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Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210
Attention: State Savings Arrangements Safe Harbor

Re: Savings Arrangements Established by States for Non-Governmental Employees, U.S. Department of Labor, 29 CFR Part 2510, RIN 1210-AB71

Dear Secretary Perez:

On behalf of the Oregon Retirement Savings Board ("the Board"), I write to you to offer our comments regarding the Proposed Regulation for state-sponsored auto-IRAs. While the Proposed Regulation provides us critical guidance as we begin to address the retirement savings crisis in Oregon, we ask for clarification on a few key points.

The Board is tasked with development of and oversight over the Oregon Retirement Savings Plan, which will connect individuals to simple, affordable IRAs at their place of employment. Guidance from the Department is critical to making sure we do this right. With a few changes, which I outline below, we are optimistic that the Proposed Regulation will provide a defined path for Oregon and other states to develop and implement auto-IRA programs.

Specifically, we ask that the Department: (1) define "instrumentality of the State" in the Proposed Regulation to include private entities with which the State contracts; (2) provide that a State demonstrates a sufficient level of responsibility over the plan where it establishes a regulatory scheme and oversight over entities providing services within the program to protect the contributions and investments of participants; (3) clarify the State's legal obligation in providing notice to participants; (4) allow the State to adopt reasonable restrictions on withdrawals; (5) require the State to establish rules restricting employer

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involvement and clarify that if an employer violates the rules, that does not disqualify the entire program from the safe harbor; (6) provide that the State can change the exemption status of employers, either by rule or legislation and clarify that if an exempt employer improperly opts into the program, that does not jeopardize the safe harbor status of the state program; and (7) permit the State to provide support to participating employers without needing to demonstrate that the support only reimburses actual costs to an individual employer.

Comments

The Proposed Regulation for 29 CFR Part 2510.3-2 directly addresses the type of program the Board endeavors to provide to Oregonians by establishing a separate safe harbor for state-sponsored plans. It is imperative that the Proposed Regulation be promulgated soon. Oregon is at a critical stage in developing its program, and the clarification and direction provided to the Board by new safe harbor rules are needed as soon as possible to inform our next steps. Without this guidance from the Department, the Board could face significant challenges and additional expenses in order to proceed.

While the Proposed Regulation is a move in the right direction, an overly prescriptive rule would unnecessarily limit our flexibility in developing a plan that works best for Oregon. Therefore, we ask that the Department take another look at the Proposed Regulation to determine where more flexibility for states could be achieved. Because the objective of the Proposed Regulation is to make it clear that state payroll deduction savings programs with automatic enrollment do not establish ERISA plans, the Proposed Regulation should focus on defining and limiting the participating employer's role, which is the true test of whether a plan is an employee benefit plan. Additional provisions limiting the options for states to develop programs are extraneous and should be stricken in favor of state flexibility.

Related to our general concerns about the Proposed Regulations described above, the Board has the following comments regarding specific provisions:

1. **The Proposed Regulation should clarify that "an instrumentality of the State" includes any entity – public or private – with which the State contracts to perform functions within the program.**

The Proposed Regulation, at § 2510.3(h)(1)(ii), requires that, "[t]he program is administered by the State establishing the program, or by a governmental agency or instrumentality of the State, which is responsible for investing the employee savings or for selecting investment alternatives for employees to choose." The Proposed Regulation clearly contemplates that a state may contract with outside entities to perform functions within its state-sponsored program; we note the language in § 2510.3(h)(2)(ii) permitting a state to "[utilize] one or more service or investment providers to operate and administer the program." However, this arrangement is only permissible under the Proposed Regulation "provided that the State (or the designated governmental agency or instrumentality described in paragraph (h)(1)(ii) of this section) retains full responsibility for the operation and administration of the program." Consequently, it is unclear whether an "instrumentality" could include a private entity with which the state contracts, particularly if there is a limitation on the delegation of responsibility.

HB 2960 (2015) not only allows the Board to contract for services of private financial institutions, depositories, consultants, investment advisers, investment administrators, and third-party plan administrators, but it requires that the plan developed by the board "[a]llow the use of private sector partnerships to administer and invest the contributions to the plan under the supervision and guidance of the board."[1] Further, the plan must "[p]rovide for contributions to the plan to be deposited directly with the investment administrator for the plan."[2] The Legislature passed the bill with the understanding that, like the Oregon 529 College Savings Plan, the accounting and investment would be done by one or more third party providers. In fact, the Legislature only appropriated funds for the State Treasurer to hire 1.5 FTE (Full Time Equivalent) to staff the program.

