STATE AUTOMATIC ENROLLMENT IRAS AFTER THE TRUMP ELECTION: ARE THEY PREEMPTED BY ERISA?

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In recent years, a number of states have sought to close the retirement savings funding gap by enacting legislation mandating that employers that do not sponsor a voluntary pension plan for their employees automatically enroll their employees in a state-administered IRA program. This Article focuses on the most serious legal challenge these programs face: ERISA preemption.

The Article begins by providing an overview of the state automatic enrollment IRA programs. It then discusses a regulatory safe harbor created for these programs in 2016 and disapproved under the Congressional Review Act in 2018. It then turns to the question whether, in the absence of the safe harbor, state automatic enrollment IRAs are preempted by ERISA. In addressing this question, it considers two subsidiary issues: (1) whether state automatic enrollment IRA programs are employee benefit plans for purposes of ERISA and thus preempted by ERISA, and (2) even if state automatic enrollment IRA programs are not employee benefit plans for purposes of ERISA, whether the state law creating these programs nevertheless relates to other employee benefit plans so as to be preempted by ERISA. Finally, the Article considers the merits of two complaints that have been filed challenging state automatic enrollment IRA programs.

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I. Introduction

The United States faces a serious retirement savings funding gap.[1] Although estimates of the magnitude of this problem vary,[2] there is virtually uniform agreement that retirement savings in the U.S. are inadequate,[3] and that people of color face particularly severe challenges in preparing for retirement.[4] In recent years, a number of states have sought to close this gap by enacting legislation mandating that employers who do not sponsor a voluntary pension plan for their employees automatically enroll their employees in a state-administered Individual Retirement Account ("IRA") program.[5] This Article focuses on the most serious legal challenge these programs face: ERISA preemption. Section 514(a) of ERISA (the Employee Retirement Income Security Act) preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan."[6] Whether the state laws mandating the automatic enrollment IRAs are preempted by ERISA has been a hotly contested issue.

1. *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-419, RETIREMENT SECURITY: MOST HOUSEHOLDS APPROACHING RETIREMENT HAVE LOW SAVINGS 7 (2015) (finding, among other things, that about half of households age fifty-five and older have no retirement savings).

2. *See, e.g.*, ALICIA H. MUNNELL ET AL., NATIONAL RETIREMENT RISK INDEX SHOWS MODEST IMPROVEMENT IN 2016, CENT. FOR RET. RESEARCH AT BOS COLL. 5 (2018) (discussing the National Retirement Risk Index which shows that 50% of working households are "at risk" of being unable to maintain their present standard of living in retirement); Jack VanDerhei, *Auto-IRAs: How Much Would They Increase the Probability of "Successful" Retirements and Decrease Retirement Deficits? Preliminary Evidence from EBRI's Retirement Security Projection Model*, 36 EMP. BENEFIT RES. INS. NOTES, 11, 19–20 (2015) (estimating retirement savings shortfalls in present value (in 2014 dollars) at age sixty-five of $36,387 (per individual) for those ages sixty to sixty-four and $54,120 for those ages thirty-five to thirty-nine for an estimated aggregate national retirement deficit of $4.13 trillion for all U.S. households where head of household is between thirty-five and sixty-four years of age).

3. *See* Daniel Shaviro, *Multiple Myopias, Multiple Selves, and the Under-Saving Problem*, 47 CONN. L. REV. 1215 (2015) (discussing the reasons why individuals "under-save.").

4. *See, e.g.*, NARI RHEE, RACE AND RETIREMENT INSECURITY IN THE UNITED STATES, NAT. INST. ON RET. SEC. (2013), https://www.nirsonline.org/reports/race-and-retirement-insecurity-in-the-united-states.

5. California Secure Choice Retirement Savings Trust Act, CAL. GOV'T CODE §§ 100000–100044 (West 2018); Connecticut Retirement Security Exchange, CONN. GEN. STAT. § 31–418 (2018); Illinois Secure Choice Savings Program Act, 820 ILL. COMP. STAT. 80/1–95 (2018); Maryland Small Business Retirement Savings Program and Trust Act, MD. CODE ANN., LAB & EMPL. §§ 12-201 to -502 (West 2018); OR. REV. STAT. § 178.215 (2018).

6. 29 U.S.C. § 1144(a) (2018).

Recognizing the vulnerability of these programs to an ERISA preemption challenge, the U.S. Department of Labor ("DOL") issued a final regulation, effective October 31, 2016, which provided that a state automatic enrollment IRA program does not constitute an employee benefit plan for purposes of ERISA if it satisfies eleven separate requirements.[7] The regulation was relatively short-lived. Shortly after the Trump election, Representative Tim Walberg introduced House Joint Resolution 66 disapproving the regulation.[8] The House Joint Resolution was later passed by both the House and the Senate and ultimately signed into law by President Trump on May 17, 2017.[9] The Department of Labor removed the regulation from the Code of Federal Regulations on June 28, 2017 "[b]ecause the resolution[] invalidated the final rule[]."[10]

This Article considers whether state automatic enrollment IRA programs are preempted by ERISA. Section II provides an overview of the state automatic enrollment IRA programs. Section III discusses the regulatory safe harbor and its subsequent disapproval under the Congressional Review Act. Section IV analyzes the question of whether, in the absence of the safe harbor, state automatic enrollment IRAs are preempted by ERISA. In addressing this question, Section IV also discusses two subsidiary issues: (1) whether state automatic enrollment IRA programs are employee benefit plans for purposes of ERISA and thus preempted by ERISA, and (2) even if state automatic enrollment IRA programs are not employee benefit plans for purposes of ERISA, whether the state laws creating these programs nevertheless relate to other employee benefit plans so as to be preempted by ERISA. Finally, Section V briefly considers the merits of two complaints that have been filed challenging state automatic enrollment IRA programs.

7. Savings Arrangements Established by States for Non-Governmental Employees, 81 Fed. Reg. 59,464 (Aug. 30, 2016).
8. H.J. Res. 66, 115th Cong. (2017).
9. H.J. Res. 66, Pub. L. No. 115-35, 131 Stat. 848 (2017).
10. Definition of Employee Benefit Plan Under ERISA, 82 Fed. Reg. 29,236 (June 28, 2017).

II. Overview of State Automatic Enrollment IRA Programs

Currently, five states—California,[11] Connecticut,[12] Illinois,[13] Maryland,[14] and Oregon[15]—have enacted legislation creating state automatic enrollment IRA programs.[16] A number of other states are also considering establishing automatic enrollment IRA programs.[17] Although the state programs differ in many of their details, they share some similar purposes and provisions.[18]

First, and most importantly, all of the programs are intended to provide a workplace retirement savings program for individuals who would not otherwise have access to such a program. Because the programs are only intended to cover workers who would not otherwise have access to a workplace retirement savings program, they do not cover employers that offer their employees a retirement plan.[19] Thus,

11. California Secure Choice Retirement Savings Trust Act, CAL. GOV'T CODE §§ 100000–100044 (West 2018).

12. Connecticut Retirement Security Exchange, CONN. GEN. STAT. § 31–418–427 (2018).

13. Illinois Secure Choice Savings Program Act, 820 ILL. COMP. STAT. §§ 80/1–80/95 (2018).

14. Maryland Small Business Retirement Savings Program and Trust Act, MD. CODE ANN., LAB & EMPL. §§ 12-201 to -502 (West 2018).

15. OR. REV. STAT. §§ 178.200-178.245 (2018).

16. Two other states, New Jersey and Washington, have enacted legislation to establish a marketplace to provide for a voluntary program. *See* New Jersey Small Business Retirement Marketplace Act, N.J. STAT. ANN. § 43:23 (West, 2018); Washington Small Business Retirement Marketplace Act, WASH. REV. CODE ANN. § 43.330.730–750 (West 2018).

17. *See, e.g.*, Missouri Secure Choice Savings Program Act, HB 1672, 99th Gen. Assemb., 2d. Reg. Sess. (Mo. 2018). In the spring of 2018, New York Governor Andrew Cuomo signed a budget bill that includes a voluntary state IRA program for private-sector employees. *See also* James T. Madore, *NY private-sector employees to receive retirement savings plans* NEWSDAY (April 2, 2018, 8:00PM), https://www.newsday.com/business/private-retirement-savings-new-york-1.17828511. This program differs fundamentally from the other state automatic enrollment IRA programs because it is voluntary—employers may decide whether to offer the plan to their employees.

18. *See Comparison of Retirement Plan Design Features, By State: California, Illinois, Oregon, and Washington*, GEO. U. MCCOURT SCH. OF PUB. POL'Y CTR. FOR RETIREMENT INITIATIVES (Sept. 30, 2015), https://cri.georgetown.edu/wp-content/uploads/2015/11/CRI-State_Comparison-Chart-FINALtoweb11-11-15.pdf (providing for a more detailed comparison of the plan design features).

