



# AMERICAN BENEFITS COUNCIL

December 23, 2016

*Delivered via email to [dan.mcnally@ost.state.or.us](mailto:dan.mcnally@ost.state.or.us)*

Dan McNally  
Rules Coordinator  
Oregon State Treasury  
350 Winter Street, NE  
Suite 100  
Salem, OR 97301

**Re: Proposed Rules for the Oregon Retirement Savings Plan**

Dear Mr. McNally:

The American Benefits Council (“Council”) appreciates the opportunity to provide comments on the rules proposed for the Oregon Retirement Savings Plan (“Plan” or “ORSP”) by the Oregon Retirement Savings Board (“Board”). As the first state to issue proposed rules for the operation of a mandatory state-run IRA program for the private sector (“state-run plan”), Oregon is in a unique position to influence the development of state-run plans in other states and be looked to for best practices. We accordingly believe that the Board’s work on the rules for the ORSP could ultimately affect workers and employers well beyond Oregon’s borders.

The Council is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees across the country, including Oregon. Collectively, the Council’s members either directly sponsor or provide services to retirement and health plans that cover more than 100 million Americans.

The Council and its members have long supported both public and private efforts to expand access to retirement savings opportunities for workers. In this regard, 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 in order to encourage employers to offer (and to continue to offer) retirement plans to their employees.

Although we understand the concerns that have led several states to explore and/or pass statutes creating a state-run plan, we are nevertheless concerned that the implementation of these plans could undermine the incentive to adopt (or maintain) a retirement plan with employer contributions, higher contribution limits, and far more participant protections. For this and other reasons, we do not support mandates for employers to participate in state-run plans. We strongly believe that retirement plan coverage can be broadened in a much more effective way through the elimination of regulatory burdens, increased education of employees and employers, and greater incentives to sponsor, or participate in, plans that provide greater retirement security. However, we recognize that the Oregon law has been enacted, and we are not writing today to address that decision.

We are writing today primarily to express the great concern that we and our members have about the proposed means of implementing the Oregon law that would undermine Qualified Plan<sup>1</sup> coverage by increasing the costs and complexities faced by employers who currently sponsor a Qualified Plan for their employees.

For more than 40 years, employers who sponsor a retirement plan have been subject to a single federal statutory and regulatory regime under the Employee Retirement Income Security Act of 1974 (“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. This framework has enabled the current retirement system to successfully reach millions of employees across the country. And while we are very supportive of ideas that would increase access to a work-based retirement savings opportunity for those workers who do not currently have access to an employer-sponsored plan, it is critical that states 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-run plans, including, as noted, the opportunity for employer contributions, higher contribution limits, and more participant protections.

As the Board works to finalize the rules for the ORSP, we respectfully request that the Board take into careful consideration what steps it can take to minimize the Plan’s burdens on current plan sponsors and the retirement system in general. We appreciate that the proposed rule’s Statement of Need and Fiscal Impact indicates that the Plan is being designed to minimize its economic impact on small businesses with fewer than 50

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<sup>1</sup> Terms not defined herein have the definition assigned to them in the proposed rule.

employees.<sup>2</sup> However, we ask that the Board also strive for a goal of minimizing the Plan's economic impact on (1) all employers who currently sponsor a retirement plan (regardless of size), and (2) large and mid-sized businesses, which are more likely to operate in multiple states and be subject to multiple state-run plans in the future. As proposed, the rules create a program that we expect would work well for and minimize the burdens on small employers who do not offer a Qualified Plan and whose employees only work in Oregon. Our recommendations for changes to the proposed rule, as described below, are intended to ensure that the Plan *also* works well for plan sponsors and businesses that operate in multiple states.

## **SUMMARY OF THE COUNCIL'S MAIN COMMENTS**

As described in more detail below, the Council has the following key recommendations regarding the proposed rules, which are aimed at addressing our members' most critical concerns with respect to the ORSP. Additional suggestions are also included at the end.