The State of Oregon does not currently have the capacity to self-administer an IRA program for an estimated 600,000 participants. Nor do we believe that developing that capacity would be an effective use of either State funds or participant fees. Indeed, one of our priorities is to ensure that we keep administrative fees low.[3] This will be a complex program to administer, and it is imperative that we have the flexibility to choose the *right* entity to administer the program. Creating the capacity to administer this program within a government entity would not only be cost prohibitive, but developing a new function for an Oregon state agency would have additional risks.

While many of the detailed mechanics will be handled by a third party provider, the Board will be the contracting authority and will have oversight responsibility to ensure that participants are treated fairly. The Oregon 529 College Savings Plan is an example of a current program that utilizes this type of structure – the State (through a Board) contracts with private sector providers to handle program management, investment management, underwriting, and other services associated with the program. Both the Oregon 529 College Savings Plan and Oregon Retirement Savings Plan have board meetings that are public and subject to open meetings laws. Indeed, a designated board provides a high-level of state oversight of both the development and long-term administration of the program.

Further, § 2510.3(h)(1)(viii) restricts which parties an employer can interact with in this program. Unless "instrumentality" is defined to include private entities with which the State contracts, employers could only provide information to the State and could only distribute program information that comes directly from the State to employees. If a service provider is authorized by the State to act on its behalf, then the new safe harbor should allow that arrangement. Requiring the State to serve as a middleman would be inefficient and result in higher program costs. The Proposed Regulation should expressly allow for appropriate communication between an employer and a private entity utilized by the State to operate and administer the program.

2. **The Proposed Regulation should clarify that a state satisfies its responsibility for the program by having wage theft laws to protect contributions, properly vetting and overseeing entities providing services within the program, and establishing rules that can reasonably be expected to protect the contributions and investments of participants in the program.**

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[1] H.B. 2960, 78th Or. Legis. Assemb., Reg. Sess. § 3(1)(r) (Or. 2015).
[2] *Id.* § 3(1)(f).
[3] *Id.* § 3(1)(q).

It is clear from the Proposed Regulation that ensuring proper oversight and protections for participants is a critical piece of the safe harbor. The Proposed Regulation uses the term "responsibility" in two subsections. First, § 2510.3(h)(1)(iii) states, "[t]he State assumes responsibility for the security of payroll deductions and employee savings." Second, at § 2510.3(h)(2)(ii), the Proposed Regulation permits the State to utilize investment providers to operate and administer the program, "provided that the State (or designated governmental agency or instrumentality described in paragraph (h)(1)(ii) of this section) retains full responsibility for the operation and administration of the program." While we recognize the intent of these provisions, it is unclear what a state must do to demonstrate that it has maintained or assumed a sufficient level of "responsibility" to satisfy its obligation under the Proposed Regulation.

The Board is responsible for developing a program that will offer participants an opportunity to effectively save for their own retirement. Ensuring that payroll deductions and employee savings are secure is certainly a critical part of that. The State, through the Board and through other means, will have several tools through which it can protect payroll deductions and employee savings. It will do this with Board oversight, contracting with consultants and auditors, developing an enforcement program that includes a mechanism for participants to report wrongdoing directly to the State, and taking legal action to remedy wrongdoing. Further, Oregon, like many states, has a robust regulatory scheme developed to make sure that people are treated fairly by employers, financial institutions, and public entities. A misappropriation of payroll deductions (regardless of their intended destination) is already illegal under state law.

HB 2960 expressly states that "[t]he plan, the board, each board member and the State of Oregon may not be liable for any loss incurred by any person as a result of participating in the plan."[4] This provision in the bill is not an attempt to escape responsibility for ensuring the security of payroll deductions and employee savings, but rather a realistic reflection of the State's role in providing the plan. At no time will the State have possession of payroll deductions and employee savings. The State has no property interest in accounts, and payroll deductions will go directly to the investment administrator for the plan.[5] The State should not assume liability for loss of funds where it does not have actual control over those funds.

The Board requests that the Department either strike the requirement that the State assume responsibility for the security of payroll deductions and employee savings, or instead clarify that state wage withholding and wage theft laws are sufficient to secure contributions and savings. The Proposed Regulation should also clarify that if a state utilizes an investment provider to administer the program, a state may meet its responsibility through appropriate selection, oversight and bonding of such a provider. Further, because § 2510.3(h)(2)(ii) calls on either the State, or designated governmental agency or instrumentality to "retain full responsibility," it should be made clear how much responsibility and/or liability each type of entity must retain, particularly given our requested definition of "instrumentality" as described above.

