

Deadline looms for small employers to establish retirement programs

By Dan Eaton

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The CalSavers program requires for-profit and non-profit employers with five or more employees, at least one of whom is age 18, to offer their employees either an employer-sponsored plan that offers favorable federal income tax treatment under the Internal Revenue Code or the CalSavers state-sponsored retirement plan. According to the CalSavers website, the CalSavers program “ensures nearly all Californians have access to a workplace retirement savings vehicle by offering employees a completely voluntary, low cost, portable retirement savings vehicle... .”



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For answers to questions about the program, I accessed the FAQ page on CalSavers’ website, as well as emailing questions to my Seltzer Caplan McMahon Vitek partner Brian Katusian, a state bar-certified tax law specialist whose practice focuses on employee benefits.

What must an employer do to comply with the CalSavers program?

Employers with 5-50 employees that do not already offer a qualified retirement plan — such as a 401(k) plan — must register to facilitate the CalSavers program by June 30. The deadline for larger employers has passed and enforcement actions are underway.

What are the penalties for noncompliance?

According to the CalSavers FAQ, “each eligible employer that, without good cause, fails to allow its eligible employees to participate in CalSavers, on or before 90 days after service of notice of its failure to comply, shall pay a penalty of \$250 per eligible employee.” An employer that hasn’t complied 180 days after the notice is subject to an additional penalty of \$500 per eligible employee.

Are some employers exempt from registering with CalSavers?

Yes. An employer with a qualified retirement plan is exempt from registering with CalSavers. Also exempt from the program are government, religious, and tribal employers.

The government employer exemption appears in the CalSavers statute, but the religious and tribal employer exemptions do not. Katie Selenski, executive director of CalSavers, explained in an email that defined terms in CalSavers regulations, such as “employee” and “exempt employer,” “refer to definitions of employment established under the Unemployment Insurance Code.” Section 634.5 of that code excludes religious and tribal employers and their employees. “More broadly, federal law prohibits states from applying state laws to tribes and their activities on reservations unless expressly authorized by Congress.”

Exempt employers are requested, but not required, to register their exemption with CalSavers. Employees of exempt employers, and gig workers and otherwise self-employed workers may establish an individual CalSavers account.

How does an employer enroll in the CalSavers program?

According to the CalSavers website, covered employers must: (1) register with CalSavers, using the employer identification number or tax identification number; (2) provide “basic employee roster information to the Program for eligible employees (name, date of birth, Social Security Number or ITIN [Individual Taxpayer Identification Number], and contact information);” and (3) facilitate “by payroll deduction the appropriate contributions for each pay cycle.” Employee contributions to CalSavers accounts must be remitted to the program “within seven days of taking the deduction out of the participating employee’s paycheck.”

There is no cost to employers to enroll in CalSavers. Employers may not contribute to their employees’ CalSavers accounts and must remain neutral about whether their employees should participate or opt out of participating in CalSavers. CalSavers provides a sample email for employers to send their employees after the employer registers with CalSavers.

Investments with CalSavers “are not guaranteed or insured by California, the FDIC, or any other organization,” according to Katusian. CalSavers says the program “offers a range of investment types” to enable participating employees to invest in line with their own risk tolerance.

Are there any disadvantages to an employer in sponsoring its own retirement program?

Yes, according to Katusian. “There are significant disadvantages to participating in the CalSavers program in that it is not a pre-tax retirement program and higher income employees are barred from participating at all. Furthermore, the annual contribution maximum is \$6,000, no employer contributions (e.g. matching and profit sharing) are allowed, and participant loans are not allowed.”

Employees who do not opt out of CalSavers “will have their after-tax take-home pay reduced by 5%-8% by ‘default’ in situations where they may value and/or need those funds for household expenses and would not have otherwise contributed. Qualifying retirement plan alternatives offer a great deal more flexibility, do not bar higher income employees from participating, allow pre-tax options, participant loans, and ‘incentivizing’ employer contributions, without a ‘requirement’ to ‘auto-enroll’ or ‘auto-escalate’ eligible employees.” Katusian adds, however, “[f]or an employer who does not have the financial wherewithal to establish and administer a plan of its own, registering with CalSavers may make sense.”

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