

January 15, 2016

Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: State Savings Arrangements Safe Harbor
RIN 1210-AB71
Room N-5655
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

**Re: Savings Arrangements Established by States for Non-Governmental Employees
RIN 1210-AB71**

Dear Madam or Sir:

The American Retirement Association (the “ARA”) is writing in response to the request for comments on the proposed rule regarding Savings Arrangements Established by States for Non-Governmental Employees.¹ ARA wishes to thank the Department of Labor (the “Department”) for the thought, time and effort put into the initiative. In addition to filing these written comments, ARA respectfully requests that a public hearing be held on the proposal at which ARA would offer oral testimony.

The ARA is a national organization of more than 25,000 members who provide consulting and administrative services to American workers, savers and sponsors of retirement plans and IRAs. ARA members are a diverse group of retirement plan professionals of all disciplines including financial advisers, consultants, administrators, actuaries, accountants, and attorneys. The ARA is the coordinating entity for its four underlying affiliate organizations, the American Society of Pension Professionals and Actuaries (“ASPPA”), the National Association of Plan Advisors (“NAPA”), the National Tax-deferred Savings Association (“NTSA”) and the ASPPA College of Pension Actuaries (“ACOPA”). ARA members are diverse but united in a common dedication to America’s private retirement system.

Summary

In the proposed rule, the Department sets forth certain requirements under which an individual retirement plan, as defined in Internal Revenue Code Section 7701(a)(37) (hereinafter referred to as an “IRA Plan” or “IRA Program”), if established and maintained pursuant to a state law mandated payroll deduction program, would not be considered to be an “employee pension

¹ RIN 1210-AB71, 80 Fed. Reg. 72006 (November 18, 2015).

benefit plan” or “pension plan” under Title I of the Employee Retirement Income Security Act of 1974 (“ERISA”).² The ARA has previously voiced our support for proposals that expand access to workplace retirement savings programs such as “auto-IRAs.”³ It is also our long held belief that automatic enrollment is an important and effective tool for increasing savings rates and employee participation.

The ARA generally agrees with and supports the Department’s proposal and the underlying goal of expanding coverage.⁴ We are concerned, however, that the proposed rule creates different standards for payroll deduction IRA Programs administered by a state and those administered by private sector providers outside of a state program. Furthermore, we believe the lack of a private sector alternative operating alongside the various state programs would be contrary to the overall objective of increasing access to workplace retirement savings programs. This would be to the detriment of improving retirement security for American workers. This is especially true in states that have no mandate or in states that exempt certain employers from a mandate.⁵ We believe that because the proposal significantly limits the employer’s involvement, it could and should be extended to all payroll deduction IRA programs irrespective of whether provided under a state law mandate, a state established arrangement or an arrangement offered by a private sector provider.

In light of the forgoing concerns and considerations, the ARA makes the following recommendations:

1. ***The ARA recommends***, that the non-ERISA safe harbor under the proposed rule be expanded to apply to comparable payroll deduction programs established and administered by private sector providers; and
2. ***The ARA further recommends***, that the non-ERISA safe harbor under the proposed rule be available to any payroll deduction IRA program without regard to whether it is mandated by a state law (or offered under a state established IRA Program). Alternatively, the ARA recommends that the final rule include an amendment to the non-ERISA safe harbor contained in ERISA Regulation Section 2510.3-2(d) to permit automatic enrollment features.

Discussion

I. Need for a Uniform Safe Harbor for State and Private Sector Established Payroll Deduction IRA Programs.

² Proposed ERISA Reg. §2510.3-2(h), 80 Fed. Reg. 72006 (2015).

³ See testimony of Judy Miller, ARA Director of Retirement Policy, to the U.S. House of Representatives Committee on Ways and Means, April 17, 2012, available at <http://www.asppa.org/Resources/Testimony>.

⁴ It is important that the U.S. Department of the Treasury provide coordinating guidance if it is anticipated that a State, governmental agency or instrumentality of the State will act as non-bank custodian or trustee for the IRA Plan since existing regulations do not appear to permit such an approach. In addition, changes to IRS promulgated model IRA language would be needed (and/or changes to the IRA prototype program).