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[4] *Id.* § 3(2).

[5] *Id.* § 3(1)(f), (n).

3. **The State should be required to adopt rules that are reasonably expected to cause employees to be notified of their rights.**

The Proposed Regulation, at § 2510.3(h)(1)(iv) requires the State to "[adopt] measures to ensure that employees are notified of their rights under the program." This high burden on states to "ensure" notification could subject the State to unnecessary legal liability. Even where a State adopts rules and deploys significant resources to provide employees with notification, a State cannot guarantee that every participant will receive proper notification. For instance, an employer may deliberately withhold information from an employee. The State should adopt rules to respond to such a case, but the State should not be held legally liable where an employer's misconduct precludes the State from "ensuring" that the employee receives notification.

The Proposed Regulation should place a more reasonable requirement on the State. Specifically, the provision should be amended so that the State is required to adopt rules that are reasonably expected to cause employees to be notified of their rights.

4. **The Proposed Regulation should allow states to adopt reasonable restrictions on withdrawals.**

The Board has just begun its process of developing a retirement savings program that will work best for Oregon. While we do not yet know whether and to what extent we may want to constrain withdrawals, it may be beneficial to participants and the program as a whole if the Board were to adopt additional rules around withdrawals. Under the Proposed Regulation at § 2510.3(h)(1)(vi), however, the Board is precluded from imposing *any* restrictions on withdrawals.

There are several reasons why a state may want to implement reasonable restrictions on withdrawals. In particular, limiting frequent, repeated withdrawals of small amounts may lower the overall cost of administering the program, which would benefit all participants by allowing the State to negotiate lower administrative fees. Further, it is unclear from this provision whether a state could offer or default to a cost-effective lifetime income solutions (e.g. an annuity) to participants should it make a determination that such an offering would be desirable.

5. **The Proposed Regulation should require a state to adopt rules aimed at achieving the limitations on employer involvement enumerated in § 2510.3(h)(1)(viii), rather than directly limiting employer involvement in the Regulation.**

HB 2960 requires that the Oregon Retirement Savings Plan not trigger ERISA obligations for participating employers. Consequently, the program will involve a significant amount of outreach to employers to ensure that they understand their obligations and limits. However, because states cannot control the actions of employers, but only make a good faith effort to ensure that they are adequately informed, it is important that the missteps of employers do not threaten the status of the plan as a whole. In other words, if one employer fails to abide by all of the provisions enumerated in the Proposed Regulation, then it should not trigger ERISA for the State and all other participating employers. Because this is a new program, there may be confusion among employers regarding their obligations and limitations, and there may be some mistakes. If the actions of a single employer put the entire program at risk, then it will make the program nearly impossible to set up.

Further, even if the consequence of employer mistakes is that the program triggers ERISA for that employer, then that could have several negative consequences for the program as a whole. First, employers could be able to escape their obligations under state law to provide their employees with access to the state-sponsored auto-IRA simply by violating one of the provisions in this subsection. Second, for employers and employees who want access to the program, there would be a disincentive to report mistakes to the appropriate authority because doing so would remove access to the plan from that place of employment. It will be important for states to have this information regarding such missteps reported to them, in order to remedy the problem for that employer and educate other employers who could make similar mistakes.

Because it is ultimately up to the states to develop a program that accomplishes the provisions in the Proposed Rule, a state should be able to satisfy the goal of limiting employer involvement by developing rules aimed at limiting employer involvement in the areas described by the Department. The Department should also clarify that employer violations of these limitations (whether intentional or accidental) will not be enough to disqualify the program as a whole from the safe harbor.

6. **The Proposed Regulation should provide more clarity around the provision at § 2510.3(h)(1)(x) that, "[t]he employer's participation in the program is required by State law" by expressly permitting the State to provide and change exemptions by legislation or by rule. The Proposed Regulation should also clarify that the violation of these rules by an employer is not sufficient to disqualify the State's program from the safe harbor.**

HB 2960 requires all employers that do not otherwise offer a retirement savings plan to offer the Oregon Retirement Savings Plan to its employees. However, the Board may determine that it should provide some exemptions for certain types of employers by rule. Additionally, the Board may determine that the implementation of the program will be improved if the employer mandate is staggered so that not all eligible employers are mandated at the same time. It is unclear from this rule whether the State may provide exemptions (either through legislation or through administrative rulemaking) for some employers for reasons other than offering another retirement savings plan.

