



January 6, 2020

By email (leah.marvin-riley@state.co.us)

Colorado Secure Savings Plan Board
c/o Leah Marvin-Riley
Department of the Treasury
200 East Colfax Avenue
Denver, Colorado 80203-1722

Re: Study of Retirement Savings Plan Options for Colorado's Private-Sector Workers (SB 19-173)

Dear Members of the Board:

Thank you for allowing me to speak by phone during the public comment portion of the December 11, 2019 meeting of the Colorado Secure Savings Plan Board ("Board"). In connection with my remarks, I indicated that I would follow up with additional comments in a written submission. This letter serves as that submission and is being sent on behalf of myself and our client, the American Benefits Council ("Council"). We hope that our comments will be helpful as the Board concludes its study and develops a report for the legislature regarding various approaches to creating retirement savings opportunities for Colorado's private-sector workers. The Council has actively engaged on similar such efforts and programs in several other states and cities.

The Council is a national non-profit organization dedicated to protecting and fostering privately sponsored employee-benefit plans. The Council's approximately 440 members are primarily large, multi-state employers that provide employee benefits to active and retired workers and their families. The Council's members also include organizations that provide employee-benefit services to employers of all sizes. Collectively, the Council's members either directly sponsor or provide services to retirement and health plans covering virtually all Americans who participate in employer-sponsored programs.

I am a partner of Davis & Harman LLP, a law firm in Washington, D.C. that specializes in, among other things, retirement and savings policymaking. I have written and spoken about state and city auto-IRA programs for many years, including, for example, testifying in connection with a recent OregonSaves rulemaking.

The Council and its members have long supported both public and private efforts to expand access to retirement savings opportunities for workers. Due to the voluntary nature of the United States' employment-based retirement system, the Council has worked closely with Congress and the federal agencies over the years to reduce the administrative burdens and costs of sponsoring a retirement plan in order to encourage employers to offer (and to continue to offer) plans to their employees. Although we understand the concerns that have led several states and cities to explore and/or pass statutes creating a state- or city-run plan, we are nevertheless concerned that the implementation of these plans, unless done with care, could undermine the incentive for employers to adopt and maintain a retirement plan with employer contributions, higher contribution limits, and far more participant protections.

Appropriate Features of a State- or City-run Auto-IRA Program

Our goal in working with states and cities that seek to implement an auto-IRA program for private-sector workers is to ensure that such a program does not undermine the incentive to adopt and maintain employer-based, federally regulated retirement plans. With that goal in mind, we have consistently advocated for the following program features:

1. The state or city law should not impose any requirements on employers that already offer a retirement plan. As such, any requirement for employers to make an auto-IRA program available to their employees (and/or automatically enroll their employees) should not apply to an employer that offers a plan, *even if* some employees have not met the plan's eligibility requirements.

Note: Senate Bill 19-173 sets forth language for the "Colorado Secure Savings Plan Act" ("Act") that we believe would satisfy this feature in that the definition of "Employer" for purposes of the Act would exclude employers that offer a qualified plan "to any employees" in the preceding two years. We support the bill in this regard. Additional discussion of the importance of this feature is provided below.

2. A mandate requiring employers to participate in the state or city program should not apply to an employer whose retirement plan does not contain particular features (such as a particular type of investment), all of which are extensively regulated by federal law.

Note: Senate Bill 19-173 sets forth language for the Act that would not, in its current form, require a qualified retirement plan to contain particular features in order for a plan sponsor to be excluded from the definition of "employer." We support the bill in this regard.

3. The program should minimize the reporting burden on employers that are exempt from the mandate because they already offer a retirement plan. We recommend that administrators of these programs rely on the Annual Report (Form 5500) filed with the U.S. Department of Labor to determine whether an employer already offers a plan.

Note: Senate Bill 19-173 does not address whether employers that offer a retirement plan may be subjected to new reporting burdens. We recommend including language prohibiting (or minimizing to the extent possible) any new reporting or similar requirements that would require such employers to inform Colorado that they are not covered by the Colorado Secure Savings Plan Act because they offer a qualified plan.

For example, we ask states and cities to refrain from introducing a new reporting requirement on existing forms, even if employers are already required to submit a particular form (such as a tax form) for other purposes. Although the addition of a new question on an existing form may seem like a minimal burden on employers with respect to a single state, that burden quickly escalates for multi-state employers if up to 50 states and a number of cities take similar action with respect to their own reporting requirements.

