BENEFITS INSIDER

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The ***Benefits Insider*** is a bimonthly member exclusive publication prepared for WEB members by the American Benefits Council ("the Council"), a premiere benefits advocacy organization based in Washington, DC. This newsletter provides the latest news and analysis on the most important benefits-related policy matters in Congress, executive branch agencies and the federal judiciary.

Please note: any views or opinions expressed in these stories represent the advocacy positions of the American Benefits Council and its membership. They do not necessarily reflect the views of WEB or its membership. To inquire about membership with the American Benefits Council, contact Deanna Johnson at (202) 289-6700 or djohnson@abcstaff.org.

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RECENT REGULATORY ACTIVITY

IRS Private Letter Ruling Suggests Flexibility for Creative Plan Designs

You Need to Know:

- A new IRS private letter ruling has approved a flexible benefit design allowing employer contributions to be allocated across multiple health, retirement, and education vehicles.
- The ruling suggests the IRS may be open to innovative plan designs, presenting an opportunity for future Council advocacy on behalf of plan sponsor flexibility.

A recent Internal Revenue Service (IRS) private letter ruling (PLR) has given one plan sponsor the green light to implement a flexible benefit design that allows employees to allocate employer contributions across a range of health, retirement and education vehicles, including 401(k) plans, health reimbursement arrangements (HRAs), health savings accounts (HSAs) and educational assistance programs. This innovative approach could potentially offer greater flexibility in benefit plan design.

The ruling comes with significant caveats. Most importantly, the PLR is specific to the employer who requested it and cannot be broadly applied to other employers. It also does not address questions regarding nondiscrimination testing, HSA comparability rules and potential ERISA implications.

Despite these limitations, the ruling indicates a potential openness on the part of the IRS to creative plan designs. This could pave the way for future advocacy efforts by the Council to promote greater flexibility for plan sponsors. As employers continue to explore new ways to offer competitive benefits, this ruling serves as a reminder of the importance of the regulatory landscape.

Council Testifies, Recommends Changes to Vermont Saves Program Rules

You Need to Know:

- The Council is working to ensure that state-run "automatic IRA" retirement programs do not present compliance challenges for employers that already sponsor retirement plans.
- As the Council noted in public and written testimony, the proposed regulations implementing Vermont's state program include problematic provisions that should be modified prior to finalization.

The *Vermont Saves* program, one of numerous state-based "auto-IRA" programs that aim to improve retirement coverage for employees by enrolling uncovered workers in public automatic IRAs, recently issued proposed regulations implementing the program. In public testimony before the state treasurer's office and in August 20 written comments, the American Benefits Council identified some problematic language in the proposed rules and recommended modifications to protect large plan sponsors.

The Council continues to track and, where necessary, engage on state-level auto-IRA initiatives, focusing on how state programs affect existing employer-sponsored retirement plans. The Council's focus has been on simplifying employer compliance and ensuring alignment with federal law.

On August 20, Grace F. Sullivan, an associate with Davis and Harman LLP, testified before the Vermont Office of the Treasurer on the Council's behalf, outlining the elements of the proposed rules that would pose difficulties for large employer plan sponsors.

Sullivan's testimony closely followed the text of the Council's formal written submission to Becky Wasserman, executive director of the *Vermont Saves* program. In written comments, the Council recommended three key changes to the proposed rules:

- **Use Form 5500 data to reduce the number of plan sponsors to whom the program sends registration notices.** We strongly support the effort to target the registration notice only to *covered* employers (e.g., excluding existing plan sponsors) who are required to facilitate the program. To reduce the instances in which a plan sponsor receives a registration notice from *Vermont Saves*, which directs plan sponsors to certify their exempt status with the program, we recommend that the program refrain from sending registration notices to those employers for whom the program locates a federal Form 5500.

- **Clarify that plan sponsors are not required to submit an employer certification if they do not receive a registration notice.** Although not entirely clear, the proposed rules appear to indicate that a plan sponsor only is required to submit an employer certification of exempt status if it receives a registration notice. However, to avoid confusion, this should be clarified.