19. *See, e.g.*, CONN. GEN. STAT. § 31-422(a)(4) (2018) (providing that qualified employer is exempt if it otherwise maintains a retirement plan or retirement arrangement); 820 ILL. COMP. STAT. 80/5 (2018) (limiting definition of employer to person or entity that has not offered qualified retirement plan in the preceding two years); MD. CODE ANN., LAB. & EMPL. § 12-101(d)(2)(v) (West 2018) (excluding from

for example, the California law provides that "[a]n employer that provides an employer-sponsored retirement plan . . . shall be exempt from the requirements of the California Secure Choice Retirement Savings Program, if the plan . . . qualifies for favorable income tax treatment under the Federal Internal Revenue Code."[20]

Second, all of the programs are designed as automatic enrollment programs in order to maximize voluntary participation. A host of studies show that participation rates are higher in automatic enrollment 401(k) plans than in 401(k) plans in which workers must affirmatively opt in to participate.[21] Drawing on this insight from behavioral economics, all of the programs are structured so that workers are automatically enrolled and must affirmatively opt out of participation if they do not want to participate in the program.[22] For example, California's statute provides that "[e]ach eligible employee shall be enrolled in the program unless the employee elects not to participate in the program."[23]

Because all of the programs provide for automatic enrollment, they must necessarily provide for a default contribution rate. The programs differ in the default contribution rate or how the rate is to be established, or both. Connecticut's statute sets the default contribution rate at 3% of compensation.[24] California's statute also sets the default

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definition of covered employer "an employer that currently offers an employer-offered savings arrangement that was established separately from the requirements of this title"); OR. REV. STAT. § 178.215(8) (2018) (requiring Oregon Retirement Savings Board to establish process for employer to obtain exemption if employer offers a qualified retirement plan).

20. CAL. GOV'T CODE § 100032(g)(1) (West 2018).

21. *See* Kathryn L. Moore, *Closing the Retirement Savings Gap: Are State Automatic Enrollment IRAs the Answer?*, 24 GEO. MASON L. REV. 35, 64-68 (2016) [hereinafter Moore] (discussing studies).

22. *See, e.g.*, CONN. GEN. STAT. § 31-419(a)(4) (2018) (directing the Connecticut Retirement Security Authority board of directors to establish "the process by which a participant may opt out of the program by electing a contribution level of zero . . . ."); 820 ILL. COMP. STAT. § 80/60(b) (2018) (providing that "Employers shall automatically enroll in the Program each of their employees who has not opted out of participation in the Program . . . ."); MD. CODE ANN., LAB. & EMPL. § 12-205(d)(1) (2018) (directing the Board to "establish procedures for: a covered employee to opt out of participation in the Program . . . ."); OR. REV. STAT. § 178.215 (2018) (directing the Oregon Retirement Savings Board to adopt "procedures for automatic enrollment of employees and for employees to opt out of the plan.").

23. CAL. GOV'T CODE § 100032(f)(1) (West 2018).

24. CONN. GEN. STAT. § 31-416(3)(B) (2018).

contribution rate at 3% of wages, but authorizes the California Investment Board to adjust the default rate to between 2% and 5%.[25] Illinois' law charges the Illinois Board with selecting a default contribution rate between 3% and 6% of wages,[26] while both Maryland's and Oregon's laws task the implementing boards with establishing a default contribution rate without such constraints.[27] Currently, the Maryland Board has not yet established a default contribution rate,[28] while the Oregon Board has set the initial contribution rate at 5% with auto-escalation at the rate of an additional 1% each year until a maximum contribution of 10% is reached.[29]

Just as each program must necessarily provide for a default contribution rate, all of the programs must also establish a default investment. Again, the programs differ in the selection or method of selecting the default investment. Connecticut's statute provides for a default investment in "an age-appropriate target date fund that most closely matches the participant's normal retirement age, rotationally assigned by the program."[30] Illinois' statute also provides for "a life-cycle fund with a target date based upon the age of the enrollee" as the default investment option.[31] Unlike Connecticut's law, however, Illinois' law authorizes the Illinois Board to establish a "secure return fund whose primary objective is the preservation of the safety of principal and the provision of a stable and low-risk rate of return,"[32] and provides that if the Board elects to establish such a fund, the Board must determine whether that fund should replace the life-cycle or target date fund as the default investment option.[33]

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25. CAL. GOV'T CODE § 100032(i), (j) (West 2018). The regulations provide for a default initial contribution rate of 5% with automatic escalation of 1% each year until it reaches 8%. CAL. CODE REGS, tit 10, chp. 15, §10005(a)(1) & (2) (Nov. 19, 2018).

26. 820 ILL. COMP. STAT. § 80/30(o-5) (2018). The default contribution was set at 5%. *See Contributions*, ILL. SECURE CHOICE, https://saver.ilsecurechoice.com/home/savers/contributions.html (last visited Apr. 1, 2019).

27. MD. CODE ANN. LAB. & EMPL. § 12-403(f) (West 2018); OR. REV. STAT. § 178.210(1)(d) (2018).

28. *Cf. Maryland$aves – Your bridge to a secure financial future*, MARYLAND$AVES, http://www.marylandsaves.org (last visited Apr. 1, 2019) [hereinafter *Maryland$aves*] (stating that the "Maryland Program will arrange for a selection of privately-managed investment options, with a default option if an employee doesn't want to choose.").

29. OR. ADMIN. R. 170-080-0030(1)(a) (2018).

30. CONN. GEN. STAT. § 31-423(b) (2018).

31. 820 ILL. COMP. STAT. § 80/45(a) (2018).

32. *Id.* at § 80/45(b)(3).

33. *Id.* at § 80/45(c).

Maryland's law charges the Maryland Board with evaluating and establishing a range of investment options, including a default investment.[34] Oregon's law gives the Oregon Board the power to "direct the investment of the funds consistent with the investment restrictions established by the board."[35] This legislation requires the Oregon Board to exercise prudence in establishing investment restrictions that are consistent with the objectives of the plan,[36] and prohibits guaranteeing any rate of return or interest rate.[37] The Oregon Board's regulations provide for a default investment of the first $1,000 of contributions in a capital preservation investment with the remainder invested in a target date fund.[38] California's statute directs the California Board to "establish managed accounts invested in United States Treasuries, myRAs, or similar investments" for up to the first three years following implementation of the program.[39] During this three-year period, the California Board is directed to "develop and implement an investment policy that defines the program's investment objectives" and permits the objectives to be met in a prudent manner.[40]

Some, but not all, of the programs exclude small employers from coverage. Specifically, the California and Connecticut programs exclude employers with fewer than five employees,[41] while the Illinois program excludes employers with fewer than twenty-five employees.[42] In contrast, the Maryland and Oregon programs do not exclude small employers;[43] although the Oregon program provides for delayed implementation with larger employers subject to the mandate sooner than smaller employers.[44]

Generally, the programs require that the state agency implementing the program design employee information packets about the pro-

34. MD. CODE ANN., LAB. & EMPL. § 12-204(a)(8) (West 2018).
35. OR. REV. STAT. § 178.205(2)(c) (2018).
36. *Id.*
37. OR. REV. STAT. § 178.210(2) (2018).
38. OR. ADMIN. R. 170-080-0030(1)(a)(C) (2018).
39. CAL. GOV'T CODE § 100002(e)(1)(A) (West 2018).
40. CAL. GOV'T CODE § 100002(e)(2)(A). The California Board adopted the Investment Policy Statement on May 21, 2018. The statement is available at https://www.treasurer.ca.gov/sub/regulations/investments-policy-statement.pdf.
41. CAL. GOV'T CODE § 100000(d)(1); CONN. GEN. STAT. § 31-416(7) (West 2018).
42. 820 ILL. COMP. STAT. § 80/5 (2018).
43. MD. CODE ANN., LAB. & EMPL. § 12-101(d)(2) (West 2018); OR. ADMIN. R. 170-080-010(2)(k).
44. OR. ADMIN. R. 170-080-0015(1)(b) (2018).

gram, including information on employees' rights and program features. The packets are to be disseminated directly to employees[45] or to employers who are required to distribute the information to employees.[46]

California was the first state to enact automatic enrollment IRA legislation.[47] Specifically, the California Secure Choice Retirement Savings Trust Act was signed into law in September 2012.[48] The California program, however, was not immediately effective. Instead, the California law established the California Secure Choice Retirement Savings Investment Board[49] and authorized a comprehensive feasibility study to determine whether an automatic enrollment IRA program was feasible in California.[50] The market analysis and feasibility study, which found the program to be "feasible, sustainable, and legally permissible,"[51] was issued on January 31, 2016.[52] On September 29, 2016, legislation approved the program and required the California Board to begin developing the program as of January 1, 2017.[53] Regulations were adopted in November 2018,[54] and the first employers registered in a pilot phase of the program in November 2018.[55]

45. CAL. CODE REGS. tit. 10, chp. 15, § 10003(c) (West 2018).
46. *See, e.g.*, CONN. GEN. STAT. § 31-419 (2018); 820 ILL. COMP. STAT. § 80/55 (2018); MD. CODE ANN., LAB. & EMPL. § 12-205 (West 2018); OR. REV. STAT. § 178.215(9) (2018).
47. Kathryn L. Moore, *A Closer Look at the IRAs in State Automatic Enrollment IRA Programs*, 23 CONN. INS. L. J. 217, 219 (2016).
48. California Secure Choice Retirement Savings Trust Act, CAL. GOV'T CODE §§ 100000–100044 (West 2018).
49. CAL. GOV'T CODE § 100002.
50. OVERTURE FIN. LLC., CALIFORNIA SECURE CHOICE MARKET ANALYSIS, FEASIBILITY, STUDY, AND PROGRAM DESIGN CONSULTATION SERVICES 5 (Mar. 17, 2016), https://www.treasurer.ca.gov/scib/report.pdf [hereinafter OVERTURE FIN. REPORT].
51. *See* Letter from Cal. Secure Choice Ret. Sav. Inv. Bd., to Hon. Kevin de Leon, President pro Tempore of Cal. State Senate (Mar. 28, 2016), http://www.treasurer.ca.gov/scib/recommendations/senate.pdf.
52. *See* OVERTURE FIN. REPORT, *supra* note 50.
53. CAL. GOV'T CODE § 100046 (West 2018).
54. CAL. CODE REGS. tit. 10, chp. 15, (West 2018), available at https://www.treasurer.ca.gov/sub/regulations/amended-regs-20181119.pdf.
55. CalSavers Retirement Savings Program, Making Workplace Retirement Savings Possible for 7.5 Million Californias, available at https://www.treasurer.ca.gov/sub/fact.pdf.

