

Fact Sheet

U.S. Department of Labor
Employee Benefits Security Administration
November 16, 2015

State Savings Programs for Non-Government Employees

At the 2015 White House Conference on Aging, the President directed the Department of Labor to publish guidance to support the efforts of a growing number of states trying to promote broader access to workplace retirement saving opportunities for America's middle class workers. The Employee Benefits Security Administration (EBSA) is publishing in the Federal Register a proposed regulation describing a safe-harbor for state laws that require employers to facilitate enrollment in state-administered payroll deduction individual retirement accounts (IRAs). Under the terms of the safe harbor, state programs that mandate auto-enrollment in IRAs in accordance with the safe-harbor would not be treated as ERISA-covered plans. EBSA also released an Interpretive Bulletin regarding certain state laws designed to expand the retirement savings options available to their private sector workers through ERISA-covered retirement plans.

I. Background

Approximately 68 million US employees do not have access to a retirement savings plan through their employers. For older Americans, inadequate retirement savings can mean sacrificing or skimping on food, housing, health care, transportation, and other necessities, and places stress on social welfare programs as a source of income and economic security for older Americans. To address this problem, some states have adopted or are considering retirement savings programs for their private sector workers. Some have passed laws that would require employers not offering workplace plans to automatically enroll employees in payroll deduction IRAs administered by the states, which are also called "auto-IRA" laws. Other states are considering alternatives in which the states sponsor or facilitate plans covered by ERISA, such as state marketplaces, prototype plans, and multiple employer plans. A serious impediment to wider adoption of such state measures is uncertainty about the effect of ERISA's broad preemption of state laws that "relate to" private sector employee benefit plans and its prohibition on requiring employers to offer ERISA plans.

II. Proposed Regulation

The proposed regulation describes circumstances under which a state-required payroll deduction savings IRA program would not give rise to an employee pension benefit plan under ERISA and, therefore, should not be preempted by ERISA.

State Law and Role of the State -- The principal conditions of the proposed safe harbor focus on the role of the state. The state program must be established and administered by a state pursuant to state law. The state must be responsible for investing the employee savings or for

selecting investment alternatives from which employees may choose. The state must be responsible for the security of payroll deductions and employee savings. The state also must adopt measures to ensure that employees are notified of their rights under the program, and create a mechanism for enforcement of those rights. The state may administer its program or contract with private-sector providers to administer the state program.

Additional Conditions -- Other conditions of the proposed safe harbor focus on the role and rights of employees. For example, participation in the program must be voluntary for employees. Thus, if the program requires automatic enrollment, employees must be given appropriate notice and have the right to opt out. Moreover, since employees own their IRAs, they must have the ability to withdraw their money under normal IRA rules without any other cost or penalties.

Limited Role of Employer -- Under the proposal, the employer's activities must be limited to ministerial activities such as collecting payroll deductions and remitting them to the program; providing program information to employees; maintaining records of payroll deductions and remittance of payments; and providing information to the state necessary to the operation of the program. The employer may have no discretionary authority or control over the employees' IRAs or the operation of the IRA program. Employers cannot contribute employer funds to the IRAs.

Public Notice and Comment -- The proposed regulation has a 60-day comment period. Comments can be submitted electronically by email to e-ORI@dol.gov or by using the Federal eRulemaking portal at www.regulations.gov. All comments will be available to the public, without charge, online at www.regulations.gov and www.dol.gov/ebsa, and at the EBSA Public Disclosure Room.

III. Interpretive Bulletin

Today the Department also issued an Interpretive Bulletin to assist states interested in helping employers establish ERISA-covered plans for their employees. Under one approach, the state would establish a marketplace to connect eligible employers with retirement plans available in the private sector market. The marketplace would not itself be an ERISA-covered plan, and the arrangements available to employers through the marketplace could include ERISA-covered plans and other non-ERISA savings arrangements. Under another approach, the state would make available a "prototype plan" that individual employers could adopt. Each employer that adopts the prototype would sponsor an ERISA plan for its employees, and the state or a designated third-party could assume responsibility for most administrative and asset management functions of an employer's prototype plan. Under a third approach, a state would establish a "multiple-employer plan" or MEP that eligible employers could join rather than establishing their own separate plan. The MEP would be run by the state or a designated third-party.

Because ERISA broadly preempts most state laws that relate to employee benefit plans covered by the Act, some states may have been deterred from enacting measures to facilitate the establishment of such plans because of legal uncertainty about their status. The Department is issuing an interpretive bulletin explaining its view that the state law approaches described above should not be preempted by ERISA.

1. *Preemption.* The interpretive bulletin makes clear the Department's view that ERISA preemption principles leave room for states to encourage greater access to ERISA-based retirement savings options, as long as employers participate voluntarily and ERISA's requirements, liability provisions, and remedies fully apply to plans established through the state programs. Such state actions do not undermine the primacy of federal regulation with respect to covered employee benefit plans. They do not require employers to adopt or participate in ERISA plans, or mandate any particular benefit structure. Instead, they merely give employers an additional option for providing benefits to their employees in a way that is fully subject to ERISA's regulations, obligations, and remedies.

2. *Multiple Employer Plans.* The interpretive bulletin also makes clear that a state is able to sponsor and administer a multiple employer plan for the state's private sector employers ("state MEP"). The interpretive bulletin explains that, unlike financial institutions that sell retirement plan products to employers, a state can indirectly act in the interest of the employers and sponsor a MEP under ERISA because the state is tied to the contributing employers and their employees by a special representational interest in the health and welfare of its citizens. The state is standing in the shoes of the employers in sponsoring the plan.

3. *Scope.* The interpretive bulletin sets forth the Department's views of sections 3(2), 3(5), and 514 of ERISA as applied only to the three approaches described therein. The interpretive bulletin does not deal with state payroll deduction savings IRA programs that would be covered by the proposed regulatory safe harbor discussed in Section II above. States would have the option of requiring IRA programs under that safe harbor, facilitating or sponsoring ERISA-covered plans in accordance with this interpretive bulletin, or both.