- **Eliminate the option to require recertification.** As currently drafted, the proposed rules provide that a confirmation of a plan sponsor's exempt status will remain in effect as long as the employer continues to offer a plan. However, the proposed rules permit the program to require exempt plan sponsors to recertify their exempt status up to once per year. To the extent that the program requires plan sponsors to take any action to obtain an exemption from the program, we strongly support providing that the confirmation of exempt status will remain in effect as long as the employer continues to offer a plan. We recommend that the annual recertification provision be deleted from the rules in order to avoid imposing undue burdens on plan sponsors.

There is no timetable for finalization of the regulations.

Vermont has also joined the Colorado-led Partnership for a Dignified Retirement, adding its *VT Saves* program to the only existing interstate collaboration for state auto-IRA programs. Vermont follows Colorado, Maine and Delaware in this partnership, with Colorado seeking further collaborations, including discussions with Rhode Island.

State-Run Auto-IRA Programs Expand

The American Benefits Council continues to track and, where necessary, engage on state-level auto-IRA initiatives, focusing on how state programs affect existing employer-sponsored retirement plans. Generally, these programs require employers that do not sponsor retirement plans to enroll employees in an automatic payroll-deduction IRAs; but often have implications for companies that do sponsor a plan.

As more states explore mandatory retirement programs, the Council remains committed to simplifying employer compliance and ensuring alignment with federal qualifications. This involves urging state legislators to eliminate conflicts with federal laws affecting Council member companies.

Rhode Island Enacts New Auto-IRA Legislation

On June 26, Rhode Island Governor Daniel McKee signed into law State Senate Bill 2045, establishing the Rhode Island Secure Choice Retirement Savings Program. Rhode Island is now the 17th state to enact a mandated employer-facilitated retirement savings program, following Washington State's similar enactment in March, though seven of those states have not implemented their programs yet.

Under the new law, Rhode Island employers with five or more employees must participate unless they offer an employer-sponsored retirement plan, such as a 401(k). The statute does not clarify if plan sponsors must certify their exemption.

Recent Program Implementations

New Jersey and Delaware are also implementing their auto-IRA programs, becoming the 9th and 10th states to do so. New Jersey's "RetireReady NJ" opened to all employees June 30, 2024, with employer registration deadlines set for September 15 (for employers with 40 or more employees) and November 15 (for employers with 25-39 employees). Delaware's "EARNS" program started July 1, with a registration deadline of October 15.

Maine's MERIT program, launched in January 2024, has already passed its employer registration deadlines — employers with 15 or more covered employees were required to register by April 30, 2024, and employers with five to 14 covered employees were required to register by June 30, 2024.

Vermont Joins Interstate Partnership, Proposes Rules

Vermont has joined the Colorado-led Partnership for a Dignified Retirement, adding its VT Saves program to the only existing interstate collaboration for state auto-IRA programs. Vermont follows Colorado, Maine and Delaware in this partnership, with Colorado seeking further collaborations, including discussions with Rhode Island.

Vermont also recently posted proposed rules for its auto-IRA program. Public hearings on the proposal are scheduled for August 16 (in person) and August 20 (virtual), and the comment deadline is August 23. The Council has requested the opportunity to testify.

Legislative Activity

Hawaii's state auto IRA program continues to be under development. It has again failed to pass legislation adding automatic enrollment with an opt-out to its IRA program, which currently requires employees to opt-in. The stalled legislation also aimed to address ERISA preemption concerns, proposing exemptions for plan sponsors offering retirement plans to some employees.

In 2024, at least 14 states have considered auto-IRA legislation with employer mandates. So far, Washington and Rhode Island have enacted new laws. The Council also continues to monitor legislative activity in the District of Columbia, Massachusetts, Michigan and Pennsylvania, among others.

Auto-IRA programs that challenge ERISA preemption by interfering with employer plan designs or imposing additional state-level reporting requirements remain a significant concern. The Council continues to keep a close watch on these developments as states implement new programs and to communicate with the states when we identify potential concerns.

