

2016

Allowing States to Help Workers Save For Retirement: Department of Labor's Proposed Rulemaking That Provides A Safe Harbor For State Savings Programs Under ERISA

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ALLOWING STATES TO HELP WORKERS SAVE FOR RETIREMENT: DEPARTMENT OF LABOR'S PROPOSED RULEMAKING THAT PROVIDES A SAFE HARBOR FOR STATE SAVINGS PROGRAMS UNDER ERISA

William A. Nelson*

There is a “retirement crisis” in America. Contributing to this crisis is the fact that millions of Americans do not have access to a retirement savings plan through their employers. States, concerned with the economic stability of their citizens, have created laws that require private sector employers to implement state-administered payroll deduction IRA programs in their workplaces. Even though many states are currently debating whether to adopt state payroll deduction programs, this Article will focus on Oregon, Illinois, and California, which have enacted laws along those lines.

One obstruction to wider adoption of such state measures has been uncertainty about the effect of the Employee Retirement Income Security Act’s (ERISA) broad preemption of state laws that “relate to” private sector employee benefit plans and its prohibition on requiring employers to offer ERISA plans. To remedy this problem, the Department of Labor (DOL) has published a Notice of Proposed Rulemaking (NPRM), which

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would make it clear that state payroll deduction savings programs with automatic enrollment conforming to the safe harbor in this proposal do not establish ERISA plans.

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I. INTRODUCTION

There is a “retirement crisis” in America.¹ Even though some would view this as a hyperbole, empirical evidence reflects that “[t]he average working household has virtually no retirement savings”² and that “[t]he collective retirement savings gap among working households age 25-64 ranges from \$6.8 to \$14 trillion.”³ Contributing to this crisis is the fact that millions of Americans do not have access to a retirement savings plan through their employers.⁴ This problem is more prevalent in the small business community; more than three quarters of small business employers do not offer a retirement plan to their employees.⁵ Research reflects that an important predictor for retirement readiness is participation in an employee benefit plan, as employees save more in a workplace plan than they would on their own.⁶ For example, even though there are a

¹ Nari Rhee, *The Retirement Savings Crisis: Is It Worse Than We Think?*, NAT'L INST. ON RETIREMENT SECURITY 20 (June 2013), www.nirsonline.org/storage/nirs/documents/Retirement%20Savings%20Crisis/retirementsavingscrisis_final.pdf [<https://perma.cc/5PRP-S5LZ>].

² *Id.* at 1 (“When all households are included—not just households with retirement accounts—the median retirement account balance is \$3,000 for all working-age households and \$12,000 for near-retirement households. Two-thirds of working households age 55-64 with at least one earner have retirement savings less than one times their annual income, which is far below what they will need to maintain their standard of living in retirement.”).

³ *Id.*

⁴ Craig Copeland, *Employment-Based Retirement Plan Participation: Geographic Differences and Trends, 2013*, EMP. BENEFIT RES. INST., NO. 405 1, 6 (Oct. 2014), https://www.ebri.org/pdf/briefspdf/EBRI_IB_405_Oct14.RetPart.pdf [<https://perma.cc/XYF9-5RJ6>]. A January 2016 Pew Report found that 42% of full-time workers and 67% of part-time workers do not have access to an employee benefit plan at work. *Who's In, Who's Out*, THE PEW CHARITABLE TRUSTS (Jan. 2016), http://www.pewtrusts.org/~media/assets/2016/01/retirement_savings_report_jan16.pdf [<https://perma.cc/NN3S-DDAH>] [hereinafter *Who's In, Who's Out*].

⁵ *Retirement Security Challenges and Prospects for Employees of Small Businesses*, U.S. GOV'T ACCOUNTABILITY OFFICE 1 (Jul. 16, 2013), <http://www.gao.gov/assets/660/655889.pdf> [<https://perma.cc/44BW-4M97>].

⁶ Jack VanDerhei, *What Causes EBRI Retirement Readiness Ratings™ to Vary: Results from the 2014 Retirement Security Projection Model®*, EMP. BENEFIT RES. INST., NO. 396 1, 18 (Feb. 2014), https://www.ebri.org/pdf/briefspdf/EBRI_IB_396_Feb14.RRRs2.pdf [<https://perma.cc/FJ5L-GYX3>].

number of non-employer based retirement savings options, such as IRAs, few workers actually utilize them.⁷

States, concerned with their citizens' economic stability, have created laws that require private sector employers to implement state-administered payroll deduction savings programs in their workplaces. Even though many states are currently debating whether to adopt the programs, this Article will focus on California, Illinois, and Oregon, all of which have enacted laws creating payroll deduction savings programs.⁸

One obstruction to a wider adoption of such measures at the state level has been uncertainty of the effect of the Employee Retirement Income Security Act's (ERISA) "broad preemption of state laws that 'relate to' private sector employee benefit plans[,] and [ERISA's] prohibition on requiring employers to offer [employee benefit] plans."⁹ To remedy this problem, the Department of Labor (DOL) has published a Notice of Proposed Rulemaking (NPRM) that would clarify "that state payroll deduction savings programs with automatic enrollment that conform to the safe harbor in th[e] proposal do not establish ERISA plans."¹⁰

⁷ David C. John & William G. Gale, *Structuring State Retirement Saving Plans: A Guide to Policy Design and Management Issues* 1, 2 (Sept. 2015), <https://www.brookings.edu/wp-content/uploads/2015/09/structuring-state-retirement-saving-plans.pdf> [<https://perma.cc/B39H-BYTH>].

⁸ Illinois Secure Choice Savings Program Act, Pub. L. No. 98-1150, 2014 Ill. Legis. Serv. 6092, 6094 (2016); California Secure Choice Retirement Savings Trust Act, 2012 Cal. Legis. Serv. 6007-08 (2016); Oregon Retirement Savings Board, 2015 Or. Legis. Serv. Ch. 557 (2016). Even though this Article focuses on states that have passed auto-IRA laws, it is important to note that more than half of the states have introduced laws that would provide some type of state-based retirement program. *How States are Working to Address the Retirement Savings Challenge An Analysis of State-Sponsored Initiatives to Help Private Sector Workers Save*, THE PEW CHARITABLE TRUSTS 1, 3 (Jun. 2016), www.pewtrusts.org/~media/assets/2016/06/howstatesareworkingtoaddresstheretirementsavingschallenge.pdf [<https://perma.cc/A64V-BVML>] [hereinafter *Retirement Savings Challenge*].

⁹ *State Savings Programs for Non-Government Employees*, U.S. DEP'T OF LAB. 1 (Nov. 16, 2015), <https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/fact-sheets/state-savings-programs-for-non-government-employees.pdf> [<https://perma.cc/Z2RJ-2SAE>].

¹⁰ Savings Arrangements Established by States for Non-Governmental Employees, 80 Fed. Reg. 72,006 (Nov. 18, 2015) (to be codified at 29 C.F.R. pt. 2510).

This Article begins by discussing the current statute concerning ERISA’s preemption of state laws that “relate to” private sector employee benefit plans, and provides a discussion of the DOL’s proposed rulemaking that provides a safe harbor for state payroll deduction savings programs. The Article then transitions into an examination of the current state-based initiatives, analyzes specific state legislative proposals under the requirements of the proposed rulemaking, and proposes what, if any, changes need to be made to the state payroll deduction savings programs to ensure that the programs will not run afoul of ERISA. The Article concludes by analyzing policy concerns regarding state payroll deduction savings programs, provides comment on the DOL proposed rulemaking, and provides additional elements of a model state payroll deduction savings program.

II. EMPLOYEE RETIREMENT INCOME SECURITY ACT PREEMPTION – CURRENT LAW

A. *Statutory Language*

The stated policy of ERISA is to

protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.¹¹

ERISA applies to employee benefit plans that are “established or maintained—(1) by any employer engaged in commerce or in any

¹¹ 29 U.S.C. § 1001(b) (2012).

industry or activity affecting commerce; or (2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or (3) by both.”¹²

To assure uniformity of the laws governing employee benefit plans, Congress placed their regulation under federal jurisdiction. Section 514 of ERISA states that the Act “supersede[s] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in . . . [29 USCS §] 1003(a) . . . and not exempt under . . . [29 USCS §] 1003(b).”¹³ “The term ‘State’ includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans.”¹⁴ “State law[s] include[] all laws, decisions, rules, regulations, or other State action having the effect of law, of any State.”¹⁵

While broadly applied, ERISA preemption provisions allow for a number of exceptions.¹⁶ The preemption provisions generally do not apply to state criminal law.¹⁷ The preemption provisions also do not apply to any state law that “regulates insurance, banking, or securities”¹⁸ or “plans established solely to meet state workers’ compensation, unemployment compensation, or disability insurance laws.”¹⁹ ERISA as a whole does not apply to a “governmental plan,” which is defined as “a plan established or maintained for its employees by the Government of the United States, by the government of any

¹² *Id.* at § 1003(a).

¹³ *Id.* at § 1144(a).

¹⁴ *Id.* at § 1144(c)(2).

¹⁵ *Id.* at § 1144(c)(1).

¹⁶ Jeffrey Lewis & Mary Ellen Signorille, *ERISA Preemption*, AM. BAR ASS’N, <http://apps.americanbar.org/labor/lel-aba-annual/papers/2000/signorille.pdf> [https://perma.cc/T98L-96EZ].

¹⁷ 29 U.S.C. § 1144(b)(4).

¹⁸ *Id.* at § 1144(b)(2)(A); *ERISA Preemption Primer*, 1, http://www.nashp.org/sites/default/files/ERISA_Primer.pdf [https://perma.cc/53EN-LX9K] [hereinafter *ERISA Primer*].

¹⁹ *ERISA Primer*, *supra* note 18, at 1.

State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing.”²⁰

While it is important to note these exceptions exist, each state law discussed would not be exempt from ERISA preemption under the current statutory language. Even though the state sponsors the plans, the statutory language will cover private-sector employees, and not public employees.²¹ Because the preemption provision only covers plans established for governmental employees, the exemption does not apply.²² Therefore, each state law (California, Illinois, and Oregon) must rely on the DOL’s proposed safe harbor for state savings programs to avoid being preempted by ERISA.

B. Judicial Interpretation

ERISA’s preemption language under the statute is relatively clear and straightforward: “ERISA preempts any state law[s] that relate[] to . . . ‘employee benefit plan[s].’”²³ However, “[b]ecause ERISA policy is developed through court interpretations of federal law, it is complex and leaves many unanswered questions[,]” most importantly the scope of laws that “relate to” employee benefit plans.²⁴ Since ERISA’s enactment, courts have been asked to opine on the scope of the preemption provisions; “[w]hile the Supreme Court is ultimately responsible to interpret federal law, it has decided relatively few ERISA cases[.]”²⁵

²⁰ 29 U.S.C. § 1002(32).

²¹ David E. Morse, *State Initiatives to Expand the Availability and Effectiveness of Private Sector Retirement Plans How Federal Laws Apply to Plan Design Options*, GEORGETOWN U. MCCOURT SCHOOL OF PUB. POL’Y CTR. FOR RETIREMENT INITIATIVES 1, 2-3 (Dec. 2014), http://cri.georgetown.edu/wp-content/uploads/2014/12/Morse_CRIPaper.pdf [<https://perma.cc/D8P2-LACT>].

²² *Id.* at 3. It is important to note that there are ERISA academics who believe that automatic enrollment would not trigger ERISA preemption, but the Article relies on the DOL’s opinion that a separate safe harbor is necessary for automatic payroll deduction savings programs. *See id.* at 7.

²³ *Id.* at 3.

²⁴ *ERISA Primer*, *supra* note 18, at 1.

²⁵ *Id.* at 3.

“State policymakers face ERISA [preemption] issues [when] they consider proposals to expand access to health care, regulate . . . health insurers, prescribe appeal rights of health plan enrollees, and monitor health care costs and quality.”²⁶ ERISA preemption concerns also arise in the context of worker’s compensation laws, disability benefits claims, and employee compensation claims.²⁷ Historically, courts have interpreted ERISA’s preemption provision broadly with respect to employee benefit plans in order to conform to Congress’ intent to promote uniform administration of those plans.²⁸

1. State Laws that “Relate To” Employee Benefit Plans

Courts look at a number of factors when considering whether a state law “relates to” ERISA. Factors include whether the state law: refers to an employee benefit plan, mandates how employee benefit plans are designed or administered, is a law of general applicability, or has a direct economic impact on employee benefit plans.²⁹ The factors also include whether an employee benefit plan is essential to the state law’s operation.³⁰

In *Alessi v. Raybestos-Manhattan, Inc.*,³¹ a group of retired employees sued their employer, challenging a provision in their employer’s pension plan that offset retirees’ pension benefits “by an amount equal to [a] workers’ compensation award[] for which the [retiree was] eligible.”³² The retirees argued that the New

²⁶ *Id.* at 1.

²⁷ *Id.*

²⁸ *Id.* at 2.

²⁹ *Shaw v. Delta Air Lines*, 463 U.S. 85, 96-97 (1983) (stating that a state law relates to a plan “if it has connection with or reference to such a plan”); *United Food & Commercial Workers v. Pacyga*, 801 F.2d 1157, 1160 (9th Cir. 1986) (determining whether the state law impacts the structure of ERISA plans); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 11 (1987) (determining whether the state law impacts the administration of ERISA plans); *Aetna Life Ins. Co. v. Borges*, 869 F.2d 142, 147 (2d Cir. 1989) (determining whether state law has an economic impact on ERISA plans).

³⁰ Cal. Div. of Labor Standards, *Enft v. Dillingham Constr., N.A.*, 519 U.S. 316, 325 (1997) (determining whether “the existence of ERISA plans is essential”).

³¹ 451 U.S. 504 (1981).

³² *Id.* at 507.

Jersey Workers' Compensation Act prohibited such offsets.³³ The U.S. District Court for the District of New Jersey held that "the pension offset provisions [in the employers' pension plans] were invalid under New Jersey law, and concluded that Congress had not intended [the Employee Retirement Income Security Act of 1974] to pre-empt [such a] state law[]." ³⁴ The Third Circuit subsequently reversed the District Court's decision, holding that "the New Jersey statute forbidding offsets of pension benefits by the amount of workers' compensation awards could not withstand ERISA's general pre-emption provision[.]" ³⁵ On certiorari, the United States Supreme Court affirmed the decision of the Third Circuit. ³⁶

The Supreme Court opined that to resolve the retirees' claims, it must determine whether ERISA preempted the provision in the New Jersey Workers' Compensation Act by analyzing whether it was a state law "that relate[s] to any employee benefit plan."³⁷ The Court first found that, as a general matter, "[p]re-emption of state law by federal statute or regulation is not favored 'in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.'" ³⁸

The Court looked at the plain language of ERISA, which states that "the provisions of this subchapter . . . shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a)

³³ *Id.* at 521 (quoting N. J. STAT. ANN. § 34:15-29 (West 1980) ("[T]he right of compensation granted by [the New Jersey Workers' Compensation Act] may be set off against disability pension benefits or payments but *shall not be set off against employees' retirement pension benefits or payments.*").

³⁴ *Id.* at 508.

³⁵ *Id.* at 509 (citing *Buczynski v. General Motors Corp.*, 616 F.2d 1238, 1250-51 (3d Cir. 1980)).

³⁶ *Id.*

³⁷ *Alessi*, 451 U.S. at 522-23 (quoting 29 U.S.C. § 1144(a)).

³⁸ *Id.* at 522 (quoting *Chi. & Nw. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981)).

of this title and not exempt under section 1003(b) of this title.”³⁹ The Court also noted Congress’ declaration of policy, where it made clear that “ERISA is a ‘comprehensive and reticulated statute,’ which Congress adopted after careful study of private retirement pension plans.”⁴⁰

The Court found that the contested provision of the New Jersey Workers’ Compensation Act was preempted because “it ‘relate[s] to pension plans’ governed by ERISA.”⁴¹ Writing for the majority, Justice Marshall opined that

[w]hatever the purpose or purposes of the New Jersey statute, we conclude that it “relate[s] to pension plans” governed by ERISA because it eliminates one method for calculating pension benefits—integration—that is permitted by federal law. ERISA permits integration of pension funds with other public income maintenance moneys for the purpose of calculating benefits, and the IRS interpretation approves integration with the exact funds addressed by the New Jersey workers’ compensation law. New Jersey’s effort to ban pension benefit offsets based on workers’ compensation applies directly to this calculation technique.⁴²

The Court also held that even though the New Jersey law only affects employee benefit plans indirectly through a workers’ compensation law, ERISA establishes “that even indirect state action bearing on [employee benefit plans] may encroach upon the area of exclusive federal concern.”⁴³

³⁹ *Id.* (quoting 29 U.S.C. § 1144(a)).

