MY BENEFIT ADVISOR

# California Enacts A "Two Notice" Requirement for FSAs

Issued date: 10/17/19

On August 30, 2019, California Governor Gavin Newsom signed into law Assembly Bill 1554, which applies to employers with employees working in California who participate in a flexible spending arrangement (FSA), including a health FSA, dependent care FSA, or adoption assistance FSA.

The new state law requires employers to notify California employees who participate in an FSA of any deadline to withdraw funds before the end of the plan year. The notice must be made in two different forms (one of which may be electronic), including by electronic mail, telephone, text message, postal mail, or in-person.

The language of the new state law does not clearly indicate what the notification deadline is. According to the legislative history, California intended the two notices to be provided before the end of the FSA plan year, but the statutory language could be interpreted to require their delivery before an employee stops participating in the FSA during the year (for example, because of termination of employment). Cautious employers should follow the latter approach, which means delivering the two notices to participants shortly after the FSA plan year begins or, in the case of mid-year enrollments, shortly after they begin participating in the FSA.

The new state law is effective on January 1, 2020. Employers that fail to comply with the new state law could be required to indemnify employees for losses caused by the employer's "want of ordinary care" under California employment law.

The new state law does not address the issue of federal ERISA preemption, which generally overrides state laws that relate to an ERISA plan. Whether this new state law is preempted by ERISA with respect to health FSAs offered by private sector employers is not clear; further guidance would be helpful. However, dependent care FSAs, adoption assistance FSAs, and health FSAs that are governmental plans or church plans are not ERISA plans, and would be subject to the new state law.

The California Department of Industrial Relations has not indicated whether it will provide guidance to employers on the specific requirements of the new state law or on the ERISA preemption issue.

As a best practice, employers with employees working in California should comply with the notice requirements and maintain applicable records.