601 E Street, NW | Washington, DC 20049
202-434-2277 | 1-888-OUR-AARP | 1-888-687-2277 | TTY: 1-877-434-7598
www.aarp.org | twitter: @aarp | facebook.com/aarp | youtube.com/aarp

January 19, 2016

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

Submitted via: e-ORI@dol.gov

Re: Proposed Rule on Savings Arrangements Established by States for Non-Governmental Employees [RIN-1210-AB71]

Ladies and Gentlemen:

AARP appreciates the opportunity to respond to the Department of Labor's (the Department) request for comments on the proposed regulation relating to arrangements established by states to enhance retirement savings for their citizens.

AARP is the largest nonprofit, nonpartisan organization representing the interests of Americans age 50 and older and their families. More than a quarter of our members are employed full or part-time, with many of their employers not providing any opportunity to save for retirement. A major priority for AARP is to assist Americans in accumulating and effectively managing adequate retirement assets to supplement Social Security. We have been working for decades, at both the federal and state levels, to improve and expand coverage under the retirement system -- especially for employees working for small employers.

I. States Want To Ensure That Their Residents Have Adequate Retirement Income.

No one disputes that individuals need a strong and adequate retirement system in order to provide sufficient income to live in retirement when they are no longer

Real Possibilities

working. Social Security provides a strong income base, but Social Security was never intended to be the sole source of retirement income.

Currently, one out of two households is at risk of having a financially insecure retirement. Financial insecurity means that middle-class households will be unable to afford the basics -- food, medicine, and utilities. According to the National Institute on Retirement Security, the median retirement account balance is $3,000 for all working-age households and $12,000 for near-retirement households. Three out of five families headed by a person age 65 or older have no money in retirement savings (such as a 401(k) plan or an IRA) and have few other financial resources.

Increasingly, states are realizing that if retired individuals do not have adequate income, they are likely to be a burden on state resources for housing, food, and medical care. For example, according to a recent Utah study, the total cost to taxpayers for new retirees in that state will top $3.7 billion over the next 15 years. Jay Goodliffe, Erik Krisle, Sterling Peterson, & Sven Wilson, *The Cost Of Retiring Poor: Government Outlays In Utah's Retiring Population* at 2, 10 (Jan. 2015), http://media.navigatored.com/documents/Retiring+Poor+Impact+Study+2015-01-19+Final.pdf . The study also found that 18 percent of retirees in the next 15 years will retire with more debt than savings. *Id*. at 2. Failure to address the retirement savings shortfall will translate into more costs for taxpayers. *Id.* at 9-11. In contrast, a 10 percent increase in net worth of the one-third least prepared for retirement will save taxpayers $194 million through 2030.[1] *Id*. at 11. Such an increase is clearly beneficial for the country as a whole.

According to the Center for Retirement Research, access to a workplace retirement savings arrangement is second only to having a job as the most important factor in helping families build retirement savings as a supplement to Social Security. Having access to such an arrangement makes workers 15 times more likely to save. Employee Benefit Research Institute and Greenwald & Associates, 2014 RCS Fact Sheet #6 Preparing For Retirement In America at 4, https://www.ebri.org/pdf/surveys/rcs/2014/RCS14.FS-6.Prep-Ret.Final.pdf . When employees are offered a workplace savings arrangement, about 70 percent voluntarily participate. Even better, when workers are automatically enrolled, with the option to opt out, participation jumps to about 90 percent. However, only about half of the workforce has access to a retirement savings arrangement or other type of retirement plan at work, leaving approximately 55 million Americans without the ability to save for retirement at work. *See* David John and Gary Koenig, *Workplace Retirement Plans Will Help Workers Build Economic Security*, Fact Sheet 317 (Oct. 2014), http://www.aarp.org/content/dam/aarp/ppi/2014-10/aarp-workplace-retirement-plans-build -economic-security.pdf for more detailed analysis by education level, salary, race, and ethnicity. Unfortunately, pension coverage in the private-sector labor force, which has never been much above 50 percent, has declined slightly in recent years, and trends indicate that employers will continue to move away from sponsoring retirement

