



AMERICAN BENEFITS COUNCIL

March 1, 2019

Submitted electronically via email

Senator Brian T. Taniguchi
Hawaii State Capitol
Room 219
415 South Beretania Street
Honolulu, HI 96813
sentaniguchi@capitol.hawaii.gov

**Re: Recommended Amendments to SB 1374 SD1 to Reduce the Risk of ERISA
Litigation for the Hawaii Saves Program**

Dear Senator Taniguchi:

The American Benefits Council (“Council”) is writing to bring your attention to a provision of SB 1374 SD1, the Hawaii Retirement Savings Program (“Program”), that would unnecessarily create a substantial risk of litigation for the Program under the federal Employee Retirement Income Security Act of 1974 (“ERISA”) based on preemption concerns. We are also writing to recommend clarifications to the bill that we believe would further minimize the risk of ERISA-based challenges for the Program. Provided below are the Council’s suggestions for some modest amendments to the bill’s language that we believe would still accomplish the intent of SB 1374 SD1 while minimizing certain ERISA-related risks that states with similar programs have encountered.¹

The Council is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing

¹ Although our comments are directed at SB 1374 SD1, the Council recommends that similar changes be made to similar bills that have been introduced this session (e.g., SB 1049, SB 1028, and HB 470).

benefits to employees. Collectively, the Council's members either directly sponsor or provide services to retirement and health plans that cover more than 100 million Americans. The great majority of the Council's members have operations in multiple states, including Hawaii.

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, we have worked closely with Congress and the federal agencies over the years to reduce the administrative burdens and costs of sponsoring a pension plan. Now that a number of states have enacted programs similar to what Hawaii is considering, we have also been working with the states, such as our recent participation on an OregonSaves' Rulemaking Advisory Committee, to share our experiences in how to achieve savings success and to ensure that these programs do not adversely affect those employers that already offer a retirement savings opportunity to their workers.

As successful as the employment-based retirement system has been for millions of workers, for many very small businesses, establishing a retirement plan is viewed as too burdensome, and so we understand the concerns that have led Hawaii to consider legislation that would establish a program targeting individuals without access to a retirement plan at work. We are therefore not writing in opposition to SB 1374 SD1 in its entirety, but to offer our recommendations for modest changes that would (1) help ensure that the Program does not disrupt existing employer-provided retirement plans and (2) reduce the threat of challenges to the Program.

BACKGROUND ON ERISA PREEMPTION

Very briefly, ERISA is a comprehensive federal statute regulating employer-sponsored retirement and welfare benefit plans. 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 regimes under state laws that would inevitably vary from state to state. To produce this result, Congress included an explicit and far-reaching preemption provision in the statute. According to that provision, and except as otherwise provided by law, title I and title IV of ERISA "*shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan*" (emphasis added).²

² ERISA § 514.

A state's failure to recognize the role of ERISA in promoting the uniform design and operation of employee benefit plans could result in inconsistent requirements being imposed on national employers and cause both confusion for and unequal treatment of participants who work and live in different states. To avoid this result, ERISA's preemption provision would apply to a wide range of state laws that "relate" to employer-sponsored retirement plans in a manner that, for example, dictates a particular plan design or employee coverage requirements, attempts to alter the voluntary nature of the employment-based retirement system, or imposes additional reporting requirements on employers that sponsor a plan.

RECOMMENDED CHANGES TO SB 1374 SD1

In light of ERISA's broad preemption provision and to avoid imposing additional burdens on employers that offer a retirement plan, the Council has the following three recommendations:

- 1. Replace the bill's prohibition on employers canceling their existing retirement plans for five years with a similar provision that would not implicate ERISA preemption.**

Section 5(1) of SB 1374 SD1 provides that the act shall take effect upon its approval, provided that:

No employer with a retirement plan or program for their employees shall cancel their retirement plan or program for five years from the effective date of this Act; ...

The Council believes that the above provision would be preempted by ERISA as currently written because it clearly "relates" to an employee benefit plan by prohibiting an employer from terminating its retirement plan – an action that would otherwise be permitted under federal law. As such, *we strongly recommend that this language be removed from the bill and that an* alternative approach to achieving what we assume to be the intent of section 5(1) be used instead.

We assume that section 5(1) is intended to prevent Hawaiian employers from terminating a more robust retirement plan (e.g., a 401(k) plan) simply in order to participate in the Hawaii Saves Program instead. We understand that a number of other states have had similar concerns. After all, the intention of these state IRA programs is to provide retirement savings opportunities to those workers who do not currently have

access to a plan at work, and not to encourage employers that already offer a more robust plan to reduce the coverage offered to an IRA program.

If this is indeed the intent of section 5(1), then *we encourage you to consider a different approach that has been used in a number of other states, which is to limit the eligibility of employers to offer the state's IRA program to those employers that do not offer a qualified retirement plan currently or in the past [X] number of years*. This approach does not interfere with an employer's ability to voluntarily terminate its retirement plan, but it also prevents an employer from terminating its plan for the purpose of immediately joining the state's IRA program.