⁴⁰ *Id.* at 510 (quoting *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 361-62 (1980)).

⁴¹ *Id.* at 524.

⁴² *Id.* at 507, 524-25.

⁴³ *Alessi*, 451 U.S. at 525.

In *Shaw v. Delta Air Lines*,⁴⁴ Delta and other airlines “provided their employees with various medical and disability benefits through welfare plans subject to ERISA.”⁴⁵ The plans, which were in place “prior to the effective date of the Pregnancy Discrimination Act, did not provide benefits to employees disabled by pregnancy as required by the New York Human Rights Laws and . . . Disability Benefits Laws.”⁴⁶ The airlines “brought three separate federal declaratory judgment actions against . . . state agencies and officials, alleging that” ERISA preempted both the Human Rights and Disability Benefits Laws.⁴⁷

The Southern District Court of New York “held that the Human Rights Law was pre-empted, . . . as it required the provision of pregnancy benefits prior to the effective date of the Pregnancy Discrimination Act[;] . . . [b]ecause . . . the Airlines would have provided pregnancy benefits solely to comply with the Disability Benefits Law, the court dismissed the portion of their complaint seeking relief from that law.”⁴⁸ “[T]he Second Circuit affirmed [the lower court’s holding] as to the Human Rights Law[,]” but remanded the Disability Benefits Law claim to resolve “whether the Airlines provided disability benefits through plans constituting separate administrative units, in which event the Disability Benefits Law would be enforceable, or through portions of comprehensive benefit plans, in which case ERISA regulation would be exclusive.”⁴⁹ On certiorari, the United States Supreme Court affirmed the decision of the Second Circuit with respect to the Human Rights Law provision, holding that it was preempted by ERISA insofar as the state law

⁴⁴ 463 U.S. 85 (1983).

⁴⁵ *Id.* at 92.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 92-93 n. 9 (citing *Delta Air Lines, Inc. v. Kramarsky*, 485 F. Supp. 300, 311 (S.D.N.Y. 1980)).

⁴⁹ *Id.* at 93, 95 (citing *Delta Air Lines, Inc. v. Kramarsky*, 650 F.2d 1287, 1291, 1307-08 (2d Cir. 1981)).

prohibited practices that were lawful under ERISA;⁵⁰ however, the Court reversed the decision that the portions of one employer’s multi-benefit plan, which were maintained to comply with the Disability Benefits Law, were exempt from ERISA preemption.⁵¹

The Supreme Court found that “the Human Rights Law and the Disability Benefits Law ‘relate to’ employee benefit plans.”⁵² The Court reasoned that “[a] law ‘relates to’ an employee benefit plan . . . if it has a connection with or reference to such a plan.”⁵³ Using this description, the Court found that “the Human Rights Law, which prohibits employers from structuring their employee benefit plans in a manner that discriminates on the basis of pregnancy, and the Disability Benefits Law, which requires employers to pay employees specific benefits, clearly ‘relate to’ benefit plans.”⁵⁴ Courts must “give effect to this plain language unless there is good reason to believe Congress intended the language to have some more restrictive meaning.”⁵⁵ To support its conclusion, the Court cited legislative history illustrating the expansive “breadth of [ERISA] preemption,”⁵⁶ and held that “[b]y establishing benefit plan regulation ‘as exclusively a federal concern,’ . . . Congress minimized the need for interstate employers to administer their plans differently in each State in which they have employees.”⁵⁷

⁵⁰ *Shaw*, 463 U.S. at 108-09.

⁵¹ *Id.* at 109-10.

⁵² *Id.* at 96.

⁵³ *Id.* at 96-97.

⁵⁴ *Id.* at 97.

⁵⁵ *Id.*

⁵⁶ *Shaw*, 463 U.S. at 98-99 (quoting 120 Cong. Rec. 29,933 (1974))

(It should be stressed that with the narrow exceptions specified in the bill, the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans. This principle is intended to apply in its broadest sense to all actions of State or local governments, or any instrumentality thereof, which have the force or effect of law.)

⁵⁷ *Id.* at 105 (quoting *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981)).

In *Shaw*, the Supreme Court established that companies cannot “circumvent the [New York] Disability Benefits Law by adopting plans . . . combin[ing] disability benefits inferior to those required by that law with other types of benefits” and unintended by Congress, while simultaneously preserving “the role of state disability laws[] to make enforcement of those laws impossible.”⁵⁸ The Court held that

while the State may not require an employer to alter its ERISA plan, it may force the employer to choose between providing disability benefits in a separately administered plan and including the state-mandated benefits in its ERISA plan. If the State is not satisfied that the ERISA plan comports with the requirements of its disability insurance law, it may compel the employer to maintain a separate plan that does comply.⁵⁹

In *Fort Halifax Packing Co. v. Coyne*,⁶⁰ “employees filed suit . . . seeking severance pay pursuant to [a Maine statute].”⁶¹ The employer argued that the Maine statute was preempted by ERISA.⁶² The Maine Superior Court ruled that the employees were entitled to severance pay and that ERISA did not preempt the provision because the employer’s severance pay liability arose from the statute rather than the operation of the employee benefit plan.⁶³ Maine Supreme Judicial Court affirmed, holding

⁵⁸ *Id.* at 108.

⁵⁹ *Id.*

⁶⁰ 482 U.S. 1 (1987).

⁶¹ *Id.* at 5 (citing ME. REV. STAT. tit. 26, § 625-B(2) (2015)

(“Any employer who relocates or terminates a covered establishment shall be liable to his employees for severance pay at the rate of one week’s pay for each year of employment by the employee in that establishment. The severance pay to eligible employees shall be in addition to any final wage payment to the employee and shall be paid within one regular pay period after the employee’s last full day of work, notwithstanding any other provisions of law.”).

⁶² *Id.* at 7.

⁶³ *Id.* at 6 (citing *Dir. of Bureau of Labor Standards v. Fort Halifax Packing Co.*, Civ. Action No. CV81-516, at 3, 7 (Me. Oct. 29, 1982)).

that the severance pay statute was not preempted by ERISA because the statute “pre-empted only benefit plans created by employers or employee organizations.”⁶⁴ On certiorari, the United States Supreme Court affirmed the Maine Supreme Judicial Court’s decision, holding “that the Maine statute is not pre-empted by ERISA, not for the reason offered by the Maine Supreme Judicial Court, but because the statute neither establishes, nor requires an employer to maintain, an employee welfare benefit ‘plan’ under that federal statute.”⁶⁵

The Supreme Court, analyzing the plain language of the statute, found that “ERISA’s pre-emption provision d[id] not refer to state laws relating to ‘employee benefits,’ but to state laws relating to ‘employee benefit *plans*.”⁶⁶ The Court then found “that pre-emption of the Maine statute would not further the purpose of ERISA pre-emption.”⁶⁷ Relying on legislative history, the Court opined that

[t]he purposes of ERISA’s pre-emption provision make clear that the Maine statute in no way raises the types of concerns that prompted pre-emption. Congress intended pre-emption to afford employers the advantages of a uniform set of administrative procedures governed by a single set of regulations. This concern only arises, however, with respect to benefits whose provision by nature requires an ongoing administrative program to meet the employer’s obligation. It is for this reason that Congress pre-empted state laws relating to *plans*, rather than simply to *benefits*.⁶⁸

⁶⁴ *Id.* (citing *Dir. of Bureau of Labor Standards v. Ft. Halifax Packing Co.*, 510 A.2d 1054, 1056, 1059, 1064 (Me. 1986)).

⁶⁵ *Id.* at 6-7.

⁶⁶ *Fort Halifax Packing Co.*, 482 U.S. at 7 (emphasis in original).

⁶⁷ *Id.* at 8.

⁶⁸ *Id.* at 11.

In *Ingersoll-Rand Co., v. McClendon*,⁶⁹ an employee sued his employer for wrongful termination.⁷⁰ The company stated it fired the employee as part of “a companywide reduction in force[;]” however, the employee alleged “that his pension would have vested in another four months and [the main] reason for his termination was the company’s desire to avoid making contributions to his pension fund.”⁷¹ The District Court granted the employer’s Motion for Summary Judgment, which was affirmed by the Texas Court of Appeals “holding that [the plaintiff’s] employment was terminable at will.”⁷² “The Texas Supreme Court reversed and remanded,” finding that the “passage of ERISA demonstrate[d] the great significance attached to income security for retirement purposes . . . [and] that under Texas law a plaintiff could recover in a wrongful discharge action if he established that ‘the principal reason for his termination was the employer’s desire to avoid contributing to or paying benefits under the employee’s pension fund.’”⁷³ On certiorari, the Supreme Court reversed, finding that “a claim that the employer wrongfully terminated plaintiff primarily because of the employer’s desire to avoid contributing to, or paying benefits under, the employee’s pension fund—‘relate[s] to’ an ERISA-covered plan within the meaning of [Section] 514(a), and is therefore pre-empted.”⁷⁴

The Supreme Court cited the language of ERISA’s “pre-emption clause [a]s conspicuous for its breadth.”⁷⁵ The Court opined that “a state law may ‘relate to’ a benefit plan, and thereby be pre-empted, even if . . . a state law is consistent with

⁶⁹ 498 U.S. 133 (1990).

⁷⁰ *Id.* at 135.

⁷¹ *Id.* at 135-36.

⁷² *Id.* at 136 (citing *McClendon v. Ingersoll-Rand Co.*, 757 S.W.2d 816, 817 (Tex. App. 1988)).

⁷³ *Id.* (quoting *McClendon*, 779 S.W.2d at 71).

⁷⁴ *Id.* at 133, 140.

⁷⁵ *Ingersoll-Rand Co.*, 498 U.S. at 138 (quoting *FMC Corp. v. Holliday*, 498 U.S. 52, 58 (1990)).

ERISA's substantive requirements."⁷⁶ The Court, distinguishing from its precedent where the ERISA preemption clause was found to be limited, found that they were

not dealing here with a generally applicable statute that makes no reference to, or indeed functions irrespective of, the existence of an ERISA plan. Nor is the cost of defending this lawsuit a mere administrative burden. Here, the existence of a pension plan is a critical factor in establishing liability under the State's wrongful discharge law. As a result, this cause of action relates not merely to pension benefits, but to the essence of the pension *plan* itself.⁷⁷

In *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*,⁷⁸ a commercial insurer sought relief from "a New York statute requir[ing] hospitals to collect surcharges from patients covered by a commercial insurer . . . and . . . subject[ing] certain health maintenance organizations (HMO's) to surcharges that vary with the number of Medicaid recipients each enrolls."⁷⁹ The United States District Court for the Southern District of New York granted the insurers' Motion for Summary Judgment,⁸⁰ and the Second Circuit affirmed, holding that the surcharge provisions, which required hospitals to collect surcharges from patients covered by plaintiffs but not from patients insured by the plan, were preempted by ERISA because the surcharges imposed "a significant economic burden on . . . insurers' . . . and therefore 'ha[d] an impermissible impact on ERISA plan structure and administration."⁸¹ On certiorari, the Supreme Court reversed and held "that the provisions for

⁷⁶ *Id.* at 139 (citing *Metro. Life Ins. Co. v. Mass.*, 471 U.S. 724, 739 (1985)).

⁷⁷ *Id.* at 139-40 (emphasis in original).

⁷⁸ 514 U.S. 645 (1995).

⁷⁹ *Id.* at 645.

⁸⁰ *Id.* at 652 (citing *Travelers Ins. Co. v. Cuomo*, 813 F. Supp. 996, 999 (S.D.N.Y. 1993)).

⁸¹ *Id.* at 653-54 (citing *Travelers Ins. Co. v. Cuomo*, 14 F.3d 708, 711, 721, 725 (2d Cir. 1993)).

surcharges do not ‘relate to’ employee benefit plans within the meaning of ERISA’s pre-emption provision[.]”⁸²

The Supreme Court found that “under the applicable “broad common-sense meaning,” a state law may “relate to” a benefit plan, and thereby be pre-empted, even if the law is not specifically designed to affect such plans, or the effect is only indirect[.]”⁸³ however, the Court also stated that “[p]re-emption does not occur . . . if the state law has only a tenuous, remote, or peripheral connection with covered plans, as is the case with many laws of general applicability.”⁸⁴ The Supreme Court opined that the New York laws were not preempted by ERISA because the surcharge provisions neither referenced ERISA plans in any manner, nor bore “the requisite ‘connection with’ ERISA plans to trigger pre-emption.”⁸⁵ Also, in relying on Legislative history, the Court found that Congress did not intend “to displace general health care regulation.”⁸⁶

2. *Takeaways*

It is important to analyze the takeaways from the history of ERISA Supreme Court jurisprudence. As previously noted, because ERISA policy is developed through judicial interpretations of federal law, these takeaways can inform the public on how courts are likely to view whether state payroll deduction savings programs are preempted, as well as the scope of that preemption.

The first takeaway is that the Supreme Court, looking at the Supremacy Clause,⁸⁷ will begin its analysis by focusing on congressional intent, specifically on whether Congress intended

⁸² *Id.* at 645, 649.

⁸³ *Id.* at 653 (quoting *Ingersoll-Rand Co.*, 498 U.S. at 139).

⁸⁴ *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 514 U.S. 645, 661 (1995) (quoting *D.C. v. Great Washington Bd. of Trade*, 506 U.S. 125, 130 n. 1 (1992)).

⁸⁵ *Id.* at 656, 662.

⁸⁶ *Id.* at 661.

⁸⁷ U.S. CONST. art. VI, § 2.

a federal law to preempt a state law.⁸⁸ Historically, by relying on congressional intent, the Court has viewed ERISA as a comprehensive, broad statute that “Congress enacted . . . to establish uniform federal standards to protect private employee pension plans from fraud and mismanagement.”⁸⁹ However, as previously noted, even with its breadth, ERISA preemption is subject to a number of exemptions.⁹⁰

The second takeaway is that state laws are only preempted by ERISA as far as they “relate to” plans, rather than simply relating to benefits provided by those plans.⁹¹ Even though the “relate to” language has been “construed expansively,” generally, only laws that establish or require employers to maintain an employee benefit plan will be subject to ERISA preemption.⁹²

The third takeaway is that state laws do not have to directly affect employee benefit plans. The Supreme Court has ruled that it is enough for the state law to indirectly affect employer-sponsored health plans by imposing substantial costs on plans.⁹³ This is an important takeaway because there are many laws that do not directly affect employee benefit plans, but may still run afoul of ERISA preemption provisions.⁹⁴

⁸⁸ See *Gibbons v. Ogden*, 22 U.S. 1, 89 (1824). The Supremacy Clause invalidates state laws that “interfere with, or are contrary to the laws of Congress.” *Id.*

⁸⁹ *ERISA Primer*, *supra* note 18, at 1.

⁹⁰ *Id.* at 3; See Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1144 (2012).

⁹¹ *ERISA Primer*, *supra* note 18, at 2.

⁹² *Multiple Employer Welfare Arrangements under the Employee Retirement Income Security Act (ERISA): A Guide to Federal and State Regulation*, U.S. DEP’T OF LAB. EMP. BENEFITS SECURITY ADMIN. 1, 17, <https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/enforcement/healthcare-fraud/mewa-under-erisa-a-guide-to-federal-and-state-regulation.pdf> [<https://perma.cc/CS7K-75SJ>]; Kelsey N. H. Mayo & Eugene S. Griggs, *Offering Benefits to Employees – When Benefits are Subject to ERISA & What that Means*, (Feb. 12, 2010), www.poynerspruill.com/publications/Offering-Benefits-to-Employees-%7c2D-When-Benefits-are-Subject-to-ERISA-%7c26-What-that-Means [<https://perma.cc/H8LD-LMHE>].

⁹³ *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645, 668 (1995).

⁹⁴ *ERISA Primer*, *supra* note 18, at 1.

