WILL THE STATES STEP INTO THE BENEFITS VOID?

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State-Sponsored Retirement Plans

- In 2017, Congress issued two resolutions of disapproval under the Congressional Review Act of regulations promulgated by the Department of Labor that would have allowed states and cities to create mandatory private sector retirement savings plans not governed by ERISA.

- Nonetheless, Oregon, Illinois, and California have moved forward
State-Sponsored Retirement Plans - Oregon

- Already required for employers with more than 100 employees.
- [https://employer.oregonsaves.com](https://employer.oregonsaves.com)
State-Sponsored Retirement Plans - Illinois

- As of November, all employers with 500 or more employees are required to participate in the program.
- [https://www.ilsecurechoice.com/](https://www.ilsecurechoice.com/)
State-Sponsored Retirement Plans – California

- Pilot program started December 1
- Employer registration starts July 1, 2019
- [https://www.calsavers.com/](https://www.calsavers.com/)
State-Sponsored Retirement Plans

Other states have mandatory or voluntary *marketplaces*:

- New Jersey
- New York
- Washington
- Vermont
- Massachusetts
- Connecticut
- Maryland

Source: InvestmentNews
City Auto-IRA Programs

**New York City**-run auto-IRA proposal
  • Public Advocate-led
  • Auto-enroll employees at age 18, regardless of hours worked

**Seattle 2017 ordinance** to establish a city-run program for private-sector workers
  • Eligible if at least 18 years old
ERISA Advisory Committee v. Read (D. Or.)

- Suit alleged that ERISA preempted requirement that employers sponsoring pension plans periodically register with the State to be exempt from participating in OregonSaves.
  - Registration requirement constitutes state-mandated reporting of plans preempted by ERISA
  - Oregon: Employer, not the plan, is required to report and the burden imposed on employer is minimal
  - Parties agreed that employers could comply by informing Oregon that they are ERIC members; Oregon could verify membership with ERIC.
  - If 5500 modified to require a plan sponsor to provide information about controlled groups which meets Oregon’s needs, registration requirement rescinded.
California Secure Choice Retirement Savings Trust Act

- CalSavers is an individual retirement account payroll deduction saving program for employees.
- CalSavers applies to California non-governmental employers that do not offer a retirement plan or automatic enrollment payroll deduction IRA and have five or more employees.
- IRAs established under CalSavers are funded through voluntary employee payroll deductions.
- Employer contributions are not allowed to the IRAs under CalSavers.
- CalSavers provides that participating employers shall not be considered to be fiduciaries with respect to CalSavers and shall have no authority, control or responsibility for the design, administration, or operation of the program.
HJTA litigation against CalSavers

- Howard Jarvis Taxpayer Association (“HJTA”) sued the California Secure Choice Retirement Savings Program and John Chiang, the State Treasurer, as Chair of the Board
- HJTA asserts federal jurisdiction under ERISA
- HJTA requests a declaratory judgment under ERISA Section 502(a)(3)
- Plaintiffs seek a ruling that the CalSavers legislation is preempted by ERISA on the basis that CalSavers establishes an “employee benefit plan” under ERISA
- HJTA asserts that it is a “putative” fiduciary under ERISA as an employer that would be required to provide a CalSavers payroll deduction IRA in the future
HJTA litigation against CalSavers

- Under CalSavers, subject employees are automatically enrolled but may opt out
- Under CalSavers, the State has no liability for the payment of retirement benefits of employees enrolled under the program
- Plaintiffs assert that putative participants and beneficiaries under CalSavers will suffer the loss of nationally uniform protections under ERISA
- Plaintiffs cite the 2017 Congressional disapproval, under the Congressional Review Act, of the Obama administration DOL regulation relating to Savings Arrangements Established by States for Non-Governmental Employees (former 29 C.F.R. § 2510.3-2(h))
HJTA litigation against CalSavers

- Defendants have filed a motion to dismiss that is fully briefed and under submission to the court.
- Defendants assert plaintiffs lack Article III constitutional standing because they lack the required “injury in fact” to trigger a case or controversy required for federal court subject matter jurisdiction.
- The injury-in-fact requirement consists of an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.
- The CalSavers program was not open for enrollment at the time the complaint was filed, when existence of federal jurisdiction is generally determined.
- Defendants also assert that the claims are not constitutionally ripe for review by the court.
HJTA litigation against CalSavers

- Defendants assert plaintiffs lack statutory standing to bring an action under ERISA section 502(a)(3) as the action must be brought by a participant, beneficiary, or fiduciary, as those terms are defined by ERISA.