[1] Effective utilization of state sponsored payroll deduction IRAs by employees will directly and positively affect state finances inasmuch as state residents will not need to rely on state services.

vehicles. C. Copeland, *Employment-Based Retirement Plan Participation: Geographic Differences and Trends*, 2011 at 29 (EBRI No. 378 Nov. 2012), https://www.ebri.org/pdf/briefspdf/EBRI_IB_11-2012_No378_RetParticip.pdf .

Not only does participation increase if automatic enrollment is used, but the amount of savings increases dramatically. For those employees with access to a retirement plan, 62 percent had more than $25,000 in total savings and 22 percent had $100,000 or more. Significantly, access to workplace retirement savings plans can help workers supplement Social Security and achieve greater economic security in retirement. Employee Benefit Research Institute and Greenwald & Associates, 2014 *RCS Fact Sheet #6 Preparing For Retirement In America* at 4, https://www.ebri.org/pdf/surveys/rcs/2014/RCS14.FS-6.Prep-Ret.Final.pdf .

Not surprisingly, the best way to increase retirement savings is to ensure that all workers have access to a low-cost, professionally managed retirement savings vehicle that enables them to save automatically from every paycheck. Consequently, AARP supports the Department's proposed rule on savings arrangements established by states for non-governmental employees with some modifications. In particular, AARP submits that the Department should review and redefine "completely voluntary" to permit automatic enrollment and automatic escalation with opt-outs; this definition should be applicable to both safe harbors. In addition, AARP submits that the Department should acknowledge that a state could use either safe harbor, depending on the type of program the state establishes.

AARP submits the following comments on the proposed rule:

II. The Department Of Labor Has The Authority To Provide Guidance On Whether A Plan Is Covered By ERISA.

ERISA defines a pension plan as any "plan, fund, or program" "established or maintained" by an employer to the extent that it "provides retirement income to employees," or "results in a deferral of income by employees for periods extending to the termination of covered employment or beyond." ERISA §3(2)(A), 29 U.S.C. §1002(2)(A). However, ERISA itself does not address what constitutes a "plan, fund or program." Nor does ERISA identify the circumstances under which an employer will be deemed to "establish or maintain" such a plan, fund, or program.

Shortly after ERISA took effect, the Department of Labor issued guidance concerning some of the indicia that are necessary for plans, programs or funds to be considered an ERISA-covered plan. Forty years ago, the Department clarified under which circumstances individual retirements accounts (IRAs) would not be treated as ERISA-covered plans. The Department did so solely because of the concern that IRAs were covered under Title I with all of its attendant obligations. Preamble to 29 C.F.R. § 2510.3-2(d), 40 Fed. Reg. 34530 (Aug. 15, 1975). Under that safe-harbor regulation, the IRA must meet the following conditions:

(i) No contributions are made by the employer or employee association;

(ii) Participation is completely voluntary for employees or members;

(iii) The sole involvement of the employer or employee organization is without endorsement to permit the sponsor to publicize the program to employees or members, to collect contributions through payroll deductions or dues checkoffs and to remit them to the sponsor; and

(iv) The employer or employee organization receives no consideration in the form of cash or otherwise, other than reasonable compensation for services actually rendered in connection with payroll deductions or dues checkoffs.

29 C.F.R. § 2510.3-2(d). The importance of this determination cannot be understated. If a plan, program or fund is not an ERISA plan, ERISA preemption is not applicable. *See* ERISA § 514(a), 29 U.S.C. § 1144(a) (Section 514 preempts only those state laws that relate to employee benefit plans described in section 4(a)); *see, e.g., Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987) (holding no preemption of a Maine statute requiring employers who closed their plants to pay one time severance benefits to employees because there was no "plan").