III. DEPARTMENT OF LABOR GUIDANCE

While the state retirement initiatives are laudable and would provide millions of Americans access to a retirement savings vehicle, the initiatives do not meet the current safe harbor for payroll deduction IRAs and would be preempted by ERISA.⁹⁵ The state laws would not meet the current safe harbor because each of the state laws require employee participation in the program (automatic enrollment), rather than allowing employees to voluntarily participate in the program.⁹⁶

“The 1975 regulation [implementing ERISA] provides that ERISA does not cover a payroll deduction IRA arrangement so long as four [requirements] are met:”⁹⁷

- (i) [n]o contributions are made by the employer or employee association; (ii) [p]articipation is **completely voluntary** for employees or members; (iii) [t]he sole involvement of the employer or employee organization . . . without endors[ing] [the program,] to permit the sponsor to publicize the program to employees or members, to collect contributions through payroll deductions or dues checkoffs and to remit them to the sponsor; and (iv) [t]he employer or employee organization receives no consideration in the form of cash or otherwise, other than reasonable compensation for [administrative] services actually rendered in connection with payroll deductions or dues

⁹⁵ Letter from Randel Johnson, Senior Vice President, Labor Immigration & Emp. Benefits, U.S. Chamber of Commerce and Aliya Wong, Exec. Dir., Ret. Pol’y, Lab., Immigration & Emp. Benefits, U.S. Chamber of Commerce, to Dep’t of Lab., Office of Regulations and Interpretations, Emp. Benefits Sec. Admin. (Jan. 19, 2016), <http://www.regulations.gov/contentStreamer?documentId=EBSA-2015-0018-0057&attachmentNumber=1&disposition=attachment&contentType=pdf> [<https://perma.cc/8YQA-2ZZ8>] [hereinafter *Johnson & Wong Letter*].

⁹⁶ Savings Arrangements Established by States for Non-Governmental Employees, 80 Fed. Reg. 72,008 (Nov. 18, 2015) (to be codified at 29 C.F.R. pt. 2510).

⁹⁷ *Id.*

checkoffs.⁹⁸

The courts have held that employee participation is “completely voluntary” if the employee’s enrollment is self-initiated;⁹⁹ courts have found that an opt-out arrangement is not consistent with the requirement for a “completely voluntary” arrangement.¹⁰⁰ However, the DOL believes that the 1975 safe harbor was not written with the current situation in mind—when a state government, rather than an employer, sets terms and administers the payroll deduction savings arrangement.¹⁰¹ Therefore, with this belief, and a Presidential directive, the DOL has proposed a new safe harbor permitting automatic enrollment in state payroll deduction savings arrangements.¹⁰²

A. Proposed Rulemaking: Safe Harbor for Savings Arrangements Established by States for Non-Governmental Employees

The DOL has published a proposed rulemaking that “set[s] forth a safe harbor describing circumstances in which a payroll deduction savings program, including one with automatic enrollment, would not give rise to an employee pension benefit plan under ERISA.”¹⁰³ The proposed rulemaking states that

the terms “employee pension benefit plan” and “pension plan” shall not include an individual retirement plan . . . established and maintained pursuant to a State payroll deduction savings program, provided that:

⁹⁸ 29 C.F.R § 2510.3-2 (2015) (emphasis added).

⁹⁹ 80 Fed. Reg. at 72,008.

¹⁰⁰ *See, e.g.,* Int’l Res., Inc. v. N.Y. Life Ins. Co., 950 F.2d 294, 298 (6th Cir. 1991) (holding that regulatory exception did not apply partly because “coverage was automatic and applied to all employees”); *Kanne v. Conn. Gen. Life Ins. Co.*, 867 F.2d, 489, 492 (9th Cir. 1988) (contrasting “voluntary” participation with “automatic” participation).

¹⁰¹ 80 Fed. Reg. at 72,008.

¹⁰² *Final Report: White House Conference on Aging*, U.S. DEPT OF LAB. 1 (July 13, 2015), <https://whitehouseconferenceonaging.gov/2015-WHCOA-Final-Report.pdf> [<https://perma.cc/MY66-DAUH>].

¹⁰³ 80 Fed. Reg. at 72,006.

- (i) The program is established by a State pursuant to State law;
- (ii) The 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;
- (iii) The State assumes responsibility for the security of payroll deductions and employee savings;
- (iv) The State adopts measures to ensure that employees are notified of their rights under the program, and creates a mechanism for enforcement of those rights;
- (v) Participation in the program is voluntary for employees;
- (vi) The program does not require that an employee or beneficiary retain any portion of contributions or earnings in his or her IRA and does not otherwise impose any restrictions on withdrawals or impose any cost or penalty on transfers or rollovers permitted under the Internal Revenue Code;
- (vii) All rights of the employee, former employee, or beneficiary under the program are enforceable only by the employee, former employee, or beneficiary, an authorized representative of such a person, or by the State;
- (viii) The involvement of the employer is limited to the following:

- (A) Collecting employee contributions through payroll deductions and remitting them to the program;
 - (B) Providing notice to the employees and maintaining records regarding the employer's collection and remittance of payments under the program;
 - (C) Providing information to the State . . . necessary to facilitate the operation of the program; and
 - (D) Distributing program information to employees from the State . . . and permitting the State or such entity to publicize the program to employees;
- (ix) The employer contributes no funds to the program and provides no bonus or other monetary incentive to employees to participate in the program;
 - (x) The employer's participation in the program is required by State law;
 - (xi) The employer has no discretionary authority, control, or responsibility under the program; and
 - (xii) The employer receives no direct or indirect consideration in the form of cash or otherwise, other than the reimbursement of the actual costs of the program to the employer[.]¹⁰⁴

¹⁰⁴ 80 Fed. Reg. at 72,014.

It is important to note that all of these criteria must be met for a state savings program to qualify for the safe harbor provision.¹⁰⁵

IV. STATE PAYROLL DEDUCTION SAVINGS PROGRAMS

Some states, concerned with the economic stability of their citizens, have created laws that require private sector employers to implement state-administered payroll deduction savings programs in their workplaces.¹⁰⁶ Even though many states are currently debating whether to adopt these programs,¹⁰⁷ this Article focuses on California, Illinois, and Oregon—states that have enacted laws creating payroll deduction savings programs for private-sector employees.¹⁰⁸

A. *California Secure Choice Retirement Savings Trust Act*

“The California Secure Choice Retirement Savings Program ([California Program]) was established through legislation enacted in 2012.”¹⁰⁹ The California Program is a retirement savings program administered by the state for private sector workers who do not have access to employee benefit plans through their employers.¹¹⁰ Importantly, the legislation provides that the program will only be implemented “if it is

¹⁰⁵ *E.g.*, *Bruce v. First Fed. Sav. & Loan Ass’n of Conroe*, 837 F.2d 712, 715 (5th Cir. 1988) (“The word ‘and’ is therefore to be accepted for its conjunctive connotation rather than as a word interchangeable with ‘or’ except where strict grammatical construction will frustrate clear legislative intent.”).

¹⁰⁶ *Retirement Savings Challenge*, *supra* note 8, at 2.

¹⁰⁷ Nancy Ober & Sean Brown, *Mandatory Payroll Deduction Savings Programs Rise*, LITTLER (Nov. 7, 2016), <https://www.littler.com/publication-press/publication/mandatory-payroll-deduction-savings-programs-are-rise> [<https://perma.cc/4JZU-VBUW>].

¹⁰⁸ *Id.*

¹⁰⁹ *California Secure Choice Retirement Savings Program*, OFFICE OF THE STATE TREASURER CALIFORNIA, <http://www.treasurer.ca.gov/scib/fast.pdf> [<https://perma.cc/R9K5-849F>] (referencing CAL. GOV’T CODE § 100000 (2015)); S.B. 1234, 2011-12 Sess. (Cal. 2012).

¹¹⁰ *Id.* (referencing CAL. GOV’T CODE § 100000).

determined that the program is [not] an employee benefit plan under the federal Employee Retirement Income Security Act.”¹¹¹

The Program creates the California Secure Choice Retirement Savings Trust (California Trust),¹¹² administered by the nine-member California Secure Choice Retirement Savings Investment Board (California Board).¹¹³ All members of the California Board serve without compensation and are required to discharge their duties solely in the interest of the California Program participants.¹¹⁴ This includes an exclusive purpose test, where the board members must act for the “exclusive purposes of providing benefits to program participants and defraying reasonable expenses of administering the program.”¹¹⁵ This also includes a prudent person test, where the board members must invest “with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with those matters would use in the conduct of an enterprise of a like character and with like aims.”¹¹⁶

The California Board also has the responsibility of preparing a written statement of investment policy for the California Trust, which includes a risk management and oversight program.¹¹⁷ The investment policy will be guided by two overarching principles:

¹¹¹ CAL. GOV'T CODE at § 100043.

¹¹² *Id.* at § 100004(a) (“There is hereby established a retirement savings trust known as the California Secure Choice Retirement Savings Trust to be administered by the board for the purpose of promoting greater retirement savings for California private employees in a convenient, voluntary, low-cost, and portable manner.”).

¹¹³ *Id.* at § 100002(a)(1). The nine-member board is chaired by the State Treasurer and includes the Director of Finance, the State Controller, “[a]n individual with retirement savings and investment expertise appointed by the Senate Committee on Rules[,] . . . [a]n employee representative appointed by the Speaker of the Assembly[,] . . . [a] small business representative appointed by the Governor[,]” and three additional members appointed by the Governor. *Id.*

¹¹⁴ *Id.* at § 100002(b), 100002(d).

¹¹⁵ *Id.* at § 100002(d)(1).

¹¹⁶ *Id.* at § 100002(d)(2).

¹¹⁷ CAL. GOV'T CODE § 100002(e)(2)(A).

[t]he primary objective of the investment policy is to preserve the safety of principal and provide a stable and low-risk rate of return [and] [t]he investment policy shall mitigate risk by maintaining a balanced investment portfolio that provides assurance that no single investment or class of investments will have a disproportionate impact on the total portfolio.¹¹⁸

The California Board will be granted a number of powers as trustee for the California Trust. This authority includes the power to:

[m]ake and enter into contracts necessary for the administration of the trust[;] . . . [c]ause moneys in the program fund to be held and invested and reinvested[;] . . . [m]ake provisions for the payment of costs of administration and operation of the trust[;] . . . [e]mploy staff[;] . . . [p]rocure insurance against any loss in connection with the property, assets, or activities of the trust, and secure private underwriting and reinsurance to manage risk and insure the retirement savings rate of return[;] . . . [s]et minimum and maximum investment levels in accordance with contribution limits set for IRAs by the Internal Revenue Code[;] . . . [and] [f]acilitate compliance by the retirement savings program or arrangements established under the program with all applicable requirements for the program under the Internal Revenue Code[.]¹¹⁹

Importantly, the board has the power to adopt regulations to implement these powers.¹²⁰ The California Board also has the authority to

¹¹⁸ *Id.* at § 100002(e)(2)(B).

¹¹⁹ *Id.* at § 100010(a).

¹²⁰ *Id.* at § 100010(b).

[d]isseminate educational information concerning saving and planning for retirement[;] . . . determine the eligibility of an employer, employee, or other individual to participate in the program[;] . . . [d]esign and establish the process for the enrollment of program participants[;] . . . [a]llow participating employers to use the program to remit employees' contributions to their individual retirement accounts on their employees' behalf[;] . . . [a]llow participating employers to make their own contributions to their employees' individual retirement accounts[;] . . . and establish the process by which an individual or an employee of a nonparticipating employer may enroll in and make contributions to the program.¹²¹

The California Board must also provide employers with information packets that will include information disclosing how “employees seeking financial advice should contact financial advisors, that . . . [t]he [California] [P]rogram is not an employer-sponsored retirement plan[,] . . . [and that] the [California Trust] is privately insured and is not guaranteed by the State of California.”¹²²

The California Program offers a staggered approach to enrollment. Three months after the program is established, “eligible employers with more than 100 eligible employees and that do not offer an employer-sponsored retirement plan or automatic enrollment payroll deduction IRA shall have a payroll deposit retirement savings arrangement to allow employee participation in the program.”¹²³ Six months after the program is established, “eligible employers with more than 50 eligible employees and that do not offer an employer-sponsored retirement plan or automatic enrollment payroll deduction IRA

¹²¹ *Id.* at § 100012.

¹²² *Id.* at § 100014.

¹²³ CAL. GOV'T CODE § 100032(b).

shall have a payroll deposit retirement savings arrangement to allow employee participation in the program.”¹²⁴ Nine months after the program is established, “all other eligible employers that do not offer an employer-sponsored retirement plan or automatic enrollment payroll deduction IRA shall have a payroll deposit retirement savings arrangement to allow employee participation in the program.”¹²⁵ The program provides for automatic enrollment, where the eligible employee must opt-out of the program.¹²⁶

The California Program clearly excludes employers from liability.¹²⁷ The statute explicitly states that “[e]mployers shall not have any liability for an employee’s decision to participate in, or opt out of, the California Secure Choice Retirement Savings Program, or for the investment decisions of employees whose assets are deposited in the program[.]”¹²⁸ and that “[e]mployers shall not be a fiduciary, or considered to be a fiduciary, over the California Secure Choice Retirement Savings Trust or the program.”¹²⁹ The statute also exempts the State from liability with respect to payments to be made to employees under the program.¹³⁰

B. Illinois Secure Choice Savings Program Act

The Illinois Secure Choice Savings Program Act was enacted in 2015.¹³¹ The legislation created the Illinois Secure Choice Savings Program (Illinois Program), which is “[a] retirement savings program in the form of an automatic

¹²⁴ *Id.* at § 100032(c).

¹²⁵ *Id.* at § 100032(d).

¹²⁶ *Id.* at § 100032(e)(1).

¹²⁷ *Id.* at § 100034(a).

¹²⁸ *Id.*

¹²⁹ CAL. GOV’T CODE § 100034(b).

¹³⁰ *Id.* at § 100036 (“The [S]tate shall not have any liability for the payment of the retirement savings benefit earned by program participants pursuant to this title.”).

¹³¹ 820 ILL. COMP. STAT. 80/1 (2015).

enrollment payroll deduction IRA[.]”¹³² The legislation also established the Illinois Secure Choice Savings Program Fund (Illinois Fund)¹³³ as a trust administered by the seven-member Illinois Secure Choice Savings Board (Illinois Board).¹³⁴ All “Members of the Board . . . serve without compensation.”¹³⁵

Members of the Illinois Board are required to discharge their duties under a fiduciary standard of conduct.¹³⁶ This includes an exclusive purpose test, where the board member must act “for the exclusive purposes of providing benefits to [program participants] and defraying reasonable expenses of administering the Program”¹³⁷ and a prudent person test, where the board members must “invest[] with the care, skill, prudence, and diligence under the [circumstances then prevailing] that a prudent person acting in a like capacity and familiar with those matters would use in the conduct of an enterprise of a like character and with like aims[.]”¹³⁸

The Illinois Board also has the responsibility of preparing “a written statement of investment policy” for the Illinois Fund, which “includes a risk management and oversight program.”¹³⁹ The investment policy should be

¹³² *Id.* at 80/10.

¹³³ *Id.* at 80/15.

¹³⁴ *Id.* at 80/20. The seven-member board is chaired by the State Treasurer and includes

the State Comptroller, or his or her designee; . . . the Director of the Governor’s Office of Management and Budget, or his or her designee; . . . two public representatives with expertise in retirement savings plan administration or investment, or both, [representative of enrollees,] appointed by the Governor; . . . a representative of participating employers, appointed by the Governor; and . . . a representative of enrollees, appointed by the Governor. *Id.*

¹³⁵ *Id.* at 80/20(b).

¹³⁶ *Id.* at 80/25.

¹³⁷ 820 ILL. COMP. STAT. 80/25(1).

¹³⁸ *Id.* at 80/25(2).

¹³⁹ *Id.* at 80/35.

designed to ensure that an effective risk management system is in place to monitor the risk levels of the Program and Fund portfolio, to ensure that the risks taken are prudent and properly managed, to provide an integrated process for overall risk management, and to assess investment returns as well as risk to determine if the risks taken are adequately compensated compared to applicable performance benchmarks and standards.¹⁴⁰

The Illinois Board is granted broad power to effectuate its duties as fiduciary to the Illinois Fund.¹⁴¹ The board has the authority to:

[e]xplore and establish investment options[;] . . .
 [m]ake and enter into contracts necessary for the
 administration of the Program and Fund[;] . . .
 [d]etermine the number and duties of staff
 members needed to administer the Program and
 assemble such a staff[;] . . . [e]valuate and establish
 the process by which an enrollee is able to
 contribute a portion of his or her wages to the
 Program for automatic deposit of those
 contributions and the process by which the
 participating employer provides a payroll deposit
 retirement savings arrangement to forward those
 contributions and related information to the
 Program[;] . . . [d]esign and establish the process
 for enrollment . . . including the process by which
 an employee can opt not to participate in the
 Program[;] . . . [e]valuate and establish the process
 by which an individual may voluntarily enroll in
 and make contributions to the Program[;] . . . [and]

¹⁴⁰ *Id.* at 80/35.

