PENSION RIGHTS CENTER

PROTECTING AND PROMOTING RETIREMENT SECURITY
1350 Connecticut Ave., NW, Suite 206 | Washington, DC 20036-1739
P: 202-296-3776 | F: 202-833-2472 | www.pensionrights.org

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Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Ave., NW Washington, DC 20210

Re: RIN 1210-AB71; State Savings Arrangements Safe Harbor

The Pension Rights Center ('the Center") submits the following comments on (i) the Department of Labor's proposed regulations (published in the Federal Register on November 18, 2015) creating a safe harbor in which certain state-legislated retirement savings programs would not be considered employer plans under the Employee Retirement Income Security Act of 1974, and (ii) an interpretive bulletin on state retirement savings programs that either create state-sponsored ERISA plans or provide employers with important market information on private plans. The Center is a nonprofit consumer organization that has been working since 1976 to protect and promote the retirement security of American workers, retirees, and their families.

We note our strong interest in the subject area of the Department's guidance. Through our Conversation on Coverage, a public policy initiative that brought together a range of experts with different perspectives to find new approaches to increasing pension coverage for low and moderate income wage earners without workplace retirement plans, the Center contributed to the development of the approaches now being considered by the states. The Center has also provided various forms of technical support to a number of states that have adopted or are considering adopting legislation to increase retirement savings opportunities for their citizens.

I. Background and Overview

ERISA was enacted in 1974, after more than a decade of governmental attention and study of the nation's retirement program. The focus of this legislation, as extensive as it was, was on ensuring that retirement promises, once made, were transparent, fair, enforceable, and reliable. Although ERISA continued pre-existing tax incentives to encourage employer-sponsored retirement plans, its primary focus was on consumer protection, not expansion of retirement savings. The one ERISA innovation to encourage retirement savings for those not enrolled in employer plans—the individual retirement account (IRA)—has had only modest success in providing a retirement account for those without employer coverage. A significant factor in the IRA's limited success is that it is, as behavioral economists have noted, easier to save through an easy, efficient vehicle where contributions are automatically deducted from payroll, as is provided by employer plans, than through an individual IRA in which the owner must take the initiative each time he or she wishes to make a contribution.

Congress has, over the years, taken steps to encourage new plan sponsorship through more generous tax incentives—largely aimed at personally benefiting higher paid employees on the theory that some firms will adopt new plans to satisfy such employees' desire for tax-advantaged savings—and also through relaxed regulatory requirements, particularly the non-discrimination rules. Congress has also sought to encourage additional savings among participants in 401(k) plans through automatic enrollment, automatic escalation, and a saver's tax credit. Despite these efforts, coverage has essentially remained flat since enactment of ERISA in 1974. Indeed, approximately 50% of the workforce was covered by private sector plans before ERISA and approximately 50% of the workforce has been covered post-ERISA. A stubborn part of the problem is that smaller firms tend not to adopt plans and that many firms that do adopt plans fail to cover all of their employees.

The lack of retirement savings is a significant domestic policy issue. Social Security, a critical foundation that must be preserved and strengthened, is nevertheless insufficient by itself to ensure that older Americans are able to maintain their standard of living in retirement. And the problem of limited savings is compounded by increased longevity after American's retire from the job market. The non-partisan Center for Retirement Research estimates that America's retirement income deficit—that is, the gap between what American households have actually saved today and what they should have saved to maintain their living standards in retirement—is $7.7 trillion.

The problem of insufficient retirement savings is increasingly a concern of the states, where low retirement savings of its citizens have serious repercussions (including increased demand for public programs to support the elderly poor and the impacts of reduced retiree spending on local economies). Because of inaction at the national level to increase access to secure and adequate retirement savings plans, state legislators, responding to retirement insecurity among their own constituents, are considering a range of proposals to increase effective retirement savings opportunities for their citizens.

Several states, including California, Illinois, and Connecticut, have already enacted legislation authorizing study or implementation of programs in which certain employers will provide automatic-enrollment payroll IRAs unless they already offer a workplace retirement plan. Other states plan to facilitate new retirement coverage within their borders through electronic marketplaces to assist employers in identifying appropriate private-sector vendors of retirement programs or, as in the case of Massachusetts, through sponsorship of an ERISA multiple-employer plan for small non-profit organizations.

Uncertainty about the effects and impacts of ERISA coverage, preemption, and regulatory effects on these initiatives has slowed their adoption and implementation. The Department's proposed regulations and new interpretative bulletin provide essential guidance to state governments seeking to stimulate better retirement savings rates among their citizens. We believe that the regulations correctly and prudentially interpret ERISA and will provide a roadmap for states on how to structure new retirement initiatives in ways that promote retirement savings, provide meaningful consumer protections, and are consistent with the language and intent of ERISA. The regulations will foster a healthy federalism in which states and the federal government work collectively and in cooperation to address one of our nation's most pressing social and economic problems, inadequate retirement financial security for working men and women.

The remainder of our comments are divided into two sections, the first on the proposed regulations and the second on the interpretive bulletin.

