NOVEMBER 19, 2024

AGENDA ITEM 5
ACTION ITEM

CALSAVERS RETIREMENT SAVINGS BOARD

Resolution No. 2024-03, Approval of Regulations Amendments to Sections 10000-10006, 10008, and 10010 of Chapter 15 of Title 10 of the California Code of Regulations and Authority to Conduct Rulemaking

Summary

The CalSavers Retirement Savings Board (Board) will consider approving regulation amendments to Sections 10000-10006, 10008, and 10010 of Chapter 15 of Title 10 of the California Code of Regulations. The Board will consider authorizing the Executive Director to conduct the rulemaking activities to implement CalSavers programmatic requirements of the employer and CalSavers participant community.

Authority

Title 21 (commencing with Section 100000) of the Government Code establishes the Board and the CalSavers Retirement Saving Program ("Program" or "CalSavers"). Section 100048 of the Government Code authorizes the Board to adopt regulations to implement the CalSavers Retirement Savings Program (Program) and deems the adoption, amendment, repeal, and readoption of those regulation as addressing an emergency for the purposes of the Administrative Procedure Act (APA) (Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code).

Detail

Board staff are seeking Board approval for amendments to implement existing program requirements, clarify the Board's regulations, and create an exemption process for employers. If approved by the Board, staff will file the regulations amendments and begin the rulemaking process.

The substantive changes to the regulations are described by section below. There are also a large number of non-substantive changes that include referential edits to ensure clear and cohesive methods of referencing information, grammatical edits, and formatting edits to keep information consistent and understandable by the regulated community.

Section 10000- Definitions

Staff propose the following changes to Section 10000:

1. The addition of a meaning of words paragraph which explains that, unless stated or communicated otherwise, the words the Board uses in its regulations are intended to be

communicated and understood using the usual meaning (dictionary definition) of the term, that words used in the present tense also include future tense, and that "shall" is a mandatory term and "may" is a permissive term (see page 1 of attachment 5A). This addition is necessary to clarify the Board's regulations by encapsulating as many scenarios in the regulations as possible while not making the regulations overly complicated and burdensome to interpret. The proposed change also makes the text more concise and easier to reference for the regulated community.

2. Adding to the definition of exempt employer under subsection (q) to include federally recognized Indian tribes (see page 3, subsection (q)(iv) of attachment 5A), and religious organizations (see page 2, subsection (q)(v) of attachment 5A).

   The inclusion of federally recognized Indian tribes is necessary to implement existing Board staff policy to exempt Native American tribes as they are sovereign entities and as such exempt from California regulatory efforts.

   Additionally, the inclusion of religious organizations to subsection (q)(v) implements existing Board staff policy as religious organizations such as churches, temples, and other places of worship have been considered as exempt employers since the inception of the Program. Previously, religious organizations were exempt from the Program under subsection (n) as those employers do not pay federal unemployment tax and as such do not employ any "eligible employees." The issue with that exemption is that it is not likely to be clear, easily identifiable, or understood by a large part of the regulated community. Instead, Board staff propose adopting subsection (q)(v) to communicate to the employer community in more clear and digestible language who is and who is not subject to the Program mandate.

3. Making non-substantive referential, grammatical, and formatting changes to subsections (c), (d), (g), (j), (k), (m), (m)(i), (m)(ii), (m)(iii), (q), (q)(i), (q)(ii), (q)(iii), (r), (s), and (aa).

Section 10001 – Eligible Employers

Staff propose the following changes to Section 10001:

1. The re-location of subsection (d) (see page 5, former subsection (d) of attachment 5A) to a newly proposed section, Section 10010 subsection (a) (see page 28 of attachment 5A), which will serve as a central hub of regulations for employer exemptions from the program. This is necessary to make the exemption regulations easier for employers to locate and to formally implement the employer exemption process which is required by the Administrative Procedures Act (APA).

2. Making non-substantive referential, grammatical, and formatting changes to subsections (a), (a)(1), (a)(2), (c), (c)(1), (c)(2), (c)(3), (c)(4), (e), (e)(1), and (e)(3).

Section 10002 – Employer Registration

Staff propose the following changes to Section 10002:

1. Adding subsections (a)(1), (a)(2), (a)(3), and (a)(4) (see page 7 of attachment 5A) to comport the Board's regulations with Title 21 of the Government Code which expressly requires that employers must establish a retirement savings arrangement with the program by a specified date, not just register. Registration is an important step toward facilitating CalSavers but does not actually get the Program running, as employees do not begin saving until the employer fully completes their obligations under state law. This change is necessary to comply with Title 21 of the Government Code and to get more employees saving with the Program.