¹⁴¹ *Id.* at 80/30(s). The board is authorized to “[e]xercise any and all other powers reasonably necessary for the effectuation of the purposes, objectives, and provisions of this Act pertaining to the Program.” *Id.*

[e]valuate the need for, and procure as needed, insurance against any and all loss in connection with the property, assets, or activities of the Program[.]¹⁴²

The Illinois Board also has the authority to “design and disseminate to all employers an employer information packet and an employee information packet, which shall include background information on the Program, [and] appropriate disclosures for employees[.]”¹⁴³ The information packet includes information regarding the “mechanics of how to make contributions to the Program; . . . how to opt out of the Program; . . . the process for withdrawal of retirement savings; . . . [and] how to obtain additional information about the Program[.]”¹⁴⁴ The information packet must also include information disclosing how “employees seeking financial advice should contact financial advisors, . . . that the Program is not an employer-sponsored retirement plan[,] and . . . [that the trust is privately insured and] is not guaranteed by the State [of Illinois].”¹⁴⁵

The Illinois Program is limited to employers with twenty-five or more employees that have been in business for two years.¹⁴⁶ The statute excludes employers from liability, stating that “[p]articipating employers shall not have any liability for an employee’s decision to participate in, or opt out of, the Program or for the investment decisions of the Board or of any enrollee[.]”¹⁴⁷ and “[a] participating employer shall not be a fiduciary, or considered to be a fiduciary, over the Program.”¹⁴⁸ The statute also exempts the State from liability with respect to payments to be made to employees under the Program.¹⁴⁹

¹⁴² *Id.* at 80/30.

¹⁴³ 820 ILL. COMP. STAT. 80/55(a).

¹⁴⁴ *Id.* at 80/55(c)(2)-(6).

¹⁴⁵ *Id.* at 80/55(c)(7)-(9).

¹⁴⁶ *Id.* at 80/5.

¹⁴⁷ *Id.* at 80/75(a).

¹⁴⁸ *Id.* at 80/75(b).

¹⁴⁹ 820 ILL. COMP. STAT. 80/70(a).

C. Oregon Retirement Savings Board Act

The Oregon Retirement Savings Board Act was enacted in 2015.¹⁵⁰ The legislation created the Oregon Retirement Savings Plan (Oregon Program), which is a retirement savings program in the form of an automatic enrollment payroll deduction IRA,¹⁵¹ as a trust administered by the seven-member Oregon Retirement Savings Board (Oregon Board).¹⁵² Members of the board are required to discharge their duties under a prudent person test, where the board members must “exercise the judgment and care then prevailing that persons of prudence, discretion and intelligence exercise in the management of their own affairs with due regard to the probable income and level of risk from certain types of investments of money[.]”¹⁵³

The Oregon Board is granted broad power to effectuate its duties.¹⁵⁴ The board has the authority

[t]o establish, implement and maintain the plan[;]
 . . . adopt rules for the general administration of
 the plan[;] . . . direct the investment of the funds
 contributed to accounts in the plan consistent with
 the investment restrictions established by the
 board[;] . . . collect application, account or
 administrative fees to defray the costs of
 administering the plan[;] . . . [and] make and enter
 into contracts, agreements or arrangements, and to

¹⁵⁰ OR. REV. STAT. § 557.3 (2015).

¹⁵¹ *Id.* at § 557.3(1)(a)-(c).

¹⁵² *Id.* at § 557.1(1)-(2). The seven-member board is chaired by the State Treasurer and includes “a representative of employers[,] . . . experience in the field of investments[,] . . . “a representative of an association representing employees[,] . . . a public member who is retired,” all appointed by the Governor. *Id.* at § 557.1(1)(b)(A)-(D). The Senate must confirm members of the board appointed by the Governor. The board shall also include “a member of the Senate appointed by the President of the Senate to be a nonvoting advisory member of the board[,] . . . [and] a member of the House of Representatives appointed by the Speaker of the House of Representatives to be a nonvoting advisory member of the board.” *Id.* at § 557.1(1)(c)-(d)

¹⁵³ *Id.* at § 557.2(2)(c).

¹⁵⁴ *Id.* at § 557.2(2)(b).

retain, employ and contract for any of the following considered necessary or desirable, for carrying out the purposes set forth in [the Act].¹⁵⁵

The board must create rules that

[e]stablish the process for participants to make the default contributions to plan accounts and to adjust the contribution levels[;] . . . the process for employers to withhold employee contributions to plan accounts from employees' wages and send the contributions to the investment administrator for the plan[;] . . . the process for allowing employees to opt out of enrollment in the plan[;] . . . [and] the process for participants to make nonpayroll contributions to plan accounts.¹⁵⁶

The legislation exempts employers from any liability with respect to the Oregon Program.¹⁵⁷ The statute explicitly states that the law will “[n]ot impose any duties under the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1001 et seq.) on employers.”¹⁵⁸ The statute also exempts the State from liability with respect to payments to be made to employees under the Oregon Program.¹⁵⁹

V. LOOKING AT STATES' LEGISLATION UNDER THE DEPARTMENT OF LABOR PROPOSED RULEMAKING

The proposed regulation sets a safe harbor for state payroll deduction savings programs.¹⁶⁰ However, even with this regulation, the DOL is cognizant that the

¹⁵⁵ *Id.* at § 557.2.

¹⁵⁶ OR. REV. STAT. § 557.4(2)-(5).

¹⁵⁷ *Id.* at § 557.4(9)(g).

¹⁵⁸ *Id.* at § 557.3(1)(p).

¹⁵⁹ *Id.* at § 557.3(2).

¹⁶⁰ Savings Arrangements Established by States for Non-Governmental Employees, 80 Fed. Reg. 72,006 (Nov. 18, 2015) (to be codified at 29 C.F.R. Pt. 2510).

proposed regulation would provide that certain state savings programs would not create employee benefit plans. However, the fact that state programs do not create ERISA covered plans does not necessarily mean that, if the issue were litigated, the state laws would not be preempted by ERISA. The courts' determinations would depend on the precise details of the statute at issue, including whether that state's program successfully met the requirements of the safe harbor.¹⁶¹

This Part addresses this concern and provides an analysis of each states' program under the proposed safe harbor regulation.

A. Judicial Deference to Federal Agency Regulations

It is important to understand the history of jurisprudence when the courts grant deference to administrative interpretations of statutes that the agency is empowered to implement. The question of deference to the DOL rulemaking will become important if a legal challenge is filed against the rule. Judging by the industry reaction to this rulemaking and the DOL conflict of interest rulemaking discussed elsewhere in this Article,¹⁶² a legal challenge seems likely. This section will discuss the Supreme Court's views on agency deference pre- and post-*Chevron*.¹⁶³

In *Skidmore v. Swift & Co.*,¹⁶⁴ employees of Swift & Co. "brought an action under the Fair Labor Standards Act [(FLSA)] . . . to recover overtime, liquidated damages, and attorneys' fees[.]"¹⁶⁵ The issue was whether "waiting time" spent in a stand-by capacity on the company premises—not active duty,

¹⁶¹ *Id.* at 72,010-11.

¹⁶² See discussion *infra* Section VI.H.

¹⁶³ *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council Inc.*, 467 U.S. 837 (1984).

¹⁶⁴ 323 U.S. 134 (1944).

¹⁶⁵ *Id.* at 135.

but time the employees were subject to emergency calls—was included as “working time” under the FLSA.¹⁶⁶ In administrative rulings and opinions, the Administrator of the Wage and Hour Division, U.S. Department of Labor, provided practical guidance for employees and employers as to how the DOL would seek to enforce the FLSA.¹⁶⁷

The Supreme Court found that there was “no statutory provision as to what, if any, deference courts should pay to the Administrator’s conclusions.”¹⁶⁸ The Supreme Court held that the

rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.¹⁶⁹

The *Skidmore* decision reflects that even though the Supreme Court believed that the Administrator had special experience in the area of labor law, his interpretation of the FLSA was not owed deference by the court.¹⁷⁰ This decision also reflected the ad hoc nature of deference before the *Chevron* decision, and was not based upon any type of structured analysis for determining whether to defer to an agency’s interpretation of a statute.¹⁷¹ This ad hoc approach resulted in courts choosing to

¹⁶⁶ *Id.* at 136-38.

¹⁶⁷ *Id.* at 138.

¹⁶⁸ *Id.* at 139.

¹⁶⁹ *Id.* at 140.

¹⁷⁰ *Skidmore*, 323 U.S. at 139-40.

¹⁷¹ *Id.*

analyze statutes without any attention to, let alone deference to, prior agency interpretations.¹⁷² Courts would not provide a structured analysis for applying deference to agency interpretation until forty years later in *Chevron*.¹⁷³

In *Chevron, U.S.A., Inc. v. Natural Resource Defense Council*,¹⁷⁴

[e]nvironmental groups filed a petition to review Environmental Protection Agency (EPA) regulations (40 CFR 51.18(j)(1)) that allow states to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single “bubble.” The regulations were promulgated to implement 172(b)(6) of the Clean Air Act Amendments of 1977 (42 USCS 7502(b)(6)), which requires states that have not achieved the national air quality standards established by the EPA to establish a permit program regulating new or modified major stationary sources of air pollution.¹⁷⁵

The United States Court of Appeals for the District of Columbia Circuit set aside the regulations, holding that the “bubble” concept was inappropriate in programs enacted to improve air quality.¹⁷⁶ The Supreme Court reversed the lower court’s decision by holding that “the EPA regulations allowing states to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single ‘bubble’ were based on a reasonable construction of the

¹⁷² Bradley George Hubbard, *Deference to Agency Statutory Interpretations First Advanced in Litigation? The Chevron Two-Step and Skidmore Shuffle*, 80 U. CHI. L. REV. 447, 463 (2013).

¹⁷³ See *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944); *Chevron, U.S.A., Inc. v. Natural Resource Defense Council*, 467 U.S. 837 (1984).

¹⁷⁴ 467 U.S. 837 (1984).

¹⁷⁵ *Preview Chevron*, U-CURSOS, https://www.u-cursos.cl/derecho/2010/2/D123D0823/6/material_docente/previsualizar?id_material=330944 [<https://perma.cc/72BQ-UYUG>] [hereinafter *Preview Chevron*].

¹⁷⁶ *Nat. Res. Def. Council Inc. v. Gorsuch*, 685 F.2d 718, 727 (D.C. Cir. 1982).

term ‘stationary source’ in 172(b)(6) of the Clean Air Act Amendments of 1977.”¹⁷⁷

The Supreme Court used *Chevron* to enunciate a new two-part test for courts to follow when deciding whether to give deference to agency interpretations of ambiguous statutory provisions.¹⁷⁸ Under the *Chevron* test, the first question the reviewing court must answer is “whether Congress has directly spoken to the precise question at issue.”¹⁷⁹ “If the intent of Congress is clear” from the language of the statute, the court’s deference analysis ends.¹⁸⁰ “[T]he court, as well as the [administering] agency, must give effect to the unambiguous[] . . . intent of Congress.”¹⁸¹ If the court finds that “Congress has not directly addressed the precise question at issue, the court [must avoid] impos[ing] its own construction on the statute[.]”¹⁸² “If the statute is silent” as to the precise question at issue, “the question for the court [becomes] whether the agency’s [interpretation] is based on a permissible construction of the statute.”¹⁸³

It is important to note that the crux of any judicial review is whether the clear intent of Congress is given effect.¹⁸⁴ “The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.”¹⁸⁵ However, the court reaffirmed that the wisdom of the agency’s policy choice is

¹⁷⁷ *Preview Chevron*, *supra* note 175.

¹⁷⁸ *Chevron*, 467 U.S. at 842.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 842-43.

¹⁸² *Id.* at 843.

¹⁸³ *Id.* When looking at the agency interpretation, the court does not need to conclude that it would have reached the same conclusion had the question arisen in a judicial proceeding. *See, e.g.*, *Fed. Election Comm’n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 39 (1981); *Zenith Radio Corp. v. U.S.*, 437 U.S. 443, 450 (1978); *Train v. Nat. Res. Def. Council Inc.*, 421 U.S. 60, 75 (1975); *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *Unemployment Comp. Comm’n of Ala. v. Aragon*, 329 U.S. 143, 153 (1946); *McLaren v. Fleischer*, 256 U.S. 477, 480-81 (1921).

¹⁸⁴ *Chevron*, 467 U.S. at 842-43.

¹⁸⁵ *Id.* at 843 n.9.

not subject to judicial resolution, but that the “Constitution vests such responsibilities in the political branches.”¹⁸⁶

It is also informative to review the post-*Chevron* line of cases to see the construction of the doctrine and how it has been applied. The doctrine of deference was created in part due to the judicial recognition “that a statute’s ambiguity constitutes an implicit delegation from Congress to [an] agency to fill in the statutory gaps[.]”¹⁸⁷ and that Congress meant for “the ambiguity [to] be resolved, first and foremost, by the [desired agency], . . . rather than courts[.]”¹⁸⁸ However, as discussed below, the deference given to agencies has boundaries.¹⁸⁹

Courts have clarified *Chevron*’s application, holding that deference only applies if an agency’s interpretation is the product of a formal agency process, such as notice-and-comment rulemaking, through which Congress has authorized the agency “to speak with the force of law.”¹⁹⁰ This is important with respect to the current proposed rulemaking, where the DOL has submitted the proposed regulation for notice and comment.¹⁹¹

Courts have affirmed that deference will only be granted to an agency charged with administration of the statute being interpreted.¹⁹² For example, in *Gonzales v. Oregon*,¹⁹³ the Supreme Court held that *Chevron* deference is not accorded to an administrative rule because the governing statute is ambiguous; “the rule must be promulgated pursuant to authority Congress has delegated to the [agency].”¹⁹⁴ Courts have also affirmed that administrative agencies are better equipped to

¹⁸⁶ *Id.* at 866 (quoting *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 195 (1978)).

¹⁸⁷ *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000).

¹⁸⁸ *Smiley v. Citibank (S.D.)*, N.A., 517 U.S. 735, 740-41 (1996).

¹⁸⁹ See discussion *infra* Part V.A.

¹⁹⁰ *United States v. Mead Corp.*, 533 U.S. 218, 229-30 (2001).

¹⁹¹ Savings Arrangements Established by States for Non-Governmental Employees, 80 Fed. Reg. 72,009 (Nov. 18, 2015) (to be codified at 29 C.F.R. Pt. 2510).

¹⁹² *Dunn v. Commodity Futures Trading Comm’n*, 519 U.S. 465, 478 n.14 (1997).

¹⁹³ 546 U.S. 243 (2006).

¹⁹⁴ *Id.* at 258.

opine on the policy implications of interpreting a statute.¹⁹⁵ In *Nat'l. Fed'n. of Fed. Employees, Local 1309 v. Dep't. of the Interior*,¹⁹⁶ the Supreme Court held that an agency charged with administering a statute is better suited than the judiciary to make interpretive decisions that affect various policy-related considerations underlying the statute.¹⁹⁷

B. State Law Compliance with Proposed Rulemaking

The proposed regulation lists twelve criteria that must be met for a state payroll deduction savings program to comply with the safe harbor provision.¹⁹⁸ This Section discusses whether the California, Illinois, and Oregon laws comply with the criteria for the safe harbor. This analysis is very important, as each state law includes a provision stating that the state savings programs will only be implemented if the program is determined to not be an employee benefit plan under ERISA.¹⁹⁹

1. Program Established Pursuant to State Law

The proposed regulation requires that the savings program must be established by the State.²⁰⁰ All three programs are established by statute,²⁰¹ and, therefore, are established by the State. All three state programs meet this first criterion.²⁰²

2. Program Administered by the State

The proposed regulation requires that the state payroll

¹⁹⁵ *Nat'l Fed'n of Fed. Emps, Local 1309 v. Dep't of Interior*, 526 U.S. 86, 95 (1999).

¹⁹⁶ *Id.*

¹⁹⁷ *See id.* at 99.

¹⁹⁸ 80 Fed. Reg. at 72,009.

¹⁹⁹ CAL. GOV'T CODE § 100012(k); 820 ILL. COMP. STAT. 80/95; OR. REV. STAT. § 557.15(2).

²⁰⁰ 80 Fed. Reg. at 72,014.

²⁰¹ CAL. GOV'T CODE § 100004; 820 ILL. COMP. STAT. 80/10; OR. REV. STAT. § 557.3(1).

²⁰² 80 Fed. Reg. at 72,007.

deduction savings program be “administered by the State establishing the program, or by [the] governmental agency or instrumentality of the State, . . . responsible for investing the employee savings or for selecting investment alternatives for employees to choose.”²⁰³ A statutorily established board administers all three programs.²⁰⁴ Additionally, each board has the responsibility of directing the investment of program funds.²⁰⁵ Therefore, all three State laws meet this criterion for the safe harbor.