In January 2015, Illinois became the first state to fully enact legislation establishing a state automatic enrollment IRA program, the Illinois Secure Choice Savings Program ("Illinois Secure Choice").[56] Illinois Secure Choice was initially slated to go into effect on July 1, 2017.[57] On June 30, 2017, the Illinois legislature amended the law to provide for enrollment of employees to begin in 2018.[58] On May 15, 2018, the pilot phase of Illinois Secure Choice went into effect with ten to fifteen employers volunteering to register at that time.[59] The first phase of the full program went into effect in November 2018 with employers with 500 or more employees enrolling in the program at that time.[60] The second wave for employers with 100 to 499 employees and the third wave with employers with twenty-five to ninety-nine employees are scheduled to go into effect in July 2019 and November 2019, respectively.[61]

On June 25, 2015, Oregon became the third state to enact state automatic enrollment IRA legislation,[62] and in 2017, OregonSaves became the first state automatic enrollment IRA program to go into effect.[63] Specifically, the pilot phase of the program went into effect in July 2017,[64]

56. Jamie Hopkins, *Illinois Enacts Automatic IRAs: Is Federal Mandate Coming?*, FORBES (Jan. 7, 2015, 5:35 PM) https://www.forbes.com/site/jamiehopkins/2015/01/07/automatic-enrollment-iras-first-government-mandate-automatic-iras-is-enacted-in-illinois/#15740ead290c.

57. *See id.* ("However, the program will not become effective until at least July 2017.").

58. 820 ILL. COMP. STAT. 80/60 (2018).

59. David B. Brandolph, *Illinois Launches Automatic IRA Pilot Program for Private Sector (Corrected)*, BLOOMBERG L., https://bnanews.bna.com/employee-benefits/illinois-launches-automatic-ira-pilot-program-for-private-sector-corrected (last updated May 16, 2018, 11:57 AM).

60. *See A New Choice for Retirement Savings*, ILL. SECURE CHOICE RETIREMENT SAVINGS PROGRAM, https://employer.ilsecurechoice.com/ (last visited Apr. 1, 2019).

61. Joy M. Napier-Joyce, et al., *What Employers Need to Know about the Illinois Secure Choice Mandatory Retirement Savings Program*, JACKSON LEWIS (Aug. 13, 2018), https://www.jacksonlewis.com/publication/what-employers-need-know-about-illinois-secure-choice-mandatory-retirement-savings-program.

62. Act of June 25, 2015, 2015 Or. Laws ch. 557§ 2 (page 1) (codified as amended at OR. REV. STAT. § 178.215 (2018)).

63. Greg Iacurci, *Oregon will help other states launch own auto-IRA programs*, INV. NEWS (Dec. 17, 2018, 4:50 PM), https://www.investmentnews.com/article/20181217/FREE/181219940/oregon-will-help-other-states-launch-own-auto-ira-programs. ("Oregon became the first state to automatically enroll workers without access to a 401(k) or similar plan into an individual retirement account, with money contributed via payroll deduction. The state launched the program OregonSaves, in July 2007.").

64. Eleven businesses began to register and identify improvements to the sign-up procedure software in July 2017. The second phase of the pilot program took

and the first regular wave of registrations for employers with more than 100 employees went into effect in November 2017.[65] Five additional waves of registrations are scheduled with the sixth and final wave of employers with four or fewer employees scheduled to go into effect on May 15, 2020.[66] As of July 1, 2018, more than 32,000 employees had enrolled in OregonSaves.[67] In 2016, Maryland[68] and Connecticut[69] became the fourth and fifth states to enact laws establishing automatic enrollment IRA programs. In late 2018, the chair of the Connecticut Retirement Security announced that it would begin implementing the program in January 2019 in phases modelled after the OregonSaves process.[70] The Maryland system is expected to become operational by late 2019.[71]

effect in October 2017 when forty-two additional employers began to register. *See* OREGONSAVES ANNUAL REPORT TO THE LEGISLATURE at 7, 13 (2017), http://www.oregon.gov/treasury/Newsroom/Topics%20of%20Interest/2017%20Oregon-Saves%20Annual%20Report.pdf.

65. *Id.*

66. *Id.*

67. *See* John Manganaro, *One Year In, Assessing the Progress of OregonSaves*, PLAN SPONSOR (July 6, 2018), https://www.plansponsor.com/one-year-assessing-progress-oregonsaves/.

68. *See* Maryland Small Business Retirement Savings Program and Trust, MD. CODE ANN., LAB & EMPL. § 12-101 to -502 (West 2018).

69. An act creating the Connecticut retirement security program, SHB 5591, 2016 Gen. Assemb., Reg. Sess. (Conn. 2016).

70. Maura Mastrony, *Connecticut to Implement Mandatory IRA Program* SOC'Y FOR HUM. RESOURCE MGMT. (Nov. 7, 2018), https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/connecticut-to-implement-mandatory-ira-program.aspx.

71. *See Maryland$aves*, *supra* note 28.

III. The 2016 Regulatory Safe Harbor and Its Subsequent Disapproval

Originally enacted in 1974, and amended multiple times since then, the Employee Retirement Income Security Act of 1974 ("ERISA")[72] regulates "employee benefit plans."[73] Among other things, ERISA imposes reporting and disclosure requirements,[74] vesting[75] and funding[76] rules, and fiduciary provisions[77] to protect plan participants.

Section 4(a) of ERISA provides that ERISA generally applies to any "employee benefit plan" established or maintained by an employer "engaged in commerce or in any industry or activity affecting commerce" or any plan established or maintained by unions representing employees engaged in commerce.[78] Section 514(a) of ERISA preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan."[79] Thus, if state automatic enrollment IRA programs create employee benefit plans under ERISA, ERISA preempts the state law creating the programs and the law may not be enforced.

Given the importance of this issue, the Illinois law directed the Illinois Board to request a determination from the Department of Labor as to the applicability of ERISA to the Program[80] and prohibits the Board from implementing Illinois Secure Choice "if it is determined that the Program is an employee benefit plan and State or employer liability is established under the federal Employee Retirement Income Security Act."[81] California's law includes a similar admonishment.[82] Similarly, Maryland's law directs the Maryland Small Business Retirement Savings Board "to take any action necessary to ensure that the

72. Employment Retirement Income Security Act of 1974 (ERISA), Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified as amended in scattered sections of 29 U.S.C.).

73. *See* ERISA § 3(3), 29 U.S.C. § 1002(3) (2018).

74. *See* ERISA §§ 101–105, 29 U.S.C. §§ 1021–1025 (2018).

75. ERISA § 203, 29 U.S.C. § 1053 (2018).

76. ERISA §§ 301–305, 29 U.S.C. §§ 1081–1085 (2018).

77. ERISA §§ 401–413, 29 U.S.C. §§ 1101–1113 (2018).

78. ERISA § 4(a), 29 U.S.C. § 1003(a) (2018).

79. ERISA § 514(a), 29 U.S.C. § 1144(a) (2018).

80. 820 ILL. COMP. STAT. § 80/95 (2018) ("The Board shall request in writing an opinion or ruling from the appropriate entity with jurisdiction over the federal Employee Retirement Income Security Act regarding the applicability of the federal Employee Retirement Income Security Act to the Program.").

81. *Id.*

82. CAL. GOV'T CODE § 100043 (West 2018).

Program is not preempted by federal law;"[83] while the Oregon law requires the Oregon Board to obtain legal advice about the applicability of ERISA to the plan before establishing the Oregon program.[84]

On May 18, 2015, twenty-six U.S. Senators, including the ranking members of the Senate Committee on Health, Education, Labor and Pensions and the Senate Finance Committee, sent a letter to President Barack Obama encouraging the President to take action as soon as possible to facilitate state automatic IRA programs.[85] Among other things, the Senators requested the President to ask the DOL to clarify that the California and Illinois and similar Programs are not "plans" subject to ERISA.[86]

At a White House Conference on Aging on July 13, 2015, President Obama announced that the states would have clarity on the issue by the end of 2015.[87] That same day, referring to President Obama's directive,[88] Secretary of Labor Perez announced that the Department of Labor would issue guidance that would "safeguard worker retirement savings and offer pathways for states to adopt retirement savings programs that are consistent with federal law."[89] The DOL released the promised guidance on November 18, 2015, in the form of a proposed regulation which created a safe harbor for savings arrangements established by states for non-governmental employees.[90] The proposed safe

83. MD. CODE ANN., LAB. & EMPL. § 12-204(c) (West 2018).

84. OR. REV. STAT. § 178-230(b) (2018).

85. Letter from Patty Murry et al., to President Barack Obama (May 18, 2015), http://sd24.senate.ca.gov/sites/sd24.senate.ca.gov/files/5-18-15%20Letter%20to%20President%20Obama.pdf.

86. *Id.*

87. Hazel Bradford, *Clarity on state-run private-sector retirement savings coming by year-end*, BUS. INS., (July 14, 2015), http://www.businessinsurance.com/article/20150714/NEWS03/150719940.

88. Press Release, Office of the Press Sec'y, Fact Sheet: The White House Conference on Aging (July 13, 2015), https://www.whitehouse.gov/the-press-office/2015/07/13/fact-sheet-white-house-conference-aging.

