

EMPLOYMENT DEVELOPMENT DEPARTMENT

Amendment of Title 22, California Code of Regulations, Sections 3258-1, 3267-1, and 3267-2

VOLUNTARY PLAN REPORTING

Final Statement of Reasons

BACKGROUND:

The Employment Development Department (Department) extends approval to employers to operate voluntary plans (VP) for short-term disability insurance coverage, in lieu of State Disability Insurance (SDI) coverage, as set forth in Division 1, Part 2, Chapter 6, of the California Unemployment Insurance Code (code) and California Code of Regulations (CCR), title 22.

In order to secure the approval of the Director of Employment Development, self-insured voluntary plan employers must file a bond issued by an admitted surety insurer guaranteeing the obligations of the employer under the plan with the Department. In lieu of a surety bond, the voluntary plan employer may deposit cash, bearer bond, or an irrevocable letter of credit.

Once approved, a voluntary plan must remain in effect for at least one year. Thereafter, the employer may request withdrawal on the plan anniversary date or the date that a change in the State contribution rate or benefit schedule is enacted. The voluntary plan remains responsible for payment of all claims filed prior to the date of withdrawal. The Department may terminate a voluntary plan when terms or conditions of the plan have been violated.

Upon the employer's withdrawal or the Department's termination of a voluntary plan, the Department shall retain custody of the deposit of security to ensure that all remaining obligations of the voluntary plan are met. During this period, the employer or insurer must continue to provide any records, reports, or other information needed by the Department to properly perform its voluntary plan oversight duties.

NECESSITY:

Under the code sections 305 and 306, the Department is authorized to adopt, amend, or repeal regulations for the administration of the functions of the Department. Under code sections 3251, 3253, 3254, 3255, a qualified employer is able to provide the benefits to employees electing coverage under the employer's voluntary plan.

The following proposed regulation amendments to CCR, title 22, sections 3258-1, 3267-1, and 3267-2 will:

- Allow for a longer retention period of security deposits to ensure complete resolution of all outstanding plan liabilities.
- Include language within the voluntary plan reporting requirements to reflect the 2004 legislative addition of Family Temporary Disability Insurance (FTDI) benefits.
- Allow voluntary plans to submit reports to the Department annually, instead of quarterly.
- Ensure that voluntary plans properly administer disability and FTDI benefits.

Section 3258-1. Self-Insured Plans—Security.

The provisions of CCR, title 22, section 3258-1, require voluntary plan employers to post security with the Department to ensure payment of voluntary plan benefits. The section also sets forth the retention period and terms for the security on deposit.

Subdivision (b) of section 3258-1 of the CCR provides that when a voluntary plan is either terminated or withdrawn, the Department shall retain the security for a period of six calendar quarters (18 months) in order to guarantee that all outstanding plan liabilities are paid. However, the 18 month requirement for retention is inadequate because claims arising from the voluntary plans can extend beyond 18 months. Recent data taken from the Disability Insurance Branch reveals that 14 terminated or withdrawn voluntary plans (28 percent of all terminated or withdrawn plans for this period) had claims filed beyond the 18 month time frame. One plan, in particular, had liabilities that exceeded the 18-month period by eight months. When the regulations were established, the maximum benefit period was 26 weeks; currently a claimant may receive benefits for a maximum of 52 weeks. Thus, a longer benefit period also contributes to the inadequacy of the security retention period.

The proposed amendment to subdivision (b) of section 3258-1 of the CCR is necessary to increase the amount of time the Department retains the security. After a voluntary plan is withdrawn or terminated, the employer remains liable for all disability claims prior to the plan termination date. Claims in progress at the time of termination and new claims submitted after termination that cover a disability which arose prior to the termination remain the responsibility of the voluntary plan. The current 18-month period which the Department is authorized to retain the employer's security deposit is insufficient to resolve all outstanding plan liabilities. Without additional time, the State's Disability Fund may be forced to pay for outstanding voluntary plan liabilities, for which there is no corresponding State fund contribution.

Section 3267-1. Reports from Voluntary Plans.

Subdivision (a) of section 3267-1 of the CCR requires voluntary plans to report a first claim to the Department for disability benefits within 15 days of receiving the claim and a final report of the claim within 35 days after final payment for each period of disability. When an employer reports a first claim for disability benefits, the Department generates a Report of Voluntary Plan Claim which informs the employer of the claimant's Weekly Benefit Amount and Maximum Benefit Amount. This report also prompts SDI staff to establish a claim in the Department's Single Client Database (SCDB) to avoid the Department erroneously paying on the same claim. However, section 3267-1 does not include the same reporting requirements for FTDI benefits (also known as Paid Family Leave benefits). Although employers currently provide FTDI benefit claim information to the Department, the regulations do not require them to do so.