Additionally, if an employer is exempted from the program, either by legislation or by Board rule, it is unclear what the consequence would be if an employer, not knowing that it was exempt from the mandate, automatically enrolled its employees. What would be the consequence for that individual employer? What would be the consequence for the program as a whole? Clarification on this point is critical for both participating states and employers within those states. The actions of a single employer should never be enough to change the status of the entire state program, which could require the entire program to shut down and/or change the legal obligations of other employers.

7. **The Proposed Regulation should permit states to provide support to participating employers, independent of actual costs of the program for each individual employer.**

HB 2960 directs the Board to conduct market analysis identifying potential costs to employers in providing automatic payroll deductions for participation in the program in order to provide recommendations to the Legislature for ways to eliminate or reduce those cost through incentives, tax credits and other means. Oregon is a small business state, and many small businesses may struggle with any new administrative burden. It should be within the State's discretion whether to provide support to employers that offer retirement savings plans, particularly where participation is mandated by the State.

Further, because of the large numbers of affected employers, all of which may vary widely in their costs associated with complying with this state law, it would be very difficult if the State had to determine actual cost for every individual employer before providing a benefit. Further, the State may want to provide support for employers that is non-monetary, but could still be considered direct or indirect consideration. Because participation is mandated by the State, reasonable support for employers provided by the State would not affect the employer's role in relation to the plan. In other words, the improper influence on an employer that the 1975 Safe Harbor attempted to avoid is not a threat where employer participation is mandated by the State and consideration is provided by the State.

Background on Oregon's Efforts

Oregon recognized that there was a retirement savings crisis and started working on the problem nearly 20 years ago. In 1997, Oregon had its first retirement savings task force. However, the task force report, which detailed the significant lack of sufficient retirement savings for many Oregonians and the toll that this would take on the State's budget, ended up shelved as the State failed to make any headway in addressing the problem. Unsurprisingly, in 2013, when the State Legislature passed HB 3436 (2013), commissioning the new Oregon Retirement Savings Task Force ("Task Force"), it became clear that the problem continued to get worse. One out of six Oregonians aged 45-65 has less than $5,000 in retirement savings. More and more Oregonians are retiring into poverty, and one of the main reasons for this is the fact that nearly half of Oregonians lack of a retirement savings plan at work. Individuals are 15 times more likely to participate in a retirement savings plan if one is offered to them at work than if they have to seek one out on their own. Reducing retirement savings deficit requires a significant increase in access to plans for employees at their place of employment.

After receiving the Task Force report in 2014, the Legislature took action, passing a bill based on the Task Force recommendations. In 2015, the Oregon State Legislature passed HB 2960, authorizing the establishment of the Oregon Retirement Savings Plan, the result of years of effort to find a way to address the retirement savings deficit facing many Oregonians. HB 2960 established the Oregon Retirement Savings Board, which would create and oversee a state-sponsored defined contribution plan. The bill outlines requirements for the bill, including automatic enrollment (with opt-out), auto-escalation, portability, professional management, low fees, and default contribution amounts within the limits allowed by the Internal Revenue Code. Because the plan cannot qualify as an "employee benefit plan" under ERISA, the sponsors predicted and intended the plan to be an IRA.

It was important to the Legislature that the burden on participating employers be kept at a minimum. An IRA was identified as the likely option for the Oregon Retirement Savings Plan because it uses an existing retirement savings format with a federal tax benefit and it could exist outside of the employer-employee relationship. The 1975 Safe Harbor provision for payroll deduction IRAs (29 CFR 2510.3-2(d)) was identified as providing an opportunity to access payroll for contributions – something that the Task Force identified as being critical for encouraging regular savings. However, because it was unclear whether the IRA safe harbor would allow the use of automatic enrollment, Oregon, along with other states contemplating a retirement savings program, asked for clarification regarding whether automatic enrollment with an opt-out provision qualified as "completely voluntary" under the regulations.

States are ready to step up and address the retirement security crisis in this country, but we need guidance from the Department in order to know what tools are available to us.

Conclusion

Thank you for considering the comments of the Oregon Retirement Savings Board. The work we are embarking on is critical for turning the tide on the retirement savings crisis. Beyond helping Oregonians save for their own retirement, we endeavor to create a program that can be a model for other states. Each state will have different needs, so ensuring that states retain an appropriate level of flexibility in the Proposed Regulation is crucial, both for states to be able to offer programs and to be able to respond to unanticipated challenges.

Respectfully Submitted,

Ted Wheeler
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Chair, Oregon Retirement Savings Board