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## 29 C.F.R. § 2509.2015-02

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### Interpretive bulletin relating to state savings programs that sponsor or facilitate plans covered by the Employee Retirement Income Security Act of 1974.

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- (a) *Scope.* This document sets forth the views of the Department of Labor (Department) concerning the application of the Employee Retirement Income Security Act of 1974 (ERISA) to certain state laws designed to expand the retirement savings options available to private sector workers through ERISA-covered retirement plans. Concern over adverse social and economic consequences of inadequate retirement savings levels has prompted several states to adopt or consider legislation to address this problem. <sup>[1]</sup> An impediment to state adoption of such measures is uncertainty about the effect of ERISA's broad preemption of state laws that "relate to" private sector employee benefit plans. In the Department's view, ERISA preemption principles leave room for states to sponsor or facilitate ERISA-based retirement savings options for private sector employees, provided employers participate voluntarily and ERISA's requirements, liability provisions, and remedies fully apply to the state programs.
- (b) *In general.* There are advantages to utilizing an ERISA plan approach. Employers as well as employees can make contributions to ERISA plans, contribution limits are higher than for other state approaches that involve individual retirement plans (IRAs) that are not intended to be ERISA-covered plans, <sup>[2]</sup> and ERISA plan accounts have stronger protection from creditors. Tax credits may also allow small employers to offset part of the costs of starting certain types of retirement plans. <sup>[3]</sup> Utilizing ERISA plans also provides a well-established uniform regulatory structure with important consumer protections, including fiduciary obligations, automatic enrollment rules, recordkeeping and disclosure requirements, legal accountability provisions, and spousal protections.

The Department is not aware of judicial decisions or other ERISA guidance directly addressing the application of ERISA to state programs that facilitate or sponsor ERISA plans, and, therefore, believes that the states, employers, other plan sponsors, workers, and other stakeholders would benefit from guidance setting forth the general views of the Department on the application of ERISA to these state initiatives. The application of ERISA in an individual case would present novel preemption questions and, if decided by a court, would turn on the particular features of the state-sponsored program at issue, but, as discussed below, the Department believes that neither ERISA section 514 specifically, nor federal preemption generally, are insurmountable obstacles to all state programs that promote retirement saving among private sector workers through the use of ERISA-covered plans.

#### Marketplace Approach

One state approach is reflected in the 2015 Washington State Small Business Retirement Savings Marketplace Act. <sup>[4]</sup> This law requires the state to contract with a private sector entity to establish a program that connects eligible employers with qualifying savings plans available in the private sector market. Only products that the state determines are suited to small employers, provide good quality, and charge low fees would be included in

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the state's "marketplace." Washington State employers would be free to use the marketplace or not and would not be required to establish any savings plans for their employees. Washington would merely set standards for arrangements marketed through the marketplace. The marketplace arrangement would not itself be an ERISA-covered plan, and the arrangements available to employers through the marketplace could include ERISA-covered plans and other non-ERISA savings arrangements. The state would not itself establish or sponsor any savings arrangement. Rather, the employer using the state marketplace would establish the savings arrangement, whether it is an ERISA-covered employee pension benefit plan or a non-ERISA savings program. ERISA's reporting and disclosure requirements, protective standards and remedies would apply to the ERISA plans established by employers using the marketplace. On the other hand, if the plan or arrangement is of a type that would otherwise be exempt from ERISA (such as a payroll deduction IRA arrangement that satisfies the conditions of the existing safe harbor at 29 CFR 2510.3-2(d)), the state's involvement as organizer or facilitator of the marketplace would not by itself cause that arrangement to be covered by ERISA. Similarly, if, as in Washington State, a marketplace includes a type of plan that is subject to special rules under ERISA, such as the SIMPLE-IRA under section 101(h) of ERISA, the state's involvement as organizer or facilitator of the marketplace would not by itself affect the application of the special rules.

### Prototype Plan Approach

Another potential approach is a state sponsored "prototype plan." At least one state, Massachusetts, has enacted a law to allow nonprofit organizations with fewer than 20 employees to adopt a contributory retirement plan developed and administered by the state.<sup>[5]</sup> Banks, insurance companies and other regulated financial institutions commonly market prototype plans to employers as simple means for them to establish and administer employee pension benefit plans.<sup>[6]</sup> The financial institutions develop standard form 401(k) or other tax-favored retirement plans (such as SIMPLE-IRA plans) and secure IRS approval. Typically, employers may choose features such as contribution rates to meet their specific needs. Each employer that adopts the prototype sponsors an ERISA plan for its employees. The individual employers would assume the same fiduciary obligations associated with sponsorship of any ERISA-covered plans. For example, the prototype plan documents often specify that the employer is the plan's "named fiduciary" and "plan administrator" responsible for complying with ERISA, but they may allow the employer to delegate these responsibilities to others. The plan documents for a state-administered prototype plan could designate the state or a state designee to perform these functions. Thus, the state or a designated third-party could assume responsibility for most administrative and asset management functions of an employer's prototype plan. The state could also designate low-cost investment options and a third-party administrative service provider for its prototype plans.

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