that expressly waives the benefit.

(2) Employees in San Francisco solely to attend or present at a convention or conference, if they participate in San Francisco conventions or conferences for fewer than 56 hours within a calendar year.

(3) Employees who perform work in San Francisco on an occasional basis amounting to 55 or fewer hours of work within a calendar year.

(4) Independent contractors.

(5) Workers employed at the San Francisco International Airport.

(c) **Accrual of Paid Sick Leave:**

(i) **Employees Begin to Accrue Sick Leave After 90 Days of Employment:** Paid sick leave begins to accrue 90 calendar days after the first day of work for an employer, irrespective of whether the employees worked during their eligibility period.

(ii) **One Hour of Paid Sick Leave Is Accrued for Every 30 "Hours Worked":** Employees accrue one hour of paid sick leave for every 30 hours worked within the City and County of San Francisco after paid sick leave begins to accrue. Paid sick leave accrues only in hour-unit increments, not in fractions of an hour.

(iii) **Definition of "Hours Worked":** Consistent with California state law, "hours worked" means the time during which an employee is subject to the control of the employer. Therefore, sick leave accrues during overtime hours, but does not accrue when employees are on vacation or out sick. Consult counsel to determine whether other time counts as "hours worked."

(iv) **Accrued Paid Sick Leave Hours Carry Over Year-to-Year, But Are Capped at 40 or 72 Hours Depending on Size of Employer:**

Accrued paid sick leave does not expire from year to year (whether calendar year or fiscal year), but the PSLO does limit the number of hours an employee can have "in the bank" at any given time to 72 hours or 40 hours, depending on the size of the employer:

- 10 or Fewer Employees: 40-Hour Accrual Cap
- Over 10 Employees: 72-Hour Accrual Cap

The following employees should be included in the employee "count":

- Full- and part-time employees
- Temporary employees
- Employees working within and outside of San Francisco
- Employees performing work in different locations operated by the same employer.

(v) **Accrued Sick Leave Must Be Immediately Available:** Employers cannot wait to make accrued sick leave available at the end of the pay period or some other future point in time. Paid sick leave must be made available for use as soon as it is accrued.

(vi) **Benefits Must Continue During Leave:** Benefits provided on an hourly basis must also be provided when employees are using paid sick leave hours.

(vii) **Salaried Employees:** The PSLO rate of pay for employees paid on an annual salary is determined as follows:

(1) Divide the annual salary by 53 to get the weekly salary;

(2) Divide the weekly salary by the number of hours the employee is regularly scheduled to work.

(d) **Payment of Sick Leave**

(i) **Sick Leave Pay Is Same as Hourly Wage:** The rate of sick pay must be the same as the employee's hourly wage, not including tips.

(ii) **When Payment Due:** Sick leave must be paid no later than the payday for the next regular payroll period after the sick leave was taken by the employee. However, if the employer has a reasonable verification requirement (see **Section 2(g)(ii)**, below), the employer is not obligated to pay sick leave until the employee has complied with the verification requirement.

(iii) **Cannot Be Paid Out at Separation or "Cashed Out":** Accrued unused paid sick leave does not get paid out at termination, resignation, retirement or other separation. (Note, however, that time accrued through a Paid Time Off (PTO) policy may require payout upon separation.) Unless expressly permitted by bona fide collective bargaining agreement, employees are prohibited from "cashing out" accrued paid sick leave hours.

(e) **Use of Paid Sick Leave:**

(i) **Paid Sick Leave Must Be Allowed for the Medical Need of the Employee *or* Family Member:**

(1) **Employee's Medical Need:** Paid sick leave must be allowed when the employee is ill or injured, or for the purpose of the employee's receiving medical care, treatment or diagnosis.

(2) **Family Member's Medical Need**: Paid sick leave must be allowed to aid or care for a family member who is ill, injured or receiving medical care, treatment or diagnosis. "Family member" includes any of the following:

a. Child (including step-, adopted and foster children, children of a domestic partner and children of a person standing in loco parentis);

b. Parent (including relationships resulting from adoption, step-relationships, and foster care relationships);

c. Legal guardian or ward;

d. Sibling (including relationships resulting from adoption, step-relationships, and foster care relationships);

e. Grandparent (including relationships resulting from adoption, step-relationships, and foster care relationships);

f. Grandchild (including relationships resulting from adoption, step-relationships, and foster care relationships);

g. Spouse or registered domestic partner under any state or local law; and

h. Designated person (where the employee has no spouse or registered partner).

(ii) **Employees Transferred to Work Outside San Francisco:** Employers can prohibit use of sick leave hours if an employee is transferred out of San Francisco, but any accrued hours remain "in the bank" for four years from the employee's last day of work in San Francisco, available for use should the employee return or be scheduled to work in San Francisco during that time.

(iii) **Employers Can Require Use of Paid Sick Leave in Increments of One Hour or Less:** In most employment situations, a requirement that an employee take off more hours than requested would not be considered reasonable by the OLSE.

(f) **Employer's Existing Sick Leave Policy:** An employer with a paid leave policy, such as a paid time off policy, is not required to provide additional sick leave if the following conditions are met:

(i) The paid leave can be used for the same purposes as paid sick leave under the PSLO; and

(ii) The paid leave meets the PSLO's accrual requirements (at least one hour for every 30 hours worked, subject to applicable caps).