- Defendants assert the CalSavers program and the IRAs established under it are not ERISA plans.
  - IRAs are not subject to ERISA coverage.
  - CalSavers program fits within the “safe harbor” under the DOL 1975 regulation on payroll deduction IRAs (29 C.F.R. § 2510.3-2(d)) and Interpretive Bulletin 99-1.
  - An ERISA plan must be “established or maintained” by an employer and the CalSavers program is a state-administered program.

- Without an ERISA plan, there is no preemption under ERISA § 514(a) as ERISA only preempts state laws “insofar as they may now or hereafter relate to any employee benefit plan” as defined by ERISA.
Regulation of Pharmacy Benefit Manager Practices

- *Pharmaceutical Care Management Association v. Gerhart* (8th Cir.)
  - Iowa issued imposed restrictions on PBMs operating in Iowa
  - Regulations interfered with PBMs’ operations
    - affected PBMs’ discretion to negotiate and establish prices with retail pharmacies
    - required PBMs to report proprietary information on their pricing methodologies
    - interfered with claims-processing procedures
  - 8th Circuit held the Iowa statute impermissibly interferes with the PBM function of ERISA plans operating in Iowa
  - Similar result reached in Arkansas (*PCMA v. Leslie Rutledge*, No. 4:15-cv-00510 BSM, E.D. Ark.)
  - Writ of certiorari filed with U.S. Supreme Court
Nevada State Law “Fiduciary Rule”

- Nevada state law regulates “financial planners”
- Nevada SB 383 was signed into law on June 2, 2017, and became effective on July 1, 2017.
- The statute removed the statutory exemptions that precluded broker-dealers, broker-dealer sales representatives, and most investment advisers licensed under state or federal law from being classified as a “financial planner.”
- The statute provides that “A broker-dealer, sales representative, investment adviser or representative of an investment adviser shall not violate the fiduciary duty toward a client imposed by NRS 628A.020.”
Nevada State Law “Fiduciary Rule”

- NRS 628A.020 provides:
  - A financial planner has the duty of a fiduciary toward a client. A financial planner shall disclose to a client, at the time advice is given, any gain the financial planner may receive, such as profit or commission, if the advice is followed. A financial planner shall make diligent inquiry of each client to ascertain initially, and keep currently informed concerning, the client’s financial circumstances and obligations and the client’s present and anticipated obligations to and goals for his or her family.
Nevada State Law “Fiduciary Rule”

- NRS 628A.030 Liability of financial planner.
  - 1. If loss results from following a financial planner’s advice under any of the circumstances listed in subsection 2, the client may recover from the financial planner in a civil action the amount of the economic loss and all costs of litigation and attorney’s fees.
  - 2. The circumstances giving rise to liability of a financial planner are that the financial planner:
    - (a) Violated any element of his or her fiduciary duty;
    - (b) Was grossly negligent in selecting the course of action advised, in the light of all the client’s circumstances known to the financial planner; or
    - (c) Violated any law of this State in recommending the investment or service.
Nevada State Law “Fiduciary Rule”

- On January 18, 2019, Securities Division of Nevada Secretary of State issued draft regulations under the new statute
- Draft Regulation:
  - Further defines when the fiduciary duty applies to broker dealers, sales representatives, investment advisers and employees of investment advisers
  - Provides an Episodic Fiduciary Duty Exemption and other exemptions
  - Provides detailed definition of “Investment Advice”
  - Requires disclosure of “gain” at the time advice is given
  - Provides detailed definition of “breaches of fiduciary duty”
  - Provides broker dealers and sales representatives bear the burden of proving an exemption applies
Does ERISA Preempt Nevada “Fiduciary Rule”

