

# BENEFITS BULLETIN

## California Enacts New FSA Notification Requirement

California recently enacted a new law, **AB 1554**, which imposes a notice requirement on employers who have California employees that participate in a health care flexible spending account (FSA), a dependent care FSA, or an adoption assistance FSA.

This new law is effective **January 1, 2020**.

### Claim Submission Deadline Requirement

Whether or not this was the new law's intent (which may be clarified in the future), the new law states that the employer shall notify an employee who participates in a FSA of any deadline to withdraw funds **before the end of the plan year**. However, most FSAs permit a "run-out period" designated by the employer. A run-out period is a period after the end of the plan year during which a participant can submit a claim for reimbursement for a qualified benefit incurred during the plan year. This means that a plan may provide a deadline on or after the end of the plan year for submitting a claim for reimbursement for the plan year (usually 30, 60 or 90 days).

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Therefore, the language of the new law limits the notification requirement to apply only in certain situations where a FSA participant must submit a claim before the end of the plan year. For instance, the notification requirements would apply when a FSA participant's employment is terminated mid-year or if FSA plan is terminated mid-year (for example, due to a sale or acquisition of the employer sponsor).

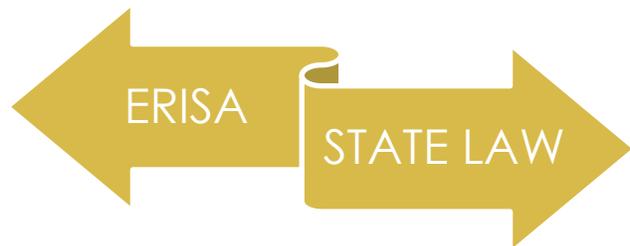
## Form of Notification

Employers must provide the notice to employees where AB 1554 applies via **two different forms, one of which may be electronic.** The law lists permissible means of communication, including: email, text message, postal mail, telephone or in-person communication. The statute does not provide a model notice or any mandatory language required for the notice.

Again, employers may have already complied with both notice requirements. Most employers have distributed the FSA Summary Plan Description (SPD), whether in paper form or electronic form (which would describe the “run-out period”). Employers may also have provided other employee communication that contains the mid-year run-out rules, including open enrollment materials or information provided by employer’s FSA claims administrator.

## ERISA Preemption

ERISA, a federal law, expressly preempts (overrides) state laws that relate to ERISA employee benefits plans. Generally, a health FSA is a self-funded, ERISA-covered group health plan and, as such, is subject to the ERISA requirements. Therefore, an employer’s health FSA is subject to ERISA and employers could assert that California law would not apply. However, there has been no official guidance on this issue and it is unclear what approach the courts would take if challenged on the validity of the new law. Whether or not ERISA preemption applies to health FSAs, employers should still make plans to comply with the notification requirements.



In addition, employers must keep in mind that ERISA preemption may only apply to certain health FSAs. A health FSA sponsored by a government or church employer would not be subject to ERISA. In addition, dependent care and adoption assistance FSAs are not subject to ERISA and are subject to California notice requirements.

## Timing and Penalties

The statute does not state any specific timing requirements for the notices or specific penalties for violation.

## Action Items

- ✓ If you are an employer (whether or not you are located in California) that has California employees who are FSA participants, review your FSA plan(s) for any deadlines to submit claims before the end of the plan year;

- ✓ If you have a FSA SPD, confirm that the disclosures are already in the SPD and make sure the SPD is properly distributed;
- ✓ Employers may need to create an open enrollment notice or integrate new notices in any existing employment termination paperwork;
- ✓ Employers must comply with this notification requirement with **two notices** (only one of which may be electronic);
- ✓ Employers may want to also contact their FSA claims administrator (if applicable);
- ✓ Employers should be on the lookout for any additional guidance that may be issued regarding this new law.

## **Additional Resources**

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*AB-1554 Employers (2019-2020) – Notice to Employees*



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