The proposed amendment to subdivision (a) of section 3267-1 will impose the same reporting requirements upon voluntary plan employers for FTDI benefits, as they do for disability benefits. The proposed amendment is necessary to ensure that the plans receive wage and benefit information from the Department necessary to establish appropriate benefit amounts for family care leave claims.

Subsequent to the 45-day public comment period, the Department revised the language originally noticed to the public to further reorganize the order of the information requested by the Department. The Department's decision to revise the language was based upon the necessity to clearly discern between the information required in the initial report regarding a claim for disability or family temporary disability insurance benefits and the final report. The revision to the text further clarifies the type of information requested by the Department on the initial report and the final report.

Section 3267-2. Self-Insured Plans—Reports.

Subdivision (a) of section 3267-2 of the CCR requires voluntary plans to provide quarterly reports to the Department. The reports must include information regarding plan funds, the amount of disability benefits paid, the amount of benefits accrued but not paid, the amount of benefits claimed, and other information with respect to the financial ability of self-insurers to meet their obligations under the plan. Currently this information must be submitted within 15 days after each calendar quarter. The proposed amendment of the reporting requirements from quarterly to annual reporting would reduce the number of required reports. An examination of audit results conducted by the Disability Insurance Branch demonstrates that amending the reporting requirements from quarterly to annual reporting would not adversely impact the Branch's administration of the voluntary plan program.

The current provisions of section 3267-2 do not require voluntary plans to report the location of the financial institution where trust funds are being held, despite the requirement under section 3261 of the code for employers to maintain a separate, specifically identifiable account for such funds.

To summarize, the proposed amendment to subdivision (a) of section 3267-2 would: (1) require voluntary plans to submit reports annually to the Department; (2) extend the amount of time under which a voluntary plan files the reports; (3) include a requirement to disclose the location of the financial institution where the voluntary plan funds are held; and (4) update the language of the reporting requirements to include reference to FTDI benefits. The proposed amendment is necessary to: (1) reduce the number of reports required to be filed by voluntary plans; (2) provide the plans more time to gather information and prepare the report; (3) provide the Department with information to demonstrate employer compliance with the statutory requirement to maintain a separate, specifically identifiable account for such funds; and (4) update the reporting requirements to include reference to FTDI benefits.

The addition of subdivision (c) to section 3267-2 will address the issue of claims arising 36 months after a voluntary plan is withdrawn or terminated. As a result, voluntary plans will be required to provide reports to the Department for 36 months following a termination or withdrawal of a voluntary plan. This amendment is necessary to provide the Department with sufficient plan information to determine if a voluntary plan met all outstanding obligations under the plan.

The proposed regulation as originally noticed to the public would have: (1) extended the amount of time under which a voluntary plan files the reports from fifteen to thirty days; (2) retain the requirement for the plans to report the amount of benefits accrued, but not paid; and (3) retain the amount of time an extension can be granted as fifteen days. In response to comments from members of the directly affected public, the Department has made the following three changes to the regulation: (1) require the submission of the report by the forty-fifth day following the close of the calendar year; (2) delete the requirement for the plans to report the amount of benefits accrued, but not paid; and (3) change the amount of time an extension can be granted from fifteen to thirty days.

PLAIN ENGLISH CONFORMING STATEMENT:

The Department has drafted the proposed amendments in plain English pursuant to section 11346.2(a)(1) of the Government Code.

PUBLIC NOTICE, 45 DAY WRITTEN PUBLIC COMMENT PERIOD, AND WRITTEN COMMENTS RECEIVED DURING 45 DAY PUBLIC COMMENT PERIOD:

On March 14, 2008, the Office of Administrative Law printed a public notice for this regulatory action in the California Regulatory Notice Register, and the Department mailed a copy of the public notice, the text of the proposed regulations, and the initial statement of reasons to everyone known to be interested in the Department's regulations.

During the 45-day written public comment period which was held from March 14, through April 28, 2008, no one requested a public hearing. However, during the comment period, the Department received two comments (the comments are included as part of this rulemaking file at Tab No. 6). The comments are indicated below, followed by the Department's response to each comment.