2. Revising subsection (b) (see page 7 of attachment 5A) to clarify when an employer must register and facilitate the program from when they are informed by the Program to when they became eligible employers. This change is necessary to get more employers enrolled in the Program and ultimately facilitating for their employees earlier. Additionally, beyond bringing employers into the Program earlier the amendment is necessary to eliminate the current regulation's dependency on an action made by Board staff and/or the Administrator and instead communicate to the public what is required of them.

   The information that Board staff and the Administrator use to notify these employers is from the previous calendar year meaning under the current regulation employers have two years to enroll in the Program not one or less. Additionally, since the regulation relies on the employer being notified, if an employer never received a notification from the Administrator due to mailing issues, typographical errors made by either part, or some other error they may be able to contest their Program compliance deadline. Instead, it is more consistent to broadly require that employers register and facilitate the Program in the year that they became subject to the CalSavers mandate not when they are notified.

3. Making non-substantive referential, grammatical, and formatting changes to the following subsections (b), (c), (d), and (e).

Section 10003 – Participating Employer Duties

Staff propose the following changes to Section 10003:

1. Revising subsection (c) to change the deadline for remitting contributions to the Administrator to no later than 30 days following enrollment instead of 30 days after notification by the Administrator and changing the cross reference to how contribution rates are established (See page 9, subsection (c) of attachment 5A). This is necessary because some employers may not receive notification by the Administrator due to typographical errors made during the registration process, email notifications being routed to spam/junk folders, or other technicalities. Additionally, the cross reference to Section 10005 is necessary to correctly explain how contribution rates are established and inform the employer community of the applicable regulations.

In most cases employees do not establish their contribution rate during the enrollment process as unless the employee makes an alternative election the Program will establish the contribution rate at the default of 5%. The removal of "by the participating employee" eliminates the potential for confusion and more accurately describes what is happening to the regulated community.

2. The addition of subsection (e) to set the deadline for when an eligible employee's information needs to be sent to the Administrator. (See page 10 of attachment 5A). This is necessary to ensure all eligible employees are enrolled in the Program as they become eligible. Most employees are eligible to be enrolled when they are hired, however, some employes may be hired as minors or have their eligibility status from exempt to eligible well after they are hired. The proposed change corrects that lapse in the Board's regulations and requires that employers enroll employees when they are eligible.

3. The addition of subsection (f) to specify that participating employers shall provide eligible employee to the administrator electronically. (See page 10 of attachment 5A) This is necessary to inform employers as to how they must provide required information to the Administrator.

4. Making non-substantive referential, grammatical, and formatting changes to subsections (a), (a)(1), (a)(2), (a)(3), (a)(4), (a)(5), (a)(6), (b), (c), (c)(1), (d)(1), and (d)(3).

Section 10004 – Employee Enrollment

Staff propose the following changes to Section 10004:

1. Reordering and revising subsections (d)(1) and (d)(2) (see page 11 of attachment 5A) to match the order of opt out procedures in subsection (d) and to include the requirement that eligible employees must provide the name of their participating employer. This is necessary to structure the regulations in a more logical manner and to implement a requirement the Administrator has for opting out from the Program.

2. Revising subsection (f) to remove the statement that the Administrator will provide instructions about not remitting contributions for employees that the Administrator can't enroll (see page 11 of attachment 5A). This is necessary because this clause is redundant and unnecessary as Section 10003 subsection (d)(3) states that contributions cannot be sent to the Program for employees that are not enrolled. The regulated community which includes employers are expected to be aware of the Board's regulations and as such will be aware that contributions cannot be remitted to the Program for employees that are not enrolled in the Program.

3. Making non-substantive referential, grammatical, and formatting changes to the following subsections (a), (b), (c), (d), (e), and (f).

Section 10005 - Default Program Options and Alternative Elections for Contributions, Automatic Escalation, and Investment Options for Participants.

Staff propose the following changes to Section 10005:

1. The relocation of subsection (a)(2)(A) to subsection (c) (see pages 13 and 16 of attachment 5A) and adding the process by which a participating employee would opt out from automatic escalation. This is necessary to inform the regulated community of the exact steps they need to take to opt out from automatic escalation, comply with the APA, and create a universal regulation relating to opting out from automatic escalation.

