WRMarketplace

An AALU Washington Report

The *WRMarketplace* is created exclusively for AALU members by experts at Greenberg Traurig and the AALU staff, led ***by Jonathan M. Forster, Steven B. Lapidus, Martin Kalb, Richard A. Sirus, and Rebecca Manicone.*** **WRMarketplace #17-14** was written by Greenberg Traurig Associate Michelle C. Kauppila.

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TOPIC: State Auto-IRA Update: Congress Acts to Block DOL Rules Allowing State & Local Government Sponsored Retirement Programs.

MARKET TREND: A Republican-controlled Congress interested in reducing the regulatory burden on businesses is taking action to block many Obama-era regulations, including Department of Labor ("DOL") regulations issued in 2016 that provide competitive advantages to state retirement savings programs for private sector employees who do not have access to employment-based retirement plans.

SYNOPSIS: Automatic IRAs allow employees to make contributions to an IRA run by a state or certain local subdivisions with automatic payroll deductions made and submitted to the state/locality by the employer ("State Auto-IRAs"). In 2016, the DOL issued regulations that provide State Auto-IRAs with a safe harbor exemption from ERISA requirements, while similar, private payroll deduction IRA programs that include an automatic enrollment feature ("private Auto-IRAs") would still need to comply with ERISA. The U.S. House of Representatives, however, recently passed House Joint Resolution 66 ("HJR 66") and House Joint Resolution 67 ("HJR 67," also passed by the Senate), which would eliminate this ERISA exemption for State Auto-IRAs. Note that the joint resolutions do not affect DOL Interpretive Bulletin 2015-02, which allows treatment of state-run multiple employer plans ("MEPs") as single plans under ERISA, resulting

in cost savings for employers that participate in the state MEPs. This advantage is not available to private MEPs. Also, State Auto-IRAs may fall under DOL guidance exempting voluntary payroll deduction IRAs from ERISA's requirements.

TAKE AWAYS: Arguably, elimination of the DOL's ERISA exemption for State Auto-IRAs attempts to put government-run IRA programs and private IRA programs on equal footing and provide ERISA protection to employees with wages put into State Auto-IRAs. To become effective, the Senate has to pass HJR 66 (or its similar resolution), and President Trump must sign the legislation. When consulting with employer-clients, advisors should: (1) be aware that changes to State Auto-IRAs may be likely, and (2) be ready to advise the employer-client on the pros and cons of establishing its own private retirement plan instead of being required to participate in a state program.

MAJOR REFERENCES: House Joint Resolutions 66 and 67; Senate Joint Resolutions 32 and 33; DOL Final Rule 29 CFR Part 2510 "Savings Arrangements Established by States for Non-Governmental Employees;" DOL Interpretive Bulletin 2015-02.

PRIOR REPORT: 16-35.

In 2016, the DOL issued regulations providing a safe harbor for State Auto-IRAs, exempting them from ERISA (see our prior coverage in *WRMarketplace No. 16-35*). However, given recent Congressional activity and the expressed desire of Congress and President Trump to reduce the regulatory burden on businesses, it appears highly likely that Congress and President Trump will enact pending joint resolutions eliminating this safe harbor ERISA exemption for State Auto-IRAs.

BACKGROUND: THE DOL REGULATIONS

State Auto-IRAs allow employees to contribute to a state-run IRA with automatic payroll deductions made and submitted to the state by the employer. Before the issuance of the DOL regulations, some states were in the process of implementing State Auto-IRAs, but it was unclear whether ERISA applied to the arrangements. The DOL issued final regulations in August 2016 providing a safe harbor that can be followed for State Auto-IRAs to be exempt from ERISA (the DOL later extended the safe harbor to certain local governments). Under the DOL regulations, the employees must be given notices about the program and the opportunity to elect to have a different amount of deductions or no deductions taken out of their paychecks. The employer's involvement with a State Auto-IRA had to be limited to ministerial functions, such as providing notices to employees, deducting and transmitting the payroll deductions to the State Auto-IRA, and providing information to the state that is necessary for the administration of the program.

The safe harbor exemption under the DOL regulations would not apply to private Auto-IRAs. Under prior DOL guidance, the automatic enrollment feature of a private Auto-IRA causes it to become subject to all of ERISA's requirements. Thus, the DOL regulations arguably provide an advantage to State Auto-IRAs because the government-run program can automatically enroll employees in IRAs without ERISA application.