For example, Illinois Public Act 098-1150, which created the Illinois Secure Choice Program, accomplished the above approach by defining "employer" as follows:

"Employer" means a person or entity engaged in a business, industry, profession, trade, or other enterprise in Illinois, whether for profit or not for profit, that ... (iii) has not offered a qualified retirement plan, including, but not limited to, a plan qualified under Section 401(a), Section 401(k), Section 403(a), Section 403(b), Section 408(k), Section 408(p), or Section 457(b) of the Internal Revenue Code of 1986 *in the preceding 2 years* [emphasis added].

Should Hawaii choose to follow the approach used in Illinois, Hawaii could, of course, substitute any number of years (e.g., five) for the "2 years" as provided under Illinois law.

2. Clarify the scope of the exemption from the Hawaii Saves Program for employers that offer a qualified retirement plan.

SB 1374 SD1 provides that the Program shall "[r]equire an employer to offer its employees the opportunity to contribute to an account in the program through payroll deduction *unless the employer offers a qualified retirement plan...*" (emphasis added). The Council strongly supports exempting employers that already offer a retirement plan from the Program's employer requirements, which avoids both imposing burdens on plan sponsors and triggering ERISA preemption concerns in this regard. However, for the avoidance of any doubt as to the scope of such exemption, *we encourage you to clarify that plan sponsors are exempt if they offer a qualified retirement plan to "some or all" employees, or to "at least one employee."*

When an employer creates a retirement plan, the plan is generally available to most employees. 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. For example, the plan may not generally require, as a condition of participation, achievement of an age of more than 21 or more than two years of credited service. But, consistent with these restrictions, it is unusual for a qualified 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.

If the clarification requested above is not made, an argument could potentially be made that a plan sponsor is not exempt if it does not offer a retirement plan with respect to a *specific employee*. The scope of this exemption is particularly unclear when considering that SB 1374 SD1 would require the Program to "[a]llow employers to establish an alternative retirement program for some or all employees." In other words, what is the purpose of specifying that an employer may establish a retirement plan for "some or all" employees if the exemption is already intended to be available to all plan sponsors, regardless of whether 100% of employees are covered?³ Again, we urge further clarification that all plan sponsors are entirely exempt from the Program, even if not every employee is covered by the plan.

3. Clarify that no reporting requirements may be imposed on employers that offer a qualified retirement plan.

As noted above, ERISA's preemption provision applies even to state laws that simply impose a new or different employer reporting requirement that "relates" to an employee benefit plan. A recent Supreme Court decision reaffirmed this point when it struck down a state reporting requirement imposed on ERISA-covered health plans because the new reporting requirements interfered with a national and uniform system of plan administration.⁴ And *OregonSaves*, which requires all employers (including those that offer a qualified retirement plan) to register on a website or report that they

³ One suggestion is to amend this provision in SB 1374 SD1 to provide that the Program shall "allow employers that establish an alternative retirement program to obtain an exemption from the program as of the date that such alternative retirement program is first established or made available to one or more of the employer's employees."

⁴ *Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 943 (2016).

offer a retirement plan, has faced legal challenges over their decision to implement such a reporting regime.

As such, *we recommend clarifying in SB 1374 SD1 that no reporting shall be required by plan sponsors with respect to the Hawaii Saves Program.*⁵ We offer the following two examples of approaches used to address this issue in other states that we believe would help the Program avoid ERISA preemption concerns in this regard. Either approach could be easily incorporated into SB 1374 SD1:

- **Example A: CalSavers draft proposed permanent regulations**

Section 10001. Eligible Employers

...

(d) The Program will notify Employers about the Program and its registration deadlines and require Eligible Employers that have not previously registered for the Program to do so on or before the deadlines set forth in Section 10002(a). *Exempt Employers may, but need not, inform the Program of their exemption from the Program using one of the methods established under Section 10002(e)* (emphasis added).

- **Example B: Massachusetts SD 1902 (2019), Section 7**

NEW Section 64F Massachusetts Secure Choice Program

...

3. Powers, Authority, and Duties of the Board

...

(2)(g)... The Board may establish any processes that the Board reasonably deems to be necessary or advisable to verify whether an employer is a Covered Employer (including reference to on-line data and possible use of questions in employer State tax filings), *consistent with the objective of avoiding to the fullest extent practicable any requirement that an employer that is not a Covered Employer register with the Program or take other action to demonstrate that it maintains a Specified Tax-Favored Retirement Plan or is exempt for other reasons from being treated as a Covered Employer* [emphasis added].

⁵ Although SB 1374 SD1 provides that the Program shall not “impose on employers any duties that are otherwise prohibited under [ERISA],” for the avoidance of doubt as to the intended scope and application of this provision, we recommend including language that would specifically prohibit the Program from imposing reporting requirements on plan sponsors.

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Thank you for your consideration of our comments. If you would find it helpful to discuss any of these matters with us, please contact me at jjacobson@abcstaff.org.

Sincerely,

A handwritten signature in black ink, appearing to read "Jan Jacobson". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Jan Jacobson
Senior Counsel, Retirement Policy
American Benefits Council

Cc: Introducers of SB 1049

- Senator Laura Thielen (senthielen@capitol.hawaii.gov)
- Senator Stanley Chang (senchang@capitol.hawaii.gov)
- Senator Rosalyn Baker (senbaker@capitol.hawaii.gov)
- Senator Kaiali'i Kahele (senkahele@capitol.hawaii.gov)
- Senator Dru Mamo Kanuha (senkanuha@capitol.hawaii.gov)