2. The relocation of subsection (a)(2)(B) to subsection (d) (see pages 13 and 17 of attachment 5A) that states that participating employees that have participated in the Program for less than 6 months will not be subject to automatic escalation until January 1 of the following year. The current regulation is located within the default account settings regulations, and gives the impression that the regulation only applies to accounts established under the default settings. That is not the case. Making this change is necessary to apply the rule to all accounts, not just accounts that are subject to the default account settings.

3. The relocation of subsection (a)(2)(B)(1) to subsection (e) (see pages 13 and 17 of attachment 5A) that states the Administrator will notify a participating employee of their upcoming automatic escalation at least 60 calendar days before it takes place. This is necessary because the regulation applies to all accounts, not just accounts with default settings.

4. Revising subsection (b)(2) (see page 14 of attachment 5A) to implement the processes by which a participating employee would elect an alternative contribution rate. This is necessary to inform the regulated community of the exact steps they need to take to elect an alternative contribution rate and to comply with the APA which requires the Board promulgate regulations for every rule, criteria, guideline etc. that it has of the public.

5. The relocation of subsection (b)(3) to subsection (f)(5) (see pages 15 and 19 of attachment 5A) which outlines the ability to make recurring non-payroll contributions. This is necessary to move the regulation from automatic escalation related rules to "other contribution rules" which is a more natural fit for the regulation.

   Board staff also propose revising the regulation to add the step-by-step process a participant would need to complete to make recurring non-payroll contributions to the Program. This is necessary to comply with the requirement of the APA to promulgate regulations for rules the Board has of the public and to inform the public as to how they make recurring non-payroll contributions to the Program.

6. The relocation of subsection (b)(4) to subsection (f)(6) (see pages 15 and 20-21 of attachment 5A) which outlines the ability to make non-recurring non-payroll contributions. This is necessary to move the regulation from automatic escalation related rules to "other contribution rules" which is a more natural fit for the regulation.

Board staff also propose revising the regulation to add the step-by-step process for what a participant would need to do to make non-recurring non-payroll contributions to the Program. This is necessary to comport with the requirement of the APA to promulgate regulations for rules the Board has of the public and to inform the public as to how they make non-recurring non-payroll contributions to the Program.

7. Revising subsection (b)(3) (see page 15 of attachment 5A) to include the process by which a participant would make an alternative election. This is necessary to correct the existing cross-referenced procedures (Section 10004 subsection (d)) which are for opting out from the Program not alternative elections. Additionally, the change is necessary to inform the regulated community of what they need to do to make alternative elections, to comply with the requirements of the APA, and to implement existing Administrator requirements.

8. The amendment to subsection (f)(4) (Previously subsection (c)(4)) (see page 17-19 of attachment 5A) to implement and clarify the process by which a participating employee may recharacterize their contributions to a Traditional IRA. This is necessary to inform the regulated community as to what is required of them to recharacterize contributions, comply with the APA, and to implement existing Administrator requirements.

9. And making non-substantive referential, grammatical, and formatting changes to the following subsections (a)(2), (a)(2)(A), (a)(2)(B), (a)(2)(B)(1), (a)(3), (a)(4), (b), (b)(2), (b)(3), (b)(4), (c), (f), (f)(2), and (f)(4).

Section 10006 – Individual Participation

Staff propose the following changes to Section 10006:

1. The addition of subsection (a)(1)-(a)(8) (see page 22-23 of attachment 5A) which clarify and implement the process by which individuals enroll in the Program. This is necessary because the APA requires that state agencies promulgate regulations for any rule, guidelines, and criteria that the agency has that is not already enumerated in state law. The enrollment process is a series of rules and criteria that the public must follow to enroll in the Program making this adoption necessary to comply with the APA.

2. The adoption of subsections (b)(1), (b)(2), (c)(1), and (c)(2) (see pages 24-25 of attachment 5A) to implement the requirements for individuals to make recurring and non-recurring contributions outside of a payroll agreement. Similar to subsection (a)(1)-(a)(8) the adoption of these subsections is necessary to comply with the APA.

3. The amendment of subsection (d) (see page 25 of attachment 5A) to clarify that exempt employers may set up payroll deductions for individual CalSavers participants. This is necessary to comprehensively communicate to the exempt employer community that they may - but are not obligated to - comply with the regulations contained in this Section.

4. Making non-substantive referential, grammatical, and formatting changes to the following subsections (a), (b), and (c).