3. *State Must Assume Responsibility for the Security of Payroll Deductions and Employee Savings*

The proposed regulation requires that the State assumes responsibility for the security of payroll deductions and employee savings.²⁰⁶ Under the California law, while the State will be exempt from liability in connection with funding retirement benefits, “the [California] [B]oard shall ensure that an insurance, annuity, or other funding mechanism is [always] in place [to] . . . protect[] the value of individuals’ accounts.”²⁰⁷ Under the Illinois law, while the State is exempt from liability in connection with funding retirement benefits, the Illinois Board “[e]valuate[s] the need for, and procure[s] as needed, insurance against any and all loss in connection with the [Illinois Fund].”²⁰⁸ Under the Oregon law, while the State is exempt from liability in connection with funding retirement benefits, the Oregon Board “evaluate[s] the need for, and procure[s] as needed, . . . private insurance for [the Oregon Plan].”²⁰⁹

²⁰³ *Id.* at 72,014.

²⁰⁴ CAL. GOV’T CODE § 100002(a)(1); 820 ILL. COMP. STAT. 80/10; OR. REV. STAT. § 557.1(1).

²⁰⁵ CAL. GOV’T CODE § 100012(b); 820 ILL. COMP. STAT. 80/40(a); OR. REV. STAT. § 557.2(2)(c).

²⁰⁶ 80 Fed. Reg. at 72,014.

²⁰⁷ CAL. GOV’T CODE §§ 100012(c), 100013.

²⁰⁸ 820 ILL. COMP. STAT. 80/30(c), (k).

²⁰⁹ OR. REV. STAT. §§ 557.2, 557.3.

Only the California law explicitly meets this criterion.²¹⁰ Under the Illinois and Oregon laws, the State is exempt from liability and has no explicit duty to insure the funding of retirement benefits.²¹¹ For Illinois and Oregon to meet this requirement, there must be an explicit mandate to implement a mechanism to secure payroll deductions and employee savings.²¹²

In a comment letter to the DOL, representatives from Illinois, California, and Oregon voiced concerns with the broad language of this provision and noted that each state had “existing wage theft provisions governing the handling of withholdings, which should be suitable for program funds sent by the employer to the employee’s account directly.”²¹³ The issue of security of payroll deductions is discussed later in this Article.²¹⁴

4. *State Must Adopt Measures to Ensure Employees are Notified and Create a Mechanism for Enforcement of Rights Under Program*

The proposed regulation requires that “[t]he State adopt measures to ensure that employees are notified of their rights under the program, and create[] a mechanism for enforcement of those rights[.]”²¹⁵ Under the California law, the California Board must design and disseminate an employee information packet with information regarding the California Program.²¹⁶ The California law grants the California Department of Insurance the authority to impose penalties on employers who

²¹⁰ CAL. GOV’T CODE §§ 100012-100013.

²¹¹ 820 ILL. COMP. STAT. 80/70(a); See OR. REV. STAT. §§ 557.2, 557.3.

²¹² Savings Arrangements Established by States for Non-Governmental Employees, 80 Fed. Reg. 72,014 (Nov. 18, 2015) (to be codified at 29 C.F.R. pt. 2510).

²¹³ Letter from John Chiang et al., to Office of Regulations and Interpretations, Emp. Benefits Sec. Admin., U.S. Dep’t of Lab. 1, 3 (Jan. 19, 2015), http://www.osc.ct.gov/crsb/docs/JointDOLLetter_CA_CT_IL_OR.pdf [<https://perma.cc/58YZ-PQ8U>] [hereinafter *Chiang Letter*].

²¹⁴ See discussion *infra* Section VI.H.

²¹⁵ 80 Fed. Reg. at 72,014.

²¹⁶ CAL. GOV’T CODE § 100014.

do not enroll employees in the Program; however, there is no mechanism for employees to enforce their rights under the Program.²¹⁷ Under the Illinois law, the Illinois Board must design and disseminate an employee information packet with information regarding the Illinois Program.²¹⁸ The Illinois law also grants the Illinois Department of Revenue with the authority to impose penalties on employers who do not enroll employees in the Program.²¹⁹ Additionally, because the Illinois Board operates as a fiduciary to the Program, employees will be able to bring an action against the board for breach of its fiduciary duty.²²⁰ Under the Oregon law, the Oregon Board must provide disclosures to employee participants about participation in the Oregon Program.²²¹ However, the Oregon law does not provide the Oregon Board with enforcement authority over noncompliance by employers, nor does it provide any explicit mechanism to enforce employee's rights.²²²

In their comment letter to the DOL, representatives from Illinois, California, and Oregon voiced concerns with the broad language of this provision and noted that each state had existing wage and employment laws that would meet the requirements under the proposed rulemaking.²²³ As discussed below, this Article recommends that the DOL should provide that states may rely on current laws, as long as they are referenced in the regulations and the state provides a brief explanation of why the current law meets the requirement under the proposed rulemaking.²²⁴ The issue of enforcement of employees' rights is discussed later in this Article.²²⁵

²¹⁷ CAL. UNEMP. INS. CODE. § 1088.9(c)-(d) (2015).

²¹⁸ 820 ILL. COMP. STAT. 80/55(a).

²¹⁹ *Id.* at 80/85(a).

²²⁰ 820 ILL. COMP. STAT. 80/25; 720 ILL. COMP. STAT. 5/3-6 (2012).

²²¹ OR. REV. STAT. § 557.4(9).

²²² *See id.* at § 557.2.

²²³ *Chiang Letter, supra* note 213, at 3.

²²⁴ *See* discussion *infra* Part V.A.

²²⁵ *See* discussion *infra* Part V.B.vii.

5. *Participation in the Program is Voluntary for Employees*

The proposed regulation requires that employee participation be voluntary.²²⁶ The DOL clarifies this provision by finding that a state savings plan will not fail to meet the safe harbor conditions merely because it requires automatic enrollment subject to employees having a right to opt out.²²⁷

All three State laws provide for automatic enrollment of eligible employees and allow those employees to opt out of the savings program.²²⁸ Therefore, under the proposed regulation, employee participation is voluntary under each of the State laws.²²⁹ This provision is interesting, because it contradicts ERISA preemption jurisprudence, which has traditionally found that an employee's participation is only *completely voluntary* if it is self-initiated, rather than an opt-out arrangement.²³⁰ Because of the deference granted to agency regulations,²³¹ this provision will likely be upheld and each State law will likely be found in compliance.

6. *Program Must Not Impose Restrictions on Withdrawals or Impose Penalties on Transfers or Rollovers*

The proposed regulation requires that the State savings program cannot restrict withdrawal and cannot impose penalties

²²⁶ Savings Arrangements Established by States for Non-Governmental Employees, 80 Fed. Reg. 72,014 (Nov. 18, 2015) (to be codified at 29 C.F.R. pt. 2510).

²²⁷ *Id.*

²²⁸ CAL. GOV'T CODE § 100032; 820 ILL. COMP. STAT. 80/10, 80/30(i); OR. REV. STAT. § 557.3(c).

²²⁹ CAL. GOV'T CODE § 100004(a); 820 ILL. COMP. STAT. 80/30(j); OR. REV. STAT. § 557.4(1).

²³⁰ *See, e.g.,* Int'l Res., Inc. v. N.Y. Life Ins. Co., 950 F.2d 294, 298-99 (6th Cir. 1991) (holding that regulatory exception did not apply partly because coverage was "automatic applied to all employees"); Kanne v. Conn Gen. Life Ins. Co., 867 F.2d 489, 492-93 (9th Cir. 1988) (contrasting "voluntary" participation with "automatic" participation).

²³¹ Chevron U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 844 (1984).

on transfers or rollovers.²³² Under each state law, respective boards are required to disclose to employees the process for withdrawing retirement savings;²³³ however, none of the laws provide any specific guidance on how to do so.²³⁴ The Oregon law is the only state law that provides information concerning rollovers, stating that the Oregon Plan must allow for account owners to maintain an account regardless of where they are employed and have the ability to roll over funds into other retirement accounts.²³⁵ Because the state laws do not provide specific guidance on withdrawals and rollovers,²³⁶ it is unclear on whether the laws would comply with the proposed regulation.

The states could look to the Department of the Treasury's MyRA program for guidance on how to handle withdrawals and rollovers. Under Treasury regulations, MyRA participants can transfer their balance to a commercial retirement product available in the marketplace.²³⁷ Additionally, "[b]ecause the accounts offered through the [MyRA] program are Roth IRAs, participants also have the flexibility to withdraw their contributions at any time without a penalty."²³⁸ The MyRA program also imposes a ceiling on assets—once the participant's account balance reaches \$15,000 or its thirty-year lifespan, the participant's account balance may be transferred into a private-sector Roth IRA.²³⁹ The issue of portability of the employee's retirement accounts is discussed later in this Article.²⁴⁰

²³² 80 Fed. Reg. at 72,014.

²³³ CAL. GOV'T CODE § 100014(b); 820 ILL. COMP. STAT. 80/55(c); OR. REV. STAT. § 557.4(9).

²³⁴ See CAL. GOV'T CODE §§ 100000-100044; 820 ILL. COMP. STAT. 80; OR. REV. STAT. § 557.

²³⁵ OR. REV. STAT. § 557.3(k).

²³⁶ See CAL. GOV'T CODE §§ 100000-100044; 820 ILL. COMP. STAT. 80; OR. REV. STAT. § 557.

²³⁷ *myRA – my Retirement Account: Frequently Asked Questions*, THE DEPT OF THE TREASURY, 4 (Jan. 2015), https://myra.gov/files/myRA_FAQ.pdf [<https://perma.cc/HPT7-ELTW>].

²³⁸ Regulations Governing Retirement Savings Bonds, 79 Fed. Reg. 74,023 (December 15, 2014) (to be codified at 31 C.F.R. pt. 347).

²³⁹ *Id.*

²⁴⁰ See discussion *infra* Part VI.F.

7. *Employee Rights Are Enforceable Only by Employee, Former Employee, or by the State*

The proposed regulation requires that employee rights are enforceable by the employee, former employee, or the state.²⁴¹ This provision is similar to the second sentence in the fourth criterion under the proposed regulation, which states that the State law must create a mechanism for enforcement of rights under the state savings program.²⁴² The Illinois and California laws grant the State the authority to impose penalties on employers who do not enroll employees in the respective state savings programs.²⁴³ Additionally, as noted above, the Illinois law imposes a fiduciary duty on the Illinois Board;²⁴⁴ because the board operates as a fiduciary to the Illinois Program, employees will be able to bring an action against the Illinois Board for breach of its fiduciary duty.²⁴⁵ The Oregon law does not grant the State or individual employees with the authority to enforce employees' rights,²⁴⁶ and therefore, does not meet the criteria for this provision.

8. *Limited Employer Involvement and Prohibition on Employer Contributions*

The proposed regulation requires that employers have limited involvement with a state savings program.²⁴⁷ To determine whether the employer's involvement meets this criterion, the regulation requires that employer involvement is limited to

²⁴¹ Savings Arrangements Established by States for Non-Governmental Employees, 80 Fed. Reg. 72,014 (Nov. 18, 2015) (to be codified at 29 C.F.R. pt. 2510).

²⁴² *Id.*

²⁴³ CAL. UNEMP. INS. CODE § 1088.9(c)-(d); 820 ILL. COMP. STAT. 80/85(a).

²⁴⁴ 820 ILL. COMP. STAT. 80/25.

²⁴⁵ 720 ILL. COMP. STAT. 5/3-6.

²⁴⁶ See OR. REV. STAT. § 557.

²⁴⁷ 80 Fed. Reg. at 72,014.

[c]ollecting employee contributions through payroll deductions and remitting them to the program; [p]roviding notice to the employees and maintaining records regarding the employer's collection and remittance of payments under the program; [p]roviding information to the State . . . necessary to facilitate the operation of the program; and [d]istributing program information to employees from the State . . . and permitting the State or such entity to publicize the program to employees.²⁴⁸

The proposed regulation also prohibits employer contributions to individual employee accounts.²⁴⁹

Each State program requires employers to set up payroll deduction systems and provide information to employees about participation.²⁵⁰ However, the California law goes further: under the law, because the employer is allowed to make contributions to employee's individual accounts, the law would not meet the criterion for this provision.²⁵¹

The Oregon law requires employers to provide information to employees and set up the payroll deduction;²⁵² however, employers are still prohibited from contributing to individual employee accounts.²⁵³ The Illinois law is silent on whether employer contributions are prohibited.²⁵⁴ Because the Illinois law does not explicitly allow employer contributions, I would argue that the Illinois law meets the criterion for this provision. I would suggest that the Illinois Board promulgate a rule that would prohibit employer contributions; this action would ensure compliance with this provision.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ CAL. GOV'T CODE § 100012(h); 820 ILL. COMP. STAT. 80/30(h), 80/55(a); OR. REV. STAT. § 557.3.

²⁵¹ CAL. GOV'T CODE § 100012(h).

²⁵² OR. REV. STAT. § 557.3.

²⁵³ *Id.* at § 557.3(1)(h).

²⁵⁴ See 820 ILL. COMP. STAT. 80/30(j).

9. Employer Participation in the Program is Required by State Law

The proposed regulation requires that state law require employer participation.²⁵⁵ All three state laws require employers to provide a payroll deposit retirement savings arrangement for eligible employees.²⁵⁶ However, California and Illinois provide exemptions based on size of the company;²⁵⁷ for example, the California Program exempts employers with less than five employees²⁵⁸ and Illinois exempts employers with less than twenty-five employees.²⁵⁹ Under the current language of the proposed rule, California and Illinois would not meet this criterion. The DOL should therefore provide a hardship exemption that would provide States with the flexibility to determine which employers may be exempt from the mandatory adoption requirement.

10. Employer Has No Discretionary Authority, Control, or Responsibility Under the Program

The proposed regulation requires that employers have “no discretionary authority, control, or responsibility under the [state] program.”²⁶⁰ All three state laws exempt employers from the responsibility of administration or investment of the Program, and exempt employers from liability with respect to investment returns or Program design.²⁶¹ Therefore, all three state laws meet this criterion for the safe harbor.

²⁵⁵ 80 Fed. Reg. at 72,014.

²⁵⁶ CAL. GOV'T CODE § 100012(h); 820 ILL. COMP. STAT. 80/60(a); OR. REV. STAT. § 557.3(1)(b).

²⁵⁷ CAL. GOV'T CODE §§ 100000(e)(2)(d), 100012(h); 820 ILL. COMP. STAT. 80/5, 80/60(b).

²⁵⁸ CAL. GOV'T CODE § 100000(d).

²⁵⁹ 820 ILL. COMP. STAT. 80/5.

²⁶⁰ 80 Fed. Reg. at 72,014.

²⁶¹ CAL. GOV'T CODE § 100034(b); 820 ILL. COMP. STAT. 80/75(b) OR. REV. STAT. § 557.3(p).

11. *Employer Receives No Consideration, Other than for the Reimbursement of the Actual Costs of the Program*

The proposed regulation prohibits employers from being compensated for any obligation outside of the actual cost of setting up payroll deposit retirement savings arrangement for their employees.²⁶² All three state laws require the State to pay for administrative costs, including those incurred by employers, until sufficient assets are available in the Programs to cover those costs.²⁶³ Because the state laws do not provide for any compensation to employers other than for administrative costs incurred, all three state laws meet this criterion for the safe harbor.²⁶⁴

VI. POLICY CONCERNS WITH STATE LAWS

While many agree that there is a retirement crisis in the United States, there is no consensus as to how to address the issue. Industry and consumer groups differ on the effectiveness of state-based retirement plans. Industry groups such as the Financial Services Institute (FSI), Investment Company Institute (ICI), National Association of Insurance and Financial Advisors (NAIFA), American Council of Life Insurers (ACLI), and the Securities Industry and Financial Markets Association (SIFMA) generally oppose state-run retirement plans.²⁶⁵

²⁶² 80 Fed. Reg. at 72,014.

²⁶³ CAL. GOV'T CODE § 100042; 820 ILL. COMP. STAT. 80/30; OR. REV. STAT. § 178.225.

²⁶⁴ See discussion *supra* Part III.A.

²⁶⁵ Mark Schoeff, Jr., *FSI to Fight States on auto IRAs: Independent broker-dealer group says plans pose competition to financial advisors*, INVESTMENTNEWS (Dec. 17, 2014, 2:24 PM) <http://www.investmentnews.com/article/20141217/FREE/141219922/fsi-to-fight-rollout-of-auto-iras> [<https://perma.cc/PQH7-64WJ>]; Letter from David W. Blass, Gen. Counsel, Inv. Co. Inst., to Office of Regulations and Interpretations, Emp. Benefits Sec. Admin., U.S. DEP'T OF LAB. (Jan. 19, 2016), <https://www.regulations.gov/contentStreamer?documentId=EBSA-2015-0018-0064&attachmentNumber=1&disposition=attachment&contentType=pdf> [<https://perma.cc/BV34-2H9A>] [hereinafter *Blass Letter*]; Letter from Gary A. Sanders, Counsel and Vice President, Gov't Relations, Nat'l Ass'n of Insurance and Fin. Advisors, to Office

Consumer groups such as the American Association of Retired Persons (AARP) and Pension Rights Center (PRC) support state-run retirement plans.²⁶⁶ This Section will discuss a number of the policy implications arising from state-run retirement plans and endeavors in response to a number of the opposition arguments.