Employers are free to provide a more generous leave policy than what is required under the PSLO.

(g) **Other Rights and Obligations:**

(i) **Employer Can Require Reasonable Notice:** Employers may require reasonable notification for use of paid sick leave. What is considered "reasonable" depends on the specific situation. In general, an employer's policy should not be so onerous that it deters legitimate use of paid sick leave.

(ii) **Employer Can Require Doctor's Note:** Employers may require a doctor's note or other verification after an employee's use of paid sick leave for more than three consecutive work days. Employers who suspect abuse of sick leave may also require a doctor's note or other verification. However, consistent with California law, employers should not request disclosure of the diagnosis of the specific health condition prompting the need for paid sick leave.

(iii) **Employer Cannot Require Employee to Find Replacement:** Employers cannot require employees to find replacement workers to cover the hours they are absent from work.

(iv) **No Retaliation:** Employees are protected from retaliation for exercising their rights under this program. Employer cannot discharge, threaten to discharge, demote, suspend, or in any manner discriminate or take adverse action in retaliation for exercising rights protected under the PSLO.

(v) **Paid Sick Leave Cannot Be Counted as an Absence under Employer's Attendance Policy:** Consistent with the PSLO's anti-retaliation provision, if an employer has an attendance policy that may lead to discipline, discharge, demotion, suspension, or any other adverse action, an employee's use of paid sick leave cannot count as an absence under such a policy.

(vi) **Required Poster:** Employers are required to post in a conspicuous place a notice published by the San Francisco Office of Labor Standards Enforcement (OLSE) advising employees of their PSLO benefits. The notice must be posted in English, Spanish, Chinese and any language spoken by at least 5% of the San Francisco workforce. The Notice is provided to employees though the City's annual business registration mailing. A downloadable version is also available on the OLSE's website.

(vii) **Required Documentation:** Employers must document hours worked and paid sick leave taken by employees and keep those records for a minimum of four years.

(h) **Enforcement and Liability:** There are significant penalties for noncompliance with this ordinance and the posting requirement.

(i) **Private Right of Action:** Any aggrieved employee can bring a civil action against the employer on her behalf and on behalf of other aggrieved employees. Prevailing plaintiffs can be awarded reinstatement; back pay; payment of any sick leave unlawfully withheld, multiplied by three; liquidated damages of $50 per hour a violation occurred for each aggrieved employee; reasonable attorneys' fees and costs; and interest.

(ii) **The Office of Labor Standards Enforcement (OLSE):** The Ordinance is also enforced by the San Francisco Office of Labor Standards Enforcement (OLSE), which is authorized to settle, request an administrative hearing, or initiate a civil action in the event of employer noncompliance or interference with OLSE investigative actions.

(i) **PSLO References:**

(i) San Francisco Administrative Code, Chapter 12W, available at: http://www.amlegal.com/library/ca/sfrancisco.shtml.

(ii) San Francisco Office of Labor Standards Enforcement's Website: http://sfgsa.org/index.aspx?page=391.

3. HEALTH CARE SECURITY ORDINANCE ("HCSO")

Effective January 2008, the San Francisco Health Care Security Ordinance ("HCSO") requires employers to spend a minimum amount per hour on health care for their employees who work at least eight hours in San Francisco. The amount employers must spend is specific based on the hours worked by each employee. For 2014, the expenditure rate is $2.44 for employers with 100 or more employees, and $1.63 for employers with 20 to 99 employees. Employers with 19 or fewer employees are exempt from the Ordinance.

(a) **Applicable Statute:** San Francisco Administrative Code, Chapter 14

(b) **Covered Employers:** An employer is covered by the HCSO for any calendar quarter if it meets the following three conditions:

(i) Employs one or more workers within the geographic boundaries of the City and County of San Francisco;

(ii) Is required to obtain a valid San Francisco business registration certificate pursuant to Article 12 of the Business and Tax Regulations Code, and

(iii) Is either a for-profit business with 20 or more persons performing work or a nonprofit organization with 50 or more persons performing work. (This includes all persons working for the entity, regardless of where they are located.) *See* **Section 3(e)(ii)**, below, for a list of employee who count as "persons performing work" under the Ordinance.

(c) **Covered Employees:**

(i) **Eligibility Requirements**: Employers must pay Health Care Expenditures ("HCE") to or on behalf of those employees who:

(1) Are entitled to be paid the minimum wage;

(2) Have been employed for at least 90 days;

(3) Regularly perform at least 8 hours per week within the geographic boundaries of San Francisco, and

(4) Does not meet one of the five exemption criteria discussed in **Section 3(d)**, below.

(ii) **Includes Undocumented Employees:** All employees who work in San Francisco – whether or not they are legally authorized to work in the United States – are covered by the HCSO.

(iii) **Includes Exempt and Non-Exempt Employees:** For employees who are not exempt from the overtime provisions under federal and California law, the HCE is calculated based on all hours worked, including overtime hours worked, up to the 172-hour monthly cap. For

exempt employees, it is presumed that the minimum HCE should be calculated based upon a 40-hour work week, unless there is evidence that the regular work week is less than 40 hours, in which case the hours in a regular work week will be used to calculate the required expenditure.