⁵ See Illinois Secure Choice Savings Program Act, 2014 Ill. Legis. Serv. P.A. 98-1150 (S.B. 2758) which requires 25 employees in order to trigger the state mandate, and the California Secure Choice Retirement Savings Act, 2012 Cal. Legis. Serv. Ch. 734 (S.B. 1234) which requires five employees in order to trigger the state mandate.

The proposed rule sets forth conditions for a “safe harbor” under which a state established payroll deduction IRA Program will not be considered to be subject to Title I of ERISA. The proposed safe harbor stands in stark contrast to the existing non-ERISA safe harbor for payroll deduction IRA Programs under regulations issued in 1975.⁶ Under the 1975 safe harbor, a program is not treated as an ERISA plan if a four-part test is satisfied.⁷ One of the requirements is that employee participation in the program is “completely voluntary.”⁸ Conversely, the safe harbor offered in the proposed rule requires only that employee participation be “voluntary.”⁹

Nothing in the statutory language (or legislative history) of ERISA would support such a distinction in defining what is an “employee pension benefit plan” or a “pension plan.” Yet the net result is a significant disparity in the application of ERISA. Specifically, the rule provides an exclusive privilege to state established payroll deduction IRA Programs to offer automatic enrollment, a feature that is not available to other IRA Programs under the non-ERISA safe harbor found in the 1975 regulation.¹⁰

The ARA believes the mere presence of an automatic enrollment feature in a payroll deduction IRA Program should not cause the program to be subject to Title I of ERISA. As a result, the ARA supports the Department’s position in the proposed regulation that an automatic enrollment feature does not automatically result in ERISA coverage. With that said, there is little difference between a state payroll deduction IRA program and a payroll deduction IRA program offered by a private sector provider that would warrant different standards with respect to the inclusion of automatic enrollment features. The Department’s rationale for promoting two different standards appears to emanate from the following points made in the proposal’s preamble:

- a. The Department believes it was important for the 1975 regulations “... to contain conditions to limit employer involvement, both to avoid establishing or maintaining an employee benefit plan and to prevent undue employer influence in arrangements that would not be subject to ERISA’s protective provisions.”¹¹
- b. The 1975 regulation intended the term “completely voluntary” to “... mean considerably more than that employees are free to opt out of participation in the program.”¹²
- c. A belief that when states require employers to offer savings arrangements, undue employer influence or pressure to enroll is far less of a concern.¹³

⁶ 29 C.F.R. §2510.3-2(d).

⁷ 29 C.F.R. §2510.3-2(d)(1).

⁸ 29 C.F.R. §2510.3-2(d)(1)(ii).

⁹ Proposed ERISA Reg. §2510.3-2(h)(1)(v), 80 Fed. Reg. 72014 (2015).

¹⁰ 29 C.F.R. §2510.3-2(d).

¹¹ 80 Fed. Reg. 72006, 72009 (2015).

¹² *Id.*

¹³ *Id.* at 72009.

The ARA strongly believes that the employer’s involvement in a payroll deduction IRA Program established and offered by a private sector vendor can be significantly limited to avoid concerns regarding the employer’s role in establishing and maintaining a plan. This limited involvement can be achieved by adhering to the principles and restrictions enumerated in the proposed rule and the existing safe harbor.¹⁴ There is no real reason why these restrictions could not be applied equally to programs established by states and those established by private sector providers.

It may be suggested that offering a private sector alternative would invoke ERISA because of undue involvement of the employer in the making available the private sector IRA provider. That issue, however, has long been put to rest by the existing non-ERISA safe harbor under ERISA Regulation Section 2510.3-2(d). Since the inception of ERISA, the Department has recognized that making available, without endorsement, a private sector sponsor’s voluntary payroll deduction IRA Program is not alone sufficient employer involvement to subject the arrangement to ERISA.¹⁵ The key is that the employer “...makes clear to employees its neutrality concerning the program and its involvement is limited to collecting the deducted amounts and remitting them promptly to the IRA sponsor, just as it remits other payroll deductions to taxing authorities and other third parties. 29 C.F.R. 2510.99-1(c).”¹⁶ The Department has even put forth standards under which an employer “...may limit the number of IRA sponsors to which employees may make payroll deduction contributions without exceeding the limitations of [the non-ERISA safe harbor].”¹⁷

