

## Update on California's Proposed Plan to Set Up a State-Run Pension Plan

A few months back it was mentioned at one of our seminars that California was preparing to launch a state-run retirement program that calls for the automatic enrollment of private sector employees into a state-run pension plan.<sup>1</sup> Though there is an opt-out provision for employers who offer a private retirement plan option for their employees, employers who choose not to do so will be required under the law to enroll their employees in the state-run plan. There is no exemption for church and religious organizations.

One of the key assumptions upon which the Plan was established was that it would not be subject to ERISA, the federal Employee Retirement Income Security Act of 1974. ERISA sets standards to protect individuals in private pension plans<sup>2</sup>. And under an executive order issued by the Obama Administration in 2016, special regulations were adopted by the U.S. Department of Labor (DOL) which offered employers a safe harbor exempting California's Secure Choice program, and those in other states like it<sup>3</sup>, from the complex requirements of ERISA.

Earlier this month, however, Congress passed – and the President signed – legislation to roll back the DOL rule, leaving employers extremely concerned about the applicability of ERISA to the Secure Choice program<sup>4</sup>.

In response, California has proposed adding language to the regulation that allows the Secure Choice Investment Board to “self-certify” that the program is not subject to ERISA. The proposal relies on legal advice paid for by the Board which says that if the plan meets the individual retirement account (IRA) safe harbor requirements, as established under federal regulation in 1975, it would remain exempt from ERISA compliance. However, given the opinion of the DOL that only the Courts have the final say in such matters, some are expressing concern about moving forward with the Secure Choice program without an exemption in place which could very well expose employers to legal challenges in the federal courts.

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<sup>1</sup> <http://www.treasurer.ca.gov/scib/>

<sup>2</sup> ERISA sets minimum standards for funding, vesting, participation, and benefit accruals, requires certain reporting and disclosures, and describes fiduciary responsibilities for those who control plan assets. Failure to adhere to the standards opens employers up to potential lawsuits and financial penalties.

<sup>3</sup> <http://www.pensionrights.org/issues/legislation/state-based-retirement-plans-private-sector>

<sup>4</sup> In the background to the now-repealed rule, DOL agreed that current law does not allow automatic enrollment into a retirement plan without being subject to ERISA. Further DOL acknowledged and that even while issuing its 2016 safe harbor regulation, it remained merely an internal opinion and would not guarantee that the state-run programs would be outside of current safe harbor laws governing employee benefits. Only the courts would have the final say.

This is an important development that all church and religious organizations should be paying attention to, especially since you have options (e.g. (403(b) type plans sponsored by religious organizations are, by law, exempt from ERISA). If your ministry does not offer employees a retirement plan we encourage you to consider doing so.

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