



## AMERICAN BENEFITS COUNCIL

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### STATE-ENACTED RETIREMENT SAVINGS PROGRAMS FOR PRIVATE-SECTOR EMPLOYEES: PRINCIPLES TO GUIDE US

In recent years, a number of states have considered or enacted legislation to create state-run retirement savings programs for private-sector employees. These programs have come in two types: (1) programs that *mandate* an employer that does not offer a retirement plan to automatically enroll its employees in a savings program administered by the state, and (2) programs that set up voluntary mechanisms to facilitate the offering of plans by employers, either by creating a “marketplace” of retirement savings vehicles or providing access to a voluntary plan administered by the state. In November 2015, the Department of Labor released a proposed regulation and Interpretive Bulletin that are intended to support these state efforts.

All of the state programs are well intended; the states are striving to serve a goal shared by the American Benefits Council – to increase retirement plan coverage and savings. It is not clear, however, that all of these programs will have the intended effect, and some programs could discourage employers from providing or continuing to provide employer-sponsored coverage. Employer-sponsored retirement plans afford significant advantages compared to the kinds of Individual Retirement Accounts (IRAs) that are the basis for most of the State programs. Most importantly employer sponsored programs allow for significantly higher levels of tax preferred savings for retirement than are available for IRAs and typically involve contributions by employers in addition to those of employees. In addition, they are subject to a more robust and developed regulatory structure that includes fiduciary standards applicable to the oversight of investment options and plan operations and other protections and rights for participants and beneficiaries. Any state plan should be carefully constructed to avoid any potential to displace existing employer –sponsored coverage. State mandates can potentially lead to a new lower benchmark for retirement savings. The Council is particularly concerned about the implications of state programs on large employer plan sponsors – most of which operate in multiple states. Any efforts to increase coverage by the states should be done in a uniform manner and aligned with current federal law to avoid imposing the burden of different and sometimes conflicting requirements on employers that are already providing a retirement plan for their workers.

The following principles serve as guide posts for evaluating state proposals to create retirement savings arrangements for private-sector employees and federal efforts to support and facilitate them, such as the Department of Labor's November 2015 guidance. In any discussion of these state efforts, we need to focus on two critical points. First, the employer-sponsored system of retirement benefits is a voluntary system so government at all levels must enact policies that incentivize, not discourage, the offering of plans by employers. Second, the retirement system works best as a partnership between employers, employees, and the government. Thus, while private savings in IRAs plays an important role in retirement security, the key driver of success in saving for a secure retirement, as a complement to Social Security, is the existence of employer-sponsored plans.

**1. An employer should be exempt from a state program's mandate if it offers a retirement plan that meets required participation and nondiscrimination rules.**

In the states that have adopted a mandate, the legislation generally exempts employers that offer a plan. Less clear, however, is whether the mandate applies to an employer that offers a plan that does not cover 100% of its employees which is the case for nearly every employer sponsored plan. There will always be some employees, such as seasonal or part-time employees or new employees who have not met initial service requirements, for whom it simply does not make sense to enroll them in the plan. Statements from state officials, however, suggest that they may interpret the state mandate to cover some of these employees. If this is the case, states will inevitably impose *different* standards with respect to which employees an employer must enroll in the plan.

Federal law regulates plans with respect to eligibility and participation, ensuring that every plan meets minimum participation rules and covers a non-discriminatory group of employees. Under these rules, it is often the case that an employee may not be immediately eligible for participation, but that employee will become eligible at a later time. Congress has carefully balanced the need to ensure that a plan covers both executives and rank and file employees while allowing reasonable exclusions consistent with business needs and practical administrative concerns.

Without a clear rule to prevent current plan sponsors from being subject to a state mandate with respect to all of its employees, employers with employees in multiple states will face multiple and potentially conflicting requirements for the small number of employees not (or not yet) eligible for the employer-sponsored retirement plan. The best solution to this problem is the simplest – an employer should not be subject to a state mandate if the employer offers a qualified plan to employees (i.e., the exemption would apply even if less than 100% of the employer's employees participate or are eligible to participate in the plan, as long as the applicable rules in the Internal Revenue Code and ERISA are met).

If this principle is not followed – which we think will cause significant harm to the existing system – then at a minimum an employer should not be subject to a state mandate if it offers an employee not covered by the plan the opportunity to make payroll deductions to an IRA whether or not the arrangement involves automatic enrollment or is an ERISA plan).

## **2. A state should not be able to regulate the features of an employer’s plan.**

Most of the current state proposals provide that the mandate does not apply if an employer offers a plan to its employees. It is critical that states not be able to condition this exemption on an employer offering a plan with *particular* attributes, such as a certain type of plan, a certain level of benefits, certain features (e.g., automatic enrollment, or automatic enrollment at a certain default contribution level), or particular investments or fee levels. Excepting only those plans with particular attributes would effectively amount to state regulation of employee benefit plans that would otherwise be impermissible under the federal pre-emption provisions of ERISA.