- The proposed rule should be modified so that the employer exemption is available to all Employers who offer a Qualified Plan to some or all Employees. In addition, the definition of Qualified Plan should be expanded to include payroll deduction IRAs. These two changes (the most critical of which is the former) are necessary to ensure that the ORSP complements the existing retirement system rather than undermines it by imposing unnecessary burdens and expense on current plan sponsors, which would ultimately harm the thousands of Oregon workers who are already saving for retirement in an employer-sponsored plan.
- Employers with operations and employees in multiple states are very likely to be subject to multiple and potentially conflicting state-run plan regimes as more states implement their state-run plans. We urge the Board to take action, both in its rulemaking and through coordination with other states, to reduce employer burdens in situations including (1) employers who are subject to multiple state-run plan regimes; (2) employees who are subject to enrollment in more than one state-run plan; and (3) the employer's performance of administrative tasks where the employer is required to comply with multiple sets of rules in multiple states.

## **NEED FOR APPROPRIATE EXPANSIONS TO THE PROPOSED EMPLOYER EXEMPTION**

### **1. All Employers Who Offer a Qualified Plan Should Have Permanent Access to the Employer Exemption**

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<sup>2</sup> The Statement of Need and Fiscal Impact estimates that 53,000 small businesses and 64,000 firms of all sizes will be affected by the Plan.

Under the proposed rule, Employers who file a Certificate of Exemption with the Plan would be exempt from the Plan's requirements. A Certificate of Exemption is only available to Employers who offer a Qualified Plan to "all of its Employees." However, an Employer who offers a Qualified Plan to "some but not all of its Employees" may file a "conditional" Certificate of Exemption. Although the conditional Certificate of Exemption would also serve to exempt an Employer from the Plan, the proposed rules state that such Employers "may be required to register with the Plan at a later time." That is, the proposed rule would reserve for the Board the right to determine in the future that such Employers would be required to participate in the Plan.

The statutory basis for the proposed rule's employer exemption is located in section 3(1)(b) of H.B. 2960. That section provides that the Board must develop and establish a plan that "Require[s] an employer to offer its employees the opportunity to contribute to the plan through payroll deductions *unless the employer offers a qualified retirement plan...*" (emphasis added).

Although we appreciate that the proposed rule provides for a conditional exemption for Employers who offer a Qualified Plan to "some but not all" Employees, *we urge the Board to establish in its rulemaking a permanent employer exemption that is available to all Employers who offer a Qualified Plan, regardless of whether that plan is offered to some or all of the Employer's Employees.* The statute requires that an exemption be made available for an Employer who "offers a qualified retirement plan." It does not limit the exemption to Employers who offer a plan to "all" Employees.

Making the employer exemption permanently available to all plan sponsors is the *single most critical thing* that the Board can do to ensure that the ORSP complements the current retirement system instead of jeopardizing the continued offering of ERISA-covered plans to thousands of Oregonians and imposing unnecessary complexity and expense on plan sponsors. Many proponents of the state-run plans assume that medium and large employers will continue to maintain 401(k) plans regardless of the regulatory environment. This is not accurate in our view or in the view of the Council's members, just as the exact same assumption regarding defined benefit plans from many years ago has proved to be incorrect.

An employer who sponsors a Qualified Plan has administrative fees, fiduciary duties, and numerous potential liabilities. An employer participating in the ORSP has none of that, thus strongly pushing the employer away from its Qualified Plan and toward the ORSP, to the detriment of the employer's employees who benefit far more under a Qualified Plan. In this context, it is critical that the Board not do anything further to cause employers to drop their savings plan. If the ORSP applies to employers with a plan, that would certainly cause many employers to drop their plan, as discussed below. Workers in a state will not be benefitted if employers would forego their offering of an ERISA-covered plan with greater benefits and employee protections in favor of

the reduced employer costs and liabilities associated with the state-run plans. However, under the proposed rules, and for very real and legitimate business reasons, employers would be placed in the unfortunate position of having to consider such a move.

It goes without saying that an employer who offers a 401(k) plan to, for example, 95% of its employees (but excludes, for example, the 5% of its employees who are temporary or contract employees or are not yet eligible for participation) would be burdened by an additional requirement that the employer enroll the remaining 5% of its employee population in a state-run plan. For example, not only would the employer be responsible for understanding and carrying out its responsibilities under the state-run plan (on top of its many duties with respect to the 401(k) plan), but the employer would also be forced to constantly monitor and switch employees between the state-run plan and 401(k) plan as employee eligibility for the 401(k) plan changes. At some point, those additional burdens will inevitably discourage many employers from continuing to offer an ERISA-covered plan, especially since the ORSP would not subject employers to fees or liabilities.

