January 19, 2016

Office of Regulations and Interpretations
Employee Benefits Security Administration
Department of Labor
Room N-5655
200 Constitution Avenue, NW
Washington, DC 20210
Attn: State Savings Arrangement Safe Harbor

RIN: 1210-AB71—State Savings Arrangement Safe Harbor

To Whom It May Concern:

The California Chamber of Commerce and below listed organizations submit these comments in response to the request for comments on the Proposed Regulations pertaining to Savings Arrangements Established by States for Non-Governmental Employees[1] and the Interpretive Bulletin relating to Stating Savings Programs that Sponsor or Facilitate Plans Covered by the Employee Retirement Income Security Act of 1974 (ERISA)[2] which were both published in the Federal Register on November 18, 2015.

California is in a process to expand retirement coverage by implementing state legislation to establish a state run retirement program for private employers. The implementation of this program is conditioned on it not being found to be an ERISA plan. Further, there is concern about the state legislation being preempted by ERISA.

The DOL has issued two pieces of guidance to address these issues. The Proposed Regulation pertaining to Savings Arrangements Established by States for Non-Governmental Employees ("Proposed Regulation") creates a safe harbor for these state retirement programs to not be considered "employee benefit plans" for purposes of ERISA.[3] While the ultimate determination of ERISA preemption is up to the courts, the objective of the guidance is to reduce the risk of the state programs being found preempted.[4]

Comments

The Proposed Regulation Increases Litigation Risks for Employers. The purpose of the Proposed Regulation is to "reduce the risk of state programs being preempted" but the DOL admits that the ultimate determination rests with the courts.[5] As such, there is a risk of increased legal liability for employers that the guidance does not address—an employee or class action suit could challenge the safe harbor definition under this proposal and claim that the employers are subject to ERISA. If a violation of ERISA is found, the employers will have been unwittingly subjected to this increased liability without any recourse against the states or the DOL. To prevent this outcome, final guidance should include protections for employers if courts disavow the safe harbor rule.

Furthermore, no State, California included, would be able to fully vet all participating employers.

[1] 80 Fed. Reg. 72006 (November 18, 2015).
[2] 80 Fed. Reg. 71936 (November 18, 2015).
[3] 80 Fed. Reg. at 72008.
[4] 80 Fed. Reg. at 72006.
[5] 80 Fed. Reg. 72006.

Some ineligible employers may inadvertently or intentionally "sneak" into the Program and auto-enroll their employees, or maintain enrollment when their employee count drops below the mandated threshold. The Proposed Safe Harbor suggests that such non-mandated employers could cause an entire program to fail the safe harbor and become an ERISA plan, with potentially disastrous consequences for the thousands of participating employers and millions of employees.

Importantly, we recommend that the Proposed Regulation include greater detail about ministerial duties on the part of employers in order to make sure employers clearly understand their limited duties and do not inadvertently become subject to ERISA and the requirements there under. Our members are very concerned that if the state follows the guidance but an employer inadvertently provides more than ministerial duties, it could put all employers in the position of being covered under ERISA and at risk of legal liability.

The Economic Analysis of the Proposed Regulation is Incomplete. The regulatory economic analysis presents many questions. The DOL admits that state-sponsored retirement savings plans may impose some costs on employers: Costs of adapting payroll systems to facilitate deductions for participating employees, and other possible costs. However, the proposed regulation is not clear what the full array of cost categories may be, and they ask for public comment on this, among many issues.[6]

The DOL does recognize that the Proposed Regulation will be responsible for imposing cost burdens on employers because the rule, by removing uncertainty and providing a safe harbor, may facilitate the adoption of subject plans by more states or sooner than might occur in the absence of the DOL rule. However, the agency does not clearly describe or quantify the costs and, despite an admitted lack of knowledge, the agency concludes that the costs imposed on employers will be "minimal." There is no evidence in the analysis on how the DOL arrived at this conclusion—there was no investigation into the costs associated with modifying payroll systems or other administrative costs that employers may incur. Consequently, the DOL's claim of minimal cost impact is at best an arbitrary guess, not founded on credible research.

Furthermore, the DOL admits that the employers most likely impacted by the Proposed Regulation will be small businesses,[7] but the agency has not pursued the regulatory flexibility analysis far enough. DOL needs to do more research to characterize the small businesses most likely to be impacted.

The agency's regulatory analysis duty is not fulfilled by merely asking employers to speak up about the cost burden. The DOL has an affirmative duty to investigate the question of costs independently, and to do so before proposing a regulation. Below is a list of some of the questions that agency needs to investigate and answer before moving forward with this proposal.

- What are companies saying about the cost and other implications of this Proposed Regulation?
- Will the proposed State plans adversely affect plans currently offered by employers?
- Besides the administrative cost of handling payroll deductions for participants, what are the other possible cost burdens that these plans may impose on employers?
- Would the Proposed Regulation expose employers to liabilities that would not be applicable in the absence of the rule?
- Will employers need to exercise diligence to ensure that State plans do qualify for the proposed safe harbor?
- Are there alternative safe harbor definitions that DOL could have considered and that would have less burdensome impacts on employers?

[6] 80 Fed. Reg. at 72012.
[7] Id.

- How many new employees will participate in the state programs and how does that benefit measure against the financial and administrative costs imposed on employers?
- What are the risks to employees who participate in these savings plans? Are they safer or riskier than traditional employer sponsored plans?

Conclusion

Thank you for your consideration of these comments. To further discuss our comments, you may contact:
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Sincerely,

Marti Fisher
California Chamber of Commerce

On behalf of:
California Business Roundtable
California Framing Contractors Association
California Manufacturers & Technology Association
California Professional Association of Specialty Contractors