States have, unfortunately, begun to take steps that would result in this sort of regulation of plans. In California, Illinois, and Oregon, for example, the plan offered by the employer must be tax-qualified under specific Internal Revenue Code sections to avoid the mandate. In addition, the Oregon statute mandates employer involvement in the state plan unless the employer “obtain[s] an exemption” because it offers a qualified plan. The fact that an employer exemption for offering a qualified a plan is not automatic highlights plan sponsors’ concerns that there is nothing stopping Oregon (or any other state) from further conditioning the exemption based on plan particulars. Any relief from federal regulations the Department of Labor provides to these states must, at the same time, prevent such interference by a state in the plan design choices that are afforded plan sponsors under federal law.

## **3. Policy changes intended to increase plan coverage should build upon our existing and successful system; the first principle should be to “do no harm.”**

Employer-sponsored defined contribution and defined benefit retirement plans are an indispensable building block of our nation’s retirement system. Retirement plans, like those sponsored and administered by Council members, successfully assist tens of millions of families in accumulating retirement savings, allowing for a more financially secure retirement and providing trillions of dollars in retirement income.

There is no dispute that ERISA-covered defined contribution and defined benefit plans have multiple and significant advantages over the state-run IRA arrangements being developed, including the opportunity for employer contributions, higher contribution limits, fiduciary oversight, and the protections of ERISA. So if these state efforts lead to *fewer* employees participating in an employer-sponsored plan over time, retirement security for Americans will be reduced, not enhanced.

**4. The ability for employers operating in multiple states to administer benefits uniformly should be vigorously protected.**

A cornerstone of ERISA is its preemption of any state law that relates to an employee benefit plan. This principle has been instrumental in the growth of employee benefit plans. For large employers, it allows them to design benefit programs that apply equally to employees in multiple states and are subject to one uniform set of standards and requirements, making the administration of these plan far more feasible and cost effective. All three branches of the federal government (Congress, the Supreme Court, and the Department of Labor) have vigorously protected ERISA's preemption provision for more than 40 years.

**5. Employers should not be subject to multiple or conflicting state requirements.**

Employers with operations and employees in multiple states could be subject to multiple state regimes. This concern will disproportionately affect large employers and current plan sponsors, who are much more likely to operate across state lines than the generally smaller employers who do not sponsor an ERISA-covered plan. At worst – though certainly not inconceivable – the state mandates could subject a large plan sponsor with, for example, operations and employees in every state to just as many different state regimes. This would be an extraordinary burden for plan sponsors, whose only option to reduce their burden would be to terminate their ERISA-covered plan.

Even worse than the concern that plan sponsors will be required to participate in multiple state mandates is the very real likelihood that employers could be subject to *conflicting* state mandates *with respect to the same employee*. Consider the implications of a situation where Employee A resides in State X and works for Employer B in State Y. Employer B has operations in both State X and State Y. State X requires that all employers with operations in State X automatically enroll employees who *reside* in State X in State X's state-run arrangement at a 3% contribution rate in a target date fund. State Y requires that all employers with operations in State Y automatically enroll employees who *work* in State Y in State Y's state-run arrangement at a 4% contribution rate in a balanced fund. Consequently, Employer B faces conflicting requirements with respect to the same Employee A, demonstrating why this principle is so critical.

**6. There must be a level playing field between the states and private service providers.**

If states are allowed to either mandate or offer retirement savings vehicles, they should not be entitled to special privileges or exemptions that do not apply to private service providers. When a State acts as a market participant, it should not receive preferential treatment that disadvantages the private sector. States operate without having to pay taxes and can exempt themselves from private causes of action in state

court that can provide them with significant cost advantages and diminish the protections afforded to individuals. There is no shortage of retirement savings opportunities or products offered by private service providers that can assist an employer in setting up a plan or assist an individual with saving in a tax-favored account. As private retirement savings continues to expand, largely driven by employer sponsored plans, this marketplace has become increasingly competitive and efficient, lowering costs for employers and workers. If states are to be allowed to enter this market, at a minimum, the playing field must be kept level to ensure that the existing marketplace is not disrupted and fair competition promotes efficiency.

To illustrate, the Council has long supported guidance or legislation that would expand the availability of multiple employer plans (MEPs) to small businesses with no formal, joint relationship, an arrangement that is called an “open” MEP. Current guidance from the Department of Labor requires a bona fide nexus or relationship between each participating employer in order to consider a MEP a single plan, which results in administrative and expense efficiencies, such as a single Form 5500 filing and a single plan audit. The Department of Labor’s Interpretive Bulletin issued in November 2015 would allow states – but not private service providers – to operate an “open” MEP that would be treated as a single plan. The Council strongly objects to the Department creating an unequal playing field by treating state open MEPs as a single ERISA plan without affording private-sector open MEPs the same treatment.

Similarly, the Department’s November 2015 proposal provides relief for states to offer payroll IRAs with automatic enrollment but did not offer the same relief for payroll IRAs offered by private sector service providers. If an employer preferred to use a private service provider for a payroll IRA with automatic enrollment, the employer and the service provider would face additional burdens, including ERISA regulation, that would not be imposed on an otherwise identical state program.