- Is the Nevada state law “Fiduciary Rule” preempted by ERISA to the extent it seeks to regulate financial advisers that provide services to a plan governed by ERISA, to the plan’s fiduciaries and/or to the plan’s participants or beneficiaries?
  - Express preemption under ERISA §514(a)
    - Application of savings clause as to state securities law
  - Conflict preemption with ERISA's exclusive remedial scheme set forth in ERISA § 502(a)
    - Complete preemption allowing a state-law claim that is originally filed in a state court to be removed to federal court
  - Time (and litigation) will tell?
State Paid Leave Laws

- Employer Concerns
  - Compliance/Preemption
  - Classification of full/part-time employees
  - Definitions
  - Waiting periods
State Paid Leave Laws

Colorado –
- **Colorado HB 1044** - Tax credit for employers with Paid Family and Medical Leave Policy. A Paid Family and Medical Leave bill is currently being crafted by the new democratic majority leadership - room for cooperation and advocacy in forming this bill.

Illinois –
- **Illinois SB 179** - Requires private employers with 50 or more employees to provide 6 weeks of paid family leave to care for a child or close family member.

New York –
- **New York AB 3975** - Makes it an unlawful employment practice for employers to provide employees over the age of 45 with one day of paid leave every 10 years to get a colonoscopy.
- **New York AB 2385** - Establishes unpaid leave for victims of domestic abuse.

NY SB 1353 - Requires employees to provide employees with 30 days of paid family and medical leave. Establish leave for employees to attend their children’s school events and activities.

California –
- **California AB 775** and **California SB 114** express intent to increase PFML wage replacement to 100% of employee wages during a period of paid family or medical leave.

New Jersey –
- **New Jersey AB 4317** - Makes changes to the current PFML Program. **New Jersey AB 4709** - Establishes leave for employees to attend their children’s school events and activities.
- **New Jersey SB 490** - Establishes leave for employees to attend their children’s school events and activities.
- **New Jersey AB 4709** - Makes changes to the current PFML Program.

Massachusetts –
- **Massachusetts HD 1030** - Extends the definition of parental leave to include newly adopted children.
- **Massachusetts HD 1156** and **Massachusetts HD 1157** - Establishes the right of employees to be compensated for unused PSL hours.

Massachusetts HD 1084 - Establishes employee leave to attend family court hearings and proceedings.
- **Massachusetts HD 1007** - Establishes employee bereavement leave.
- **Massachusetts HD 1074** - Establishes voter leave.

Connecticut –
- **Connecticut HB 5993** - Creates a Paid Family and Medical Leave Program with a social insurance model.
- **Connecticut HB 5993** - Tax credit for employers with Paid Family and Medical Leave Policy.
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Connecticut SB 621 - Creates a sick leave reserve fund for use during unpaid sick leave.

Delaware –
- **Delaware**

Minnesota –
- **Minnesota HB 139** and **Minnesota HB 206** - Propose the creation of a PFML program with a social insurance model.
- **Minnesota HB 139** and **Minnesota HB 206** - Propose changes to PSL standards.
- **Minnesota HB 139** - Establishes earned sick and safe time standards.
- **District of Columbia B 25** - Establishes requirements for voter leave.

District of Columbia, like Washington State and Massachusetts, passed a Paid Family and Medical Leave Program which is currently in regulatory development.
- **NY Model 488** - Authorizes the use of leave for employee caregiving time - bill unavailable, session begins 2/4/19.

New Mexico –
- **New Mexico HB 10 and New Mexico HB 475** - Create a Paid Family and Medical Leave Program using a social insurance model.

Virginia –
- **Virginia SB 1155** and **Virginia HB 254** - Create a tax benefit for companies providing parental leave.
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- **Virginia SB 1155** and **Virginia HB 254** - Propose different Paid family and Medical Leave Programs. Washington D.C. –

Hawaii –
- **Hawaii HB 1015** - Proposes changes to the definition of parental leave, including for non-biological parents. **Hawaii SB 358** and **Hawaii SB 348** extend the deadline for a state family leave sunrise analysis from September 2019 to December 2019.