89. Tom Perez, *Clearing a Path for State Based Retirement Plans*, U.S. DEP'T OF LAB. BLOG (July 13, 2015), http://blog.dol.gov/2015/07/13/clearing-a-path-for-state-based-retirement-plans/.

90. Savings Arrangements Established by State for Non-Governmental Employees, 80 Fed. Reg. 72,006 (proposed Nov. 18, 2015) (proposing a regulation that would establish a safe harbor excluding from the definition of plan under ERISA certain state payroll deduction savings programs including automatic enrollment IRA programs); Interpretive Bulletin Relating to State Savings Programs That Sponsor or Facilitate Plans Covered by the Employee Retirement Income Security Act of 1974, 80 Fed. Reg. 71,936 (proposed Nov. 18, 2015) (to be codified at 24 C.F.R. pt. 570) (setting forth DOL guidance regarding state marketplace approach, state-sponsored prototype plan approach, and state multiple employer plan approach).

harbor,[91] which received about seventy comments,[92] was modestly amended and finalized in a final regulation published on August 30, 2016.[93] Under the final regulation,[94] state automatic enrollment IRAs would not constitute employee benefit plans for purposes of ERISA if they met eleven separate requirements.[95] A companion rule extending the safe harbor to qualified state political subdivisions was published on December 20, 2016.[96]

Shortly after the Trump election, Representative Tim Walberg introduced House Joint Resolution 66 disapproving the 2016 regulatory safe harbor.[97] The resolution was passed in both the House[98] and the Senate[99] and ultimately signed into law by President Trump on May 17, 2017.[100] The DOL removed the 2016 regulatory safe harbor from the

91. For ease of reference, the proposed regulation will be referred to as the "proposed 2016 regulatory safe harbor," even though the proposed regulation was issued in 2015.

92. *See* Moore, *supra* note 21, at 52.

93. Savings Arrangements Established by State for Non-Governmental Employees, 81 Fed. Reg. 59,464 (proposed Aug. 30, 2016).

94. For ease of reference, the final regulation will be referred to as the "2016 regulatory safe harbor."

95. Savings Arrangements Established by State for Non-Governmental Employees, 81 Fed. Reg. at 59,464, 59,476–77; Savings Arrangements Established by Qualified State Political Subdivisions for Non-Governmental Employees, 81 Fed. Reg. at 92,639.

96. Savings Arrangements Established by Qualified State Political Subdivisions for Non-Governmental Employees, 81 Fed. Reg. at 92,639.

97. Representative Francis Rooney introduced House Joint Resolution 67 disapproving the companion rule extending the safe harbor to qualified State political subdivisions. That House Joint Resolution was passed by the House and the Senate and ultimately signed by the President on April 13, 2017. 163 CONG. REC. H1206–1218 (Feb. 15, 2017).

Representatives Walberg and Rooney contended the regulations would force workers into government-run IRAs without the consumer protections provided by ERISA. The representatives cited concerns that the regulations would "discourage small businesses from offering private-sector plans and leave working families with less retirement security, inadequate safeguards, and limited control over their retirement savings." *See* WOLTERS KLUWER, INDIVIDUAL RETIREMENT PLANS GUIDE LETTER NO. 424 (2017) [hereinafter INDIVIDUAL RETIREMENT PLANS GUIDE LETTER NO. 424].

98. 163 CONG. REC. H1206–1218 (Feb. 15, 2017).

99. 163 CONG. REC. S2692–2712 (May 3, 2017). The resolution passed in the Senate 50-49 with two Republican senators, Senators Corker and Young, voting against it. *See Roll Call 115h Congress-1st Session*, U.S. Senate, https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=115&session=1&vote=00120 (last visited Apr. 1, 2019).

100. H.J. Res. 66, Pub. L. No. 115–35, 131 Stat. 848 (2017).

Code of Federal Regulations on June 28, 2017 "[b]ecause the [resolution] invalidated the final [rule]."[101] This joint resolution of disapproval was made pursuant to the Congressional Review Act ("CRA").[102] Enacted in 1996, the CRA provides an expedited procedure[103] for Congress to overturn agency regulations.[104]

The CRA generally provides that before an agency rule can take effect, the agency promulgating the rule must submit a report regarding the rule to both houses of Congress and the Comptroller General of the Government Accountability Office ("GAO").[105] Congress then has sixty session or legislative days[106] after the date the agency submits its report of the rule to pass a joint resolution of disapproval and present the resolution to the President.[107] If the joint resolution is passed by both houses of Congress and signed by the President, the rule shall not take effect.[108] Moreover, if a rule does not take effect, it "may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule

101. Definition of Employee Pension Benefit Plan Under ERISA, 82 Fed. Reg. 29,236 (June 28, 2017).

102. Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104–121, 110 Stat. 871, Title II, Subtitle E (1996) (codified at 5 U.S.C. §§ 801–808 (2018)).

103. For a detailed discussion of the expedited procedure, *see* RICHARD S. BETH, CONG. RESEARCH SERV. RL31160, DISAPPROVAL OF REGULATIONS BY CONGRESS: PROCEDURE UNDER THE CONGRESSIONAL REVIEW ACT (2001).

104. In order to meet the requirements set forth in *Immigration & Naturalization Service v. Chadha*, 426 U.S. 919 (1983), the CRA requires passage by both houses and presentment to the President. *See* Adam M. Finkel & Jason W. Sullivan, *A Cost-Benefit Interpretation of the "Substantially Similar" Hurdle In the Congressional Review Act: Can OSHA Ever Utter the E-Word (Ergonomics) Again?*, 63 ADMIN. L. REV. 707, 722 n. 77 (2011) (quoting 142 CONG. REC. 6926, statement of Rep. Hyde) (noting that, "after *Chada*, 'the one-house or two-house legislative veto . . . was thus voided,' and as a consequence the authors of the CRA developed a procedure that would require passage by both houses and presentment to the President").

105. The report must include any available cost-benefit analysis. 5 U.S.C. § 801(a)(1) (2018).

106. 5 U.S.C. § 801(d) (2018).

107. *See* Michael J. Cole, *Interpreting the Congressional Review Act: Why the Courts Should Assert Judicial Review, Narrowly Construe "Substantially the Same," and Decline to Defer to Agencies Under Chevron*, 70 ADMIN. L. REV. 101, 107–110 (2018) [hereinafter Cole] (providing overview of CRA and its procedure); Paul J. Larkin, Jr., *Reawakening the Congressional Review Act*, 41 HARV. J. L. & PUB. POL'Y 187, 197–204 (2018) [hereinafter Larkin].

108. 5 U.S.C. § 801(b)(1) (2018). If a rule had taken effect and is later disapproved by a joint resolution of disapproval, the rule shall be treated as never having taken effect. 5 U.S.C. § 801(f) (2018).

is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule."[109]

Prior to the 2016 election, Congress had successfully enacted only one joint resolution of disapproval under the CRA:[110] a joint resolution disapproving a DOL regulation relating to ergonomics.[111] In contrast, since President Trump took office, the 115th Republican Congress has enacted, and President Trump has signed, fourteen joint resolutions "veto[ing] 14 of the 15 [so-called][112] 'midnight'[113] regulations promulgated by the Obama Administration,"[114] including the 2016 regulatory

109. 5 U.S.C. § 801(b)(2) (2018).

110. Between 1996 and 2011, more than 57,000 agency rules were submitted to Congress. Nevertheless, until 2017, Congress only passed seventy-two joint resolutions of approval, and only one became law. *See* Larkin, *supra* note 107, at 234.

111. Act of March 20, 2001, Pub. L. No. 107-5, 115 Stat. 7 (2001) (vetoing rule relating to ergonomics published at 65 Fed. Reg. 68,261). For a detailed discussion of this disapproval, *see* Note, *The Mysteries of the Congressional Review Act*, 122 HARV. L. REV. 2162, 2169–73 (2009).

112. Because of the manner in which the sixty session or legislative days are calculated with rules finalized many months before the election subject to the Congressional Review Act, one may argue that the term "midnight" is a misnomer. *Cf.* Christopher M. Davis & Richard S. Beth, *Agency Final Rules Submitted on after June 13, 2016, May be Subject to Disapproval by 115th Congress*, CRS INSIGHT (Dec. 15, 2016), https://fas.org/sgp/crs/misc/IN10437.pdf.

113. Because the President can always veto disapproval resolutions, the CRA mechanism has traditionally been thought to be most relevant during Presidential transitions to veto "midnight" regulations. It is particularly useful when the President is of a newly-elected party and accompanied by a newly-gained majority in Congress, and together they "seek[] to block rules issued by a prior administration." Cole, *supra* note 107, at 104.

Since the Trump election, however, there has been interest in expanding the reach of the CRA to longstanding regulations. Specifically, proponents of an expansion contend that the CRA can be used to invalidate any agency regulations promulgated since 1996 if a report on the regulation was not properly submitted to Congress. *See* Larkin, *supra* note 107, (making and defending this argument); *see also* Cole, *supra* note 107, at 112, n.46 (noting that "[s]ome prominent attorneys are arguing that the deadline never expired for many rules that were never properly submitted to Congress" and describing this argument and its proponents). To the extent that the CRA applies to subregulatory guidance, its potential reach is even more significant. *Cf.* Letter from U.S. General Accountability Office to Senator Patrick Toomey (Dec. 5, 2017), https://www.gao.gov/assets/690/688763.pdf (opining that Bulletin issued by Bureau of Consumer Financial Protection is general statement of policy and rule under CRA).

