Flashpoint: Things Are Happening… Finally!

After a period of national quiet in relation to retirement plans, several things have occurred recently that are worth discussing. Sorry that this is a longer newsletter than we like, but we wanted to give you quick feedback on what's finally going on.

California's State-Mandated Retirement Program Survives Preemption Challenge

One of the interesting trends across the country over the past several years is the involvement of states in getting people to save for retirement. Everyone in both the government and the private sector is aware of the national retirement crisis—i.e., that few people have sufficient funds for a meaningful retirement—and are seeking ways to encourage both individual savings and employer involvement in solving the problem. Notwithstanding the fact that the federal government's venture into this arena – the MyRA program – was an epic failure, and the fact that many governmental plans for their own employees have phenomenal economic problems, several states are trying to help employees of private employers save for retirement.

Ten states—California, Oregon, Illinois, Maryland, Connecticut, New Jersey, New York, Washington, Vermont, and Massachusetts—have passed legislation that would provide for some form of state-facilitated or mandated retirement program for private companies that do not sponsor their own qualified retirement plans. Of those ten state programs, two (Oregon and Illinois) are actively operating at this time. Maryland is poised to go on-line later this year, and California will begin enrollment in mid-2020. Many other states' lawmakers have at least initiated studies as to whether they should consider similar programs.

All four of the state programs that are currently active or have scheduled beginning dates require companies with certain minimum numbers of employees (between 1 and 25, depending on the state) that do not sponsor retirement plans to:

- Automatically enroll their employees in a retirement savings program, at a given rate of payroll deduction (generally 5% of compensation), that can be overridden by an affirmative election by the employee; and
- Transfer those salary deferrals to a Roth IRA program set up by the state for this purpose.

The Roth IRAs are invested among options that the state makes available for selection by the employees. There are also default options if the participant does not direct his or her investments.

There has been much talk about whether these state-run plans are either preempted by ERISA—that is, they cannot operate legally in the retirement plan arena—or are actually covered by ERISA's rules—which would make them much less attractive to the states, themselves. It appeared that both of these issues were resolved under a 2016 Department of Labor (DOL) regulation, but that regulation was invalidated by a law enacted by Congress in 2017.

Although the invalidation of the 2016 regulation cooled the progress of many state-run plans, several states—led by Oregon—continued to roll out their mandatory automatic IRA programs. In California, the CalSavers program is scheduled to become mandatory for employers with more than 100 employees in mid-2020, with application to other employers to occur in two steps: in 2021 (for 100-500 employees) and 2022 (for 5 or more employees).

In anticipation of these rules, California's Howard Jarvis Taxpayers Association sued the state in federal court, claiming that ERISA preempts the proposed state-run program. Preemption is a doctrine under which certain federal laws override—and, in fact, invalidate—state action that seeks to regulate in a way that affects the federal rules. In particular, ERISA provides that no state may enact legislation that would impact any employee benefit plans. Surely, one would think, a state-mandated retirement program would impinge on the federal regulation of benefit plans. Not so fast, says the U.S. District Court for the Eastern District of California.

In *Howard Jarvis Taxpayers Association, et al. vs. the California Secure Choice Retirement Savings Program*, the District Court determined that ERISA neither regulates nor preempts the CalSavers program. The court found that the CalSavers program does not interfere with ERISA, because it does not apply to any employer that sponsors an ERISA plan. So, there is no overlap between the state rules and the federal law. Furthermore, as the involvement of the employers in the CalSavers program is limited to ministerial duties, including enrolling the employees and submitting their payroll deductions to the Program, with no attendant fiduciary duty, the CalSavers program is not an ERISA-covered plan. (Prior court decisions have limited ERISA applicability when the benefit program requires so little employer involvement that the program does not rise to the level of being a "plan.") While both of these court findings are well-rooted in prior caselaw, the court's application of the relevant principles is different and unexpected.

If not overturned on appeal, this decision should open the door for other interested states to enact similar legislation.