Section 10008 – Enforcement of Employer Compliance

Staff propose the following changes to Section 10008:

1. The removal of the sentence in subsection (a) (see page 26 of attachment 5A) referring to "due diligence" and "reasonable attempts" in bringing employers into compliance prior to issuing a final notice of penalty application. This is necessary because "due diligence" and "reasonable attempts" are vague and subjective making the regulation unenforceable. This type of regulation is prone to being contested by an employer because of its vague nature when compared to other regulations the Board has that are more clearly written and understood.

   Additionally, the State Administrative Manual Section 8293 strongly encourages state agencies to issue three nonpayment notices (commonly referred to as "dunning letters") to debtors prior to assessing a penalty. Because of this, the Board's contractual agreement with our penalty collector (The Franchise Tax Board (FTB)) requires Board staff to issue three nonpayment letters at least 90, 60, and 30 days before notifying FTB to assess a penalty collection on the non-compliant employer. These nonpayment letters notify the employer of their noncompliant status and expressly provide the employer with a step-by-step process to come into compliance and avoid paying a penalty. This serves the function of clarifying the types of "due diligence" and "reasonable attempts" Board staff will make to bring employers into compliance.

   For these reasons Board staff propose amending subsection (a) to limit the contestability of the regulation, remove ambiguity, and because staff are already regulated under other authorities to notify noncompliant employers of their situation before issuing a penalty notice.

2. Revising subsection (c)(1) (see page 26 of attachment 5A) to clarify that noncompliant employers will be subject to a penalty of $500 per eligible employee, if noncompliance continues after the initial $250 penalty is assessed. This is necessary to clarify confusing language in the current regulation which could be interpreted as saying the $500 penalty will be assessed in the subsequent year of noncompliance. That is not the case, as under the existing statutory framework and current Board staff policy employers are assessed a penalty of $250 for noncompliance and a $500 penalty if noncompliance continues for 90 or more days after the first penalty (see Section 19287 of the Revenue and Taxation Code), which could occur in the same or subsequent calendar year.

3. Revising subsection (c)(2) (see page 26 of attachment 5A) to clarify that a noncompliant employer will be fined $500 per eligible employee during any calendar year, including their first year, or any non-consecutive year(s) in the future that they are noncompliant. This is necessary to clarify confusing language and better describe Board staff policy when assessing penalties.

4. Revising subsection (d) (see page 26 of attachment 5A) to remove the statement concerning Board staff determining compliance as an alternative to the employer demonstrating compliance through the submission of documentation. Board staff recommend this change for a few reasons.
    a. The regulation does not explain how or by what metric compliance will be measured by Board staff.
    b. The regulation does not reflect real world practices as Board staff require the employer to submit documentation proving their compliance before issuing a penalty. The alternative of changing the "or" in the regulation to an "and" cannot be implement by Board staff as there is not enough personnel to proactively and individually review all noncompliant employer account details and information.
    c. Some of the Board's internal information provided by the Administrator is not accurate. While Board staff are aware of this issue and have implemented internal work arounds there may be instances where a lapse of judgement leads to a noncompliant employer being told they are in compliance (when they are not) and will receive a refund. To ensure Board staff are certain the employer is compliant removing the internal review alternative and requiring the employer to demonstrate compliance is necessary.

    Board staff also propose removing the clause where staff inform the Franchise Tax Board (FTB) to not impose penalty collections for noncompliance. This is necessary as the regulation does not accurately reflect Board staff penalty enforcement processes. The regulation concerns what an employer needs to do to receive a penalty refund which means FTB has already imposed and attempted to collect on the penalty. Board staff cannot contact FTB and have them retract a penalty collection letter that has already been sent to the employer. Instead, the proposed addition clarifying eligibility for a penalty refund is a more accurate reflection of the penalty collections and refunds process.

    Lastly, Board staff propose removing the last sentence of the regulation stating that erroneous payments will be refunded. This is necessary because the proposed changes made to subsection (d) and (d)(1) set forth the process by which an employer demonstrates to the Board that their penalty assessment and collection was erroneous. If the proposed changes are adopted, the last sentence of subsection (d) is redundant and unnecessary.

5. The addition of subsection (d)(1) (see page 27 of attachment 5A) which clarifies what kinds of documents an employer must submit to demonstrate compliance and be eligible for a penalty refund. This is necessary to communicate to the employer community what they need to do to receive a penalty refund. Specifically, Board staff will accept written documentation that proves the employer was exempt from the Program mandate or that the employer was fully facilitating the Program for all eligible employees during the period of time noncompliance was identified by Board staff.