A. Will Reduce Savers' Access to Current Private Sector Savings Options and Professional Advice

Opponents of state-run retirement plans argue that there are already a number of private sector retirement options, including 401(k) plans, 403(b) plans, 401(a) plans, 457(b) plans, SIMPLE IRAs, SEP IRAs, and traditional IRAs.²⁶⁷ While this statement is true, the vast majority of empirical research shows that workers without employer-based retirement plans are not utilizing these services.²⁶⁸ Research also demonstrates that

of Regulations and Interpretations, Emp. Benefits Sec. Admin., U.S. DEP'T OF LAB. (Jan. 19, 2016), <http://www.regulations.gov/contentStreamer?documentId=EBSA-2015-0018-0037&attachmentNumber=1&disposition=attachment&contentType=pdf> [https://perma.cc/4SPS-MNMS] [hereinafter *Sanders Letter*]; Letter from James H. Szostek, Vice President, Taxes & Ret. Sec. & Howard M. Bard, Vice President, Taxes & Ret. Sec., to Office of Regulations and Interpretations, Emp. Benefits Sec. Admin., U.S. DEP'T OF LAB. 1, 2 (Sept. 29, 2016), <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB76/00022.pdf> [https://perma.cc/R59X-PKH9] [hereinafter *Szostek & Bard Letter*]; Letter from Lisa J. Bleier, Managing Dir. and Assoc. Gen. Counsel, Securities Indus. and Fin. Mkts. Ass'n, to Sec. Perez, Office of Regulations and Interpretations, Emp. Benefits Sec. Admin., U.S. DEP'T OF LAB. 1, 2 (Jan. 19, 2016), <http://www.regulations.gov/contentStreamer?documentId=EBSA-2015-0018-0031&attachmentNumber=1&disposition=attachment&contentType=pdf> [https://perma.cc/U6SV-AQUU] [hereinafter *Bleier Letter*].

²⁶⁶ Melissa Kahn & Jody Strakosch, *Making State Retirement Plans Work for Private Employers: Including Lifetime Income Options*, AARP PUB. POL'Y INST. (Jan. 2016), <http://www.aarp.org/content/dam/aarp/ppi/2015/making-state-retirement-plans-work-for-private-employers-spotlight.pdf>, [https://perma.cc/TCC4-YRG5]; Letter from Norman Stein, Senior Pol'y Advisor, Pension Rights Center, to Office of Regulations and Interpretations, Emp. Benefits Sec. Admin., U.S. DEP'T OF LAB. 1, 2-3 (Jan. 19, 2016), <https://www.regulations.gov/contentStreamer?documentId=EBSA-2015-0018-0067&attachmentNumber=1&disposition=attachment&contentType=pdf> [https://perma.cc/6G75-35AT] [hereinafter *Stein Letter*].

²⁶⁷ *Szostek & Bard Letter*, *supra* note 265, at 3.

²⁶⁸ *The Role of IRAs in U.S. Households' Saving for Retirement, 2014*, 21 ICI RES. PERSP. 1, 1-3 (Jan. 2015), <https://www.ici.org/pdf/per21-01.pdf>

workers do not take the initiative to learn about their investment options, do not take the affirmative steps needed to start saving, and fail to make regular contributions.²⁶⁹ Without empirical evidence to show that workers without employer-based retirement plans are successfully utilizing these private sector tools, the opposition argument is without merit.

The importance of a savings plan is clearly illustrated in the 2015 Employee Benefit Research Institute Retirement Confidence Survey.²⁷⁰ The survey found “increased confidence since 2013 [that] is strongly related to retirement plan participation. Among those with a plan, the percentage [of] ‘very confident’ increased from 14 percent in 2013 to 28 percent in 2015. In contrast, the percentage of ‘very confident’ remained statistically unchanged among those without a plan (10 percent in 2013, 9 percent in 2014, and 12 percent in 2015).”²⁷¹

Opponents of state-run retirement plans further argue that “[d]espite state lawmakers’ best intentions, the net result of these efforts could be a reduction in investor choice and further limitation of access to high-quality, objective financial guidance.”²⁷² Specifically, opponents argue that these plans will compete “against small [financial advisors] [who] are working hard to address the[] needs” of middle-class workers.²⁷³

[<https://perma.cc/9PVU-8YBJ>] (An IRA is an option for employees with no employer-sponsored retirement plan. “Only 12% of U.S. households contributed to any type of IRA in 2013.”).

²⁶⁹ Jodi DiCenzo & Paul Fronstin, *Lessons From the Evolution of 401(k) Retirement Plans for Increased Consumerism in Health Care: An Application of Behavioral Research*, EMP. BENEFIT RES. INST. 1, 13-14 (Aug. 2008), https://www.ebri.org/pdf/briefspdf/EBRI_IB_08-2008.pdf [<https://perma.cc/66KK-Z7Q3>].

²⁷⁰ Ruth Helman, Craig Copeland, & Jack VanDerhei, *The 2015 Retirement Confidence Survey: Having a Retirement Savings Plan a Key Factor in Americans’ Retirement Confidence*, EMP. BENEFIT RES. INST. 1, 20 (Apr. 2015), https://www.ebri.org/pdf/briefspdf/EBRI_IB_413_Apr15_RCS-2015.pdf [<https://perma.cc/K9KP-BPG3>].

²⁷¹ *Id.* at 1.

²⁷² Dale E. Brown, *The case against state-run retirement plans*, INVESTMENTNEWS (Aug. 28, 2014, 12:26 PM), <http://www.investmentnews.com/article/20140828/BLOG09/140829925> [<https://perma.cc/6USL-ZMZS>].

²⁷³ Schoeff, *supra* note 265.

Contrary to opposition claims, the empirical evidence reflects that without these plans, middle-income workers will neither save nor receive professional financial advice.²⁷⁴ First, regardless of whether the financial advisor serves the client under a commission-based, fee and commission, or fee-only business model, lower and middle-income workers cannot always afford to pay for professional advice.²⁷⁵ Second, these plans are only enacted to provide retirement savings vehicles to employees who currently do not have access to a workplace retirement savings plan;²⁷⁶ essentially, the opposition makes the untenable argument that the state is reducing investor choice by providing access to a workplace retirement plan that does not currently exist.²⁷⁷

This Article contends that the state-run retirement plans will provide financial advisors with an increase in future clients.²⁷⁸ For example, lower and middle-income workers who did not have access to a workplace retirement savings plan and could not save will now have the ability to save in the state-run retirement plan.²⁷⁹ Once the worker is financially stable, he or she can then decide to rollover the funds in the state-run plan to an IRA or other private retirement vehicle, where the financial

²⁷⁴ Dan Iannicola, Jr. & Jonas Parker, *Barriers to Financial Advice to Non-Affluent Consumers*, THE FIN. LITERACY GROUP 1, 39 (Sept. 2010), <https://www.soa.org/researchbarriers/> [<https://perma.cc/U9KM-NXRK>].

²⁷⁵ *Id.* at 5-6. (“[D]espite the need, the data consistently demonstrate that non-affluent consumers are not accessing financial advice from licensed and informed professionals. Fewer than half (47 percent) of all consumers have ever used the services of a financial professional for retirement planning, a trend that has persisted since at least the 1980s.”)

²⁷⁶ *State Run Retirement Plan Proposals Resource Center*, SEC. INDUSTRY AND FIN. MARKETS ASS’N (2016), <http://www.sifma.org/issues/savings-and-retirement/state-run-retirement-plan-proposals/overview/> [<https://perma.cc/5TFN-VCEH>] [hereinafter *Resource Center*].

²⁷⁷ Brown, *supra* note 272.

²⁷⁸ See discussion *infra* Part VI.A.

²⁷⁹ Peter M. Kelly, *State Retirement Plans for Private Employers*, ABA JOINT COMMITTEE ON EMP. BENEFITS AND THE AM. COLLEGE OF BENEFITS COUNS. (May 10, 2016), http://www.americanbar.org/content/dam/aba/events/employee_benefits/EB1605WEB15_PPT.authcheckdam.pdf [<https://perma.cc/8AR2-BYZE>].

advisor could then help manage those assets.²⁸⁰

To support this claim, according to ICI, 85% of households undertaking a rollover since 2010 transferred their entire retirement plan balances into traditional IRAs, and “[87% of] new traditional IRAs in 2012 were opened [exclusively] with rollovers.”²⁸¹ Importantly, according to the Employee Benefits Research Institute, thirteen times more money was rolled over into IRAs as was directly contributed to IRAs in 2011—this data reflects the importance in employees—having access to a workplace savings plan.²⁸²

B. Burden on Fiscally-Strained States

Opponents argue that state-run retirement plans would burden fiscally-strained states with additional costs and liability to operate the state-run programs.²⁸³ While these are legitimate concerns over the cost of state-run programs, the opposition greatly exaggerates those claims. This Article argues that based upon the structure of the state programs discussed above, there would be reasonable costs incurred by the state.²⁸⁴

States do not bear the full burden of implementing the savings programs.²⁸⁵ For example, in California, “[f]unding for the market and feasibility study must come from private nonprofit or for-profit entities, or from federal sources. The use of State funds . . . is prohibited.”²⁸⁶ Additionally, states can

²⁸⁰ *2015 Investment Company Fact Book*, THE INV. CO. INST. 1, 153 (2015), https://www.ici.org/pdf/2015_factbook.pdf [<https://perma.cc/4R3A-ZM66>].

²⁸¹ *Id.*

²⁸² Craig Copeland, *Individual Retirement Account Balances, Contributions, and Rollovers, 2011: The EBRI IRA Database*, EMP. BENEFIT RES. INST. (May 2013), https://www.ebri.org/pdf/briefspdf/EBRI_IB_05-13.No386.IRAs.pdf [<https://perma.cc/HM9C-32YC>].

²⁸³ *Blass Letter*, *supra* note 265; *Bleier Letter*, *supra* note 265, at 2.

²⁸⁴ *See* discussion *infra* Part VI.B.

²⁸⁵ *See, e.g.*, Grant Boyken, *Request for Information (RFI) from Financial Service Providers, Experts and Scholars*, SECURE CHOICE RETIREMENT SAVINGS INV. BOARD 1, 3 (Sept. 4, 2013), <http://www.treasurer.ca.gov/scib/staff/2013/20130904/4.pdf> [<https://perma.cc/L9EM-QLXM>].

²⁸⁶ *Id.*

leverage the experience they have gained with respect to implementing Section 529 college savings programs and state employee retirement savings programs.²⁸⁷

The state laws provide that the state must bear the initial costs of the program;²⁸⁸ however, each law is structured to create a self-sustaining trust that pays the administrative costs of the Program.²⁸⁹ The State laws provide for uniform enrollment materials, created by the state, which employers distribute to their employees.²⁹⁰ By using uniform materials, the expense to the state will be greatly minimized. Additionally, the state-run retirement programs, if successful, would allow millions of workers to become financially self-sufficient, and could reduce the burden on state services. So even if the state-run retirement plans increased costs to the state in the near term, they would be compensated for in the long-run.

Opponents argue that states cannot establish a successful state-run retirement savings program given the economic status of several public pension plans.²⁹¹ This Article contends that this is a misleading argument. First, unlike public pension plans, the state would only be funding the initial costs of the program.²⁹² Second, unlike public pension plans, the state does not have discretion whether to or how much to fund the state-

²⁸⁷ CAL. EDUC. CODE § 69980 (2015); 15 ILL. COMP. STAT. 505/16.5 (2015); OR. REV. STAT. § 178.300 (2015).

²⁸⁸ See generally CAL. GOV'T. CODE § 100042; 820 ILL. COMP. STAT. 80/30; OR. REV. STAT. § 178.225.

²⁸⁹ CAL. GOV'T. CODE § 100042; 820 ILL. COMP. STAT. 80/30; OR. REV. STAT. § 178.225.

²⁹⁰ CAL. GOV'T. CODE § 100014; 820 ILL. COMP. STAT. 80/55; OR. REV. STAT. § 178.205.

²⁹¹ One example provided by the opposition is that “[t]he Teachers’ Retirement System of the State of Illinois is one of the worst funded public pensions in the nation. In 2013, it held enough assets to cover only 41 percent of its future obligations.” Richard W. Johnson & Benjamin G. Southgate, *Evaluating Retirement Income Security for Illinois Public School Teachers: Public Pension Project Report*, URB. INST. 1 (Jul. 2014), <http://files.eric.ed.gov/fulltext/ED559321.pdf> [<https://perma.cc/VV5S-2H9F>].

²⁹² CAL. GOV'T. CODE § 100042; 820 ILL. COMP. STAT. 80/30; OR. REV. STAT. § 178.225.

run programs.²⁹³ Third, each state law has designated a board to oversee the program, which includes government regulators and public and private parties.²⁹⁴ Fourth, unlike public pension plans, the state-run retirement programs are not subject to constitutional and contractual restrictions;²⁹⁵ for example, many states limit amendments to public pension funds under State constitutions.²⁹⁶

C. Financial Priorities of Employees

Opponents argue that employees not currently covered by employer-based retirement plans “may have other, more immediate savings priorities . . . [and that] [t]he policy rationale underlying the state initiatives does not give adequate consideration to the fact that retirement savings is not the beginning of the financial difficulties for many [workers].”²⁹⁷ This Article contends that the opposition argument is disingenuous. It is misguided to think that just because some employees have varied savings priorities, they should not be automatically enrolled in a workplace retirement savings program. The important counterpoint to this argument is that these state programs contain an opt-out provision,²⁹⁸ so if an employee does not want to participate, they have no obligation to do so.

Opponents also argue that the rule proposal will not solve the retirement crisis;²⁹⁹ however, the DOL proposed provision is

²⁹³ CAL. GOV'T. CODE § 100004; 820 ILL. COMP. STAT. 80/15; OR. REV. STAT. § 178.225.

²⁹⁴ CAL. GOV'T. CODE § 100002; 820 ILL. COMP. STAT. 80/20; OR. REV. STAT. § 178.200.

²⁹⁵ Savings Arrangements Established by States for Non-Governmental Employees, 81 Fed. Reg. 59,467 (Aug. 20, 2015) (to be codified at 29 C.F.R. pt. 2510).

²⁹⁶ Amy B. Monahan, *Public Pension Plan Reform: The Legal Framework*, 5 EDUC. FIN. AND POL'Y J. 617, 621 (2010).

²⁹⁷ *Blass Letter*, *supra* note 265.

²⁹⁸ Savings Arrangements Established by States for Non-Governmental Employees, 80 Fed. Reg. 72,1010 (Nov. 18, 2015) (to be codified at 29 C.F.R. pt. 2510).

²⁹⁹ *Sanders Letter*, *supra* note 265, at 1.

not meant to be a silver bullet. Incredibly, one insurance trade association states that “[w]hile the proposed safe harbor could result in some increase in the percentage of people having an IRA (for some period of time), it would not help with investor education or better long-term planning.”³⁰⁰ This Article challenges this organization to explain why employees cannot have both because investment education and a state-mandated workplace retirement savings program should not be mutually exclusive.

Opponents also argue that auto-enrollment is not in workers’ best interests.³⁰¹ SIFMA argues that “data shows that while auto enrollment increases overall participation, it actually decreases the average savings rate.”³⁰² Unfortunately, SIFMA, relying sources regarding a *Wall Street Journal* article instead of the actual study, only provides part of the story.³⁰³ First, the Employee Benefit Research Institute (EBRI), the group who conducted the study, commented that “[t]he WSJ article reported only the most pessimistic setoff assumptions from EBRI research . . . [t]he WSJ also chose not to report any of the positive impacts of auto-enrollment 401(k)-type plans . . . [and] failed to mention . . . that it’s *increasing* savings for many more—especially the lowest-income 401(k) participants[.]”³⁰⁴ In its comment letter, SIFMA fails to mention that the study established that the measure increased the number of savers and savings rates for a number of smaller accounts.³⁰⁵ Second,

³⁰⁰ *Id.* at 2.

³⁰¹ *Bleier Letter*, *supra* note 265, at 2.

³⁰² *Id.* at 4.

