



# CLIENT ACTION Bulletin

Employee Benefits

## OregonSaves and Other State-Run Retirement Programs May Require Employer Action

**SUMMARY** The President recently signed into law ([P.L.115-35](#)) a bill “disapproving” a Department of Labor (DoL) final rule that permitted states to create retirement savings programs for nongovernmental workers whose employers do not sponsor a retirement plan. The August 30, 2016, final rule specified the conditions to qualify for a “safe harbor” that would exempt certain state-run individual retirement arrangements from ERISA, the federal law that governs retirement plans sponsored by employers in the private sector. Despite the disapproval, several states (and municipalities) remain committed to creating or studying retirement savings vehicles for workers whose employers do not offer a plan. The state of Oregon became the first to launch such a program, called OregonSaves™.

**DISCUSSION** Although aimed primarily at small employers, the states’ efforts have the potential to affect larger employers, including those that already maintain ERISA-covered retirement plans for their own workers. The concerns raised by some employers and benefits practitioners focused on whether or not the state-sponsored programs are exempt from ERISA (while remaining subject to the Internal Revenue Code), particularly with regard to protections for participants, administrative burdens and related costs, and conflicting or inconsistent state laws.

For employers, the state- or municipality-run programs by law or by regulations may raise several key issues, including:

- application to an employer that excludes certain workers from the plan, e.g., employees who are not yet eligible to participate due to insufficient employment service or being under age 21;
- administrative difficulties for employers that operate in multiple states, e.g., distribution of informational materials and compliance with different procedures;
- coverage of an individual who may be eligible for overlapping or multiple programs, e.g., working of more than one affected employer or a program’s application to residents or employees of a given jurisdiction; and
- the procedures to follow for payroll deduction individual retirement arrangements (IRAs) that include an automatic enrollment or automatic contribution escalation feature, e.g., the date changes occur or become effective.

### **OregonSaves: First in the Nation**

[OregonSaves](#) began on July 1, 2017, covering 11 small employers under a pilot program. On November 15 this year, the program will phase in coverage, starting with employers with 100 or more employees and ultimately covering employers with 19 or fewer workers in 2019-2020. Employers may elect to participate before they are required to do so. The program is mandatory for employers that do not sponsor an ERISA-covered retirement plan, regardless of the number of employees. OregonSaves covers individuals whose employment – not residence – is based in Oregon, and requires them to fund a personal Roth IRA through after-tax payroll deductions unless they opt out. Employers that offer an ERISA-covered plan to any of their employees must file a certificate of exemption, which will free them from having to enroll employees in OregonSaves. Payroll deductions under OregonSaves will begin in January 2018.

Employers that are not exempt from the OregonSaves requirements must:

- enroll participating employees;
- collect and remit contributions to the OregonSaves program administrator on a timely basis;
- retain employee election notices or election changes for at least three years;
- provide basic employer and employee information to the OregonSaves program administrator; and
- communicate to employees the employer's limited involvement in the program.

Details for employers about OregonSaves are available at:

<https://employer.oregonsaves.com/home.html>.

### **Other States and Localities Moving Forward**

States that have enacted laws to promote retirement savings by workers without access to an employer-sponsored plan include California, Connecticut, Illinois, and Maryland. These states' programs have different requirements, including for employer participation and definitions of covered employees. Washington and Vermont are taking distinctive approaches, with the former adopting a voluntary, small business "marketplace" offering private retirement options for employees, and the latter poised to offer an ERISA-covered, voluntary, small-employer multiple-employer plan that pools employees' assets.

Many other states and local governments (e.g., New York City) are actively working on legislation.

### **Labor Department Guidance on Payroll Deduction Programs**

As many of the states and municipalities consider payroll deduction IRAs and in light of the disapproval of the 2016 final rule on retirement savings offerings by the governmental entities, employers should note that the DoL in 1975 issued regulations and in 1999 issued [Interpretive Bulletin 99-1](#) on payroll deduction IRAs. Both specify the conditions that must be satisfied for payroll deduction IRAs to be exempt from ERISA:

- no contributions by the employer are permitted;
- participation must be completely voluntary for employees;
- the employer's sole involvement must be to publicize the program to employees, to collect contributions through payroll deductions, and to remit the amounts to the IRA sponsor; and
- the employer must not receive consideration (in the form of cash or otherwise) other than reasonable compensation for services actually rendered in connection with payroll deductions or dues checkoffs.

How the state-run programs interact or conflict, if at all, with the DoL's 1975 regulation and 1999 guidance remains unclear, as is how the agency will address the new federal law's disapproval of the 2016 final rule.

**ACTION** Employers that sponsor a retirement plan for their workers should keep abreast of state and/or local developments regarding legislation to provide retirement savings vehicles for individuals working and/or residing within a given state. Even if the state programs exempt employers that offer retirement plan coverage, the local laws and regulations could have direct and indirect implications. Key issues to consider are the size of the "small employer" base, the types of workers who may qualify, the communications requirements, and the payroll administration issues. Small employers that do not offer a retirement plan also should review the state and local requirements as the governmental jurisdictions implement or consider adopting programs to help individuals save for retirement.

Because state- or municipality-run retirement programs may face ERISA preemption or other legal challenges and the DoL has not yet provided guidance in light of the newly enacted law, employers also should consider obtaining legal advice.

For additional information about state-run retirement programs, please contact your Milliman consultant.