As proposed, the non-conditional Certificate of Exemption would only be available to a very narrow segment of current plan sponsors in Oregon. It is unusual for a Qualified Plan to be offered to 100% of all employees at all times, from the date of hire.<sup>3</sup> 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 we understand the desire to have a goal of ensuring that every single Oregon worker has access to a retirement savings opportunity at all times, even the proposed rule seemingly acknowledges that administrative impracticalities and constraints are inevitable (e.g., the proposal would allow a Participating Employer a minimum of 60 days between its Registration Date and the date upon which the Participating Employer must enroll its Employees).

In light of the risks and consequences of the proposal to current plan sponsors and the many employees who are benefiting from participation in a Qualified Plan, and given the administrative challenges associated with ensuring that 100% of a work force has access to a Qualified Plan, we urge the Board to permanently expand the employer exemption to all Employers who offer a Qualified Plan. We believe that the ORSP will have the greatest positive impact on retirement savings by focusing on ensuring that the Plan is successful for Employees of Employers who do not offer a Qualified Plan.

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<sup>3</sup> On a related point, it is not entirely clear to us what is meant by the provision stating that a Certificate of Exemption is available to an Employer who offers a Qualified Plan to "all" of its Employees. An Employer with a stable workforce and no recent hires might offer a Qualified Plan to 100% of its Employees at one particular moment, but a new Employee who is hired the following week might not be eligible due to not having met a service requirement.

The question could be raised as to whether there needs to be a special rule denying the exemption to employers who only cover a small percentage of their employees under their Qualified Plan. The answer is no. Covering only a small percentage of employees is rare today, because there is no good business reason to do this.<sup>4</sup> And escaping the state mandate is not enough of a business justification to do this. So while this is a theoretical possibility, Oregon should not construct elaborate rules to prevent an evasion that is very unlikely to occur.

## **2. The Definition of “Qualified Plan” Should Include Payroll Deduction IRAs**

Section 3(1)(b) of H.B. 2960 describes a qualified retirement plan as “*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” (emphasis added). The proposed rule would similarly define Qualified Plan as “a retirement plan qualified under the Internal Revenue Code, *including but not limited to* section 401(a), section 401(k), section 403(a), section 403(b), section 408(k), section 408(p) or section 457(b)” (emphasis added).

We ask that the proposed rule’s definition of Qualified Plan be modified to include payroll deduction IRAs, whether or not the payroll deduction IRA utilizes automatic enrollment, and whether or not the arrangement is subject to ERISA. Employers who currently offer a payroll deduction IRA should not be forced to choose between administering both the payroll deduction IRA and the ORSP (especially with respect to the same Employee) or terminating their payroll deduction IRA and replacing it with the ORSP. Assuming that the accounts utilized by the ORSP will be IRA accounts, both the payroll deduction IRA and ORSP would present nearly identical savings opportunities for Employees. The fact that the ORSP requires automatic enrollment and automatic escalation does not justify excluding Employers with a payroll deduction IRA from the employer exemption because Employers who offer a Qualified Plan (as currently defined) without those features are nevertheless eligible for the exemption.

For the above reasons, and because both the statute and the proposed rule clearly allow for consideration of other types of savings arrangements under the definition of a Qualified Plan, we believe that the inclusion of payroll deduction IRAs is appropriate. This modification to the proposed rule would, in combination with our recommendation to permanently exempt all plan sponsors, help ensure that the ORSP does not disrupt workers who are currently saving for retirement in a work-based plan.

### **NEED TO MINIMIZE CONFLICTS FOR PARTICIPATING EMPLOYERS**

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<sup>4</sup> The only exception is that in some cases, a business might want to only cover executives, who value pre-tax deferred benefits more than lower-paid employees. But that approach is prohibited by federal nondiscrimination rules.

