

# California Imposes New Flexible Spending Account Notice Requirement On Employers

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Beginning with plan years that end in 2020 California employers maintaining flexible spending accounts, or “FSAs,” will be required by a new amendment to the state’s Labor Code, enacted August 30, 2019, to notify the employee participants of any “deadline to withdraw funds before the end of the plan year.” FSAs are expense reimbursement plans that are part of an employer’s cafeteria plan under Section 125 of the Internal Revenue Code. They permit employee pre-tax salary contributions to go into an account from which the employee may be reimbursed during a plan year for expenses incurred for medical care, dependent care and/or adoption assistance.

The imprecisely worded three-sentence law appears to mandate notification of FSA participants before they will lose FSA coverage of reimbursement claims upon a mid-year termination of employment or because of a mid-year termination of the FSA plan, which could occur because of a mid-year sale or acquisition of the employer sponsor. It also seems to require giving notice of any mid-year *deadline to submit claims* for reimbursement of expenses where the time by which the expenses must have been incurred was some earlier date. But the statute gives no mandatory notice language or model form, nor any specific required notice timing or specific penalty for violation.

As with many other such state statutes, the validity of the new law will likely be successfully challenged in court as it applies to *ERISA-covered* FSAs since ERISA

generally preempts state laws regulating ERISA plans. FSAs covering *health or medical care* expenses are employee welfare plans that ERISA normally covers. That said, ERISA does not cover health or other FSAs sponsored by church organizations or by most governmental authorities. In addition, FSAs covering adoption assistance and most FSAs covering dependent care assistance are also not covered by ERISA, regardless of the type of employer. For that reason, a court decision holding the law to be preempted by ERISA would not apply to such ERISA exempted FSAs.

Employers maintaining FSAs for California employees, whether or not subject to ERISA, are advised to try to comply with the new requirement by giving at least an annual notice. The statute requires giving the notice to FSA participants in two different forms, only one of which can be electronic. In addition to an email or text message notification, the employer should also annually notify employees by mail, telephone, or in-person notice.

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