³⁰³ Ann Tergesen, *People tend to put more in their 401k if they do it voluntarily – Law Undercuts Retirement Savings*, INVESTMENTWATCH (Jul. 7, 2011), <http://investmentwatchblog.com/people-tend-to-put-more-in-their-401k-if-they-do-it-voluntarily-law-undercuts-retirement-savings/> [<https://perma.cc/AXA8-G6ZZ>]; *Bleier Letter*, *supra* note 265, at 4.

³⁰⁴ *EBRI Comments on Wall Street Journal Article on 401(k) Auto-Enrollment*, EMP. BENEFIT RES. INST. (Jul. 7, 2011), <https://www.ebri.org/pdf/PR931.07July11.WSJ-Rsp.pdf> [<https://perma.cc/HH77-QVLP>].

³⁰⁵ Jack VanDerhei & Lori Lucus, *The Impact of Auto-enrollment and Automatic Contribution Escalation on Retirement Income Adequacy*, EMP. BENEFIT RES. INST., NO. 349 (Nov. 10, 2010), https://www.ebri.org/pdf/briefspdf/EBRI_IB_011-

even if SIFMA's statement was factually accurate, as the great Wayne Gretsky once said, "[y]ou miss 100% of the shots you don't take."³⁰⁶ An account with zero dollars will remain at zero, regardless of what the average savings rate is.

SIFMA also contends that since "there is no [employer] match[,] account growth will be limited."³⁰⁷ However, this argument is misplaced, as the state laws outlined in this paper will only affect employees of companies who do not currently offer a retirement plan³⁰⁸—there cannot be an employer match if the employer refuses to offer a retirement plan. SIFMA also claims that "there is no monetary incentive to the employees to participate in the program."³⁰⁹ However, they completely, and arguably, willfully ignore the benefits of depositing money pre-tax into an account that will earn compound interest over a number of years.

D. Financial Burden on Employers

Opponents argue that employers would face increased costs with respect to state-run retirement plans;³¹⁰ however, this Article contends that opponents' claims are without merit. First, the employers' primary role under the state programs is limited to enrolling employees and sending their payroll deduction contributions to the IRA provider.³¹¹ A 2009 report by Optimal Benefit Strategies, LLC, on behalf of AARP, found that "97

2010_No349_EBRI_DCIIA.pdf [https://perma.cc/JBX5-CS6D].

³⁰⁶ Paul B. Brown, 'You Miss 100% Of The Shots You Don't Take.' *You Need To Start Shooting At Your Goals*, FORBES (Jan. 12, 2014, 6:00 AM), <http://www.forbes.com/sites/actiontrumpseverything/2014/01/12/you-miss-100-of-the-shots-you-dont-take-so-start-shooting-at-your-goal/#1014e9c45e42> [https://perma.cc/ET3S-Y7AB].

³⁰⁷ *Bleier Letter*, *supra* note 265, at 4.

³⁰⁸ CAL. GOV'T. CODE § 100032; 820 ILL. COMP. STAT. 80/5; OR. REV. STAT. § 178.210.

³⁰⁹ *Bleier Letter*, *supra* note 265, at 4.

³¹⁰ *Id.* at 2; *Blass Letter*, *supra* note 265.

³¹¹ *Most Small Employers Face Low Costs to Implement Automatic IRAs*, OPTIMAL BENEFIT STRATEGIES, LLC (Aug. 19, 2009), http://assets.aarp.org/rgcenter/econ/auto_iras.pdf [https://perma.cc/JX7K-45ZD].

percent of employers with 10 or more employees use automated systems and do not process payroll manually.”³¹² This greatly decreases costs with respect to the payroll deposit retirement savings arrangements required by the state programs.

Second, with respect to employer costs, the state-run retirement plans have a considerable cost advantage over existing payroll deduction IRA programs.³¹³ Under the current private sector programs, employers must take time “to select a provider from [a variety of] options to establish a payroll deduction IRA program and to select investment options[.]”³¹⁴ The amount of time to do so costs money. Under the state programs, “that cost to employers is not present . . . because the board chooses the provider, and the investment options are limited by statute.”³¹⁵ Importantly, employers do not have to choose financial service providers or decide which investment options meet the needs of their employees.³¹⁶

Third, the DOL proposal specifically allows for employers to be reimbursed for “the actual costs of the program to the employer.”³¹⁷ Importantly, all three programs require the state to pay for administrative costs, including those incurred by employers, until sufficient assets are available in the Programs to cover those costs.³¹⁸ Accordingly, employers are reimbursed for any costs they incur when setting up the payroll system.

³¹² *Id.*

³¹³ Spencer Cowan, *What Types of Costs Would a State-Sponsored Retirement Savings Plan Impose on Employers: A Case Study Using the Illinois Secure Choice Savings Program*, AARP PUB. POL’Y INST. 1, 4 (Dec. 2015), <http://www.aarp.org/content/dam/aarp/ppi/2015/What-Types-Of-Costs-Would-A-State-Sponsored-Retirement-Plan-Impose-On-Employers.pdf> [https://perma.cc/QT7S-428X].

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ Savings Arrangements Established by States for Non-Governmental Employees, 80 Fed. Reg. 72,1010 (Nov. 18, 2015) (to be codified at 29 C.F.R. pt. 2510).

³¹⁸ CAL. GOV’T CODE § 100004; 820 ILL. COMP. STAT. 80/16; OR. REV. STAT. § 178.225.

E. Employer Liability

Opponents argue that the state-run retirement plans would expose employers to potential liability under ERISA and the IRC.³¹⁹ For example, the U.S. Chamber of Commerce argues that “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.”³²⁰ However, each state program has a clause stating that the program shall not be implemented if it is found to be an employee benefit plan under ERISA.³²¹ Under the proposed safe harbor regulation, state-run retirement plans have a guide as to how to structure their plan to avoid ERISA liability. Even though the courts still have the ultimate authority to decide if the state plan is governed by ERISA, courts should grant deference to the DOL regulation.

Under each state law, employers will not be deemed fiduciaries under the Programs and are immunized from liability.³²² As stated earlier in the Article, employers’ duties are limited to setting up their payroll system so that their employees can utilize the state-run retirement program.³²³

F. Portability of State Savings Accounts

Opponents argue that individual state law could confuse employers and employees, and that “[d]ifferent states would likely have different rules governing operation, accumulation

³¹⁹ *Johnson & Wong Letter, supra* note 95.

³²⁰ *Id.*

³²¹ CAL. GOV’T CODE § 100043; 820 ILL. COMP. STAT. 80/95; OR. REV. STAT. § 178.210.

³²² CAL. GOV’T CODE § 100034; 820 ILL. COMP. STAT. 80/75; OR. REV. STAT. § 178.210.

³²³ *Payroll Deduction IRAs for Small Businesses*, U.S. DEPT OF LAB.’S EMP. BENEFITS SECURITY ADMIN. & THE INTERNAL REVENUE SERVICE (Oct. 2014), <https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/publications/PayrollDeductionIRAs.pdf> [<https://perma.cc/96KL-J3KZ>].

and distributions[.]”³²⁴ This Article agrees with this concern. While the state laws discuss portability, none of the laws provide guidance on the issue.³²⁵ This concern is particularly acute at this point, since very few states have passed legislation for state-run retirement plans.³²⁶

To remedy this problem, the state laws could, like the small business retirement marketplace in Washington state, work with IRA providers to establish a portal or marketplace that makes the rollover process simple and inexpensive.³²⁷ The states could also look to the federal MyRA program for guidance.

G. Contrary to Purpose of Employee Retirement Income Security Act

Opponents argue that the state programs run contrary to the purpose of ERISA, which is to assure uniformity of the laws governing employee benefit plans.³²⁸ This is a legitimate concern. However, from its inception, ERISA has provided multiple exemptions from its provisions.³²⁹ For example, ERISA does not apply to governmental plans “established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing.”³³⁰ ERISA’s preemption provisions do not apply to state laws that regulate insurance, banking, or securities, or plans established solely to meet state workers’ compensation, unemployment compensation, or disability insurance laws.³³¹

³²⁴ *Resource Center*, *supra* note 276.

³²⁵ CAL. GOV’T CODE § 100034; 820 ILL. COMP. STAT. 80/75; OR. REV. STAT. § 178.210.

³²⁶ See Tom Anderson, *More States to Offer Retirement Plans*, CNBC (Aug. 26, 2016, 12:55 PM), <http://www.cnbc.com/2016/08/19/california-set-to-join-states-offering-retirement-plans.html> [<https://perma.cc/9EBS-AK36>].

³²⁷ See WASH. REV. CODE § 43.330.735 (2015).

³²⁸ Savings Arrangements Established by States for Non-Governmental Employees, 80 Fed. Reg. 72,007 (Nov. 18, 2015) (to be codified at 29 C.F.R. pt. 2510).

³²⁹ See 29 U.S.C. § 1108 (2012).

³³⁰ *Id.* at § 1002(32).

³³¹ *Id.* at § 1144(b)(2).

The exemptions reflect that even though Congress intended ERISA to be a “comprehensive and reticulated statute,”³³² ERISA’s preemption provisions are not absolute.³³³ This Article contends that if Congress intended for ERISA to preempt all state laws, it would have written such a provision into the statute. The absence of such a clause, while not determinative, provides evidence that Congress did not intend to foreclose all state action concerning employee benefit plans.³³⁴

H. Lack of Employee Retirement Income Security Act Protection

Opponents argue that the state programs are not subject to ERISA’s fiduciary obligations under the state laws and that consumers are harmed by the lack of fiduciary protection.³³⁵ This Article agrees with this concern; however, it is disingenuous that the same groups arguing that consumers need ERISA fiduciary protection are the same groups fighting a broadened ERISA fiduciary duty under the DOL’s proposed conflict of interest rulemaking.³³⁶ It is important to note that the state programs discussed in this Article all have a required standard of conduct similar to the fiduciary standard under ERISA.³³⁷

Under the California Program, all members of the California Board are required to discharge their duties “solely in

³³² *Limbach v. Hooven & Allison Co.*, 466 U.S. 353, 361 (1984).

³³³ David Gregory, *The Scope of ERISA Preemption of State Law: A Study in Effective Federalism*, 48 U. PITT L. REV. 427, 452 (1987).

³³⁴ *Andrus v. Glover Const. Co.*, 446 U.S. 608, 616-17 (1980) (“Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.” (citing *Continental Casualty Co. v. U.S.*, 314 U.S. 527, 533 (1942))).

³³⁵ *Sanders Letter*, *supra* note 265, at 3; *Blass Letter*, *supra* note 265; *Bleier Letter*, *supra* note 265, at 4.

³³⁶ Definition of the Term “Fiduciary”; Conflict of Interest Rule—Retirement Investment Advice, 80 Fed. Reg. 21,928 (Apr. 20, 2015) (to be codified at 29 C.F.R. pts. 2509 and 2510).

³³⁷ CAL. GOV’T CODE § 100034; 820 ILL. COMP. STAT. 80/25; OR. REV. STAT. § 557.2; 29 U.S.C. § 1104.

the interest” of the California Program participants.³³⁸ This includes an exclusive purpose test, where the board member must act “[f]or the exclusive purposes of providing benefits to program participants and defraying reasonable expenses of administering the program,”³³⁹ and a prudent person test, where the board members must invest “with the care, skill, prudence, and diligence under the prevailing circumstances a prudent person acting in a like capacity and familiar with those matters would use in the conduct of an enterprise of a like character and with like aims[.]”³⁴⁰ Members of the Illinois Board are required to discharge their duties under a fiduciary standard of conduct.³⁴¹ This includes an exclusive purpose test, where the board member must act “for the exclusive purposes of providing benefits to [program participants] and defraying reasonable expenses of administering the Program”³⁴² and a prudent person test, where the board members must invest “with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with those matters would use in the conduct of an enterprise of a like character and with like aims.”³⁴³ Members of the Oregon Board are required to discharge their duties under a prudent person test, where the board members must “exercise the judgment and care then prevailing that persons of prudence, discretion and intelligence exercise in the management of their own affairs with due regard to the probable income and level of risk from certain types of investments of money.”³⁴⁴

This Article, as discussed below, contends that the DOL rule proposal should be revised to mandate that each state implement an enforceable fiduciary standard as part of its

³³⁸ CAL. GOV'T CODE § 100002(d).

³³⁹ *Id.*

³⁴⁰ *Id.*

³⁴¹ 820 ILL. COMP. STAT. 80/25.

³⁴² *Id.*

³⁴³ *Id.*

³⁴⁴ OR. REV. STAT. § 557.2.

retirement savings program.³⁴⁵ This requirement will allay any fear that consumers will not be afforded fiduciary-level protection under a state-run retirement savings plan, and minimize the fears of industry groups of a non-level playing field benefitting state-run retirement savings programs.³⁴⁶

I. Implications of Proposed Rulemaking on U.S. Trade Obligations

Opponents argue that “[e]xempting state-sponsored plans for private sector employees from ERISA requirements could . . . raise concerns regarding U.S. obligations to trading partners.”³⁴⁷ This Article contends that this argument is not legally supported. For example, ACLI cites to the North American Free Trade Agreement (NAFTA).³⁴⁸ However, NAFTA states that its provisions shall not “be construed to prevent a Party, including its public entities, from exclusively conducting or providing in its territory: (a) activities or services forming part of a public retirement plan or statutory system of social security[.]”³⁴⁹ Additionally, NAFTA states that none of its provisions “shall be construed to prevent a Party from adopting or maintaining reasonable measures for prudential reasons, such as: (a) the protection of investors, depositors, financial market participants, policy-holders, policy-claimants, or persons to whom a fiduciary duty is owed by a financial institution or cross-border financial service provider[.]”³⁵⁰

ACLI also cites the U.S.-Korea Free Trade Agreement (Agreement); however, the Agreement states that the provisions of the Agreement do “not apply to measures adopted or maintained by a Party relating to: (a) activities or services

³⁴⁵ See discussion *infra* Part VII.B.

³⁴⁶ *Sanders Letter*, *supra* note 265, at 4.

³⁴⁷ *Szostek & Bard Letter*, *supra* note 265, at 5.

³⁴⁸ North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 289 (1993).

³⁴⁹ *Id.* at 657.

³⁵⁰ *Id.* at 659.

forming part of a public retirement plan or statutory system of social security[.]”³⁵¹ The Agreement also states that “a Party shall not be prevented from adopting or maintaining measures for prudential reasons, including for the protection of investors, depositors, policy holders, or persons to whom a fiduciary duty is owed by a financial institution or cross-border financial service supplier[.]”³⁵² Since these Agreements seem to exempt public retirement plans and laws to ensure financial stability and protect investors,³⁵³ this opposition argument is not legally supported and, therefore, should be disregarded.

VII. COMMENTS ON DEPARTMENT OF LABOR RULE PROPOSAL

A. *Require Non-Binding Verification of State Programs*

The DOL should affirmatively state whether a state program is consistent with the DOL rule proposal. While the court will be the ultimate arbiter of whether a state program is subject to ERISA, the court will grant deference to the DOL’s determination.³⁵⁴ This determination would alleviate opposition concerns regarding employer liability for failing to meet the DOL proposed safe harbor and as well as concerns of states that want to implement state-run retirement savings programs. While parties currently can submit requests for interpretations and other rulings on regulations from the DOL Office of Regulations and Interpretations under the provisions established by ERISA Procedure 76-1,³⁵⁵ this Article suggests that the DOL should

³⁵¹ Free Trade Agreement between the Republic of Korea and the United States of America, U.S.-S. Kor. 13-1, Jun. 30, 2007, *modified* Dec. 5, 2010, available at https://ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset_upload_file35_12712.pdf [<https://perma.cc/36DB-5RYC>].

³⁵² *Id.* at 13-5.

³⁵³ See North American Free Trade Agreement, *supra* note 348; Free Trade Agreement between the Republic of Korea and the United States of America, *supra* note 351 .

³⁵⁴ *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 844 (1984).

³⁵⁵ *Filing Requests For ERISA Advisory Opinions*, U.S. DEP’T OF LAB., http://www.dol.gov/ebsa/regs/aos/ao_requests.html [<https://perma.cc/UW53-4LDJ>].

provide an advisory opinion automatically, without the need for such a request.

B. Require Enforceable Fiduciary Duty

The DOL rule proposal should mandate each state to implement an enforceable fiduciary standard as part of its retirement savings program. While each state law discussed in this Article either has an explicit fiduciary standard or has a written standard of conduct similar to the fiduciary standard,³⁵⁶ the proposed rulemaking does not require a state law to include a fiduciary obligation.³⁵⁷ The DOL could use the Illinois Program as a model, where members of the Illinois Board are required to discharge their duties under a fiduciary standard of conduct.³⁵⁸ Importantly, the fiduciary duty imposed by the Illinois Program is similar to the fiduciary duty under ERISA.³⁵⁹ The Illinois Program requires the Illinois Board to discharge its duties solely in the interest of the employees and for the exclusive purpose of providing benefits to those employees.³⁶⁰ The definition also includes the prudent person standard, which has been an essential criterion of the ERISA fiduciary duty since its enactment.³⁶¹

This requirement will allay any fear that consumers will not be provided fiduciary-level protection under a state retirement savings plan, as well as minimize the fears of industry groups of a non-level playing field benefitting state-run retirement savings programs.