I. Proposed Regulations

The key issues for most states establishing Auto IRA programs thus far has been to avoid entanglement with ERISA, a statute that created nationwide consumer protections and minimum standards for participants in voluntary private-sector retirement plans. The states' concerns are that their initiatives neither create employer plans subject to, nor enact laws preempted by, ERISA. The proposed regulations basically provide that states may adopt legislation mandating that certain classes of employers provide a payroll deduction mechanism in which their employees can utilize an individual retirement account without thereby creating an employer plan. The overall thrust of the proposed regulations is that the program must be a state plan and not an employer-designed or -selected plan, that the employer's role must be confined to acting as an agent of the plan in distributing plan information, facilitating employee elections, and withholding and transmitting to the plan a worker's voluntary elective contributions.

We note that the Department had already created a safe harbor in which an employer can set up a payroll deduction IRA outside ERISA's regulatory structure, so long as the IRA is completely voluntary. That earlier safe-harbor did not include provision for automatic enrollment, and the preamble to the proposed regulations clarifies that an IRA deduction program is not completely voluntary if it utilizes automatic enrollment.

The major themes of the proposed regulations are that a state may mandate that employers or certain classes of employers provide *automatic* enrollment payroll-deduction IRAs so long as such program is state-sponsored rather than employer-sponsored; that a state may confine the program to those employees who do not otherwise have access to a workplace-retirement plan; and that ERISA does not preempt such laws. The regulations are in the form of a new, additional safe harbor for certain state plans, which sensibly leaves room for additional state experimentation in the future but which sets out important parameters and principles that protect the integrity of the statute and ensure that employers are not able to use the new safe harbor as a de facto ERISA exemption for any automatic-enrollment IRA program marketed by a private vendor. This seems to us exactly the result called for by the statute and the right result as a matter of policy. Our specific comments follow:

1. Requirement of State IRA Vehicle

As noted, under the already- existing DOL safe harbor, an employer may establish a *completely voluntary* payroll deduction IRA program for its employees without creating an ERISA plan. The proposed regulations make clear, however, that if a program uses automatic enrollment, it is no longer a completely voluntary employee program because the automatic enrollment feature diminishes employee choice and results at least in some employees participating in the program, and investing in an employer-selected default investment, through inertia rather than choice.

The proposed regulations, however, take the position that a state program may use automatic enrollment if the employer has no choice or discretion about adopting or designing the IRA program. Proposed Reg. 29 CFR § 2510-3-2(1)(h)(i) & (ii). This seems to us a sensible interpretation of ERISA language and principles. It is also an instance in which statutory principles and policy are in syncopation, for if the IRA vehicle did not have to be a state-created and administered vehicle (although the state may, of course, perform its administration and investment functions by contracting with private-sector entities), it would open the door to any willing IRA vendor without the varieties of consumer protection and oversight contemplated by ERISA.

2. State Mandate Requirement for Automatic Enrollment; Hardship Exemptions

The proposed regulations' safe harbor does not apply to state-sponsored automatic-enrollment IRAs that an employer may elect but is not mandated to adopt. See Prop. Reg. 29 CFR § 2510-3-2(1)(h)(x). Some argue that this approach serves no rational policy, since if the plan is sufficiently adequate for a state to mandate that certain employers adopt it, it is certainly adequate for a state to permit employers to adopt it voluntarily. The requirement also prevents states from providing a voluntary plan option for employers who the state believes should be excluded from a mandate because of the employer's small size.

While we are sympathetic to these positions as a matter of policy, we nevertheless believe that the Department's position in the proposed regulations is reasonable as a matter of statutory interpretation, since without a mandate the employer would have the critical discretionary function of choosing whether to participate.

We do, however, believe that the proposed regulations could and should be amended to permit a state retirement program to mandate adoption by all or some defined set of employers but then permit smaller employers to apply to the state for a hardship exemption from the mandate. The ability to pair a state mandate with a hardship exemption might make some states more receptive to creating a mandate that includes smaller employers, since small employers who face hardship would be eligible for a hardship exemption.

3. Model Consumer Protections

The proposed regulations require that the state assumes responsibility for the security of payroll deductions and employee savings; adopts measures to ensure that employees are notified of their rights; creates mechanisms for enforcement of those rights by and only by plan participants and their beneficiaries and the state. We believe it would be helpful for the Department to provide further guidance on these requirements, ideally by providing one or more models of consumer protections and enforcement mechanisms. In this regard, we note that the Pension Rights Center in partnership with AARP is working on model consumer protection language and would be pleased to share our work product with the Department.

4. Restrictions on Withdrawals from IRA Vehicle

Section 2510-3-2(h)(vi) of the proposed regulations prohibits a state plan from imposing any restrictions on withdrawals or requiring that an employee or beneficiary retain any portion of contributions or earnings in his or her IRA. This requirement, however, may have the effect of preventing states from requiring an annuity payout (or even permitting an annuity payout option) or from designing investment options that include partial or full guarantees as to returns.