(iv) **90-Day Eligibility Period:** Employees must be employed for 90 days to begin accruing benefits under the HCSO. If the employee separates from the employment prior to completing the 90-day eligibility period, the prior days of employment count toward the eligibility period if the employee returns to work within one year of the separation. If the employee separates after completing the eligibility period, the employer cannot require completion of a new eligibility period if the employee returns to work within one year of the separation.

(d) **Employees Who Are *Not* Covered:**

(i) **Employees Receiving Health Benefits through Another Employer Who Voluntarily Waive the Benefit:** Employers can obtain a voluntary waiver signed by a covered employee who already has health coverage through another employer. The San Francisco Office of Labor Standards Enforcement (OLSE) publishes an **Employee Voluntary Waiver Form** (available on its website) that employers can use. Note that if the employee has health insurance that is not provided through an employer – *e.g.*, purchased individually – he or she does not qualify for this exemption.

(ii) **Managers, Supervisors, and Confidential Employees:** Employees are not eligible for HCSO benefits if they fall under the definition of "managers," "supervisors" or "confidential employees" under California law, and earn at least $88,212 ($42.41 hourly) in 2014. (In 2013, such employees must earn at least $86,593 annually, or $41.63 hourly.) Consult qualified legal counsel for further information on this exemption.

(iii) **Owners:** Employers are not required to make HCEs to or on behalf of the owner(s).

(iv) **Independent Contractors:** The HCSO applies only to employees.

(v) **Non-Profit Trainees:** Workers employed by a non-profit corporation for up to one year as trainees in a bona fide training program consistent with federal law are not entitled to benefits under the HCSO.

(vi) **Employees Covered by Medicare, TRICARE/ CHAMPUS:** The HCSO does not apply to employees who are covered by Medicare (as distinguished from Medicaid/Medi-Cal) or TRICARE / CHAMPUS (the

federal health care programs for active duty and retired members of the uniformed services, their families and survivors).

(vii) **Employees of City Contractors Receiving Benefits under the HCAO:** The HCSO does not apply to employees who receive health care benefits pursuant to the San Francisco Health Care Accountability Ordinance ("HCAO") (discussed in Section 9.c), which generally requires city contractors and certain tenants to offer health plan benefits.

(e) **How to Calculate Required Health Care Expenditures (HCE):**

(i) **Applicable HCE Rate Depends on Size of Employer:** The applicable HCE rate is adjusted annually and depends on the size of the employer. The size of the employer is determined by the number of "persons performing work" for the business.

Size of Employer	**2013**	**2014**
Large: 100 or more employees	$2.33	$2.44
Medium: 20-99 employees	$1.55	$1.63
Small: 19 or fewer employees	Exempt	Exempt

(ii) **Definition of "Persons Performing Work" for Purpose of Determining Employer Size:** Most workers fall under this definition, regardless of where or how many hours they work. The following employees should be included in the count:

- Permanent employees;
- Temporary and seasonal employees;
- Full-time and part-time employees;
- Employees who work within and outside San Francisco;
- Contracted employees (whether employed directly by employer or through a temporary staffing agency, leasing company, professional organization, or other entity);
- Commissioned employees; and
- Owners who perform work for compensation.

➢ **Fluctuating Number of Employees:** For businesses employing a fluctuating number of employees during a quarter (13 weeks), employer size is based on the weekly average number of persons performing work for compensation during that quarter. Thus, a business that employs 5 persons during the first 6 weeks of the quarter and 20 persons during the last 7 weeks of the quarter would not be covered because it has employed an average of only 13 persons per week during that quarter: [(5 persons/week x 6 weeks) + (20 persons/week x 7 weeks)]/13 weeks = 13 persons/week. Note,

however, that averaging is only permitted where the number of employees fluctuates from week to week.

(iii) **Based on "Hours Paid" to the Employee:** For each employee, the minimum HCE is determined quarterly by multiplying the applicable HCE rate by the number of "hours paid" to the employee. "Hours paid" is defined as:

(1) Hours for which the employee is paid wages for work performed (including overtime) within San Francisco; and

(2) Hours for which the employee is entitled to be paid wages, including but not limited paid vacation hours, paid time off, and paid sick leave hours.

(iv) **"Hours Paid" Is Capped at 172 Hours / Month:** Employees can earn HCEs for up to 172 hours in a single month or 516 hours in a single quarter.

(f) **Qualified Health Care Expenditures:** Employers can meet their spending obligation by purchasing insurance, paying into public programs for the uninsured, contributing to health savings accounts, or by direct reimbursement to employees for their health care expenses. Examples of qualified Health Care Expenditures (HCEs) may include:

(i) **Health Insurance** (payment of premiums for group health plan coverage);

(ii) **City Option** (direct payments to the City of San Francisco for its employees to use the co-called "City Option," also known as "Healthy San Francisco");

(iii) **Health Reimbursement Accounts (HRAs)** (contributions to an HRA or a medical/health savings account); and

(iv) **Cash reimbursements** (reimbursement to the employee for expenses incurred in the purchase of health care services).