RECENT CONGRESSIONAL ACTIVITY: HJRs 66 & 67

The House of Representatives passed HJRs 66 and 67 on February 15, 2017. The Senate introduced Senate Joint Resolution 32 ("**SJR 32**," identical to HJR 66) and 33 ("**SJR 33**," identical to HJR 67) on March 6, 2017. On March 30, 2017, the Senate passed HJR 67, which ***eliminates the safe harbor exempting State Auto-IRAs run by local governments from ERISA***. The Senate has not yet voted on HJR 66 or SJR 32, which relate to the safe harbor ERISA exemption for State Auto-IRAs run by states.

Congressional members that spoke in support of the joint resolutions indicated that the DOL safe harbor would hurt the people that it was meant to help because it would lead to fewer protections for retirement savers, provide less information about how retirement plans are managed, and provide less control over retirement savings. They further expressed concern that small business employees will be harmed because the regulations will discourage small businesses from establishing 401(k) plans, and may result in small businesses cancelling their retirement plans and putting employees in government-run retirement plans. Some supporters of the joint resolutions noted that they were not against states providing retirement programs but wanted states offering such programs to be subject to the same ERISA requirements and protections as private retirement plans.

Members of Congress that opposed the joint resolutions pointed out that there are approximately 55 million American workers that do not have access to a retirement plan and that the state programs were created because of the failure of employers to establish retirement plans despite the tax incentives. They stated that a lack of retirement savings can cause middle class workers to fall into poverty after retirement, and spoke about the need to give states the flexibility to design retirement programs for their citizens.

NOT A FULL REVERSAL FOR STATE-RUN RETIREMENT PROGRAMS

The Congressional actions will not entirely undo the DOL guidance on state-sponsored retirement savings plans. The joint resolutions do not affect the DOL's Interpretive Bulletin 2015-02 in which the DOL expressed its view that ERISA's preemption principles leave room for states to sponsor or facilitate ERISA-based retirement savings options for private sector employees—provided the employers participate voluntarily, and the requirements, liability provisions, and remedies of ERISA fully apply to the state programs.

It is this Interpretative Bulletin in which the DOL blessed a state establishing and obtaining IRS tax qualification for a MEP in which certain employers will be permitted to join the plan by executing a participation agreement. State-sponsored MEP arrangements are afforded certain incentives that are not available to private MEPs because the DOL will consider the state arrangement as a single ERISA plan that would be required to file a single Form 5500 for the whole arrangement, which is likely the rationale behind maintaining this type of program. The treatment of a state-sponsored MEP as a single ERISA plan reduces the overall costs for participating employers. This advantage is not currently available for an employer participating in a private sector MEP.

ANOTHER POTENTIAL AVENUE FOR STATE RUN-RETIREMENT PROGRAMS

Even if the joint resolutions are passed by both Houses of Congress and signed by the President, State Auto-IRAs may still be allowed under the existing DOL guidance promulgated 40 years ago, which exempts voluntary payroll deduction IRAs from ERISA's requirements. The 2016 DOL regulations were issued because it is not entirely clear if State Auto-IRAs fall under the exemption. The older DOL guidance exempts payroll deduction IRAs from ERISA if there are no contributions made by the employer, participation is completely voluntary for employees, the sole involvement of the employer is without endorsement to collect contributions through payroll deductions, and the employer receives no consideration in the form of cash or otherwise. The automatic enrollment features of the State Auto-IRAs do not clearly meet the requirement for completely voluntary employee participation. Given this ambiguity, new State Auto-IRA programs likely will not be enacted by states that have not legislated for creating such programs.

TAKE AWAYS

Arguably, elimination of the DOL's ERISA exemption for State Auto-IRAs attempts to put government-run IRA programs and private IRA programs on equal footing and provide ERISA protection to employees with wages put into State Auto-IRAs. To become effective, the Senate has to pass HJR 66 (or its similar resolution), and President Trump must sign HJR 67, which is currently on his desk. When consulting with employer-clients, advisors should: (1) be aware that changes to State Auto-IRAs may be likely, and (2) be ready to advise the employer-client on the pros and cons of establishing its own private retirement plan instead of being required to participate in a state program.