The Department of Labor has a long history of advising whether specific types of programs are employee benefit plans within the definition of ERISA. *See, e.g*., DOL Opinion 80-12 A, 1980 ERISA LEXIS 65 (Feb. 29, 1980) (the Welfare and Pension Fund, Mid-Jersey Trucking Industry, Local 701, International Brotherhood of Teamsters is an ERISA-covered plan); DOL Opinion 80-45 A, 1980 ERISA LEXIS 34 (July 22, 1980) (Central States, Southeast and Southwest Areas Health and Welfare Fund is an ERISA-covered plan); DOL Opinion 79-21 A, 1979 ERISA LEXIS 72 (Mar. 16, 1979) (Local 945 Teamsters Severance Fund and the Local 945 Welfare Fund are ERISA-covered plans); DOL Opinion 94-37 A, 1994 ERISA LEXIS 60 (Nov. 10, 1994) (Missouri Pacific Employees' Health Association is an ERISA-covered plan); DOL Opinion 85-06 A, 1985 ERISA LEXIS 39 (Feb. 19, 1985) (Money Back Health Protector Program is not an ERISA-covered plan); DOL Opinion 2000-07 A, 2000 ERISA LEXIS 7 (May 17, 2000) (Ohio Civil Service Employees Association Benefits Trust is a governmental plan and excluded from ERISA's coverage); DOL Opinion 2006-05A (July 26, 2006) (plans administered by Federal Reserve are governmental plans); *see also Massachusetts v. Morash*, 490 U.S. 107 (1989) (policy of paying discharged employees for unused vacation time does not constitute an employee welfare plan within meaning of ERISA).

The Department clearly has the authority to determine whether a plan, program, or fund is an ERISA-covered pension plan within the meaning of ERISA § 3(2).

III. State Run Payroll Deduction IRA Plans Are Not Employee Benefit Plans Under ERISA.

A. Employer Involvement In State Run Payroll Deduction IRA Programs Is Minimal.

The statute and case law are clear that an ERISA-covered retirement plan does not exist if an employer does not establish or maintain a plan, fund, or program to provide retirement income or deferral of income to employees. Courts consistently have deferred to the Department's safe-harbor regulation defining an employee benefit plan. Thus, consistent with the Department's safe harbor regulation, courts have found the employer did not establish or maintain an ERISA-covered retirement plan where there was:

- no employer contributions or premium payments;[2]
- no employer responsibility for design or implementation of the program;
- no employer performance of non-ministerial administrative tasks;
- no employer processing of claims; and/or
- no employer creating, developing, or sanctioning of plan materials.

See, e.g, Hansen v. Continental Ins. Co., 940 F.2d 971 (5th Cir. 1991) (plan existed based on facts that employer's logo was embossed on booklet and booklet described it as "company's plan"); *Stuart v. UNUM Life Ins. Co*., 217 F.3d 1145, 1153 (9th Cir. 2000) (holding that because employer contributed to the disability plan, the plan constituted an ERISA-covered plan); *Postma v. Paul Revere Life Ins. Co*., 223 F.3d 533, 537–38 (7th Cir. 2000) (same); *Libbey-Owens Ford v. Blue Cross/Blue Shield,* 982 F.2d 1031 (6th Cir. 1993) (same); *Anderson v. Unum Provident Corp*., 369 F.3d 1257, 1263–64 (11th Cir. 2004) (concluding that the controlling question is whether employer intended to offer the benefits, not whether employer intended to offer a plan covered by ERISA; employer's establishment of a fund to pay benefits, maintenance, and processing of claims forms, and employer emblem on internal documents relating to plan benefits meant employer was sufficiently involved so that the plan was established and maintained by employer).