114. Cole, *supra* note 107, at 62, n.40 (listing the fourteen vetoes); *see also* Stephan Dinan, *GOP rolled back 14 of 15 Obama rules using Congressional Review Act*, WASH. TIMES (May 15, 2017), https://www.washingtontimes.com/news/2017/may/15/gop-rolled-back-14-of-15-obama-rules-using-congress/ (discussing varying responses to use of CRA at outset of Trump Administration).

safe harbor.[115] It is not entirely clear what Congress's disapproval of the 2016 regulatory safe harbor means for state automatic enrollment IRAs. Clearly, the 2016 regulatory safe harbor has no effect and states may not rely on the 2016 regulatory safe harbor.[116] Moreover, it is clear that the DOL may not reissue the regulation in substantially the same form,[117] unless the rule is specifically authorized by a law enacted by Congress after May 17, 2017.

Nevertheless, it is not clear whether state automatic enrollment IRAs are preempted by ERISA in the absence of the 2016 regulatory safe harbor. A safe harbor guarantees that compliance with the safe harbor satisfies the law; it does not, however, foreclose the possibility that activities outside the safe harbor also satisfy the law.[118] Thus, the 2016 regulatory safe harbor guaranteed that state automatic enrollment IRAs that satisfied the regulatory requirements were not employee benefit plans for purposes of ERISA in the view of the Department of the Labor. By disapproving the safe harbor, Congress made it clear that states may not rely on the 2016 regulatory safe harbor to guarantee that their programs do not constitute employee benefit plans for purposes of ERISA.

The absence of the 2016 regulatory safe harbor, however, does not foreclose the possibility that state automatic enrollment IRAs still do not qualify as employee benefit plans for purposes of ERISA. For example, if the Department of Labor's reasoning was sound, a court might still find that state automatic enrollment IRA programs are not employee benefit plans for purposes of ERISA despite the removal of the

115. For a critique of the irony of Republican legislators disapproving the regulation which would devolve power to state governments, *see* Richard H. Thaler, *State I.R.A. Plans are Ready, If Congress Doesn't Interfere*, N.Y. TIMES (Mar. 3, 2017), https://www.nytimes.com/2017/03/03/upshot/state-ira-plans-are-ready-if-congress-doesnt-interfere.html.

116. The Center for Biological Diversity challenged the constitutionality of the CRA in *Center for Biological Diversity v. Zinke*. The district court dismissed the complaint on May 9, 2018. Ctr. for Biological Diversity v. Zinke, 313 F. Supp. 3d 976, 993 (D. Alaska May 9, 2018).

117. What "substantially the same" means is subject to debate. *See, e.g.*, Cole, *supra* note 107, at 132–42 (describing possible interpretations of "substantially the same" and arguing that it should be interpreted narrowly); MAEVE P. CAREY ET AL., CONG. RESEARCH SERV., R43992 THE CONGRESSIONAL REVIEW ACT: FREQUENTLY ASKED QUESTIONS, 16–17, 16 n.83 (2016) [hereinafter CAREY ET AL.] (describing "substantially the same" as inherently ambiguous).

118. Susan C. Morse, *Safe Harbors, Sure Shipwrecks*, 49 U.C. DAVIS L. REV. 1385, 1391 (2016) [hereinafter Morse] (stating that "[a] safe harbor guarantees compliance for described behavior, without foreclosing the possibility that activities outside the safe harbor are also compliant").

regulation from the Code of Federal Regulations. Recognizing that congressional disapproval of the 2016 regulatory safe harbor does not foreclose the possibility that state automatic enrollment IRAs do not constitute employee benefit plans for purposes of ERISA, the states establishing these programs have continued to implement these programs.[119] Commentators and analysts disagree as to whether the automatic enrollment IRAs are preempted by ERISA in the absence of the 2016 regulatory safe harbor.[120] Moreover, two lawsuits have been filed claiming that the state automatic enrollment IRA programs are preempted by ERISA.[121] One of the cases settled shortly after the complaint was filed;[122] the other was pending at the time this Article went to press.[123]

119. *See* Hazel Bradford, *States to persist with secure choice*, PENSIONS & INS. (May 15, 2017), http://www.pionline.com/article/20170515/PRINT/305159977/states-to-persist-with-secure-choice.

120. *Compare* letters from Eversheds Sutherland to U.S. Chamber of Commerce (Nov. 14, 2017), https://www.uschamber.com/sites/default/files/state_ira_letter_final_11-14-17.pdf (arguing that the state automatic enrollment IRA programs are preempted by ERISA) [hereinafter Sutherland Letter] *with* letter from David E. Morse, Partner, K&L Gates, to Katie Selenski, Exec. Dir. Cal. Secure Choice (May 16, 2017), https://www.treasurer.ca.gov/scib/k-l-gates-opinion.pdf (contending that IRAs established by California Secure Choice program should not be considered "ERISA plans 'established or maintained' by covered California employers") [hereinafter Morse Letter].

121. Complaint, Howard Jarvis Taxpayers Ass'n v. Cal. Secure Choice Ret. Sav. Program, No. 2:18-cv-01584 (E.D. Cal. May 30, 2018) [hereinafter HJTA Complaint]; Complaint, ERISA Indus. Comm. v. Read, No. 3:17-cv-01605 (D. Or. Apr. 2, 2018), [hereinafter ERIC Complaint].

122. *See* Anne Tergesen, *Oregon's Retirement-Savings Plan Settles Legal Challenge on Employer Certification: Settlement provides for some large employers to prove employees are covered without filing with state*, WALL ST. J. (Mar. 28, 2018, 5:50PM), https://www.wsj.com/articles/oregons-retirement-savings-plan-settles-legal-challenge-on-employee-certification-1522263159. The complaint challenging the Oregon program and its settlement are discussed in more detail, *see infra* Section V.A.

123. The complaint challenging the California program is discussed in more detail, *see infra* Section V.B. and postscript.

IV. Preemption of State Automatic Enrollment IRA Programs in the Absence of the 2016 Regulatory Safe Harbor

As noted above, ERISA preempts (1) state laws that (2) relate to (3) employee benefit plans.[124] Undoubtedly, the state automatic enrollment IRA programs are established pursuant to state law.[125] Thus, whether the programs are preempted by ERISA depends on the remaining two elements. First, it depends on whether the programs are employee benefit plans for purposes of ERISA. Second, even if the programs are not employee benefit plans for purposes of ERISA, preemption also depends on whether the state laws that create the programs impermissibly relate to other employee benefit plans in violation of ERISA's express preemption provision.

A. Are State Automatic Enrollment IRA Programs Employee Benefit Plans for Purposes of ERISA?

ERISA defines the term "employee benefit plan" in its definition section, § 3.[126] Section 4 of ERISA then expressly exempts five types of plans from ERISA.[127] In addition, in the exercise of its regulatory power, the DOL has expressly exempted a number of plans, funds, and programs from the definition of employee benefit plan for purposes of ERISA.[128]

Because courts typically first consider whether a particular plan or arrangement falls within a safe harbor,[129] this subsection begins by

124. 29 U.S.C. § 1144(a) (2018).

125. ERISA's preemption provision defines state law to include "all laws, decisions, rules, regulations or other State action having the effect of law, of any State." 29 U.S.C. § 1144(c)(1) (2018).

126. 29 U.S.C. § 1002(3) (2018).

127. 29 U.S.C. § 1003(b) (2018).

128. *See* 29 C.F.R. § 2510.3-1(b)–(k) (2019) (exempting specific arrangements from the definition of "employee welfare benefit plan."); 29 C.F.R. § 2510.3-2(b)–(g) (2019) (exempting specific arrangements from the definition of "employee pension plan"). These exemptions predate the disapproved exemption for savings arrangements established by states for non-governmental employees and thus are not affected by the disapproval of that exemption. *Cf.* CAREY ET AL., *supra* note 117, at 17 (noting that the disapproval of agency rule amending an existing rule would have no effect on existing rule).

129. *See, e.g.*, Langley v. DaimlerChrysler Corp. 502 F.3d 475, 479 (6th Cir. 2007) ("In general, courts apply a three-part test to determine whether ERISA covers a particular plan or practice: (1) first, does a 'safe harbor' exception apply; (2) if not,

discussing whether state automatic enrollment IRAs fall within any of the express statutory or regulatory exemptions from ERISA's definition of employee benefit plans. Then, assuming state automatic enrollment IRAs do not fall within any of the statutory or regulatory safe harbors, this subsection carefully analyzes ERISA's definition of "employee benefit plan" and considers whether state automatic enrollment IRAs fall within the statutory definition of an employee benefit plan in the first place.

1. EXPRESS STATUTORY EXEMPTIONS FROM ERISA'S DEFINITION OF "EMPLOYEE BENEFIT PLAN"

Section 4(b) of ERISA expressly exempts five types of plans from ERISA: (1) governmental plans; (2) church plans; (3) plans established to comply with workers' compensation, unemployment compensation, or disability insurance laws; (4) plans maintained outside the United States primarily for the benefit of nonresident aliens; and (5) funded excess benefit plans.[130]

State automatic enrollment IRA programs clearly do not fall within four of the five types of plans expressly exempted under the statute. They are obviously not church plans,[131] plans established to comply with workers' compensation, unemployment compensation, or disability insurance laws, plans maintained outside the United States primarily for the benefit of nonresident aliens,[132] or funded excess benefit plans.[133]

do 'the surrounding circumstances' suggest that 'a reasonable person could ascertain the intended benefits, the class of beneficiaries, the source of financing, and the procedures for receiving benefits'; and (3) has 'the employer established or maintained the plan with the intent of providing benefits to its employees'").

130. 29 U.S.C. § 1003(b) (2018).

131. *Cf.* 29 U.S.C. § 1002(33)(A) (2018) (defining "church plan" as a plan established and maintained by a church for its employees).

