



# AMERICAN BENEFITS COUNCIL

February 23, 2018

The Honorable Preston Rutledge  
Assistant Secretary  
Employee Benefits Security Administration  
Department of Labor  
200 Constitution Avenue, NW  
Washington, DC 20210

Dear Assistant Secretary Rutledge:

On behalf of the American Benefits Council (the “Council”), I am writing today with respect to an issue that could become extremely important in the next year: the possibility of states regulating fiduciary conduct with respect to ERISA retirement plans and plan participants. This could quickly evolve into a major threat to the workability of plans maintained by large multi-state plan sponsors.

The Council represents nearly 200 of the nation's Fortune 500 companies and many other major employers, as well as organizations that support employers of all sizes. Collectively our members either directly sponsor or provide services to more than 100 million Americans participating in employer-sponsored retirement and health plans.

As we all know, there has been a broad public policy discussion over the last several years about the fiduciary status and obligations of financial professionals with respect to retirement plans and IRAs. That public policy discussion has now spread to the states, some of which are considering their own rules on this topic. In fact, one state – Nevada – has already acted and has adopted a very broad fiduciary rule, which by its terms applies to advice given to ERISA plans and participants.<sup>1</sup> In fact, the Nevada

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<sup>1</sup> The Nevada law extends a fiduciary duty of care to broker-dealers, broker-dealer sales representatives, and certain investment advisers who provide investment advice to clients. The definition of a “client” to which the rule applies includes “a person who receives advice from a financial planner.” NRS 628A.010(1). A “financial planner” includes, in relevant part, “a person who for compensation advises others upon the investment of money.” NRS 628A.010(3). A “person” is defined broadly to mean, “except as expressly provided in a particular statute or required by context,” a natural person or any type

legislative history reveals that a key motivation for enactment was the need to bolster the protections for ERISA plans and IRAs in case the DOL rule was weakened. (Nevada did not appear to consider the actual effects of the DOL fiduciary rule, especially the extent to which it can adversely affect plan sponsors' ability to communicate effectively with their participants, as the Council has described in prior comment letters.)

Especially if the Fifth Circuit invalidates the Fiduciary Rule, we can expect many more states to adopt similar initiatives unless DOL clarifies publicly that application of state fiduciary rules to ERISA plans is preempted. The state rules will inevitably be different. In some cases, this will lead to a need to comply with the most stringent rule and to modify plan operations repeatedly. *This could, for example, cause an entire national plan to be modified because one city adopted a new stringent rule, followed by many other modifications as other states or cities adopt slightly different rules.* In other cases, this will lead to unintended results. For example, disclosures could be lengthy and confusing by reason of the need to comply with numerous different disclosure rules. Not only will these rules be different from one another, there is no assurance that the rules will not directly conflict. For example, one state might require advice regarding an employee's entire financial situation; another state might preclude such advice from someone who does not hold certain licenses; and DOL could find a problem with retirement advice that takes into account non-retirement needs.

Fortunately, there is a very straightforward solution. State fiduciary rules, like the one enacted in Nevada, are clearly preempted by ERISA. ERISA's powerful preemption provision expressly reflects Congress' unambiguous intent for the federal government to regulate all matters relating to retirement plans, including the provision of investment advice. ERISA defines who is a fiduciary, details that standard of care, and creates its own enforcement mechanisms through DOL, the IRS, and federal courts. States cannot add any new or additional requirements to that comprehensive system if their regulation "relates to" an employee benefit plan.

ERISA's "savings clause," under which preemption does not apply to state laws regulating insurance, banking, or securities, would not prevent preemption. As you know, the case law on ERISA's savings clause interprets it very narrowly. In the case of insurance, the Supreme Court has explained that the savings clause is not applicable unless a state law is "specifically directed toward" the regulation of insurance.<sup>2</sup> Applying similar logic to the carve-out for securities and banking regulation, it is difficult to argue that ERISA's savings clause would protect a state fiduciary rule like Nevada's from federal preemption. This is because Nevada's rule is primarily focused on the provision of investment advice, rather than the regulation of insurance, banking, or securities.

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of business organization (including a corporation, partnership, or unincorporated organization. NRS 0.039.

<sup>2</sup> *Kentucky Association of Health Plans, Inc. v. Miller*, 538 U.S. 329, 334 (2003).

In short, laws like Nevada's would clearly be preempted, in order to avoid exactly the situation that ERISA preemption was intended to prevent: a patchwork of state and local laws applying to national retirement plans.

We ask DOL to issue guidance on preemption making clear that state fiduciary laws like Nevada's cannot have any application to ERISA plans and participants.

We thank you for your consideration of the issues addressed in this letter.

Sincerely,

A handwritten signature in black ink that reads "Lynn D. Dudley". The signature is written in a cursive style with a large initial "L" and "D".

Lynn D. Dudley  
Senior Vice President, Global Retirement and  
Compensation Policy

cc: Timothy Hauser  
Jeanne Klinefelter Wilson  
Joseph Canary  
Jeffrey Turner