In the state run programs as described in the NPRM, the employer is required to offer its employees the ability to make their own contributions to a payroll deduction IRA. Black's Law Dictionary defines "offer" as presenting for acceptance or rejection. The employer merely deducts specified amounts on behalf of the employee and remits

[2] AARP submits that an employer contribution to a retirement savings arrangement, with no restrictions and/or conditions, does not raise the same issues that contributions to other types of plans do, and, thus, does not trigger employer establishment of a plan, program or fund. *Cf. Custer v. Pan Am. Life Ins. Co*., 12 F.3d 410 (4th Cir. 1993) (mere purchase of insurance without more is not enough to establish plan). Instead, the employer contribution advances the desired public policy of enhancing retirement savings in a more robust manner than mere employee contributions. We suggest that this issue be reserved for future study.

them to the stipulated provider and/or trust fund, under these state run programs. Moreover, these programs typically require the employer to provide information to the employees regarding the program, frequently consisting of state-prepared materials. Consequently, under the current and revised safe harbor regulation, employer involvement in a state run payroll deduction IRA program is minimal, at best, and does not rise to the establishment or maintenance of a plan, fund, or program to provide retirement income. *See, e.g., Hansen v. Continental Ins. Co., supra; Anderson v. Unum Provident Corp., supra.*

B. Employee Participation In State Run Payroll Deduction IRA Programs Is Completely Voluntary.

When the IRA safe harbor was fashioned in 1975, the field of behavioral economics and its application to retirement savings was non-existent. It was not until the mid-1990s and early 2000s that the idea that participation and savings amounts could be improved using changes in defaults entered into the mainstream retirement industry and the payroll deduction IRA started to be utilized. *See generally* James Banks, Richard Blundell, & Sarah Tanner, *Is There a Retirement- Savings Puzzle?*, Vol. 88 No. 4 Am. Econ. Rev. 769, 769-88 (1998); Brigitte C. Madrian & Dennis F. Shea, *The Power of Suggestion: Inertia in 401(k) Participation and Savings Behavior*, Vol. CXVI Issue 4 The Q. J. of Econ. 1149, 1149-87 (2001); Ted O'Donoghue & Matthew Rabin, *Procrastination in Preparing for Retirement*, Henry J. Aron Ed. Chapter 4 Behavioral Dimensions of Retirement Economics Brookings Inst. Press. 124, 124-56 (1999); Richard H. Thaler & Shlomo Benartzi, *Save More Tomorrow: Using Behavioral Economics to Increase Employee Saving*, Vol. 112 No. 1 J. of Pol. Econ. S164, S164-87 (2004). Indeed, the integrated strategy of using default arrangements to promote saving without sacrificing individual choice was not approved by the U.S. Treasury until the late 1990s. Consequently, it is hard to imagine the Department of Labor even considered the meaning of voluntariness in relation to auto-enrollment and auto-escalation in 1975. It was just not an issue.

Subsequent to the endorsement of auto-enrollment by the Treasury and the Pension Protection Act, retirement policy has greatly expanded the use of "auto" and "default" mechanisms for a common-sense reason. They work. Indeed, research shows that programs crafted this way are one of the few things that actually work to enhance needed retirement savings. Today's workers, of all ages, may want to save for retirement, but are immobilized by inertia. They want plan providers to simplify their options and required actions. Consequently, individuals wholeheartedly support these initiatives.

Indeed, ERISA has always contained defaults for distribution of pension benefits in defined benefit plans. See ERISA §§ 205(a)(1) & (b), 29 U.S.C. §§ 1055(a)(1) & (b). All private-sector defined benefit plans (including both traditional final-average pay (FAP) plans and hybrid/cash balance plans) are required to offer a lifetime annuity option. *Id.* However, a plan may provide for alternatives to an annuity, and many defined benefit plans offer the alternative option of a lump sum distribution. For married

participants who want to choose a plan's alternative to the 50 percent joint and survivor annuity (such as a lump sum or a different joint and survivor annuity), those participants must do more than just make a decision; they must obtain the written consent of their spouses and have the spouse's consent witnessed by a plan representative or notary public. See ERISA § 205(c)(2), 29 U.S.C. § 1055(c)(2).