132. *Cf.* 820 ILL. COMP. STAT 80/5 (2018) (defining "employee" as "any individual who is 18 years of age or older, who is employed by an employer, and who has wages that are allocable to Illinois during a calendar year under the provisions of Section 304(a)(2)(B) of the Illinois Income Tax Act").

133. *See* ERISA § 3(36), 29 U.S.C. § 1002(36) (2018) (defining "excess benefit plan" as a plan maintained by an employer solely for the purpose of providing benefits for certain employees in excess of the limitations on contributions and benefits imposed by [IRC § 415] . . . .").

Superficially, state automatic enrollment IRA programs might appear to be "governmental plans" because they are enacted by state legislatures.[134] Section 3(32) of ERISA, however, defines a "governmental plan" as a plan established or maintained by a government for its employees.[135] Because state automatic enrollment IRA programs are established to cover private-sector employees,[136] rather than state employees, they are not "governmental plans" expressly exempt from ERISA under § 4(b).[137] Thus, state automatic enrollment IRA programs do not fall within any of the five types of plans expressly exempt from ERISA under the statute.

2. REGULATORY SAFE HARBORS

The Department of Labor has long provided regulatory safe harbors expressly exempting six types of arrangements from the definition of employee pension benefit plan under ERISA: (1) severance pay plans, (2) bonus programs, (3) individual retirement accounts, (4) gratuitous payments to pre-ERISA retirees, (5) tax-sheltered annuities, and (6) supplemental payment plans.[138]

State automatic enrollment IRA programs clearly do not fall within five of the six regulatory safe harbors. Specifically, they do not qualify as severance pay plans, bonus programs, gratuitous payments

134. California Secure Choice Retirement Savings Trust Act, CAL. GOV'T CODE §§ 100000–100044 (West 2018); Connecticut Retirement Security Exchange, CONN. GEN. STAT. § 31–418 (2018); Illinois Secure Choice Savings Program Act, 820 ILL. COMP. STAT. 80/1–95 (2018); Maryland Small Business Retirement Savings Program and Trust Act, MD. CODE ANN., LAB & EMPL. §§ 12-201 to -502 (West 2018); OR. REV. STAT. § 178.215 (2018).

135. ERISA § 3(32), 29 U.S.C. § 1002(32) (2018).

136. *Cf.* CAL. GOV'T CODE § 100000 (d)(1) (West 2018) (excluding governmental employers from definition of eligible employers subject to the Act); 820 ILL. COMP. STAT. 80/5 (2018) (defining employers subject to the Act as "a person or entity engaged in a business, industry, profession, trade, or other enterprise in Illinois, whether for profit or not for profit" that employs twenty-five or more employees, has been in business for at least two years and does not otherwise provide a tax-favored retirement savings plan to its employees); 820 ILL. COMP. STAT 80/10 (2018) (stating that the Program was established "for the purpose of promoting greater retirement savings for private-sector employees in a convenient, low-cost, and portable manner").

137. *See also* Derek B. Dorn et al., *States Dive Headfirst Into Retirement Coverage Debate–But Will Their Initiatives Run Afoul of Federal Law?*, 42 PENSION & BENEFIT REP. 219 (2015) [hereinafter Dorn et al.] (concluding that state automatic enrollment IRA programs like the Illinois program would not be "governmental plans" exempt from ERISA because they do not cover governmental entity's employees).

138. 29 C.F.R. § 2510.3-2 (2019).

to pre-ERISA retirees, tax-sheltered annuities, and supplemental payment plans. Whether state automatic enrollment IRA programs fall within the regulatory safe harbor for individual retirement accounts, however, has been a hotly debated question.

a. Overview of the Regulatory Safe Harbor for IRAs

The Department of Labor regulations provide that an individual retirement account under Internal Revenue Code ("IRC") § 408(a) or individual retirement annuity under IRC § 408(b)[139] will not constitute a "pension plan" for purposes of ERISA if four requirements are satisfied:

> (1) No contributions are made by the employer or employee association;
>
> (2) Participation is completely voluntary for employees or members;
>
> (3) The sole involvement of the employer or employee organization is without endorsement to permit the sponsor to publicize the program to employees or members, to collect contributions through payroll deductions or dues checkoffs and to remit them to the sponsor; and
>
> (4) The employer or employee organization receives no consideration in the form of cash or otherwise, other than reasonable compensation for services actually rendered in connection with payroll deductions or dues checkoffs.[140]

In 1999, the DOL issued Interpretive Bulletin 99-1 clarifying "the circumstances under which an employer may facilitate employees' volun-

139. In an opinion letter, Eversheds Sutherland contends that state automatic enrollment IRA programs cannot satisfy the threshold requirement that the programs be individual retirement accounts or annuities under IRC § 408 because states cannot satisfy the criteria for non-bank custodians under IRC § 408(a) and they are not licensed insurance companies and thus cannot satisfy the requirements of IRC § 408(b). In addition, Eversheds Sutherland contends that the default contribution rates are tantamount to annuities with fixed premium payments and thus fail the requirement that IRA annuities not have fixed premiums. Sutherland Letter, *supra* note 120, at 4. David Morse of K & L Gates contends that the custodian argument can be easily brushed aside because the state serves as a facilitator and the IRAs will be maintained and the assets will be held by separate entities that satisfy the custodial requirements. *See* David E. Morse, *The First State Auto IRA Is Up, Running, and Working—So Why Do Some Business Groups Want These Plans to Fail?*, 30 BENEFITS L. J. 1, 2 (2017).

140. 29 C.F.R. § 2510.3-2(d) (2019).

tary contributions to IRAs by providing an IRA payroll deduction program without . . . inadvertently establishing or maintaining an employee pension benefit plan within the scope of [ERISA § 3(2)]."[141]

The interpretive bulletin explains that an employer will not be viewed as endorsing an IRA so long as the employer maintains neutrality with respect to the IRA sponsor in the employer's communications with its employees.[142] The employer may provide its employees with information about the program and encourage its employees to save, but the employer must make clear to its employees that its involvement is limited to collecting the deducted amounts and promptly remitting the amounts to the IRA sponsor.[143] The employer must make it clear that it does not provide any additional benefits or promise any particular return on any investment.[144]

The interpretive bulletin also clarifies that an employer may limit the number of IRA sponsors to which employees may make payroll deduction contributions so long as any limitations on, or costs or assessments associated with, an employee's ability to transfer or rollover IRA contributions to another IRA sponsor are fully disclosed before the employee decides to participate in the program.[145] In addition, the employer cannot negotiate to obtain special terms for its employees that are not generally available or exercise any influence over the investments made or permitted by the IRA sponsor.[146]

141. Interpretive Bulletin 99-1; Payroll Deduction Programs for Individual Retirement Accounts, 64 Fed. Reg. 33,000, 3301 (June 18, 1999) (codified at 29 C.F.R. § 2509.99-1).
142. 29 C.F.R. § 2509.99-1(c)(1).
143. *Id.*
144. *Id.*
145. 29 C.F.R. § 2509.99-1(d).
146. *Id.*

b. State Automatic Enrollment IRA Programs and the IRA Regulatory Safe Harbor for Individual Retirement Accounts

The state automatic enrollment IRA programs are structured to satisfy three of the four requirements set forth in the regulatory safe harbor for IRAs. First, the programs prohibit employer contributions.[147] Second, they limit the employers' involvement to educating employees about and enrolling them in the program,[148] collecting employees' contributions through payroll deduction, and remitting contributions to

147. *See, e.g.*, CONN. GEN. STAT. § 31-422(f) (2018) (providing that "[n]o employer shall be permitted to make a contribution to the program"); OR. REV. STAT. § 178.210(1)(h) (2018) (providing that plan must "[r]equire no employer contributions to employee accounts"); 820 ILL. COMP. STAT. 80/65 (2018) (providing for employee contributions) to be deducted through payroll deductions and not authorizing employer contributions. Indeed, recognizing that employer contributions are not possible under current federal law, the Act's lead sponsor, Illinois Senator Daniel Bliss, has said that he would like to see future reforms to allow for employer contributions to increase the savings rate. Josh Barro, *Illinois Will Introduce Automatic Retirement Savings*, NY TIMES (Jan. 5, 2015), https://www.nytimes.com/2015/01/06/upshot/illinois-introduces-automatic-retirement-savings-program-a-first-for-the-nation.html. The California statute authorizes employer contributions, but provides that they are only permitted if they would not cause the program to be treated as an employee benefit plan under ERISA. CAL. GOV'T CODE § 100012(j) (West 2018). The current regulations prohibit employer contributions. CAL. CODE REGS. tit. 10, chp. 15, §10005(c)(i).

148. *See, e.g.,* CAL. GOV'T CODE § 100014 (West 2018) (directing Board to design and disseminate to employers an employee information packet); CONN. GEN. STAT. § 31-419(a) (2018) (directing Connecticut Board to prepare informational materials for distribution by employers to plan participants and prospective plan participants); CONN. GEN. STAT. ANN. § 31-422 (2018) (directing employers to provide each of its covered employees with the informational materials); 820 ILL. COMP. STAT. 80/55 (2018) (directing participating employers to supply employees with information packet about Program); 820 ILL. COMP. STAT. 80/60 (2018) (directing employer to establish payroll deposit retirement savings arrangement and automatically enroll employees who do not opt out of participation).

the Fund.[149] Finally, the programs do not authorize any compensation to employers for the cost of participating in the program.[150]

149. *See, e.g.*, 820 ILL. COMP. STAT. § 80/65 (2018) (requiring employers to use payroll deposit savings arrangements to collect employee contributions and pay them to the Fund).