**Hawaii SB 1596** - Establishes unpaid leave for victims of domestic abuse.

**Hawaii SB 179** - Changes the standards for PSL accrual and use to include family illnesses.

**Hawaii HB 1308** - Extends Family leave to include care of an employee's grandparents.

**Maine**
- **Maine LD 64** - Creates a Paid Family and Medical Leave Program with a social insurance model.

**New York AB 3975** - Required employers with 3 or more employees to provide paid sick leave.

**Nevada**
- **Washington**
- **New York AB 3975** - Establishes a tax credit for employers providing their employees with paid sick leave benefits.

**Oregon SB 831** - Commissions a study on state PFML programs.
State Paid Leave Laws – Priority States

Massachusetts –
- Massachusetts HD 729 – Extends the definition of parental leave to included newly adopted children.
- Massachusetts HD 1446 and Massachusetts HD 2100 – Establishes the right of employees to be compensated for unused PSL hours.
- Massachusetts HD 2157 – Makes changes to current PSL standards.
- Massachusetts HD 2680 – Establishes employee leave to attend family court hearings and proceedings.
- Massachusetts SD 790 – Establishes employee bereavement leave.
- Massachusetts SD 1074 – Establishes voter leave.
- Massachusetts is currently in regulatory development of its proposed PFML Program which was passed last year.

Colorado –
- Colorado HB 1058 – Tax credit for employers with Paid Family and Medical Leave Policy
- A Paid Family and Medical Leave bill is currently being crafted.

Minnesota –
- Minnesota HB 5 and Minnesota HB 256 – Propose the creation of a PFML program with a social insurance model.
- Minnesota HB 11 and Minnesota HB 29 – Propose changes to PSL standards.
- Minnesota SB 528 – Establishes earned sick and safe time standards.
State Paid Leave Laws – Priority States

Connecticut –

- [Connecticut HB 5003](#) – Creates a Paid Family and Medical Leave Program with a social insurance model.
- [Connecticut HB 5025](#) – Tax credit for employers with Paid Family and Medical Leave Policy.
- [Connecticut HB 5407](#) – Tax credit for employers with Paid Family and Medical Leave Policy.
- [Connecticut HB 5638](#) – Creates a Paid Family and Medical Leave Program with a social insurance model.
- [Connecticut HB 5735](#) - Tax credit for employers with Paid Family and Medical Leave Policy.
- [Connecticut HB 5736](#) - Creates a Paid Family and Medical Leave Program with a social insurance model.
- [Connecticut HB 5882](#) - Creates a Paid Family and Medical Leave Program with a social insurance model.
- [Connecticut HB 6023](#) - Tax credit for employers with Paid Family and Medical Leave Policy.
- [Connecticut SB 1](#) and [Connecticut SB 159](#) - Create a Paid Family and Medical Leave Program with a social insurance model.
- [Connecticut SB 358](#) – Establishes voter leave.
- [Connecticut SB 613](#) – Creates a sick leave reserve fund for use during unpaid sick leave.
State Paid Leave Laws – Priority States

New Jersey –

- [New Jersey AB 136](#) – Makes changes to the current PFML Program.
- [New Jersey AB 370](#) – Establishes leave for employees to attend their children’s school events and activities.
- [New Jersey AB 381](#) – Establishes leave for employees to attend their children’s school events and activities.
- [New Jersey AB 490](#) – Makes changes to the current PSL requirements.
- [New Jersey AB 739](#) – Preemption of local PSL laws and regulations.
- [New Jersey AB 3975](#) – Makes changes to the current PFML Program
- [New Jersey AB 4759](#) – Requires paid voter leave.
- [New Jersey SB 535](#) – Preemption of local PSL laws and regulations.
- [New Jersey SB 2528](#) – Makes changes to the current PFML Program.
- [New Jersey SB 3385](#) – Requires paid voter leave.
State Paid Leave Laws – Priority States

Maine –
- **Maine LD 69** – Creates a Paid Family and Medical Leave Program with a social insurance model
- **Maine LD 369** – Required employers with 5 or more employees to provide paid sick leave

Illinois –
- **Illinois HB 9** – Requires private employers with 50 or more employees to provide 6 weeks of paid family leave to care for a child or close family member.
Questions?