Even though the default is an annuity, analysis has shown that defined benefit plans with no restrictions on lump sum distributions have an annuitization rate of 44.3 percent. Sudipto Banerjee, *Annuity and Lump-Sum Decisions in Defined Benefit Plans: The Role of Plan Rules* at 1, 17 (Employee Benefit Research Institute Jan. 2013, No. 381). Yet no one has ever suggested that the annuity defaults are not voluntary. Participants have shown that even with significant requirements to obtain a lump sum distribution (such as spousal consent rules) they are capable of voluntarily deciding to take action other than the default. Indeed, the analysis shows that well more than half of participants opt out of the annuity default. *Id*.

It is worth stressing that automatic or default arrangements are not coercive. Workers retain the final decision as to participation, contribution amounts, and withdrawals. Indeed, workers remain free to opt out at any point. More fundamentally, automatic payroll deduction IRAs do not dictate choices any more than the current set of default options, which exclude workers from the plan unless they opt to participate. Instead, automatic payroll deduction IRAs merely point workers in a pro-saving direction when they decline to make explicit choices of their own. The agencies authorizing automatic enrollment include provisions to ensure that employees retain control of enrollment and investment decisions. The plan must provide employees advance notice and an adequate opportunity to make their own alternative choices before proceeding with the default arrangement.[3] Changing the choice architecture and the defaults do not change the voluntariness of the individual's decision.[4]

---

[3] AARP submits that the notice requirements for the state run payroll deduction IRAs, at a minimum, should be coextensive with the current notice requirements under Treasury and Department regulations. Of course, states can provide for more robust notification requirements.

[4] We note that the four ERISA cases that the Department cites in its proposed regulation (at footnote 12) concerning the definition of "completely voluntary" are distinguishable. None of these programs permitted employees to opt-out of the plan in a timely manner. *Thompson v. Unum Life Ins. Co. of Am*., 2005 U.S. Dist. LEXIS 5050 (N.D. Tex. Mar. 29, 2005); *Carter v. Guardian Life Ins. Co. of Am*., 2011 U.S. Dist. LEXIS 53428 (E.D. Ky. May 18, 2011). Indeed, in one case the employer agreed to 100 percent participation of its employees. *The Meadows v. Employers Health Ins*., 826 F. Supp. 1225 (D. Ariz. 1993). Moreover, in *Davis v. Liberty Mut. Ins. Co*., Civ. A. No. 87-2851, 1987 WL 16837, *2 (D.D.C. Aug. 31, 1987), the court held that participation was not voluntary if the "choice" results in a penalty or the functional equivalent of a pay cut; this is not a real choice. Moreover, the other two cases are not ERISA cases but they also do not support the Department's interpretation of "completely voluntary." The court in *Schear v. Good Scope Am., Inc*. held that for a voluntary "tip pooling" arrangement to be considered completely voluntary under the Fair labor Standard Act and New York State wage laws, an employer may not mandate or initiate the tip pool and can take "no part in the organization of the conduct of [the] tip pool." 297 F.R.D. 114, 125 (S.D.N.Y. 2014). In *Doe v. Wood Cty. Bd. of Educ*., 888 F. Supp. 2d 771 (S.D. W. Va. 2012), the court held that enrollment in a single-sex education program was not completely voluntary when parents were given mere weeks to opt-out of the program; even if the parents timely opted out, there was inadequate time to place the student in a co-educational program.

Auto-enrollment and auto-escalation defaults with opt-out provisions are no different from distribution defaults with opt-out provisions. The Department should revise the “completely voluntary” criterion of 29 C.F.R. § 2510.3-2(d)(iii) to encompass auto-enrollment and auto-escalation – both for state run payroll deduction savings arrangements and for employer voluntarily offered payroll deduction savings arrangements. Such a revision is consistent with current behavioral research on retirement savings and is supportive of the retirement security of participants.