Maintaining different standards for IRA programs provided by states and the private sector will create an uneven playing field, which unfairly and unnecessarily favors a governmental solution. A state clearly has a substantial governmental interest in bolstering the retirement savings of its citizens. The constraints of the proposal fail to take advantage of the private sector’s considerable experience in administering and distributing IRA products to meet this state interest. The accumulated knowledge resident in private sector providers, along with their existing distribution channels, could be quickly applied to assist American workers in meeting their retirement savings need under the Department’s initiative. Private sector providers are unfairly handicapped, however, by the existing prohibition on offering automatic enrollment features, which is unchanged by the proposal. There is no underlying statutory or policy justification for precluding private sectors providers from utilizing the latest innovations in behavioral finance theory that underlie automatic enrollment features.

The proposed rule requires that employee participation be “voluntary,” intending to make a significant and meaningful distinction with participation that is completely voluntary.¹⁸ The degree to which the authorities cited at footnote 12 of the preamble to the proposal regarding the meaning of the words “completely voluntary”¹⁹ are controlling in the context of ERISA is open to debate. Any such discussion, however, would entirely miss the point. There is nothing in Title I of ERISA, or its legislative history, that would call for a regulatory standard that distinguishes

¹⁴ 29 C.F.R. §2510.3-2(d), see also discussion in Section II, *infra*.

¹⁵ 29 C.F.R. §2510.3-2(d)(1)(iii).

¹⁶ See Preamble to Proposed ERISA Reg. §2510.3-2(h) at 80 Fed. Reg. 72008 (2015).

¹⁷ 29 C.F.R. §2510.99-1(d).

¹⁸ Proposed ERISA Reg. §2510.3-2(h)(1)(v), 80 Fed. Reg. 72014 (2015).

¹⁹ 80 Fed. Reg. 72008 (2015).

between a program that is “voluntary” and one that is “completely voluntary.” To apply this semantical distinction to preclude automatic enrollment features other than in programs established by a state is disingenuous at best. Specific enrollment procedures, whether automatic or otherwise, were neither contemplated nor considered by Congress in defining the line between an employer established plan subject to ERISA and a non-ERISA voluntary payroll deduction savings program. To apply such a distinction today is an unjustified rationalization, made for the purpose of favoring a government-sponsored program over private sector alternatives. Congress has embraced automatic enrollment as a method to increase the savings rate of American workers²⁰ without noting any difference in the degree of voluntariness associated with such a feature. The Department should be following a policy that is supportive of Congressional efforts to expand the use of automatic enrollment features rather than one that restricts its use.

The Department’s regulatory efforts should recognize and support the evolution of enrollment procedures that increase voluntary savings. Unnecessary regulatory impediments to the adoption and use of automatic enrollment is a step in the wrong direction. Non-ERISA private sector payroll deduction IRA Programs should be held to the same “voluntary” standard applicable to state payroll deduction IRA programs. A private sector alternative could easily operate alongside a state payroll deduction program without undue employer influence. In fact, the proposed rule specifically contemplates “. . . that a state or the governmental agency or instrumentality could contract with commercial service providers, such as investment managers and recordkeepers, to operate and administer its program.”²¹ Those same commercial service providers should be permitted to offer safe and competitive private sector alternatives outside of a state established program.

The ARA recommends that the proposed rule be revised to include comparable private sector established payroll deduction IRA Programs under the non-ERISA safe harbor.