(g) **Affordable Care Act May Limit Employer's Options:** The Patient Protection and Affordable Care Act (PPACA), commonly called the Affordable Care Act (ACA) or "Obamacare," is a federal statute that generally puts in place comprehensive health insurance reforms. It sets higher thresholds for the number of employees a business must employ (50 or more full-time employees) and the number of hours employees must work (30 hours per week) before health care requirements apply. Employers doing business in San Francisco must comply with both the ACA and the HCSO. However, HRAs and the City Option may not satisfy employers' obligations under the ACA. Additional guidance from the federal government is expected. Consult experienced counsel

before proceeding with an HRA or the City Option to satisfy the HCSO requirements.

(h) **Other Rights and Obligations**

(i) **Funds Must Be Available for 24 Months:** Beginning January 1, 2012, employers must keep contributions available for at least 24 months after the date of the contribution.

- **Roll-Over of Any Balance as of December 31, 2011:** A 2011 amendment to the HCSO required that employers "roll over" any December 31, 2011 account balance to January 1, 2012, in order to ensure that participants start 2012 with an account balance. Employers could elect to have these rolled-over funds expire two years after the original contributions were made (staggered expiration dates), or have them expire 24 months from January 1, 2012.

(ii) **Health Care Expenditures Must Be Made Quarterly:** HCEs must be made quarterly, within 30 days of the end of the preceding quarter:

Quarter		**Contribution Due Date** (30 days after end of quarter)
1Q	January 1 – March 31	April 30
2Q	April 1 – June 30	July 30
3Q	July 1 – September 30	October 30
4Q	October 1 – December 31	January 30

(iii) **Employers Cannot Deduct HCEs from Paychecks:** The minimum HCE must be paid by the employer; thus, a deduction from the employee's earned wages for deposit in the employee's health savings or flexible spending account, for example, will not satisfy the employer's obligations under the HCSO. Likewise, an employee's contribution towards his/her health insurance premium cannot be credited towards the employer's minimum HCE.

(iv) **HCEs Must Be Paid Even if an Employee Chooses Not to Participate in Employer's Health Plan:** An employer that establishes or maintains a health insurance program that requires contributions by a covered employee must do more than offer the employee an opportunity to participate in such a program. If the employee declines to participate in such a program, the employer must satisfy its employer spending requirement in some other manner.

(v) **Employees Are Entitled to Any HCEs Earned But Not Yet Contributed at the Time of Separation:** Employers must contribute the applicable HCEs for all hours paid to a covered employee, even if the employment relationship is terminated before the end of the quarter. Employers that have not yet made the quarterly HCE for a covered employee must make the expenditure either at the time of separation or on the next quarterly contribution deadline (*i.e.*, 30 days after the end of the quarter). If an employer has chosen to purchase health insurance for its covered employees, COBRA payments to continue health insurance coverage also qualify as valid health care expenditures.

(vi) **Simply Offering Health Insurance Plan May Not Be Enough:**

- The premiums that an employer pays for medical insurance for its covered employees count toward its required HCEs, so if that amount meets the minimum required under the HCSO, the employer will have no further obligations. However, if the amount spent on premiums does not meet the minimum expenditure amount set by the HCSO, the employer must decide how it will spend the difference.
- Employers who provide health benefits only to full-time employees must be sure to make the requisite HCEs for all part-time employees who work at least eight hours per week in San Francisco.

(vii) **Required Documentation:** Employers must track HCEs for each covered employee and keep all relevant records for a minimum of four years. Employers must report on their HCEs on an annual basis using the Annual Reporting Form (ARF), available at http://www.sfgov.org/olse/hcso.

(viii) **Annual Report Due April 30th of Each Year:** Covered employers must submit an Annual Reporting Form (ARF) to the OLSE by April 30th of each year. The ARF provides data on HCEs made in the previous year, and is ARF is available on the OLSE's website, http://www.sfgov.org/olse/hcso. Employers who fail to submit a completed form by the April 30th due date are subject to penalties and other corrective action. (*See* **Section 3(j)**, below.)

(ix) **City Option Notice to Employees:** Upon contributing to the City Option, employers must provide their employees with a one-time **Employee Health Care Payment Confirmation**.

(x) **Actions to Avoid Employer Coverage Prohibited:** The HCSO makes it unlawful for an employer to reduce the number of employees in order to avoid being considered a covered employer, or to be subject to a lower health care expenditure rate.

(xi) **Discrimination and Retaliation Prohibited:** It is unlawful for an employer to discipline, discharge, demote, suspend, or take any other adverse action against an employee for exercising his/her rights under the HCSO. It is illegal for an employer to fire an employee who does not wish to waive his or her right to the mandatory health care expenditure, even if that employee is already receiving health insurance coverage from another employer.

(xii) **Customer Surcharges:** If an employer imposes a surcharge on its customers to cover the cost of the HCE requirement, the full amount of the surcharge must be spent on employee health care. Violators can be investigated for consumer fraud.

(i) **Additional Requirements for Health Reimbursement Accounts**:

- **NOTE: The Affordable Care Act may make HRAs a less desirable option for employers. *See* Section 3(g), above.**

(i) **Definition of "Reimbursement Account":** A reimbursement account is a health savings account (as defined under Section 223 of the United States Internal Revenue Code and described in IRS Publication 969, PDF) or any other account having substantially the same purpose or effect as a health savings account. These include:

(1) Health Reimbursement Accounts (also referred to as a Health Reimbursement Arrangements or HRAs);

(2) Flexible Spending Accounts (FSAs); and

(3) Medical Savings Accounts (MSAs).