In addition to ensuring that the employer exemption is permanently available to all Employers who offer a Qualified Plan (whether to all or to some Employees), our members' other critical concern is the very real likelihood that employers with operations and employees in multiple states will inevitably be subject to multiple state-run plan regimes. This concern is especially acute in the event that Employers who offer a Qualified Plan to some (but not all) Employees are required to register with the ORSP and become Participating Employers.

Large and mid-sized businesses, which are much more likely to operate in multiple states than small businesses, will be disparately impacted as more states implement state-run plans. At worst - though certainly not inconceivable - a large employer with locations and employees in every state could eventually be subject to 50 state-run plan regimes (or more if cities and counties implement plans). This would be an extraordinary burden for even large employers to face. Still worse than our concern that employers will be required to participate in multiple state-run plans is the very conceivable scenario in which employers could be subject to *conflicting* state-run plan regimes *with respect to the same employee*.

In developing the new ERISA safe harbor for state-run plans and city- or county-run plans, the Department of Labor ("DOL") acknowledged the potential for overlapping programs, but implied that the states and local governments are in a better position to address or alleviate this issue. Because DOL has not, to date, provided any guidance or assistance to states or the many employers who will face multiple and/or conflicting state-run plans, *we urge Oregon to take the lead on establishing guidelines and processes to protect both employers and workers from the unnecessary burden of being subject to multiple and/or conflicting state-run plan regimes.*

As the Board continues its work to implement the ORSP, we ask that the Board consider its opportunities to establish best practices for rules and other guidance that, if adopted in similar form by other states that implement a state-run plan, would help prevent the confusion and burdens that will surely result for many employers in the absence of coordination between the states.

There are three primary sources of conflict and/or burden that we especially request the Board to consider:

- **Multi-state employer subject to multiple regimes:** We anticipate many situations in which an employer has employees in multiple states, and more than one of those states requires that workers within the state be enrolled in the respective state's state-run plan. As a result, the employer has the burden and expense of complying with multiple state-run plans. For example, assume that Oregon, California, and Illinois have each implemented their state-run plans. An employer with 10 employees in Oregon, 3 employees in California, and 2

employees in Illinois would be responsible for following the rules of all three state-run plans, even as a small employer with only 15 employees.

*Potential option to reduce burden:* Expand the definition of Qualified Plan to include state-run plans of other states. For example, a California employer with a single employee in Oregon could file a Certificate of Exemption with the ORSP if the California employer offered the California state-run plan to all of its employees, including the Oregon employee. (This would require that state-run plans be willing to accept enrollees who are subject to another state's enrollment requirement.)

- **Single employee subject to multiple regimes:** There may be situations where, due to different state approaches in determining who is subject to enrollment in a state-run plan, an employer could be required to enroll a single individual in multiple state-run plans. For example, assume that an employer with operations in both Oregon and Idaho has an employee who works at a location in Oregon but lives in Idaho. Assume further that Idaho has implemented a state-run plan that applies to all Idaho residents working for Idaho employers. The Oregon employer could be required to enroll the employee in both the Oregon and Idaho state-run plans.

*Potential option to reduce burden:* Same as above, i.e., expand the definition of Qualified Plan to include state-run plans of other states.

- **Employer's administrative requirements:** Employers will have certain responsibilities with respect to each state-run plan that is implemented, including, for example, the distribution of materials to employees and the remittance of contributions that are withheld from employees' pay. Employers who are subject to multiple state-run plans will likely face different procedural requirements among the programs. For example, one state-run plan may require that employers distribute hard copies of program materials to employees, whereas another state-run plan allows for electronic distribution. Employers will be forced to keep track of and comply with multiple sets of procedures or may choose, where feasible, to simply follow the more stringent (and generally more expensive) process for all plans.<sup>5</sup>

*Potential option to reduce burden:* Wherever possible, the Board should provide Participating Employers with flexibility in how required tasks are performed. For example (and as is currently proposed for the ORSP), Participating Employers should have the option of delivering required program materials in hard copy or

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<sup>5</sup> As another example, if an employer is subject to two state-run plans that require the employer to maintain records for six years, and one state-run plan that requires records to be maintained for eight years, the employer could keep track of which records must be maintained for six years and which for eight, or the employer could simply maintain all records for eight years, a more expensive, yet simple, approach.



electronically. In addition, for tasks in which the submission of a form is required, it would be helpful if a Participating Employer was allowed to use either the specific form provided by the Plan or a substantially similar form that contains the necessary information (i.e., one that may be used with respect to multiple state-run plans).