RECENT LEGISLATIVE ACTIVITY

Council Expresses Concerns on California Bill Threatening ERISA Preemption

You Need to Know:

- In conflict with ERISA preemption, California is considering legislation that would undermine the ability of self-insured plans to design pharmacy networks.
- The Council communicated to California policymakers our strong concerns with this legislation, emphasizing the importance of ERISA preemption.

In our continued effort to safeguard employers' rights to maintain high-quality health plans for their employees without the burden of state-level interference, the American Benefits Council **offered input on a California health care bill**, expressing concerns about its potential effect on self-insured health plans.

California Senate Bill 966 (S.B. 966) contains provisions related to pharmacy benefit managers (PBMs) that could conflict with ERISA's preemption clause. S.B. 966 aims to regulate PBMs in California in various ways and construes all PBM activities to be the "business of insurance" for purposes of the California insurance code, without regard to whether the activities are performed on behalf of, or with respect to, a self-funded ERISA group health plan. This conflicts with ERISA's preemption standard, which prohibits states from deeming self-funded plan activity to be insurance.

If this provision stands it could result in the imposition of state-level requirements on self-insured health plans. Key provisions of the bill that should be preempted by ERISA if applied to self-insured health plans include restrictions on PBMs' ability to administer certain network designs (e.g., no patient steering and cannot require the use of affiliated pharmacies) and a requirement that PBMs accept "any willing pharmacy" into their network.

With S.B. 966 under active consideration in the state legislature, the Council took this opportunity to submit comments, addressing the scope, value and beneficial policy impacts of ERISA preemption over the last 50 years. We also explained the ways in which the bill should be preempted by ERISA and asked the legislature to specifically exempt self-insured employer health plans from the scope of S.B. 966. The bill was amended during August in some respects (including with respect to the application of the bill to self-insured collectively-bargained

plans). However, our general concerns outlined above remain. Consideration of the bill in the California legislature is ongoing.

RECENT JUDICIAL ACTIVITY

New Class Action Lawsuit Filed Against Health Plan Fiduciaries, Suggesting Growing Trend

You Need to Know:

- A class-action lawsuit has been filed by health plan participants against the fiduciaries of their employer-sponsored group health plan, alleging a breach of ERISA fiduciary duties related to the plan's prescription drug benefits.
- This is the second case in what is expected to be a new line of class action litigation. This trend is important to monitor because of the novel arguments being raised and the likelihood of similar litigation being brought in the future against other employers.

On July 30, a class action lawsuit was filed in the U.S. District Court for the District of Minnesota by several participants in the Wells Fargo health plan against the company and several other plan fiduciaries, alleging violations of ERISA related to the health plan's prescription drug benefits. In many ways, this case is similar to the lawsuit filed earlier this year in *Lewandowski v. Johnson & Johnson et al* (filed in New Jersey district court).

In the most recent case, *Navarro, et al. v. Wells Fargo Co., et al.*, several participants assert that the fiduciaries of the company-sponsored health plan breached their fiduciary duties by allegedly mismanaging the prescription drug benefit under the plan, as evidenced by the high prices the company agreed to pay its PBM for certain drugs. Plaintiffs also allege that the company engaged in a prohibited transaction under ERISA by agreeing to pay the PBM "excessive" administrative fees. The complaint is lengthy and includes detailed explanations of both allegations. (As a reminder, at this early stage of litigation, the complaint merely contains allegations, not proven facts. The opportunity for factual development of the record comes later.)

Of note, one of the same law firms that brought the Lewandowski case is behind the *Navarro* case, as well. Also, the PBM at the center of the allegations appears to be the same in both cases. The fiduciary breach allegations are similar in both cases (with some new allegations in the *Navarro* case that the plan improperly steered participants toward mail-order benefits). But the allegation regarding excessive administrative fees is new in the *Navarro* litigation. Another important similarity is that in the two cases, both employer and employee contributions are held in an irrevocable non-grantor trust, which renders them plan assets under ERISA, and which appears to make the case more valuable from the plaintiffs' perspective.