Eversheds Sutherland contends that employer involvement in the automatic enrollment IRA programs exceeds that permitted by the safe harbor because the state programs require employers to (1) calculate contribution percentages and auto-escalation amounts, (2) determine employee eligibility, (3) verify social security numbers and other employee information, and report this information to the state, and (4) conduct and provide open enrollment periods. Eversheds Sutherland contends that "in States where employers face fines for failing to comply with program requirements, employers may be expected to encourage participation in the program to avoid penalties, paperwork, etc. associated with an opt-out. It is easy to envision a small employer automatically enrolling new employees and thus inadvertently establishing an ERISA plan. This level of involvement is clearly beyond the scope contemplated by the safe harbor." Sutherland Letter, *supra* note 120, at 5.

Contrary to Eversheds Sutherland's contention, it is not clear that employers' involvement in the state automatic enrollment IRA programs exceed the level of involvement contemplated by the safe harbor. The four activities described by Sutherland are ministerial tasks. They do not involve employer discretion and do not raise concerns about an employer endorsing a particular service provider, a focus of the safe harbor requirement. *Cf.* Interpretive Bulletin 99-1; Payroll Deduction Programs for Individual Retirement Accounts, 64 Fed. Reg. 33,000, 33,002 (June 18, 1999) (stating that "so long as an employer maintains neutrality with respect to an IRA sponsor in its communications with its employees, the employer will not be considered to 'endorse' an IRA payroll deduction program"). *See also* Golden Gate Restaurant Ass'n v. City and County of S.F., 546 F.3d 639, 650 (9th Cir. 2008) (rejecting claim that employer pay-or-play mandate created plan when it required employers to keep track of employees' hours and employer credits and noting that "[m]any federal, state and local laws, such as income tax withholding, social security, and minimum wage laws, impose similar administrative obligations on employers; yet none of these similar obligations constitutes an ERISA plan").

In addition, as K&L Gates noted in its opinion letter, in two Advisory Opinions the Department of Labor has permitted some level of employer involvement without the IRA payroll deduction program falling outside the safe harbor. Morse Letter, *supra* note 120, at 4–5 (citing and discussing DOL Advisory Opinion Letter 2001-03A (Feb. 15, 2001) (permitting employer, as contract holder of a payroll deduction IRA program that was invested in a group annuity contract, to vote on the annuity provider's upcoming plan of demutualization and elect the method for allocating the demutualization proceeds among the IRA participants) and DOL Advisory Opinion 82-27A (June 16, 1982) (permitting employer to select three IRA sponsors from pool of applicants, periodically review each sponsor's performance, replace underperforming sponsors, and negotiate for and receive written indemnification from each sponsor).

150. *Cf.* 820 ILL. COMP. STAT. § 80/30(m) (2018) (directing Board to make provision for the payment of administrative costs and expenses for the creation, management, and operation of the program and cross-referencing eight different types of administrative costs and expenses, none of which include reimbursement of employer's expenses for participating in program).

Whether state automatic enrollment IRA programs satisfy the fourth requirement that employee participation be "completely voluntary"[151] is subject to considerable debate. Neither the regulatory safe harbor for IRAs nor Interpretive Bulletin 99-1 expressly address the question whether a state automatic enrollment IRA with an opt-out feature satisfies the requirement that employee participation be "completely voluntary." Nor is there any other binding authority answering that question.[152]

i. Arguments on Whether State Automatic Enrollment IRAs are Completely Voluntary Prior to the 2016 Regulatory Safe Harbor

Prior to the Department of Labor's issuance of the now-disapproved 2016 regulatory safe harbor, Cardozo Law Professor Edward Zelinsky and Executive Director and Chief Executive Officer of the American Society of Pension Professionals and Actuaries Brian Graff argued that a state law that requires automatic enrollment with an opt-out feature should be considered "completely voluntary" for purposes of the regulatory safe harbor for IRAs.[153] In contrast, Derek Dorn, Michael Hadley, and Courtney Zinter of Davis & Harman argued in a Pension & Benefits Reporter article that "it is generally thought that the inclusion of an automatic enrollment feature results in employer involvement in excess of that allowed under the [IRA] safe harbor."[154]

According to Professor Zelinsky, "[a] straightforward reading of the relevant DOL regulation indicates that employees' participation in

151. 29 C.F.R. § 2510.3-2(d)(ii) (2018).

152. *Cf.* Conn. Ret. Security Bd., *Testimony of Brian H. Graff on behalf of the American Society of Pension Professionals and Actuaries*, ST. OF CONN. COMPTROLLER, (Feb. 4, 2015) https://www/osc.ct.gov/crsb/docs/02_04_15/Brian%20Graff%20Testimony.pdf (stating that "ASPPA, [National Association of Plan Advisors and National Tax-Deferred Savings Association] are not aware of legal guidance that directly addresses whether a payroll deduction IRA that includes an automatic enrollment with opt out design will trigger employee benefit plan status under ERISA") [hereinafter Graff Testimony].

153. *See* Edward A. Zelinsky, *Retirement in the Land of Lincoln: The Illinois Secure Choice Savings Program Act*, 2016 U. ILL. L. REV. 173, 181 (2016) [hereinafter Zelinsky]; Graff Testimony, *supra* note 152.

154. Dorn et al., *supra* note 137; *see also* Eric G. Serron, *Preemption Questions for Ill. Payroll Deduction IRA Plan*, LAW 360 (Jan. 22, 2015, 4:16 PM), https://www.steptoe.com/en/news-publications/preemption-questions-for-ill-payroll-deduction-ira-plan.html (identifying ERISA preemption questions and suggesting that questions likely to be resolved in favor of finding Illinois program preempted).

the Illinois [automatic enrollment IRA program] is 'completely voluntary' since employees may readily and without penalty leave the Illinois plan or may modify their respective contribution levels."[155] Professor Zelinsky cited field assistance guidance issued by the DOL with respect to health savings accounts ("HSA") in support of his argument.[156]

In Field Assistance Bulletin 2006-02, the Department of Labor declared that an employer may open an HSA for an employee and deposit funds into the health savings account without violating the requirement that the establishment of a health savings account by an employee be "completely voluntary."[157] According to the DOL, "[t]he intended purpose of the 'completely voluntary' condition . . . is to ensure that any contributions an employee makes to an HSA, including salary reduction amounts, will be voluntary."[158] The DOL explained that:

> HSA accountholders have sole control and are exclusively responsible for expending HSA funds and generally may move the funds to another HSA or otherwise withdraw the funds. The fact that an employer unilaterally opens an HSA for an employee and deposits employer funds into the HSA does not divest the HSA accountholder of this control and responsibility and, therefore, would not give rise to an ERISA-covered plan so long as the conditions described in FAB 2004-01 [which are parallel to the requirements imposed on individual retirement accounts] are met.[159]

Brian Graff testified before the Connecticut Retirement Security Board that the better view is that a payroll deduction IRA that includes

155. Zelinsky, *supra* note 153, at 181.

156. U.S. DEP'T OF LABOR, FIELD ASSISTANCE BULL. NO. 2006–02, HEALTH SAVINGS ACCOUNTS-ERISA Q&A-1 (2006). Professor Zelinsky recognizes that a Field Assistance Bulletin is not entitled to strong deference but contends that "it is a reasonable interpretation of the Department's own regulation and of the concept of voluntariness in the context of employer-sponsored accounts." Zelinsky, *supra* note 153, at 182.

157. The Labor regulations provide a safe harbor for certain welfare benefit plans. 29 C.F.R. § 2510.3-1 (2018). Among other arrangements, they provide a safe harbor for "certain group or group-type insurance programs" that meet four requirements, 29 C.F.R. § 2510.3-1(j)(1)–(4) (2018), that are parallel to the four requirements for individual retirement accounts set forth in 29 C.F.R. § 2510.3-2(d) (2018). In Field Assistance Bulletin 2004-1, the Department of Labor announced that health savings accounts that meet the four conditions set forth in 29 C.F.R. § 2510.3-1(j) (2018) will not be treated as employee welfare benefit plans for purposes of ERISA. In Field Assistance Bulletin 2006-02, the Department of Labor responded to recurring questions it had received regarding HSAs since its issuance of Field Assistance Bulletin 2004-01.