The legal basis for the regulatory prohibition on withdrawal restrictions appears to be that employee participation must ultimately be voluntary and that any restrictions on access to plan accounts are incompatible with voluntary employee participation. We do not, however, understand ERISA coverage or preemption of a state plan to turn on voluntary participation by participants, although we understand that the structure of the proposed regulations is a safe harbor and not a comprehensive elucidation of all relevant ERISA provisions.

To permit states enhanced design flexibility for their programs, particularly as they affect plan distribution options, we urge the Department to consider relaxing the regulatory provisions on withdrawal restrictions where the conditions triggering the restrictions are related to aspects of the investment and where the employee is adequately informed in advance about such restrictions and how they contribute to the availability of a particular investment option.

5. Employer Contributions

Section 2510-3-2(1)(h)(ix) of the proposed regulations prohibits an employer from contributing funds to the program or providing other monetary incentives to employees to participate in the program. We agree with the proposed regulations that voluntary employer contributions or participation incentives would likely bring a plan within ERISA's definition of employer plan, but we disagree with the implication that a state law mandating that employers must contribute to a plan would transform the plan into an employer rather than a state plan. Although no state law to date has required employer contributions and no state law in the immediate future is likely to require employer contributions, we would prefer to see the regulation not unnecessarily inhibit future state innovation (for example, an expansion of minimum wage laws to include contributions to a state-sponsored individual retirement program or a requirement of an employer match.)

6. Application to Political Subdivisions of States

The proposed regulation applies only to state payroll deduction savings programs established by states pursuant to state laws. The regulation refers to the ERISA definition of state, which is "any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, and the Canal Zone." By its terms, the regulation would not apply to laws enacted by a political subdivision. Again, we see no basis in the law for this implied restriction on the ability of a municipality, county, or other political subdivision to adopt a mandatory payroll deduction program, although we understand prudential reasons for such concerns for relatively small entities and appreciate that the proposed safe harbor does not extend to actions by non-state governmental entities. But we would encourage the Department to consider expanding the safe harbor to permit entities in excess of a stated population size to create their own plans or to permit state legislation to authorize designated subdivisions to create such plans.

7. State Partnerships

The Department should revise the proposed regulations or indicate in the preamble to final regulations that states can enter partnerships with other states to create automatic-payroll deduction IRAs, so long as each individual state satisfies all applicable safe harbor requirements. This will allow smaller states, for example, to partner with other states to create economies of scale and cost savings for participants.

8. Consideration to Private Employers

The proposed regulations prohibit an employer from receiving "direct or indirect consideration in the form of cash or otherwise, other than the reimbursement of the actual costs of the program to the employer." The Department should consider clarifying that this provision does not apply to tax benefits that the state provides to employers, since such tax benefits will not necessarily reimburse actual costs of program sponsorship.

9.   Coverage for Employees without Access to Other Workplace Savings Arrangements

The regulations provide that a plan will not fail to satisfy the safe harbor provisions merely because the program is directed toward those employees who are not already eligible for some other workplace savings arrangement. See Prop. Reg. § 2510-3-2(h)(2)(i). To date, state statutes have applied mandates to employers that do not sponsor workplace retirement plans, even though those plans may not cover all employees. We commend the Department for including this broader provision that will allow states the flexibility to require access to a state automatic enrollment IRA program for employees without access to a workplace retirement savings program, even though an employer provides such a program for some of its employees.

III. Interpretive Bulletin

The Center applauds the interpretative bulletin for providing guidance that will allow states to set up certain types of ERISA plans without being pre-empted, allowing for potential experimentation with multiple employer and other plan designs that allow for employer and employee contributions, be paid as an annuity and that extends to state citizens the consumer protections embodied in ERISA. We have only modest comments for supplementing the interpretive bulletin:

1. State Market Places

The Department might consider issuing future guidance providing employers with a presumption of prudent initial selection of a retirement plan from a state marketplace if the state has listing standards that conform to Department specified criteria to ensure that the marketplace only lists capable and low-cost providers. This may be a particularly valuable approach, since many small employers lack expertise to identify plan providers whose products comply with ERISA prudence without engaging expensive independent advisors, and many such employers may thus have concerns about potential liability when they act without such expertise. A presumption of prudence when selecting from a selective state market place may make employers without the ability to engage experts more willing to adopt plans.

2. State Fiduciaries

The Department might consider providing further clarification that a state legislature or executive branch department that sets up a board or other entity and/or appoints its members to run an ERISA retirement plan is not itself a plan fiduciary or party in interest solely as a result of such actions.

In conclusion, we strongly support the approach and most of the substance of the proposed regulations and interpretative bulletin on state retirement-retirement savings initiatives. While we do not believe that these initiatives are a complete answer to our nation's retirement savings crisis, we do believe they are an essential component of a state-federal partnership that will ultimately help millions of working Americans build adequate and secure financial security for their retirement.

Thank you, we appreciate the opportunity to submit these comments, and we look forward to further discussion on this important issue.

Sincerely,

Norman Stein
Senior Policy Advisor