Expanding Coverage

A look at the various approaches

THE campaign to expand access to retirement savings in the workplace through automatic individual retirement accounts (auto-IRAs) continues to be given lip service in the Obama administration's 2017 fiscal year revenue proposals. To address the perceived problem posed by the fact that new and small employers tend not to offer retirement plans, every employer with more than 10 employees that does not currently offer a retirement plan would need to automatically enroll their workers in an IRA.

While legislator interest in this issue at the federal level has waned, the states have been hard at work on their own retirement savings initiatives. These pending initiatives can be categorized into two basic approaches. First, states such as California, Illinois and Oregon have enacted laws that are similar in approach to the president's Automatic IRA proposal. These laws require the state to develop its own self-sponsored IRA program, and, once it is rolled out, employers that do not offer a retirement plan would need to automatically enroll their employees. The second approach to state plans for private-sector workers is exemplified by a Massachusetts program that would give nonprofit employers with 20 or fewer employees the flexibility to participate in a state-sponsored plan. Maryland and other states favor a multiple employer plan (MEP) version of this approach, whereby the state would sponsor a MEP and offer it to private-sector employers.

Last November, the Department of Labor (DOL), at the direction of the administration, published new guidance addressing the various state retirement initiatives. Currently, there is safe harbor exclusion from the Employee Retirement Income Security Act (ERISA) for employers that make IRAs available at the workplace merely as a convenience, exempting them from being deemed fiduciaries. A key condition for this exclusion is that the arrangement must be completely voluntary for the employee. Moreover, the employer's involvement must be minimal, meaning the employer can do little more than collect contributions through payroll deductions.

The DOL concluded that the state initiatives fail to meet the existing exclusion, because an employee's enrollment is not self-initiated. However, it proposed a new safe harbor exclusion so that state-mandated auto-IRAs also would be exempt from ERISA, so long as they have a provision allowing employees to opt out or withdraw invested money, in accordance with normal IRA rules.

As a companion to its proposed regulation on state-sponsored IRAs, the DOL also released Interpretive Bulletin (IB) 2015-02, clarifying how a state-sponsored prototype or MEP would be treated under ERISA. Although these arrangements would be ERISA-covered plans, the DOL effectively gave them its blessing.

The DOL also ruled that state-sponsored MEPs could be treated as a single plan under ERISA, thereby making them less costly for small employers. This seems to fly in the face of DOL Advisory Opinion (AO) 2012-04A, which held that a group of employers may act as the employer in sponsoring a MEP only if group members were related in some way other than by offering benefits under the MEP.

Although it created that exception to further state-sponsored MEPs, the DOL has held to its position that unaffiliated employers participating in other open MEPs may not be treated as a single plan. The administration's 2017 fiscal year budget, however, proposes to amend ERISA to change that DOL interpretation. Under the proposal, a MEP lacking a commonality of interests among the participating employers would still be treated as a single plan for purposes of the Internal Revenue Code (IRC).

Relaxation of the common bond requirement would be accompanied by a number of conditions intended to act as safeguards. Thus, unaffiliated employers eligible to participate in the new, single-plan open MEP would be limited to those that had not maintained another qualified plan within the previous three years. Among other requirements, only regulated financial institutions would provide such MEPs and the provider would need to agree in writing that it would act as the plan's named fiduciary and ERISA plan administrator.

The administration has opened new fronts in its struggle to expand access to retirement savings, with state governments acting as its proxies. The states that have adopted retirement savings programs for private-sector employees can be expected to aggressively compete with private institutions to expand their reach, in order to make those programs economically viable. States that provide MEPs to private-sector workers will have a monopoly on offering single-plan open MEPs until the administration's proposal to relax the rules for such plans is enacted. Unfortunately, a patchwork of conflicting and/or inconsistent state regulations that ERISA was intended to prevent will be created.

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