6. The adoption of subsection (e) (see page 27 of attachment 5A) which clarifies how Board staff determine the penalty amount that is assessed pursuant to Section 10008.

Specifically, Board staff used the eligible employee count as determined under Section 10001 subsection (a).

7. And making non-substantive referential, grammatical, and formatting changes to the following subsections (a), (b), (c), (c)(1), (c)(2), and (d).

See below proposed changes to the enforcement regulations

§ 10008. Enforcement of Employer Compliance.

(a) The Board may delegate enforcement of Employer compliance with Title 21 (commencing with Section 100000) of the Government Code, including all failures by an Eligible Employer to allow its Eligible Employees to participate in the Program, to the Board staff.

(b) Enforcement efforts by Board staff, pursuant to subsection (a), shall include email (if available) and letter notifications of penalty application to the Noncompliant Employers identifying the cause of their Noncompliance and the methods available to Employers to comply.

(c) Noncompliant Employers are subject to the penalties set forth in Government Code Section 100033 subsection (b) until compliance is satisfied.

(1) A Noncompliant Employer, who fails to achieve compliance after the initial $250 penalty is assessed, will be fined $500 per Eligible Employee for each subsequent penalty that is assessed upon the Noncompliant Employer.

(2) Noncompliance does not need to be consecutive to assess the penalty of $500. Any calendar year in which an Employer is found to be Noncompliant after the initial penalty of $250 will result in a penalty of $500 per Eligible Employee.

(d) If, through the collection efforts of the Franchise Tax Board as described in California Code of Regulations Title 18 §§ 19285 et seq., and before the penalty payment is received by the Franchise Tax Board, a Noncompliant Employer demonstrates that they were in compliance through the submission of written documentation to the Board, then the Employer shall be eligible for a refund of the penalty imposed by the Board for the period of time in which the Employer was compliant.

(1) Written documentation submitted to the Board must demonstrate one of the following to be eligible for a penalty refund.

(i) The Employer is an Exempt Employer.

(ii) The Employer was in compliance with Section 10003 subsection (c).

(e) Eligible Employee counts for purposes of penalty assessment will be determined using the average number of employees calculated under Section 10001 subsection (a).

NOTE: Authority cited: Sections 10010 and 100048, Government Code.

Reference: Sections 100014, 100032 and 100033, Government Code.

Section 10010 – Exempt Employers

Staff propose the following changes to Section 10010:

1. The addition of a new section concerning exempt employers and what is required of these employers to exempt themselves from the Program. The section includes exemption requirements for six different types of exemption reasons including government entities, tribal or religious organizations, sold businesses, closed businesses, businesses with zero employees and no plans to hire employees, and lastly employers that already offer a tax qualified retirement plan.

   Currently employers are provided with an explanation about the exemption process through the Program's website (CalSavers.com) and in communicating with Board staff. Employers are also informed about the ability to exempt themselves from the Program through several communication methods including, but not limited to, emails, pre penalty collections letters, statute, and Program website landing pages. These communications while helpful are dissociated from one another and do not provide the employer with a single source of information that is digestible enough for the employer to gather the appropriate information and documentation required to exempt themselves from the Program.

   The adoption of this section is necessary to provide the regulated community with a single source of information explaining what is required to exempt themselves from the Program. It is also necessary to formally implement existing Board staff and Administrator requirements for employers to exempt themselves from the Program which is a requirement of the APA.

Recommendation

Board staff recommend the Board approve Resolution 2024-03 to authorize the Executive Director to amend Sections 10000-10006 and 10008, adopt section 10010 of Chapter 15 of Title 10 of the California Code of Regulations, and authorize the Executive Director to conduct the rulemaking process to enact these amendments.

In summary, the proposed amendments and adoption of Section 10010 to Chapter 15 of Title 10 of the California Code of Regulations accomplish the following.

1. Improve the clarity of the Board's regulations.
2. Standardize the Board's regulations where applicable by using the same or similar terminology, regulatory structure, and style.
3. Comport the Board's regulations, policies, and criteria with the requirements of the APA.
4. Eliminate redundant and/or unnecessary regulations.
5. Update Board penalty assessment processes to reflect changes made after real world implementation.
6. Formally implement the employer exemption process as required by the APA.

Attachments

- Attachment 5A: Text of Regulations Amendments
- Attachment 5B: Resolution 2024-03: Approval of Regulations Amendments to Sections 10000-10006, 10008, and 10010 of Chapter 15 of Title 10 of the California Code of Regulations and Authority to Conduct Rulemaking Activities