



Via Email: [e-ORI@dol.gov](mailto:e-ORI@dol.gov)

Office of Regulations and Interpretations  
Employee Benefits Security Administration  
U.S. Department of Labor  
200 Constitution Avenue, N.W.  
Washington, DC 20210

**Attn: State Savings Arrangements Safe Harbor**  
**RIN 1210-AB71**  
**RIN 1210-AB74**

Ladies and Gentlemen:

The Washington State Department of Commerce (“Commerce”) appreciates the opportunity to comment on the Department of Labor (“Department”) Proposed Regulation 2510.3-2(h) that would create a safe harbor exemption from the Employee Retirement Income Security Act of 1974 (“ERISA”) for certain state payroll deduction savings programs (“Proposed Safe Harbor”). Commerce also appreciates the guidance provided in Interpretive Bulletin 2015-2 addressing ERISA concerns associated with three approaches to state retirement savings programs (“Interpretive Bulletin”).

**1. Comments RE: Proposed Safe Harbor (RIN 1210-AB71)**

Commerce thanks Secretary Perez and the Department for their extraordinary efforts to clarify the relationship between state payroll deduction savings programs and ERISA.

Commerce believes that the Proposed Safe Harbor would be more impactful if the ERISA exemption also applied to employers that participate voluntarily in a state payroll deduction program. Many states, like Washington, have not mandated employer participation in a state payroll deduction savings program as required by Prop. Reg. § 2510.3-2(h)(1)(x). States that are not positioned to impose an employer mandate would effectively be prevented from establishing an auto-enrollment, payroll deduction IRA program. Limiting the ERISA exemption to employer programs that are mandated by state law prevents too many workers from accessing low-barrier, low-cost workplace-based retirement savings options. This limitation contravenes states’ substantial governmental interest in taking steps to address the low rate of savings among American workers. Also, a state mandate is not required in order to ensure participation is voluntary and participants are not unduly influenced by employers. These important goals can be achieved with voluntary enrollment, as permitted under 29 CFR 2510.3-2(f) for enrollment in tax shelter annuities, which are not subject to a state mandate.

If the state law mandate to offer a retirement program is removed from the Proposed Safe Harbor and if certain changes are made to the administrative and operational provisions, the Proposed Safe Harbor will be an even stronger tool, allowing states to partner with the private sector to promote responsible retirement savings programs for far more employees, that fully safeguard workers’ interests.

**2. Comments RE: Interpretive Bulletin (RIN 1210-AB74)**

Again, Commerce wishes to express gratitude to Secretary Perez and the Department for the guidance provided in the Interpretive Bulletin. We understand that the Interpretive Bulletin became effective on November 18, 2015, and wish to clarify the differing roles and responsibilities of a contracted

marketplace operator from those of private financial services firms verified to offer retirement products through a state marketplace.

We appreciate inclusion of Washington's Small Business Retirement Marketplace ("Marketplace") as an illustration of the Marketplace approach. An estimated 89,000 businesses with fewer than 100 employees in Washington do not currently offer workplace-based retirement savings options. We believe the Marketplace will succeed in closing Washington's retirement savings gap.

The interpretive bulletin cites Washington's requirement for the State to contract with a private sector entity to connect eligible employers with qualifying savings plans available in the private market. Then, the Department later states that

"A contractor retained by a state using the marketplace approach would be subject to the same ERISA standards and remedies that apply to any company offering the same services to employers."

Commerce wishes to clarify that the Department's reference to a private sector entity in § 2509.2015-02(a) under Marketplace Approach (on page 5) refers to a contractor that would be retained by the state to develop and operate a web-based information clearinghouse constituting the Marketplace, not the type of contractor referenced in § 2509.2015-02(c) (on page 13). While it is possible that the contractor retained by Commerce could be an entity that also offers retirement savings options to employers, Commerce's contract with such an entity will be exclusively for the design, architecture, and ministerial operation of the Marketplace website. Regarding the aforementioned discussion on page 13, Commerce wishes to clarify that those contractor functions are not subject to the same ERISA standards and remedies that apply to any company offering the same services to employers.

On the other hand, any private sector financial services firm verified by application through the Washington State Departments of Commerce and Financial Institutions to participate in the Marketplace will be subject to the same ERISA standards and remedies that apply to any company offering the same services to employers.

### **Conclusion**

Commerce strongly supports the Department's goal of allowing states to establish retirement savings initiatives to close savings gaps through a number of allowable models, including the marketplace approach and state payroll deduction programs.

Respectfully submitted,



Carolyn C. McKinnon (via email)  
*Washington Small Business Retirement Marketplace Director*  
Washington State Department of Commerce

cc Barbara Dunn, Director of Communications