(ii) **Flexible Spending Accounts Do Not Satisfy the HCSO's Requirements:** Because funds contributed to an FSA are only available to the employee for one calendar year, these accounts do meet the requirements of the HCSO (which requires that funds be made available for at least 24 months).

(iii) **Written Contribution Summary Required:** Within 15 days of the date of a contribution, employers must provide written summaries of reimbursement account contributions that include all of the following:

(1) Name, address and telephone number of any third party to whom the contribution was made;

(2) Date and amount of contribution;

(3) Date and amount of any debits or credits to the account since the most recent contribution summary provided to the employee;

(4) Account balance; and

(5) Any applicable expiration dates for the funds in the account.

- **NOTE:** The San Francisco Office of Labor Standards Enforcement (OLSE) has developed a sample **Contribution Summary**, which is available on its website.
- **Contribution and Summary Due Dates for HSAs:**

Quarter		Contribution Due Date (30 days after end of quarter)	Summary Due Date (15 days after contribution)
1Q	January 1 – March 31	April 30	May 15
2Q	April 1 – June 30	July 30	August 14
3Q	July 1 – September 30	October 30	November 14
4Q	October 1 – December 31	January 30	February 14

(iv) **Requirements at Separation:** The employer must comply with the following requirements upon an employee's separation:

(1) Any **remaining balance** in the account at the time of separation must remain available to the employee for a minimum of **90 days** from the date of separation.

(2) Within **three days** following the separation, the employee must receive a written notice ("**Separation Notice**"), which includes the balance in the account and any applicable expiration dates for the funds in the account. A model Separation Notice is available OLSE's website.

(3) **Funds already earned but not yet contributed** to the account must either be:

a. Contributed to the account at the time of separation, in which case an accounting of this contribution must be included in the Separation Notice; *or*

b. Contributed to the account on the next regular contribution deadline (*i.e.*, no later than 20 days after the end of the quarter), in which case the following criteria must be met:

i. The Separation Notice must indicate that the employee is entitled to a final health care expenditure to be paid prior to thirty days after the end of the quarter;

ii. The employee must be provided a Contribution Summary within 15 days of the post-separation contribution; and

iii. The post-separation contribution must remain available to the employee for at least 90 days from the date of contribution.

(v) **Annual Reporting Requirement:** If an employer uses a reimbursement account to satisfy its obligations under the HCSO, it must report to the San Francisco Office of Labor Standards Enforcement (OLSE), on an annual basis, the terms of such accounts, including which medical expenses are eligible for reimbursement. The OLSE provides specific instructions on this reporting requirement on its website, http://www.sfgov.org/olse/hcso.

(j) **Enforcement and Liability:** The ordinance is enforced by the San Francisco Office of Labor Standards Enforcement (OLSE). The OLSE is authorized to settle, request an administrative hearing, or initiate a civil action in the event of employer noncompliance or interference with OLSE investigative actions.

- **Administrative Penalties:** In addition to corrective action, the OLSE can impose administrative penalties as follows:

Violation	Penalty
Failure to make required health care expenditures	Up to $1,000 for each employee for each week that expenditures were not made. (The OLSE is *required* to impose penalties upon employers who fail to make the required HCEs within five business days of the quarterly due date (which is 30 days after the conclusion of each quarter).)
Failure to cooperate with OLSE audit or investigation	$25 per day for each day violation occurs.
Failure to allow access to records of health care expenditures	$25 for each worker whose records are at issue for each day the violation occurs.
Failure to maintain or retain accurate and complete records	$500.00
Failure to satisfy annual reporting requirement	$500.00
Reduction of number of employees to avoid or minimize duties under Ordinance	$25 per day for each day violation occurs.
Retaliation, harassment or discrimination	$100.00 for each aggrieved employee for each day violation occurs.

(k) **HCSO References:**

(i) San Francisco Administrative Code, Chapter 14, is available at: http://www.amlegal.com/library/ca/sfrancisco.shtml

(ii) San Francisco Office of Labor Standards Enforcement: http://www.sfgov.org/olse/hcso.

(iii) FAQs about Affordable Care Act Implementation Part XI (January 24, 2013): http://www.dol.gov/ebsa/faqs/faq-aca11.html

(iv) IRS Notice 2013-54 (September 14, 2013): http://www.irs.gov/pub/irs-drop/n-13-54.pdf

4. FAMILY FRIENDLY WORKPLACE ORDINANCE (FFWO)

Effective January 1, 2014, the San Francisco Friendly Workplace Ordinance (FFWO) gives certain employees the right to request a flexible or predictive work arrangement to assist with care giving responsibilities, subject to the employer's right to deny a request based on business reasons.

(a) **Applicable Statute:** San Francisco Administrative Code, Chapter 12Z

(b) **Covered Employers:** The Ordinance applies to an employer who regularly employs 20 or more employees, including through a temporary services or staffing agency.

(c) **Covered Employees:** The Ordinance applies to employees, including part-time employees, who meet the following requirements:

(i) Employed within the geographic boundaries of the City and County of San Francisco;

(ii) Has been employed for six months or more; and

(iii) Works at least eight hours per week on a regular basis.

