



2005 Market Street, Suite 2800 215.575.9050 Phone
Philadelphia, PA 19103-7077

901 E Street NW 202.552.2000 Phone
Washington, DC 20004
www.pewtrusts.org

September 29, 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

Regarding: Savings Arrangements Established by State Political Subdivisions for Non-Governmental Employees, RIN 1210-AB76

To whom it may concern:

The Pew Charitable Trusts' retirement savings project studies the challenges that American workers are facing in trying to save for retirement, the barriers that employers experience in trying to offer retirement savings plans for their workers, and the public policy initiatives that would address these challenges and barriers. We have published reports and other material on several topics related to retirement security, including "[Who's In, Who's Out](#)," which details access to and participation in retirement savings plans in each of the 50 states, "[A Look at Access to Employer-Based Retirement Plans in the Nation's Metropolitan Areas](#)," an urban complement to the 'Who's In, Who's Out' report, and "[How States Are Working to Address The Retirement Savings Challenge](#)," which analyzes state legislation designed to help private sector workers save for retirement.

For many Americans, setting aside money in a workplace retirement plan has become a critical component of ensuring financial security in their later years. Still, more than 40 percent of full-time private sector workers say they lack access to either a pension or an employer-based retirement savings plan such as a 401(k) and just under half—49 percent—say they participate in one. Pew's analysis of Census Bureau data shows broad differences in retirement plan coverage across the nation's large metropolitan areas.

About 51 million full-time, full-year private sector workers live in "metropolitan statistical areas". That is close to three-fourths of all such workers in the United States. For policymakers these areas present challenges and opportunities for increasing the availability of workplace retirement plans. For example, industries and workers that tend to have lower access rates are heavily clustered in certain metropolitan areas. At the same time, the concentrated nature of these localities means that government efforts can reach large numbers of people. Recognizing this situation, New York City, Philadelphia, and Seattle have all expressed interest in developing their own proposals to expand retirement plan coverage for private sector workers within their jurisdictions.

We appreciate the opportunity to comment on the Department of Labor's (Department) proposed rule regarding retirement savings arrangements established by state political subdivisions for private sector employees. Through the retirement savings project's ongoing research we have interacted with state and city policymakers, retirement plan service providers, employers, and employees. We have presented original research before state retirement savings boards created under CFR 2510.3-2(h), testified before state and city legislatures on the topic, and served as members of state retirement working groups studying retirement savings. Additionally, we have served as members of technical taskforces with members of the retirement industry to understand the practical aspects of an automatic IRA programs rollout. And we have conducted surveys and focus groups with both employers and employees to understand how automatic IRA programs under CFR 2510.3-2(h) will impact them directly.

Our intention in submitting this public comment is to share our understanding of how the Department's proposed rule will impact employers, employees, states, and the retirement service providers. We are not advocating for or against the expansion of the safe harbor to state political subdivisions or for any particular approach in the final regulation to be issued. Because we have had numerous communications with many entities involved in this issue, we are writing to raise two specific issues which will have a significant impact on the nature of the final rule and offer alternative approaches the Department might consider. Our interest is in helping to ensure that, if the Department chooses to propose rules regarding the creation of payroll deduction saving plans by political subdivisions, those rules are designed and implemented in an effective and consistent manner.

29 CFR 2510.3-2(h)(4) – comments are solicited on the criterion relating to a demonstrated capacity to design and operate a payroll deduction savings program

The Department's stated rationale for restricting the number of political subdivisions eligible for the safe harbor is twofold. One, the Department wants to exclude "subdivisions that may not have the experience, capacity, and resources to safely establish and oversee payroll deduction savings programs in a manner that is sufficiently protective of employees."¹ And two, the Department wants to "reduce the possibility that employers would be subject to a multiplicity of overlapping political subdivision programs."²

¹ Savings Arrangements Established by State Political Subdivisions for Non-Governmental Employees; Proposed Rule," 81 Federal Register 168 (30 August 2016), pp. 59585-59586. <https://www.gpo.gov/fdsys/pkg/FR-2016-08-30/pdf/2016-20638.pdf>.

² Proposed Rule, p. 59585.

While requiring the political subdivision to have a population equal to or greater than the population of the least populous state significantly limits the number of eligible subdivisions, such a requirement does not directly address either of the two stated motivations. Size may serve as a proxy for experience and capacity, but size is a rough approximation. Furthermore, since there is no link between the population of the least populated state and the ability of a political subdivision to administer a payroll deduction auto-IRA program, the restriction seems arbitrary and will grow more so in the future as populations change.