C. A State’s Establishment Of Terms For A Payroll Deduction IRA Provides Additional Protections For Employees.

Although AARP submits that automatic opt-out enrollment and escalation provisions for payroll deduction IRAs meet the “completely voluntary” indicia under the original regulation (§2510.3-2(d)(iii)), there is also no question that where a state government establishes the terms for and administers a payroll deduction savings arrangement there likely are more protections for the employee. The state’s active involvement and the employer’s minimal role as set forth in the proposed regulation -- merely deducting the monies and furnishing information – guarantee that the payroll deduction arrangements are not established or maintained by the employer within the meaning of ERISA § 3(2). To the extent that there may be any undue employer influence or pressure in payroll deduction IRAs,[5] any such opportunity is significantly minimized where the state runs the program. For example, in state-run payroll deduction IRAs, the state chooses the manner and amount of the defaults, thereby eliminating the potential that the choice of defaults was made merely for profit.

Justifiably, states have as their main goal increased savings -- not only from an altruistic perspective, but also from a self-interested budgeting perspective. Helping individuals save, invest, and ultimately drawdown their money in the most efficient way is clearly the goal of the program. We agree with the Department’s determination that states should have authority to determine the terms and administration of a state savings arrangement.[6]

AARP does not believe that the Department’s regulation needs to specify the types of functions that the employer could be permitted to perform. Instead, the regulation should set forth a standard. That standard should include whether the function itself is required by the state program and whether the employer function

---

[5] AARP notes however that even where employers choose these types of arrangements, employers have little reason to pressure employees to enroll. It is not apparent what the employers would have to gain from such pressure and hence the reason for the Department’s concern.

[6] AARP submits that this safe harbor regulation should be extended to municipalities with over 1 million residents. Only ten cities in the United States would meet that criterion (New York, Los Angeles, Chicago, Houston, Philadelphia, Phoenix, San Antonio, San Diego, Dallas, and San Jose). U.S. Census, 1 Million Milestone, 2014 Population Estimates (May 2015), http://www.census.gov/content/dam/Census/newsroom/releases/2015/cb15-89_graphic.jpg. They have many of the same issues as states, resulting from low retirement savings.

directly relates to or is in furtherance of the program. While examples are helpful, a specific list of functions could inhibit the implementation of the program.

AARP supports both private sector and state payroll deduction savings arrangements, with both subject to a comparable set of rules. The Department should make clear that, consistent with its guidance, a state may adopt a split model in which different types of employer or state payroll deduction IRAs and ERISA plans may be facilitated such as state run payroll deduction IRAs and ERISA plans or state run and private payroll deduction IRAs.

IV. The Department Should Acknowledge That Employers May Voluntarily Participate In A State Payroll Deduction Savings Arrangement If The Employer or State Meets The Original Safe Harbor.

AARP agrees with the Department's implicit statement that the majority of state payroll deduction savings arrangements will fall under the revised safe harbor. However, AARP submits that the Department should reaffirm that payroll deduction savings arrangements with employers who voluntarily participate in a state payroll deduction savings arrangement and meet the requirements of the original safe harbor will not be considered an ERISA plan. See discussion at Section III.B., *supra*. AARP believes states should be able to use either the proposed safe harbor, Interpretive Bulletin 2015-02, or a mixture thereof, as appropriate.

* * * * *

AARP appreciates this opportunity to provide its views on the proposed rule on savings arrangements established by states for non-governmental employees. Meaningfully expanding retirement security, particularly for employees of small employers, remains a critical challenge for this country. We look forward to continuing to work with the Department of Labor on all ideas and proposals to expand retirement coverage and adequacy to the tens of millions of Americans who need access to workplace retirement savings vehicles.

If you have any questions, please feel free to contact me or Michele Varnhagen of our Government Affairs office at 202-434-3829.

Sincerely,

David Certner
Legislative Counsel and Legislative Policy Director
Government Affairs