(d) **Employees Exempted from Ordinance:**

(i) **Certain Public Safety and Public Health Employees:** The OLSE has the authority to exempt private employees working in public safety or public health functions, upon request of the employer, based on the operational requirements according to criteria developed by the OLSE.

(ii) **Waiver through Collective Bargaining:** The ordinance does not apply to employees covered by a bona fide collective bargaining agreement (CBA) to the extent the requirements of the Ordinance are expressly waived in the CBA in clear and unambiguous terms.

(e) **Right to Request Flexible or Predictable Working Arrangement:** Any covered employee may request a Flexible or Predictable Working Arrangement subject to the following requirements:

(i) **Caregiving Purpose:** The reason for the request must be to assist with the caregiving responsibilities for any of the following persons:

(1) Child or children for whom the employee has assumed parental responsibility;

(2) Employee's parent age 65 or older; or

(3) Person or Persons with a "Serious Health Condition" in a "family relationship" with the employee.

(ii) **Definition of "Serious Health Condition":** An illness, injury, impairment or physical or mental condition that involves either of the following (1) inpatient care in a hospital, hospice or residential health care facility; or (2) continuing treatment or supervision by a health care provider.

(iii) **Definition of "Family relationship":** A relationship in which a caregiver is related by blood, legal custody, marriage, or domestic partnerships as defined in SF Administrative Code Chapter 62 or California Family Code § 297.

(iv) **Types of Arrangements Employees Can Request:** The request may include but is not limited to a change in the employee's terms and conditions of employment as they relate to:

(1) The number of hours the employee is required to work;

(2) The times when the employee is required to work;

(3) Where the employee is required to work;

(4) Work assignments; or

(5) A predictable work schedule.

(v) **Request Must Be Specific and Formalized in Writing:** An employee's initial request for a Flexible or Predictable Working Arrangement may be made <u>verbally</u>, after which the employer must instruct the employee <u>to prepare a written request</u> that includes all of the following:

(1) The requested arrangement;

(2) The requested effective date;

(3) The requested duration; and

(4) An explanation of how the request is related to caregiving.

(vi) **Employee Limited to Two Requests Every Twelve Months:** Generally, employers must consider up to two requests made by an employee every twelve months.

(1) **Exception for Revocation of Flexible or Predictable Working Arrangement by Employer:** Each time the employer revokes a Flexible or Predictable Working Arrangement, the employee can make an additional request.

(2) **Exception for Major Life Event:** An employee can exceed two requests every twelve months if he or she experiences a "major life event," which is defined as either (a) the birth of an employee's child; (b) the placement with the employee of a child through adoption or foster care; <u>or</u> (c) an increase in an

employee's caregiving duties for a person with a "serious health condition" who is in a "family relationship" with the employee.

a. "Serious health condition" means an illness, injury, impairment of physical or mental condition that involved either inpatient care, or continuing treatment or supervision by a health care provider.

b. "Family relationship" means a relationship in which a caregiver is related by blood, legal custody, marriage, or domestic partnerships as defined in SF Administrative Code Chapter 62 or California Family Code § 297.

(f) **Employer's Response to Request**:

(i) **Meet with Employee within 21 Days:** The employer must meet with the employee within 21 days of a request.

(ii) **Respond in Writing within 21 Days of Meeting:** The employer must consider and respond to a request in writing within 21 days of the meeting. The deadline may be extended by agreement with the employee confirmed in writing.

(iii) **May Request Verification:** An employer can require verification of caregiving responsibilities as part of the request.

(iv) **Decision to Grant Request:** An employer who grants the request must confirm the arrangement in writing to the employee.

(v) **Decision to Deny Request:** An employer who denies a request must provide a written notice to the employee that complies with the following requirements:

(1) Explains the bona fide business reasons for the denial;

(2) Notifies the employee of the right to request reconsideration;

(3) Includes a copy of the text of San Francisco Administrative Code § 12Z.6 (right to request reconsideration).

(g) **Definition of "Bona Fine Business Reason":** Employers can deny a request for a Flexible or Predictable Working Arrangement based on a "bona fide business reason," which can include but is not limited to the following:

(i) The identifiable cost of the change requested, including but not limited to the cost of productivity loss, retaining or hiring employees, or transferring employees from one facility to another.

(ii) Detrimental effect on ability to meet customer or client demands.

(iii) Inability to organize work among other employees.

(iv) Insufficiency of work to be performed during the time the employee proposed to work.

(h) **Request for Reconsideration of Denial:** If the employer denies a request for a Flexible or Predictable Working Arrangement, the employee may submit a request for reconsideration within 30 days of the decision. The employer must meet with the employee to discuss the request for reconsideration within 21 days after receiving the request. The employer must inform the employee of its final decision in writing within 21 days after this meeting. If the request for reconsideration is denied, the notice must explain the employer's bona fide business reasons for the denial.

(i) **Revocation of Flexible or Predictable Working Arrangement:** Either the employer or employee may revoke a Flexible or Predictable Working Arrangement with 14 days' notice to the other party. The employee may submit a request for a different Flexible or Predictable Working Arrangement. Each time the employer revokes a Flexible or Predictable Working Arrangement, the employee can make an additional request.