Comment #1

E-mail received on April 28, 2008, from Nancy Leonard of Matrix Absence Management, Inc. She made the following comments regarding section 3267-2:

1. Regarding subdivision (a), the change from quarterly to annual filing of the DE2568 report is a good one. However, the deadline seems unrealistic because of the same due date for the Q4 DE3D to the State. A large part of the information contained in the DE2568 is derived from the information contained in the DE3D. The Department should extend the report due date to allow for reasonable preparation time.
2. Regarding subdivision (a)(3), the Department should not require the plans to report the amount of benefits accrued, but not paid during the calendar year because of the inability to accurately report this information in such a short time period. Requiring this report only one month into the beginning of the year would not yield an accurate accounting.
3. Fiscal Impact: There may be additional costs to the employer for administrative costs to maintain the security for thirty-six months on terminated plans. While the voluntary plans may absorb these costs, that would only be the case for plans with a surplus in the trust fund.

Response

1. The Department agrees to extend the report due date from the thirtieth day following the close of the calendar year to the forty-fifth day. This extended deadline will provide the self-insured plans additional time to gather the requisite information and prepare the report. Section 3267-2(a)

has been revised to require the submission of the report by the forty-fifth day following the close of the calendar year.

2. The Department agrees to remove the requirement for the plans to report the amount of benefits accrued, but not paid. The requirement to provide this information appears to be burdensome and often leads to inaccurate estimates. Furthermore, the Department will be able to obtain and audit the same information for each of the self-insured plans through the Department's automated system. Section 3267-2(a)(3) has been revised to delete the requirement for the plans to report the amount of benefits accrued, but not paid.
3. The Department believes that any increased expenses for the employer that may occur as a result of the increased retention period for the security deposit will be minimal. No revision to the regulation is necessary as a result of this comment.

Comment #2

E-mail received on April 28, 2008, from Shellie Adams of The Larkin Company. She made the following comments regarding section 3267-2:

1. Regarding subdivision (a), the Department should extend the report due date from thirty to forty-five days following the close of the calendar year.
2. Regarding subdivision (a)(5), the Department should allow the plans an additional thirty day extension of time, rather than a fifteen day extension, to file the report if good cause is demonstrated.

Response

1. As noted in the previous response, the Department agrees to extend the report due date to the forty-fifth day following the close of the calendar year. This extended deadline will provide the self-insured plans additional time to gather the requisite information and prepare the report. Section 3267-2(a) has been revised to require the submission of the report by the forty-fifth day following the close of the calendar year.
2. The Department agrees to permit an additional thirty day extension of time to submit the report where good cause is demonstrated. Section 3267-2(a)(5) has been revised to allow a thirty day extension of time to file the report upon the demonstration of good cause.

WRITTEN COMMENTS RECEIVED DURING 15 DAY PUBLIC COMMENT PERIOD

The modified text was made available to the public from June 27 through July 14, 2008. The Department did not receive any comments on the modified text.

ECONOMIC IMPACT STATEMENT:

The Department does not anticipate the proposed amendments will result in any new costs to the federal government, State government, local county governments, private individuals, businesses or small businesses. Thus, no costs were shown on the Economic and Fiscal Impact Statement.

The Department has made an initial determination that the proposed amendments will not have a significant statewide adverse economic impact directly affecting businesses, nor will the proposed amendments hamper the ability of California businesses to compete with businesses in other states.

Recent departmental statistics reveal that 86 voluntary plan employers or, 16 percent of all employers that participate in a voluntary plan on behalf of their employees, submitted cash as the form of security. Fifty out of eighty-six voluntary plan employers have less than \$10,000.00 on deposit. Thus, the majority of voluntary plan employers have a nominal amount of cash on deposit. However, as a means to mitigate the cost to the voluntary plan employers, they also maintain the option of having the voluntary plan absorb the cost for the security on deposit. This option would completely eliminate any out-of-pocket expenses for the employer that may occur as a result of the increased retention period for the security deposit under the proposed regulation.

The Department has determined that the proposed amendments will not affect the creation or elimination of jobs within the State of California; the creation of new businesses or the elimination of existing businesses within the State of California; or the expansion of businesses currently doing business within the State of California.

SMALL BUSINESS IMPACT:

The Department has determined that the proposed amendments will have minimal effect on small businesses which may be offset by the use of voluntary plan funds to cover all administrative costs.

LOCAL MANDATE DETERMINATION:

The Department has determined that the proposed amendments will not impose any new mandates on school districts or other local governmental agencies or any mandates which must be reimbursed by the State pursuant to Part 7 (commencing with section 17500), Division 4 of the Government Code.

CONSIDERATION OF ALTERNATIVES:

In accordance with section 11346.9(a)(4) of the Government Code, the Department has determined that no alternative considered would be more effective in carrying out the purpose for which this action was intended than the proposed regulatory action. The Department has also determined that no alternative would be as effective and less burdensome to affected private persons than the proposed regulatory action.