The Department's interest in criteria relating to the demonstration of sufficient "experience, capacity, and resources to design and operate a payroll deduction savings program" might be preferable to a proxy criterion based on population.³ Possible alternative criteria meant to more directly assess these prerequisites are set out below. As to the second consideration of avoiding overlap, paragraph (h)(4)(iii) effectively prevents duplicative requirements on employers so long as attention is paid to what happens if a state were to pass payroll deduction auto-IRA legislation after a subdivision has done so. This could be implemented through a requirement in the final rule or left as a matter for state and subdivision law. Taken together these two capacity and overlap considerations, along with the criterion requiring the subdivision have the authority under state law to create the payroll deduction auto-IRA program, would limit the number of eligible subdivisions in a way similar to a population threshold but might do so far more directly, equitably, and elegantly.

Metrics that could demonstrate a subdivision's capacity for the purposes of the safe harbor might include some or all the following:

- A demonstrated capacity to collect taxes, fees, and/or garnishments or levies from employer payroll systems;
- A demonstrated capacity to manage payroll deductions and investments as part of an existing retirement plan or similar pool of assets at a scale appropriate for the envisioned population covered by the program;
- A demonstrated capacity to notify covered employees of their rights under an employment-related program such as "wage theft" notices; or,
- A demonstrated capacity to identify and contact employers within their jurisdiction that would be subject to the program and to enforce enrollment of covered workers, such as is done through business licensing or franchising, occupational permitting, or sales taxes.

If the Department remains concerned about capacity, reasonable levels of "assets under management" or "participants covered" also could be considered, either of which could dramatically and equitably reduce the number of eligible political subdivisions with the capacity, resources and experience to effectively manage a payroll deduction plan.

³ Proposed Rule, p. 59585.

If the final rule retains a population requirement, a population-based standard not tied to the population of the smallest state also might be considered. Capacity and resources are metrics that conceivably could be met at a given population threshold that is not tied to the annual population fluctuation of the smallest state. In addition, the Department noted that 83 percent of general-purpose political subdivisions have populations of less than 10,000 people.⁴ Expanding on that analysis, Pew calculates that 91 percent have populations of less than 25,000, 95 percent have populations of less than 50,000, and 98 percent have populations of less than 100,000, leaving approximately 800 counties, municipalities and townships with at least 100,000 people.⁵ This analysis demonstrates that these static thresholds are large enough to exclude the majority of smaller subdivisions and avoid the potential for geographic overlap.

29 CFR 2510.3-2(h)(4)(iii) – exemptions for unrelated state-wide retirement savings programs

Finally, there is some confusion over the meaning of “state-wide retirement savings program” that the Department might address in a final rule. While 29 C.F.R. 2509.3-2(h)(1) makes clear that a program refers to a payroll deduction auto-IRA savings program, the overview’s discussion of “a state-wide retirement savings program for private-sector employees” not only includes payroll deduction auto-IRA programs but also voluntary programs, such as a retirement plan marketplace and multiple employer plans and prototypes as described in the Department’s Interpretive Bulletin at 29 CFR 2509.2015-02.⁶ The overview goes on to note that the exclusion is not limited even to these programs, but could potentially encompass any state efforts, no matter how limited in scope or impact, related to retirement savings programs broadly.

Duplicative employee or employer requirements likely do not exist in instances where a state offers a voluntary program, such as a state-wide retirement marketplace for small employers, and a subdivision legislates a payroll deduction auto-IRA program as described at 29 CFR 2510.3-2(h). It is not clear why a payroll deduction auto-IRA program sponsored by the city of Seattle, for example, would be excluded from the safe harbor because Washington State has created a voluntary marketplace. Employers looking for a more robust qualified plan for their workers will turn to the marketplace and be exempt from the payroll deduction auto-IRA program once an alternative plan is in place, while those who wish to participate in the payroll deduction auto-IRA program will do so and not participate in the voluntary marketplace. In any final rule, the Department might clarify the meaning of “program” in light of these possible interactions.

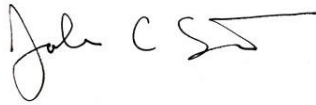
⁴ Notice of proposed rulemaking, p. 59584.

⁵ U.S. Census Bureau, Government Organization Summary Report: 2012 Census of Governments, <http://www.census.gov/govs/cog/index.html>.

⁶ Notice of proposed rulemaking, p. 59585, footnote 32 and associated text.

We thank the Department of Labor for the opportunity to comment on this important issue. We are available to discuss these comments or any other aspect of our research.

Sincerely,

A handwritten signature in black ink, appearing to read "John C. Scott". The signature is fluid and cursive, with a long horizontal stroke at the end.

John C. Scott
Director
Retirement Savings Project

A handwritten signature in black ink, appearing to read "Andrew C. Blevins". The signature is fluid and cursive, with a long horizontal stroke at the end.

Andrew C. Blevins
Senior Associate
Retirement Savings Project