



McDermott
Will & Emery

The Year in Employee Benefits 2017: Insights and Strategies for Retirement, Health and Executive Compensation Plans

Quick Hit: State-Run Retirement Plans – What Labor Allowed – Mr. Liazos

March 1, 2017

Background

- Increased movement by states to sponsor retirement type arrangements for private sector employers
- Approximately 68 million US employees do not have access to a retirement savings plan through an employer
- Legislation enacted by 8 states to date; proposals being considered by other states and large cities (NYC, Philadelphia, Seattle)
- State retirement plan approaches
 - Auto enrollment IRAs
 - State marketplaces, prototype plans and MEPs -see DOL Interpretative Bulletin 2015-12)

Auto Enrollment IRAs

DOL Rulemaking / Response by Congress and the States

- DOL issued final rules last August (DOL Reg §2510.3–2(h))
 - Establishes safe harbor from ERISA for states establishing auto enrollment IRA programs for private sector employees
- Additional rules issued last December extending this exemption to certain large municipalities
- House voted to repeal these rules on February 15th under the Congressional Review Act
 - Burdens on employers, no ERISA protection, unfair competition
- It's very likely that states will proceed with auto enrollment IRAs even if the safe harbor is revoked

Auto Enrollment IRAs

Safe Harbor Requirements – State's Role

- Program specifically established by the state pursuant to state law
- Program implemented and administered by the state
 - responsible for investing, or for selecting investment alternatives
- State responsible to secure payroll deductions and employee savings
- State to adopt measures ensuring employees are notified of rights
- State to create an mechanism to enforce rights

Auto Enrollment IRAs

Safe Harbor Requirements – Employee Participation

- Plan participation must be voluntary
- Auto enrollment is considered voluntary so long as employees given appropriate notice and opt out rights
- All rights of employees, former employees or beneficiaries are only enforceable by:
 - such individuals, an authorized representative or the state

Auto Enrollment IRAs

Safe Harbor Requirements – Limited Employer Role

- Employer obligations limited to:
 - Collecting and remitting payroll deductions
 - Providing program information
 - Maintaining certain records
 - Providing information to the state
- No discretionary authority over IRAs or operation of the IRA program
- No employer contributions

Oregon State Retirement Plan (OSRP)

- Statute requires employers with operations in Oregon to offer IRA auto enrollment contribution opportunity to their employees unless the employer offers a qualified plan
- Proposed regulations to implement OSRP significantly limit the scope of this exemption
- Only certain types of plans will qualify for it, and then only by filing a certificate of exemption
- Employers not covering *all of their employees within the first 90 days* of employment would not be exempt under the proposed regulations
- “Employee” is defined broadly as any employed person at least 18 years of age who is entitled to unemployment compensation coverage
- Plans qualifying for an exemption would be subject to reporting (e.g., type of tax-qualified plan offered, number of Oregon employees)

Oregon State Retirement Plan (OSRP) (cont'd)

- Qualified plans that impose the minimum age and service provisions under Section 410(a) of the Code would not be exempt from ORSP
- Proposed regulations, if finalized in their current form, would result in a qualified plan having to either:
 - change its eligibility rules to qualify for an exemption or
 - be forced into assisting the state to implement its auto enrollment IRA program and bear the resulting administrative burdens, such as:
 - remitting contributions, distributing materials, complying with reporting, addressing participant questions
- Plan sponsors may have to comply with similar laws in other states
- Multiple state laws may apply to a single participant (e.g., employment in different states, differences in state of residence vs. workplace)
- ERISA preemption challenge?