(j) **Retaliation Prohibited:** Employers are prohibited from discharging, threatening to discharge, demoting, suspending or otherwise taking an adverse employment action against employees who exercise their rights under the Ordinance. Employers are also prohibited from interfering with employees' rights under the Ordinance.

(k) **Notice and Posting Requirements:** Employers must post a notice informing employees of their rights under the Ordinance. The San Francisco Office of Labor Standards Enforcement will publish such a poster by January 1, 2014.

(l) **Documentation Requirements:** Employers must retain documentation required by the ordinance for three years from the date of the of a request for Flexible or Predictable Working Arrangement, and must allow the San Francisco Office of Labor Standards (OLSE) Enforcement access to inspect such records.

(m) **Implementation and Enforcement:** The Ordinance is enforced by the San Francisco OLSE. Significantly, the OLSE is not authorized to find a violation based on the validity of the employer's bona fide business reasons for denying an employee's request. It is, however, authorized to determine violations of the Ordinance's procedural, notice, posting, and documentation requirements. Such violations are punishable by administrative penalties up to $50.00 for each aggrieved employee for each day that the violation occurred or continued. The OLSE may also initiate a civil action.

(n) **FFWO References:**

(i) San Francisco Administrative Code, Chapter 12Z, available at: http://www.amlegal.com/library/ca/sfrancisco.shtml.

(ii) San Francisco Office of Labor Standards Enforcement will publish additional information on its Website: http://sfgsa.org/index.aspx?page=391.

5. SAN FRANCISCO COMMUTER BENEFITS ORDINANCE (SFCBO)

Effective January 19, 2009, the San Francisco Commuter Benefits Ordinance ("SFCBO") requires San Francisco employers with 20 or more employees to provide commuter benefits to employees who work an average of at least 10 hours per workweek within the geographic boundaries of San Francisco.

(a) **Applicable Statute:** San Francisco Environment Code § 427

(b) **Covered Employers:** The SFCBO applies to employers meeting the following three criteria:

(i) **Has 20 or more employees** (All persons performing work for the company on a full-time, part-time or temporary basis, including those who perform work outside the geographic boundaries of San Francisco, are counted, including individuals placed through a temporary service or staffing agency.)

(ii) **Does business within San Francisco** (The SFCBO also applies to employers based outside of San Francisco, but have employees working in the City, if the employer is still required to obtain a business registration certificate.)

(iii) **Is required to obtain a business registration certificate**

(c) **Covered Employees:** To qualify for benefits under the SFCBO, the employee must meet the two following requirements:

(i) Works at least 10 hours per workweek, averaged over one month, within the geographic boundaries of the City and County of San Francisco and for the same employer.

(ii) Qualifies as an employee entitled to minimum wage under California minimum wage law.

- **NOTE: Union Employees Not Exempted:** The SFCBO also applies to employees covered by a bona fide collective bargaining agreement.

(d) **Commuter Benefit Options:** Employers must offer at least one of the following transportation benefits:

(i) **Pre-Tax Employee-Paid Payroll Deduction:** Through their paycheck, employees have the option to set aside pre-tax funds each month to pay for their transit, vanpool and parking expenses. Effective January 1, 2013, the IRS pre-tax limit is $245/month for transit and vanpool expenses and $245/month for parking expenses, including parking at or near public transportation. Subsidies are typically provided in the form of a transit card or voucher.

(ii) **Tax-Free Employer-Paid Subsidy:** Employer pays a monthly subsidy for transit or vanpool costs equivalent to the value of a San Francisco Muni Fast Pass 'A' (currently $76/month). Bicycle commuters may be offered a subsidy up to $20/month to cover bicycle maintenance and repairs, provided they do not receive an additional transit benefit. As with the Pre-Tax Employee-Paid Benefit, employers do not pay payroll taxes and employees do not pay federal or payroll taxes on the benefit amount, up to the current IRS pre-tax limit. (Employers may offer a subsidy in excess of the monthly IRS pre-tax limit, but will be required to pay taxes on the amount of the benefit that exceeds the pre-tax limit.) Subsidies are typically provided in the form of a transit card or voucher.

(iii) **Employer Provided Transit:** Employer offers workers free shuttle service on a company-funded bus or van between home and place of business.

(e) **Alternative Compliance Options:**

(i) **Carpooling:** Businesses not located near transit lines may offer carpool benefits to their employees, such as subsidizing parking and toll costs or priority parking for carpoolers, to meet the Ordinance's requirements and encourage ridesharing to work. If this option is offered, pre-tax benefits for an employee who chooses to travel on transit or by vanpool must also be made available. Carpool subsidies are not tax-free under current IRS guidelines.

(ii) **Telecommuting:** San Francisco businesses with employees who solely telecommute and do not travel to an office location are not required to provide a commuter benefits program. However, if employees telecommute on a temporary basis or part of the week only, the employer is requires to comply with the Ordinance and offer a commuter benefits program. Businesses with all employees telecommuting are still required to complete the annual Compliance Reporting Form.

(f) **Required Poster:** Employers must post a compliance certificate at the worksite visible to all employees.

(g) **Reporting Requirements:** All San Francisco employers, whether or not they need to comply with the SFCBO, must submit an Annual Compliance Form to the CummuteSmart program at the San Francisco Department of Environment by April 30th of each year.