As to what happens next in the *Navarro* case, the company will have a chance to respond in the coming weeks. As to the status of the *Lewandowski* case, the court is considering a motion to dismiss that was filed by Johnson & Johnson. Final briefing on that motion is due shortly and it is conceivable we will see a decision from the court on the motion to dismiss by year-end.

It is important for employers to pay attention to this new line of cases due to novel arguments being raised and the prospect for a substantial amount of additional, similar cases being filed that raise new potential fiduciary liability for plan sponsors.

Federal Court Invalidates FTC's Non-Compete Rule

You Need to Know:

- A federal district court has invalidated an FTC rule that would have banned most non-compete contracts.
- The ruling is consistent with the Council's advocacy on the matter, in which we urged the FTC to withdraw the rule at the proposal stage because it could interfere with existing benefit arrangements.

On August 20, the U.S. District Court for the Northern District of Texas struck down the Federal Trade Commission's (FTC) non-compete rule, which was slated to take effect September 4.

The American Benefits Council has expressed opposition to the rule and previously urged the agency to withdraw its proposal, saying "because the FTC's proposal is so broad, we are concerned that it could inadvertently interfere with existing benefit arrangements that are offered to former employees in accordance with applicable federal law."

The non-compete rule, as initially proposed, would have invalidated most existing non-compete clauses, with limited exceptions for certain "senior executives" whose agreements were made before September 4. It also would have banned all new non-compete clauses moving forward. The rule broadly defined non-compete clauses as any term or condition of employment that either penalizes a worker for seeking or accepting new employment or prevents them from operating a business after their current employment ends.

The district court concluded that the FTC overstepped its statutory authority in attempting to enact the rule and found that the non-compete rule violated the Administrative Procedure Act's standard against arbitrary and capricious rulemaking.

The FTC may still appeal the decision. Additionally, two other federal courts in Florida and Pennsylvania have issued conflicting judgments on the rule, setting up likely consideration by federal appeals courts and a possible future review by the U.S. Supreme Court.

The Council will continue to pursue strategies to weigh in on further developments.

Federal District Court Strikes Down Missouri Rule on Nonfinancial Investment Advice, Citing ERISA Preemption

You Need to Know:

- A federal district court struck down state rules mandating investors' consent for incorporating social or nonfinancial objectives into investment advice, emphasizing that the regulations conflict with ERISA's federal framework.

The U.S. District Court for the Western District of Missouri has invalidated state regulations requiring broker-dealers and investment advisers to obtain written consent from investors before incorporating nonfinancial objectives (such as social goals) into their investment recommendations. Central to the court's ruling was the finding that these Missouri rules are preempted by ERISA.

In its communications with policymakers in Congress and the executive branch, the American Benefits Council has consistently emphasized the need for clear and workable rules regarding the investment of plan assets, based on ERISA's federal framework.

This ruling, *SIFMA v. John R. Ashcroft, Secretary of State of Missouri; and Douglas M. Jacoby, Missouri Securities Commissioner*, is significant for plan sponsors as it reinforces ERISA's role in governing employee benefit plans and could affect future state-level attempts to regulate fiduciary conduct. The court's decision may serve as a precedent for challenging other state fiduciary and best interest rules that impose similar compliance requirements.

The Missouri rules, effective since July 2023, mandated that broker-dealers and advisers obtain signed consent forms from investors before considering any "social objective" or other nonfinancial goal in their advice. The required forms included language acknowledging that the investment strategy will not prioritize maximizing financial returns.

The Securities Industry and Financial Markets Association (SIFMA) challenged the rules on several grounds, including ERISA preemption. The court agreed, ruling that the Missouri regulations interfered with ERISA's comprehensive framework by imposing additional disclosure and recordkeeping requirements not mandated by federal law. The decision noted that the state rules created obstacles to ERISA-compliant fiduciary advice, further justifying their preemption.