4. The savings vehicle of a state- or city-run program should be an IRA in order to maintain the incentive for a business owner to adopt a full retirement plan, such as a 401(k) plan, that has higher contribution limits.

Note: Senate Bill 19-173 proposes to use a payroll deduction IRA as the Colorado Secure Savings Plan's savings vehicle. We support the bill in this regard.

Importance of Exempting All Employers that Offer a Retirement Plan

As stated above, we believe it is critical that any state or city requirement for employers to make an auto-IRA program available to their employees should not apply to an employer that offers a plan, even if some employees have not met the plan's eligibility requirements. In case additional background would be helpful to the Board, our reasons for holding this view – some of which I briefly addressed during the December 11th meeting – are described here in more detail.

For more than 40 years, employers who sponsor a retirement plan have been subject to a single federal statutory and regulatory regime under ERISA. One of the fundamental reasons that Congress had for passing ERISA was to ensure that employers who voluntarily sponsor a retirement plan are not subject to a multitude of rules under state laws that would inevitably vary from state to state. This framework has enabled the current retirement system to successfully reach millions of employees across the country. It is critical that states and cities do not take action at the expense of employees who are already participants in an ERISA-covered plan. ERISA-covered plans offer several important advantages over state and city auto-IRA programs, including, as noted above, the opportunity for employer contributions, higher contribution limits, fiduciary oversight, and more participant protections than are available in an IRA.

Federal law already stringently regulates the design of retirement plans. The various nondiscrimination rules in the Internal Revenue Code require that the plan's eligibility and benefit rules do not favor highly compensated employees, and such rules impose restrictions on

eligibility conditions in the plan.¹ Employers may impose age and service requirements, but only within certain parameters (generally age 21 and one year of credited service). Congress will from time to time modify these requirements; in fact just a few weeks ago Congress amended the rules to require an employer to offer its 401(k) plan to certain long-term, part-time employees.² Consistent with these permitted restrictions, it is unusual for a retirement plan to be offered to 100% of all employees at all times, starting from the date of hire. Oftentimes, an employee who is not currently eligible for participation in the plan will become eligible in the future, either due to meeting the plan’s service requirement or due to moving from an ineligible position to a position eligible for participation. Although employers are free to impose less restrictive service requirements for eligibility in their qualified plans, federal law does not mandate that they do so. These federal requirements appropriately balance the administrative costs of enrolling every employee from day one with ensuring a plan adequately covers those employees who need retirement coverage with their job (particularly full-time and long-term employees).

Potential Impact of CalSavers Litigation

There is one additional issue that we would like to raise. During my presentation to the Board, we had a brief discussion of ERISA preemption. As we assume you are aware, the U.S. Department of Justice, with co-counsel from the U.S. Department of Labor’s Office of the Solicitor, filed a “statement of interest” in litigation involving California’s auto-IRA program, CalSavers, on September 13, 2019.³ The United States expressed in this statement of interest its view that (1) the CalSavers Program (which is very similar to the mandatory auto-IRA program contemplated by Senate Bill 19-173) does not satisfy the U.S. Department of Labor’s safe harbor for IRA savings programs, and (2) the CalSavers statute, which imposes a mandate on employers, is preempted by the Employee Retirement Income Security Act of 1974 (“ERISA”).

We mention this in case the Board may find it prudent to recommend that the legislature (1) wait for resolution of the CalSavers litigation before authorizing implementation of the Colorado Secure Savings Plan, or (2) otherwise ensure the legislation addresses how to proceed depending on the outcome of the litigation.

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¹ See, for example, Internal Revenue Code sections 401(a)(4), 401(k)(3), 401(m), 410, and 416, and the many pages of Treasury regulations that interpret them.

² See section 112 of the Setting Every Community Up for Retirement Enhancement (SECURE) Act, which was included as Division O of in the Further Consolidated Appropriations Act, 2020 (P.L. 116-94).

³ Howard Jarvis Taxpayers Assoc. v. California Secure Choice Retirement Savings Program, No 2:18-cv-01584-MCE-KJN (E.D. Cal.).

On behalf of myself and the American Benefits Council, thank you again for the opportunity to provide written comments in connection with the Board's work. Please do not hesitate to contact me (202-347-2230 or mlhadley@davis-harman.com) or Lynn Dudley at the American Benefits Council (202-289-6700 or ldudley@abcstaff.org) if you have any questions.

Sincerely,

A handwritten signature in black ink that reads "Michael Hadley". The signature is written in a cursive style with a large initial "M".

Michael Hadley