³⁵⁶ CAL. GOV'T CODE § 100034; 820 ILL. COMP. STAT. 80/25; OR. REV. STAT. § 557.2.

³⁵⁷ Savings Arrangements Established by States for Non-Governmental Employees, 80 Fed. Reg. 72,014 (Nov. 18, 2015) (to be codified at 29 C.F.R. pt. 2510).

³⁵⁸ 820 ILL. COMP. STAT. 80/25.

³⁵⁹ Compare 29 U.S.C. § 1104 (fiduciary duty), with 820 ILL. COMP. STAT. 80/25.

³⁶⁰ 820 ILL. COMP. STAT. 80/25.

³⁶¹ See Rosemary B. Orr, *Fiduciary Standards as Applied Under ERISA*, 7 FORDHAM URB. L.J. 377, 385-86 (1979).

C. Require Reporting and Review of State Payroll Deduction Savings Programs

The DOL should require an annual audit on the operations of the state payroll deduction savings program. The DOL should also mandate that all audits and reports published by the state entities shall use the Financial Accounting Standards Board (FASB) Accounting Standards.³⁶² States may argue that they should be able to rely on Governmental Accounting Standards Board (GASB) Accounting Standards,³⁶³ which govern the standards of accounting and financial reporting for U.S. state and local governments.³⁶⁴ States will argue that “[a]ccounting and financial reporting standards designed for the government environment are essential because governments are fundamentally different from for-profit businesses.”³⁶⁵ However, while these payroll deduction programs are state-run, the programs cover private-sector employees³⁶⁶ and, therefore, should be treated as such.

In addition to the annual financial audit, the state entity should provide a comprehensive inventory of the program including, but not limited to, the number of participants enrolled in the program both at the beginning and end of the fiscal year, retired or separated participants receiving benefits, and deceased participants whose beneficiaries are receiving or are entitled to receive benefits.³⁶⁷ The state law should also require a full study of the payroll deduction savings program at regular

³⁶² *Standards*, FIN. ACCT. STANDARDS BOARD, <http://www.fasb.org/jsp/FASB/Page/LandingPage&cid=1175805317350> [<https://perma.cc/6UMQ-F9Y5>]

³⁶³ *Standards & Guidance*, GOV'T ACCT. STANDARDS BOARD, <http://www.gasb.org/jsp/GASB/Page/GASBLandingPage&cid=1176160042327> [<https://perma.cc/B2M2-KS6M>].

³⁶⁴ *Facts About GASB 2015-2016*, GOV'T ACCT. STANDARDS BOARD 1, 2, http://www.gasb.org/jsp/GASB/Document_C/GASBDocumentPage&cid=1176166160026 [<https://perma.cc/T26U-NGKR>].

³⁶⁵ *Id.*

³⁶⁶ Anderson, *supra* note 326.

³⁶⁷ *IRS Form 5500*, ANN. RETURN/REPORT OF EMP. BENEFIT PLAN, <http://www.dol.gov/ebsa/pdf/2015-5500.pdf> [<https://perma.cc/HTE9-TKLV>] (The author used this form as a guide).

intervals of at least every three years.

D. Allow Reliance on Existing Wage and Employment Laws

The DOL proposal should not require a state to add special enforcement mechanisms or other mechanisms to protect workers enrolled in its payroll deduction savings program, if the state determines that its existing wage and employment laws offer adequate protection. California, Illinois, and Oregon each have “wage-hour” laws and an enforcement system to protect employees against employers’ failure to properly withhold from their paychecks and apply those withholdings as required by law.³⁶⁸

This Article recommends that the DOL require states to incorporate by reference these wage and employment laws,³⁶⁹ so that the protection will be explicit and meet the standard under the proposed rulemaking.

E. Allow Employers to Provide General Information to Employees

The DOL should provide guidance on the ability of employers to provide general information about state-run programs to participants. Under the proposed rule, an employer’s involvement is limited to “[d]istributing program information to employees from the State[.]”³⁷⁰ Under the current language, an employer would risk violating the safe harbor provisions by answering an employee’s questions concerning the program.³⁷¹ The DOL should allow employers to provide basic

³⁶⁸ See CAL. LAB. CODE §§ 79 et seq.; 820 ILL. COMP. STAT. 115/1 et seq.; OR. REV. STAT. §§ 652 et seq.

³⁶⁹ At the Federal level, incorporation by reference allows agencies to comply with the requirement of publishing rules in the Federal Register to be codified in the Code of Federal Regulations (CFR) by referring to material published elsewhere. The same can be done at the state level.

³⁷⁰ Savings Arrangements Established by States for Non-Governmental Employees, 80 Fed. Reg. 72,014 (Nov. 18, 2015) (to be codified at 29 C.F.R. pt. 2510).

³⁷¹ *Id.*

information concerning the program; however, the information should be limited to how the program works. Employers should receive guidance on where to direct questions about the program that are outside the safe harbor provisions, i.e., how are the employee's funds invested or how the employee can contribute more to his or her account.

To assist employers, the DOL should mandate that the state program create an office of ombudsperson, independent of the state entity overseeing the program, to address concerns of participants when they arise. The state program should allocate sufficient funds to sustain the operation of the ombudsperson's office and hire additional staff when necessary. The DOL should also require the creation of a website that addresses common questions with respect to the program, provides information to participants and houses documents created by the state entity that participants can access and print.

F. Provide Guidance on Withdrawals and Portability of Savings Accounts

The DOL should provide guidance on how withdrawals are treated under the proposed rule. Under the current language, the rule prohibits the state from imposing "any restrictions on withdrawals or impos[ing] any cost or penalty on transfers or rollovers permitted under the Internal Revenue Code[.]"³⁷² However, a state may want to include products with lifetime income features.³⁷³ Additionally, the state may wish to restrict the frequency and timing of withdrawals to reduce "leakage."³⁷⁴ The states' goal is to increase the retirement savings of its citizens; however, if the money is withdrawn for non-retirement

³⁷² *Id.*

³⁷³ Mark Schoeff Jr., *Treasury, IRS OK Annuities in 401(k) Target Date Funds*, INVESTMENTNEWS (Oct. 24, 10:26 AM), <http://www.investmentnews.com/article/20141024/FREE/141029947/treasury-irs-ok-annuities-in-401-k-target-date-funds> [<https://perma.cc/3TVB-37QC>].

³⁷⁴ *Reducing Retirement Savings Leakage*, 37 EMP. BENEFIT RES. INST. 1, 2 (Aug. 2016), https://www.ebri.org/pdf/notespdf/EBRI_Notes_07-no9-Aug16.PolFor-Ret.pdf [<https://perma.cc/G6M7-UKRH>].

uses, it defeats this purpose.

One commenter to the proposed rule suggests that the DOL allow states to incorporate the “hardship withdrawal” rule from the IRC.³⁷⁵ This provision allows retirement savers to withdraw money from a 401(k) account for certain expense including un-reimbursed medical expenses; money toward the purchase of a principal residence; to prevent foreclosure or eviction from a principal residence; college tuition and related educational expenses; funeral expenses; and certain expenses for the repair of damage to a principal residence.³⁷⁶ This provision would allow retirement savers to access savings for emergencies, but would protect retirement savings from other withdrawals.³⁷⁷

The DOL should also provide guidance on how distributions will be treated under the proposed rule. Both critics and supporters of the rule are concerned that the rule does not consider employees that move to different states.³⁷⁸ One commenter to the proposed rule suggests that States be able to enter into “partnerships with other states to create automatic-payroll deduction IRAs[.]”³⁷⁹ Additionally, the DOL should explicitly state that retirement savers can keep the same account when they change employers and can roll the balance into a private sector retirement account at any time.

G. Clarify Scope of Employers Covered

The DOL should clarify the scope of employers covered by the proposed rule. Under the current language, the rule states

³⁷⁵ Letter from William Griesser, Senior Managing Director, TIAA-CREF, to Office of Regulations and Interpretations, Emp. Benefit Sec. Admin., U.S. DEP’T OF LAB. (Jan. 19, 2016), <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB71/00044.pdf> [<https://perma.cc/QBC5-NEFV>].

³⁷⁶ *Retirement Plans FAQs Regarding Hardship Distributions*, INTERNAL REVENUE SERVICE, <https://www.irs.gov/Retirement-Plans/Retirement-Plans-FAQs-regarding-Hardship-Distributions> [<https://perma.cc/K38N-SZVD>].

³⁷⁷ *Id.*

³⁷⁸ *Blass Letter*, *supra* note 265, at 3; *Bleier Letter*, *supra* note 265, at 5.

³⁷⁹ *Stein Letter*, *supra* note 266, at 6.

that a state law will meet the requirements of the safe harbor if an “employer’s participation in the program is required by State law[.]”³⁸⁰ However, states provide exemptions based on size of the company; for example, the California Program exempts employers with less than five employees³⁸¹ and Illinois exempts employers with less than twenty-five employees.³⁸²

This Article agrees with the Pension Rights Center and argues that the DOL should provide a hardship exemption that would provide states with the flexibility to determine which employers may be exempt from the mandatory adoption requirement.³⁸³ The proposed rule should permit a state to mandate adoption by all employers but permit smaller employers to apply for a hardship exemption from the mandate.

H. Clarify States’ Ability to Delegate Responsibility

The DOL should clarify that states can delegate responsibility and rely on third-party vendors for investment management and record-keeping. Under the current language, the proposed rule requires states to establish and administer the programs, and holds states responsible for investing employee savings and selecting investment alternatives for employees to choose.³⁸⁴ While the proposed rule allows states to rely on service providers, the state still “retains full responsibility for the operation and administration of the program[.]”³⁸⁵

The DOL should clarify that this provision will not absolve third-party vendors from liability for their actions. The states, when retaining service providers, have the responsibility to monitor those providers and replace them if necessary.³⁸⁶

³⁸⁰ Savings Arrangements Established by States for Non-Governmental Employees, 80 Fed. Reg. 72,014 (Nov. 18, 2015) (to be codified at 29 C.F.R. pt. 2510).

³⁸¹ CAL. GOV’T. CODE § 100000(d).

³⁸² 820 ILL. COMP. STAT. § 80/5.

³⁸³ *Stein Letter*, *supra* note 266, at 4.

³⁸⁴ 80 Fed. Reg. at 72,014.

³⁸⁵ *Id.*

³⁸⁶ *Id.*

I. Clarify Allowable Compensation to Employers

The DOL should clarify the compensation provision under the proposed rule. Under the current language, the rule prohibits the employer from receiving direct or indirect compensation other than the actual costs of the state program.³⁸⁷ The proposed rule should be amended to exempt tax benefits that the state provides to employers, since this compensation will not be provided to reimburse the employer for actual costs of the state program.³⁸⁸ This Article contends that the DOL did not intend to strip employers of these tax benefits by mandating participation in state payroll deduction savings programs.

VIII. ADDITIONAL ELEMENTS OF A MODEL STATE PAYROLL DEDUCTION SAVINGS PROGRAM

This Article has discussed, in detail, three current state initiatives to require private sector employers to implement state-administered payroll deduction savings programs in their workplaces and suggests that the DOL improve its proposed rulemaking.³⁸⁹ This Section of the article provides additional elements of a model state payroll deduction savings program for states that are considering implementing such a program to use as a guide.

A. Provide Lifetime Income Distribution Options

The state program should provide a lifetime income distribution option to participants. This Article, relying on an AARP Public Policy Institute whitepaper,³⁹⁰ will put forth three options: an “immediate annuity at retirement, . . . [a] [l]ongevity annuity at retirement[,] . . . [and] [a] target date fund (TDF) that includes the gradual purchase of an annuity during an

³⁸⁷ *Id.*

³⁸⁸ *Id.*

³⁸⁹ See discussion *supra* Parts IV.-V.

³⁹⁰ Kahn & Strakosch, *supra* note 266, at 4.

individual's working lifetime."³⁹¹ The first option, an immediate annuity at retirement, would allow "participants [to] use a portion of their assets to create a guaranteed lifetime income stream by purchasing an annuity that begins income payments within the first twelve months after buying the annuity."³⁹² The second option, a longevity annuity at retirement, "is a deferred fixed-income annuity purchased at retirement or earlier that begins to make payments at a much later date, typically [around] age 80 or 85."³⁹³ The third option, a target date fund (TDF) that includes the gradual purchase of an annuity, would convert a portion of the TDF on an annual basis "into an annuity so that by retirement, a preset proportion of the total is available as guaranteed lifetime income."³⁹⁴ The state program should make all of these options available to the participants so that they may choose which option best suits their needs.

B. Spousal Protection

The state program should require the spouse or domestic partner to be the default beneficiary on the account, unless the spouse or partner waives those protections. This is vitally important because retirement savings is generally a family affair, where the spouse or partner has a significant interest in the outcome.³⁹⁵ It is important to note that this will not be an absolute guarantee, as there could be legitimate reasons why the employee would decide that the spouse or domestic partner should not be a beneficiary of the account. The law should also mandate that the program establish an administrative process for dividing program assets in a divorce, consistent with the

³⁹¹ *Id.* at 2.

³⁹² *Id.*

³⁹³ *Id.*

³⁹⁴ *Id.*

³⁹⁵ See Shelly Lundberg & Jennifer Ward-Batts, *Saving for Retirement: Household Bargaining and Household Net Worth* 3 (U. of Mich. Ret. Res. Ctr. Working Paper, Paper No. 2000-004), <http://ssrn.com/abstract=532822> [<https://perma.cc/ZUJ6-PFQQ>].

state's laws on marital property.

C. Increased Default Contribution Rate

The state program should set the default contribution rate at five percent or higher. Many private retirement plans follow federal legislation and use a contribution level of three percent of earnings.³⁹⁶ However, studies have found that this level is not enough to create retirement balances sufficient to replace pre-retirement earnings.³⁹⁷ Additionally, studies reflect that even though the average automatic enrollment deferral is around four percent, employees opt out at virtually the same rate when the deferral is higher.³⁹⁸

IX. CONCLUSION

There is a “retirement crisis” in America.³⁹⁹ Contributing to this crisis is the fact that millions of Americans do not have access to a retirement savings plan through their employers.⁴⁰⁰ States, concerned with the economic stability of their citizens, have created laws that require private sector employers to implement state-administered payroll deduction savings programs in their workplaces.⁴⁰¹

³⁹⁶ Jack VanDerhei, *Auto-IRAs: How Much Would They Increase the Probability of “Successful” Retirements and Decrease Retirement Deficits? Preliminary Evidence from EBRI’s Retirement Security Projection Model*,[®] 36 EMP. BENEFIT RES. INST. 1, 11-12 (June 2015), https://www.ebri.org/pdf/notespdf/EBRI_Notes_06_June15_SI-AutoIRAs.pdf [<https://perma.cc/2TVU-FYKD>].

³⁹⁷ *Id.* at 16 (“doubling the employee contribution rate (from 3 to 6 percent) for the auto-IRA increases the improvement in the RRR [defined as the probability of a “successful” retirement] values by approximately 81 percent (from an 8.4 percent increase to a 15.2 percent increase) for those in the youngest cohort and working for the smallest employers.”).

³⁹⁸ Mark Robinson, *Success of Auto Enrollment and Auto Increase: Using Behavioral Finance to Improve Retirement Planning*, T. ROWE PRICE, <https://www.ebri.org/pdf/programs/policyforums/Robinson0510PF.pdf> [<https://perma.cc/J4MX-ZCP8>].

³⁹⁹ See Rhee, *supra* note 1.

⁴⁰⁰ See *Who’s In, Who’s Out*, *supra* note 4.

⁴⁰¹ Savings Arrangements Established by States for Non-Governmental Employees, 80 Fed. Reg. 72,007 (Nov. 18, 2015) (to be codified at 29 C.F.R. pt. 2510).

This Article demonstrated that while there are legitimate policy concerns with respect to state-administered payroll deduction savings programs, opponents continue to make unfounded and misleading arguments against state laws intended to increase their citizens' retirement savings. This Article provided several comments on the proposed rulemaking that will provide more flexibility for states when designing state payroll deduction savings programs without sacrificing the level of investor protection. This Article applauds the DOL for providing guidance to allow states to institute state-administered payroll deduction savings programs that will offer benefits to millions of workers across the country.

