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DOL Releases Guidance to Facilitate State-based Retirement Initiatives

Today, the Department of Labor (“DOL”) released two pieces of guidance – a [proposed regulation](#) (the “Proposed Regulation”) and [Interpretive Bulletin 2015-02](#) (the “IB”). This guidance is designed to facilitate and enable the various state initiatives to increase coverage in the private sector retirement system. Most importantly, both pieces of guidance clarify the extent to which the Employee Retirement Income Security Act of 1974 (“ERISA”) applies to these various types of initiatives.

Background. Over the past few years, there has been a movement in many states across the country to enact legislation intended to improve retirement security by expanding access to and coverage under the private retirement system. Approximately, two dozen states have passed or are considering legislation. Generally, state-level legislation takes one of the following three forms:

- **State Automatic IRA** (e.g., California, Illinois, and Oregon). The state requires certain employers that currently do not offer a retirement plan to automatically enroll their workers in a payroll deduction IRA. The state establishes a mechanism for the investment of the assets in the IRAs.
- **State-run Plans** (e.g., Massachusetts). The state establishes and maintains a retirement plan that private sector employers can adopt on a voluntary basis. The retirement plan is often intended to be a multiple employer plan (“MEP”).
- **Marketplace** (e.g., Washington). The state establishes an online marketplace that helps connect employers with private-sector providers offering retirement plans meeting certain requirements. Employers are permitted, but not required, to purchase a retirement plan from the marketplace and can access a variety of education tools.

Although many states continue to consider legislative efforts, there have been a number of legal questions regarding the interaction of the state laws and ERISA. In May, Senator Patty Murray (D-WA) – Ranking Member of the Senate Committee on Health, Education, Labor, and Pensions – and Senator Ron Wyden (R-OR) – Ranking Member of the Senate Finance Committee – sent a letter with 24 of their Senate colleagues asking President Obama to take steps necessary to clarify some of the outstanding legal issues surrounding the various state initiatives. Soon thereafter, the President announced at the White House Conference of Aging that he was directing DOL to release guidance.

DOL Guidance. Today, DOL finally released the following two pieces of guidance intended to facilitate the state-based initiatives:

Proposed Regulation. The Proposed Regulation is intended to make it less likely that a court would find that state automatic IRAs are preempted by federal law. ERISA contains a very broad preemption clause that supersedes almost any state law that “relates to” an employee benefit plan. Courts have generally concluded that a state cannot require an employer to offer an employee benefit plan covered by ERISA. The Proposed Regulation clarifies that state automatic IRAs will not be ERISA-covered, making it less likely that the state law would be found to be preempted, if –

- The state automatic IRA is established and administered by a state pursuant to state law;
- The state is responsible for investing the employee savings or for selecting potential investment alternatives;
- The state is responsible for the security of payroll deductions and employee savings;
- The state adopts measures to ensure that employees are notified of their rights under the program;
- The state creates a mechanism for enforcement of employees’ rights;
- Participation in the state automatic IRA is voluntary for employees (*e.g.*, employees are given appropriate notice and have the right to opt out);
- Employees have the ability to withdraw their money under normal IRA rules without any other cost or penalties;
- The employer’s activities are limited to ministerial activities such as collecting payroll deductions and remitting them to the program, providing program information to employees, maintaining records of payroll deductions and remittance of payments, and providing information to the state necessary to the operation of the program;
- The employer does not have discretionary authority or control over the IRAs or the operation of the IRA program; and
- The employer cannot contribute to the IRAs.

DOL is accepting comments on the Proposed Rule through January 19, 2016. We understand that DOL intends to finalize the rule in 2016 before the Obama administration winds down.

Interpretive Bulletin 2015-02. The IB would facilitate both the marketplace and state-run plan approaches in the following ways:

- The IB clarifies DOL’s position that ERISA would not necessarily preempt state laws implementing state-run plans, provided that employers participate voluntarily and ERISA applies to the plan.
- The IB permits a state to run an “open” MEP. DOL has consistently said that employers participating in a MEP must have a common nexus, but the IB explains DOL’s position that employers have a nexus when they participate in a state-run plan. The state essentially creates a nexus because the state is tied to the contributing employers and their employees by a special representational interest in the health and welfare of its citizens.
- The IB sets forth DOL’s views of ERISA sections 3(2), 3(5), and 514 as they apply to state-run master and prototype plans, state-run open MEPs, and state-run marketplaces.

The IB is effective on November 18, 2015 and not subject to notice and comment.

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- “This guidance is just the most recent iteration of President Obama’s ‘pen and phone’ initiative announced last year. The President has proposed federal automatic IRA legislation for years, but Congress has not acted. Now, the President is using his executive authority to do what he can to achieve the same goal – expanding access to the private retirement system – without Congress.” – [Michael Kreps](#)
- “The big takeaway from the guidance is that the President is essentially green-lighting state retirement initiatives, some of which have the potential to have a major impact on the retirement system.” – [David Levine](#)

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- “The state initiatives have really expanded in recent months and have flown under the radar so far for many in the retirement industry because all of the attention has been on other policy issues – in particular the re-proposed fiduciary rule.” – [Brigen Winters](#)
- “The guidance will likely have a real impact on retirement policy, and it may prompt Congress to act in some manner.” – [Scott Mayland](#)

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