> *Quick FBLC Commentary on State Programs*: While many plan providers are worried that state-run programs will dash employer interest in qualified plans, we are optimistic that the opposite may be true. Companies that cannot afford to make contributions on behalf of their employees may find the state-run plans to be an economical alternative, as none of these programs currently permits employer contributions. However, IRA contribution limits of $6,000 per employee ($7,000 for those over age 50) are well below a level that is meaningful to business owners and executives. Therefore, the concerns that often motivate a company owner to adopt a qualified plan—from providing a meaningful level of matching or profit-sharing contributions for its employees to the need for tax and retirement planning for the owner, him- or herself—will not be met through state-run programs. Additionally, being forced to set up a state-run program for employees may be the final impetus that a business owner needs to look into how he or she can benefit from offering a qualified plan to employees. Both the Bush and Obama administrations made

> this argument to bolster a federal payroll-withholding mandate, a mandate Congress refused to adopt.

<u>All I Want for Springtime Is Retirement Legislation</u>

Over the past several years, there have been several bills introduced in Congress to modify some of the more antiquated or onerous rules governing retirement plans, and to encourage some plan innovations (particularly multiple employer plans (MEPs)). The latest proposal is being negotiated as we speak by the members of the House Ways and Means Committee with strong bipartisan support (a phrase which has become almost oxymoronic in today's Washington DC). This proposal incorporates many of the retirement plan proposals from the past several years. The new bill, called The Setting Every Community Up for Retirement Enhancement Act ("SECURE" Act), is expected to (among other things):

- Simplify the safe harbor 401(k) rules;
- Permit the adoption of a new plan up to the tax return due date of the sponsor, as opposed to the current rule, which requires adoption by the end of the tax year;
- Increase the tax credit for small employers for starting up plans;
- Expand retiree access to lifetime income products provided by insurers for those participants who are concerned about outliving their retirement funds;
- Require that participant statements estimate the lifetime income that is generated by current balances, helping workers understand the need for accelerated savings;
- Permit enhanced automatic enrollment and escalation opportunities to help employees save appropriately for retirement;
- Allow participation in 401(k) plans by long-term part-time employees without negatively affecting the plan's nondiscrimination testing;
- Permit distributions of 403(b) plan custodial accounts when the plan terminates; and
- Increase the age for minimum required distributions from 70½ to 72.

Although the Ways & Means Committee did not add MEP simplification to the bill as part of its mark-up, a separate bill has been introduced in Congress to make those changes. That is a bit disappointing, as it would seem to be unlikely that two pension bills will pass in the same year. But, optimism remains!

> *Quick FBLC Thoughts*: It's hard enough to watch Congress's inability to legislate in accordance with one's own partisan beliefs, but it's much worse when Congress cannot enact legislation that has significant bipartisan support. It seems everyone agrees that these changes are good and needed, but the legislative stalemate has prevented them from being realized. It would be terrific if we were to see these changes this year. Keep your fingers and toes crossed.

<u>Geek-Out Time: The New Operational Compliance List Has Been Published</u>

As part of its retirement plan amendment structure (which has been significantly modified in the past several years), the IRS committed to publishing an annual list of changes with which retirement plans must comply, even if amendments are not yet required. This list, called the Operational Compliance List, has just been published for this year, and can be found at https://www.irs.gov/retirement-plans/operational-compliance-list.

Newly added to the list:

- The new hardship rules for 401(k) plans, including both the Bipartisan Budget Act changes and the proposed Treasury regulations. Note that the list reassures us that "Taxpayers may rely on the proposed regulations," which was missing from the regulations' preamble.
- Relief for victims of Hurricanes Florence and Michael.
- Extension of the IRC §401(a)(26) relief (yet again) for frozen plans.

It's POP Time!

Just a note to encourage you to attend our annual Pensions on Peachtree Conference. This is our 6th year of sponsoring the conference, and we've got to tell you: there is so much about this that makes it a special two days! There is the emphasis on the practical considerations raised by guidance that has been issued, the networking opportunities (including the relaxing barbecue at Ilene's house, to which everyone is invited), the quality of the speakers (if we do say so ourselves, including the recent addition of actuary Neff McGhie), the loveliness of Atlanta in the springtime, and the easy access to the speakers that enables you to get answers to questions that you have been carrying around for some time. We really work hard to make this a fun and unique meeting. We would love to see you there. Check out the agenda and registration here:

http://www.relius.net/Events/seminardetail.aspx?CID=27190.

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