(h) **Businesses New to San Francisco:** New San Francisco employers have 90 days to set up a commuter benefits program and submit an Employer Compliance Reporting Form.

(i) **Enforcement and Liability:** The Ordinance is enforced by the San Francisco Department of Environment. Failure to comply with the SFCBO, including its reporting requirements, will result in an "infraction" of monetary fines against the employer of $100 for the first violation, $200 for a second violation within the same year, and $500 for each additional violation within the same year.

(j) **SFCBO References:**

(i) San Francisco Environment Code, Section 427, is available at: http://www.amlegal.com/library/ca/sfrancisco.shtml.

(ii) San Francisco Department of Environment's Website: http://www.sfenvironment.org/transportation/sustainable-commuting-programs/commuter-benefits/businesses/employees.

6. HEIGHT AND WEIGHT DISCRIMINATION

San Francisco prohibits employment discrimination and harassment based on height and weight. The employer advocating the use of a weight or height standard bears the burden of proving the standard is a bona fide occupational qualification. San Francisco also requires employers to provide "readily achievable modifications in the workplace including, but not limited to, accessible furnishings, workplace layout, and equipment." Employers must also ensure that common areas such as employee lounges, cafeterias, health units and exercise facilities are accessible to people of all sizes. These requirements are enforced by the San Francisco Human Rights Commission. (Statutory Authority: SF Administrative Code Chapter 12A; SF Police Code, Art. 33, § 3303.)

7. LIMITATIONS ON DRUG TESTING

San Francisco limits drug testing of employees, but places no restrictions on testing of applicants.

(a) **Applicable Statute:** San Francisco Police Code, Article 33A

(b) **Restrictions:** San Francisco requires that all of the following conditions exist before a drug test is performed on an employee:

- (i) Employer has reasonable grounds to believe that an employee's faculties are impaired on the job;
- (ii) The employee works in a position where such impairment presents a clear and present danger to the physical safety of the employee, another employee or to a member of the public; and
- (iii) The employer provides the employee, at the employer's expense, the opportunity to have the sample tested or evaluated by a State- licensed independent laboratory/testing facility and provides the employee with a reasonable opportunity to rebut or explain the results.

(c) **No Random Testing:** Employers cannot request or require random or company-wide blood, urine or encephalographic testing.

(d) **Monitoring Toxic Exposures Permitted:** Employers can conduct medical screening, with the express written consent of the employees, to monitor exposure to toxic or other unhealthy substances in the workplace or in the performance of their job responsibilities.

(e) **Employers Can Prohibit Workplace Drug Use or Intoxication:** San Francisco does not restrict an employer's ability to prohibit the use of intoxicating substances during work hours, or restrict an employer's ability to discipline employees for being under the influence of intoxicating substances during work hours.

8. LAWS APPLICABLE TO CITY CONTRACTORS:

(a) **Prevailing Wage:** Workers on government-funded construction projects must be paid prevailing wages. In California, the Department of Industrial Relations sets the prevailing wage rate for each craft. San Francisco has adopted these rates for City-funded projects. The current prevailing wage rates are available on the Internet at http://www.dir.ca.gov/DLSR/PWD.

(b) **Minimum Compensation Ordinance (MCO):** The MCO generally requires City contractors that provide services and tenants at the San Francisco Airport to provide to their covered employees: (1) no less than the MCO hourly wage in effect; (2) 12 paid days off per year (or cash equivalent); (3) 10 days off without pay per year. The Minimum Compensation Ordinance rate is adjusted on January 1 each year. The MCO hourly wage for 2013 is $12.43. For 2014, the rate is $12.66.

(c) **Health Care Accountability Ordinance (HCAO):** The Health Care Accountability Ordinance (HCAO) generally requires City contractors and certain tenants to offer health plan benefits to their covered employees, to make payments to the City for use by the Department of Public Health, or, under limited circumstances, to make payments directly to their covered employees. Effective July 1, 2013, covered employers who make payments to San Francisco General Hospital to satisfy the requirements of the HCAO must pay $4.00 per hour, capped at $160.00 per work week. This rate is adjusted for inflation annually on July 1.

(d) **Sweatfree Contracting Ordinance:** This ordinance generally prevents the San Francisco City and County government from purchasing goods produced in sweatshops that refuse to meet minimum standards for wages and working conditions. Effective January 24, 2013, the minimum wage rate, including benefits, is $11.27 for products produced in the 48 contiguous states and D.C., $14.08 for Alaska, and $12.96 for Hawaii. The minimum rate for non-U.S. produced goods vary by country.

(e) **Displaced Worker Protection Act:** Among other provisions, the Displaced Worker Protection Act requires security and janitorial or building maintenance contractors that employ 25 or more persons to implement a transition employment period for employees employed by the terminated contractor or its subcontractors.

(f) **Non-Discrimination in Contracts:** Companies that wish to bid for contracts with the state of California, or to renew existing contracts to provide good or services of $100,000 or more in a fiscal year to the state, have to certify that they do not discriminate in the provision of benefits between married spouses and registered domestic partners. Similar requirements apply to contracts with the cities of San Francisco, Los Angeles, Oakland, Berkeley and the County of San Mateo. A few narrow exceptions apply.