The options we described above are just a few possibilities of ways that the Board could help minimize the additional burden and conflicts that will arise for employers who are subject to multiple state-run plans. In addition to considering these and other alternatives, we urge the Board to reach out to other states as they move forward with the implementation of a state-run plan and work to establish similar rules and procedures. We also encourage states to consider joining their programs together, such as through the development of a plan administered jointly by multiple states.

## OTHER COMMENTS

In addition to our primary concerns described above, we have the following additional comments on the proposed rules:

- **Timing of the transmission of contributions:** The proposed rules would require that amounts deducted by a Participating Employer be transmitted to the Plan Administrator “as swiftly as possible, not to exceed five (5) calendar days from the date of deduction.” We suggest that the proposed rule be modified to allow seven (7) business days for the transmission, which would provide the same standard that many employers are familiar with in the DOL safe harbor rule for small plans.<sup>6</sup>
- **Compliance with Internal Revenue Code requirements:** Although we are not aware that a final decision has been made, due to the availability of the new DOL safe harbor for state-run IRA arrangements, we assume that the employee accounts in the ORSP will be IRA accounts (likely Roth IRAs, but potentially traditional IRAs). As the Board is aware, the Internal Revenue Code and the federal regulations thereunder contain numerous rules with respect to IRAs, including income limits and contribution limits. Although it is our understanding that Participating Employers will not be responsible for ensuring Participating Employees’ compliance with the various IRA rules – and it is critical that employers not be given this responsibility – we want to emphasize that many Participating Employees will unknowingly violate the IRA rules at some point, and that addressing any such violations could be a frustrating and expensive process for individuals.

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<sup>6</sup> 29 C.F.R. § 2510.3-102(a)(2).

We recommend that the Board consider procedures and safeguards that either the Board or the Plan Administrator could implement in order to minimize the occurrence of Participating Employees running afoul of the IRA rules.

- **Need for more detailed guidance:** Although the proposed rules establish several basic parameters for the ORSP, additional guidance with respect to many aspects of the Plan will be necessary to (1) provide Participating Employers with the information they need to carry out their duties with respect to the Plan, and (2) enable Employees to make a more informed decision as to whether to remain a participant in the ORSP or opt out.

For example, with respect to the Plan's auto-escalation feature, Participating Employers would need additional information on whether contributions are to be escalated on the same day for all Participating Employees or be based, for example, on the anniversary of an individual's participation in the Plan. If the same date is used for all Participating Employees, Participating Employers would then need guidance on whether to auto escalate the contributions of an employee who has been a Participating Employee for less than a year (or wait until the following year to first escalate his or her contribution percentage).

As another example, the proposed rules state that the Board will charge each account a fee to defray the ORSP's operating expenses, but no additional information about the fee, including the amount or the range that could be charged, is provided. Employees should have access to more detailed information on the account fees prior to their Enrollment Date.

- **Compliance with DOL's safe harbor:** Assuming that the Board intends for the ORSP to meet the conditions of DOL's new safe harbor for state-run plans, it would be helpful to have more information on how the safe harbor conditions will be met, including how employee, former employee, and beneficiary rights under the ORSP will be enforced.<sup>7</sup> In addition, because DOL's final safe harbor did not include a prohibition on states imposing withdrawal restrictions on IRA accounts, the ORSP should provide clear disclosure up front with respect to what, if any, withdrawal restrictions will exist, as any such restrictions could affect opt out rates and the sustainability of the Plan.

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Again, we appreciate the opportunity to provide comments on the Board's proposed rules for the ORSP. If you have any questions or would like to discuss these comments further, please contact me at 202-289-6700 or [ldudley@abcstaff.org](mailto:ldudley@abcstaff.org).

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<sup>7</sup> 29 C.F.R. § 2510.3-2(h)(1)(vi).

Sincerely,

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

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