II. Application of Proposal to Voluntary Payroll Deduction Savings Programs Not Mandated by State Law.

At the present time, many states have not mandated or otherwise established state payroll deduction savings programs. Others have carved out certain employers from an otherwise applicable mandate.²² As such, employers in these states have only the option provided by the non-ERISA safe harbor under ERISA Regulation Section 2510.3-2(d). Since this safe harbor does not permit automatic enrollment features to be a part of a non-ERISA payroll deduction IRA Plan, the proposal should be expanded to arrangements that are not mandated by state law and should be applied irrespective of whether established by a state or private sector provider. Alternatively, the final rule should include an amendment to the existing regulatory safe harbor to permit automatic enrollment.

The ARA agrees that limited employer involvement is crucial to the determination that a payroll deduction program is not an “employee pension benefit plan” or “pension plan” established or

²⁰ See Section 902 of the Pension Protection Act of 2006, Public Law 109-280.

²¹ 80 Fed. Reg. 72006, 72009 (2015).

²² See authorities cited at footnote 5, *supra*.

maintained by the employer (and therefore not subject to Title I of ERISA). We also generally agree with the limitations on employer involvement in the proposed rule.²³ The non-ERISA safe harbor should be available, however, to any IRA payroll deduction savings program that otherwise complies, irrespective of whether it is under a state law mandate (or a program established and administered by a state).

Specifically, the ARA agrees that the employer's involvement should be limited to making available, without endorsement, the state (or private sector provider(s)) IRA program and in furtherance thereof:

- a. Collecting employee contributions through payroll deductions and remitting them to the IRA custodian or trustee²⁴;
- b. Providing notice to the employees and maintaining records regarding the employer's collection and remittance of payments under the program²⁵;
- c. Providing information to the state (or a private sector provider) that is necessary to facilitate the operation of the program²⁶; and
- d. Without endorsement, distributing program information to employees otherwise permitting the state (or a private sector provider) to publicize the program to employees.²⁷

We believe that the enumerated conditions properly and sufficiently limit the employer's role in offering the arrangement. The presence or absence of a state law mandate does not significantly affect the employer's involvement in simply facilitating a voluntary employee savings program. If employer involvement is otherwise limited, the proposed non-ERISA safe harbor should apply. Likewise, it should apply without regard to whether the program is established through a state or private sector provider.²⁸

The expansion of the safe harbor to states where there is no legal mandate would be an important tool in increasing workplace retirement savings programs. Private sector providers in these states would be an integral part of the expansion of payroll deduction IRA programs. In addition, if the ARA's recommendations are followed, automatic enrollment features could finally be made available in all states to the benefit of increasing the retirement security of American workers.

The ARA recommends that the proposal be made applicable to payroll deduction IRA Programs that are not mandated by state law (and without regard to whether established by a state or a private sector provider). Alternatively, the ARA recommends that the final rule include an

²³ 80 Fed. Reg. at 72010.

²⁴ Proposed ERISA Reg. §2510.3-2(h)(1)(viii)(A), 80 Fed. Reg. 72014 (2015).

²⁵ Proposed ERISA Reg. §2510.3-2(h)(1)(viii)(B), 80 Fed. Reg. 72014 (2015).

²⁶ Proposed ERISA Reg. §2510.3-2(h)(1)(viii)(C), 80 Fed. Reg. 72014 (2015), limits the employer to providing the necessary information to the state. The ARA recommends that this be expanded to include a private sector alternative.

²⁷ Proposed ERISA Reg. §2510.3-2(h)(1)(viii)(D), 80 Fed. Reg. 72014 (2015), limits the employer to providing employees with information from the state. The ARA recommends that this too be expanded to include a private sector alternative.

²⁸ See discussion in Section I, *infra*.

amendment to the non-ERISA safe harbor in ERISA Regulation Section 2510.3-2(d) to permit automatic enrollment features.

The ARA appreciates the ongoing opportunity to work with the Department on these issues of great importance to our diverse membership of professionals. These comments were prepared by ARA's Government Affairs Committee and the primary drafters were Jimmy C. Hallberg, J.D., ERPA, QPA, QKA and Mark Ivceвич, QKA. We would welcome the opportunity to discuss these comments further with you. Please contact Craig Hoffman, ARA General Counsel, at CHoffman@USARetirement.org with respect to any questions regarding the matters discussed herein. Thank you for your time and consideration.

Sincerely,

/s/

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