158. U.S. DEP'T OF LABOR, FIELD ASSISTANCE BULL. NO. 2006–02, HEALTH SAVINGS ACCOUNTS ERISA Q&A-1 (2006).

159. *Id.*

automatic enrollment with an opt out feature "can be structured to avoid ERISA coverage so long as the automatic enrollment with opt out feature at a specified rate is mandated by law or regulation and is not an employer option."[160] According to Graff, as long as employees have a reasonable opportunity to opt out of participation, enrollment should be considered *voluntary* because employees still control whether or not they participate.[161] To the extent that automatic enrollment may appear to encourage or force employee participation the state, rather than the employee, is responsible.[162] In Graff's opinion, the distinction between states mandating automatic enrollment and employers electing automatic enrollment is important because the purpose of the regulation is to address whether an *employer* is establishing or maintaining a plan.[163]

Graff contended that an employer should not be viewed "as engaging in activities to establish or maintain a plan where the employer is merely complying with a legal mandate . . . and does not have or exercise any discretion with respect to employee participation."[164] In support of his position, Graff cited DOL Field Assistance guidance[165] which makes it clear that employers can satisfy the compliance obligations imposed on IRC § 403(b) tax-deferred annuities[166] without triggering ERISA plan status, which requires, among other things, that employee participation be completely voluntary[167] "so long as plan documents still describe a limited employer role and allocate all discretionary determinations to the investment provider or employee participant and

160. Graff Testimony, *supra* note 152, at 4.
161. *Id.*
162. *Id.*
163. *Id.* at 4–5. *Cf.* Coverage; Reporting and Disclosure Requirements, 40 Fed. Reg. 34,526, 43,528 (Aug. 15, 1975) (stating that "Section 2510.3-2(d) makes it clear that individual retirement accounts . . . are not pension plans under section 3(2) of the *Act because they are not established or maintained by an employer or an employee organization*") (emphasis added).
164. Graff Testimony, *supra* note 152, at 5.
165. U.S. DEP'T OF LABOR, FIELD ASSISTANCE BULL. NO. 2007-02, ERISA COVERAGE OF IRC SECTION 403(B) TAX-SHELTERED ANNUITY PROGRAMS (2007).
166. 26 C.F.R. § 1.403(b)-0 to -11 (2018).
167. The Labor regulations provide a safe harbor for IRC § 403(b) tax sheltered annuities so long as four requirements, that are similar, though not identical, to the requirements for individual retirement accounts, are satisfied. 29 C.F.R. § 2510.3-2(f) (2018). Most significantly, both safe harbors require that employee participation be completely voluntary. *See* 29 C.F.R. § 2510.3-2(d)(1)(ii) (2018); 29 C.F.R. § 2510.3-2(f)(1) (2018).

the employer does not negotiate terms of products offered by investment providers."[168]

As noted above, Derek Dorn and his colleagues contended that "it is generally thought that the inclusion of an automatic enrollment feature results in employer involvement in excess of that allowed under the safe harbor."[169] In support of this assertion, Derek Dorn et al. cited, among other things, a 2011 ERISA Advisory Council Report in which the Council noted that it had decided not to recommend that the DOL include an automatic enrollment feature in the IRC § 403(b) safe harbor regulation.[170] The Council explained:

> [A] majority of Council members concluded that automatic enrollment would require actions typically performed by a plan sponsor/fiduciary (e.g., designation of a default investment alternative), and consequently, an automatic enrollment option in the plan may not be viewed as voluntary even in light of the participant's right to opt out of the automatic contributions.[171]

Dorn et al. also noted that proposed federal automatic IRA legislation included a specific exemption from ERISA[172] "because, otherwise, an automatic enrollment payroll deduction IRA, even one required by [federal] law, would be treated as an ERISA plan."[173] In addition, Dorn et al. pointed to a letter issued by the Department of Labor to the federal government[174] regarding the federal "myRA" program established by

168. Graff Testimony, *supra* note 152, at 5.
169. Dorn et al., *supra* note 137.
170. *Id.*
171. ADVISORY COUNCIL ON EMP. WELFARE & PENSION BENEFIT PLANS, CURRENT CHALLENGES AND BEST PRACTICES FOR ERISA COMPLIANCE OF 403(B) PLAN SPONSORS 17 (2011) [hereinafter ERISA COMPLIANCE REPORT].
172. Specifically, Dorn and his colleagues cite Automatic IRA Act of 2011, S. 1557, 112 Cong. (2011). Section 2(f) of the bill amends ERISA § 3(2) of ERISA to include a new subsection (C) exempting an automatic IRA arrangement described in IRC § 438(C): "if, under the arrangement, contributions are to be made to a designated automatic IRA the provider of which is included on the website list established under section 440(b) of [the IRC], are to be made to an individual retirement plan pursuant to section 440(c), or are to be made to the Secretary of the Treasury for investment in retirement bonds pursuant to section 440(d)." Dorn et al., *supra* note 137. For more recent proposed federal automatic IRA bills with specific ERISA exemptions, *see, e.g.*, Automatic IRA Act of 2015, S. 245, 114th Cong. § 2(d) (2015); Automatic IRA Act of 2013, 113th Cong.§ 2(d) (2013).
173. Dorn et al., *supra* note 137.
174. Letter from John J. Canary, Dir. of Regulations and Interpretations, U.S. Dep't of Labor, to J. Mark Iwry, Senior Advisor to the Sec'y and Deputy Assistant Sec'y for Ret. And Health Policy, U.S. Dep't of Treasury (Dec. 15, 2014) [hereinafter Canary Letter].

President Obama[175] (which is no longer in effect)[176] in support of their argument.

ii. Department of Labor's View as to Whether State Automatic Enrollment IRAs are Completely Voluntary as Set Forth in Preamble to Now-Disapproved 2016 Regulatory Safe Harbor

In the preamble to the Department of Labor's proposed 2016 regulatory safe harbor, the DOL expressly addressed the question whether state automatic enrollment IRAs qualify as "completely voluntary" for purposes of the safe harbor for IRAs.[177] Specifically, the DOL announced that the DOL intended the term "completely voluntary" to mean "considerably more than that employees are free to opt out of participation in the program. Instead, the employee's enrollment must be self-initiated."[178] The preamble explained that the completely voluntary condition is:

> important because where the employer is acting on his or her own volition to provide the benefit program, the employer's actions—e.g., requiring an automatic enrollment arrangement—would constitute its 'establishment' of a plan within the meaning of ERISA's text, and trigger ERISA's protections for the employee whose money is deposited into an IRA.[179]

The DOL noted that courts have held in other contexts that opt-out arrangements are not consistent with a "completely voluntary" requirement.[180] In a footnote in support of this proposition, DOL cited

175. *myRA: A Simple, Safe, Affordable Retirement Savings Account*, U.S. DEP'T OF TREASURY, http://www.treasury.gov/connect/blog/Documents/FINAL%20myRA%20Fact%20sheet.pdf (last visited Apr. 1, 2019) [hereinafter *myRA*].

176. *See* Press Release, Dep't of Treasury, Treasury Announces Steps to Wind Down MyRA Program (July 28, 2017), https://www/treasury.gov/press-center/press-releases/Pages/sm0135.aspx.

177. Savings Arrangements Established by States for Non-Governmental Employees, 80 Fed. Reg. 72,006, 72,008 (proposed Nov. 18, 2015).

178. *Id.*

179. *Id.*

180. *Id.*

three reported decisions,[181] three unreported decisions,[182] field assistance bulletins regarding HSAs,[183] and the Advisory Council's report on 403(b) plans.[184] As the Department recognized, however, none of the authorities is directly on point; none involved a state-mandated opt-out arrangement.[185] Thus, none of the cited authorities unequivocally establishes that a state-mandated opt-out arrangement cannot be "completely voluntary" for purposes of regulatory safe harbor for IRAs.

In the preamble to the final, now-disapproved, 2016 regulatory safe harbor, the DOL rejected claims by commentators that the DOL

181. *See* Schear v. Food Scope Am., Inc., 297 F.R.D. 114, 125 (S.D.N.Y. 2014) (citing NY Department of Labor Opinion which provides that in order "[f]or a voluntary 'tip pooling' arrangement to exist, it must be 'undertaken by employees on a completely voluntary basis and may not be mandated or initiated by employers' and an employer can take 'no part in the organization or the conduct of [the] tip-pool" and finding that "Defendants' documents indicate that they had a heavy hand in facilitating the tip sharing arrangement"); Doe v. Wood County Bd. of Ed., 888 F. Supp. 2d 771, 773, 776 (S.D. W. Va. 2012) (holding that option to opt out of single-sex education program does not satisfy Department of Education regulation that single-sex programs be "completely voluntary;" noting that discussion leading up to regulations state that recipient is strongly encouraged to "receive authorization from parents or guardians to enroll their children in a single-sex class"); *see also* The Meadows v. Empl'rs Health Ins., 826 F. Supp. 1225 (D. Ariz. 1993) (finding that participation in group health insurance plan was not completely voluntary when employer agreed in contract to 100 percent participation of all employees for life and accidental and death and dismemberment insurance and 75 percent participation of all eligible employees for medical coverage).

182. Carter v. Guardian Life Ins. Co., 2011 WL 1884625 *1 (E.D. Ky. May 18, 2011) (noting that courts have held Department of Labor regulatory safe harbor for certain group or group-type insurance programs' requirement that participation be "completely voluntary" (29 C.F.R. 2510-3.1(j)) not satisfied if enrollment in plan is automatic and holding that participation in this case was automatic and thus did not satisfy completely voluntary requirement); Thompson v. UNUM Life Ins. Co., 2005 WL 722717 *6 (N.D. Tex. Mar. 29, 2005) (finding plan participant's participation in group health plan was not completely voluntary because participation was automatic rather than voluntary); Davis v. Liberty Mutual Ins. Co., 1987 WL 16837 *2 (D.D.C. Aug. 31, 1987) (participation in group health plan not completely voluntary where employer paid premiums for employees and employee would not receive alternative form of compensation if employee chose to withdraw from plan).

183. The Department of Labor cited Field Assistance Bulletins 2004-1 and 2006-2, which Professor Zelinsky cited in support of his argument that state automatic enrollment IRA programs fall within the IRA regulatory safe harbor. *See supra* notes 156–57 and accompanying text.

184. Derek Dorn and his colleagues also cited this report in support of their argument that state mandated automatic enrollment IRAs do not fall within the regulatory safe harbor for IRAs. *See supra* notes 172–73 and accompanying text.

185. Savings Arrangements Established by States for Non-Governmental Employees, 80 Fed. Reg. 72,006, 72,008 (proposed Nov. 18, 2015).

was arbitrary in interpreting the safe harbor for IRAs to prohibit automatic enrollment.[186] The DOL asserted that its interpretation was "a reasonable reading of the safe harbor condition supported by legal authorities interpreting the concept of 'completely voluntary' in other contexts."[187] The DOL further claimed that its position was "consistent with a legitimate policy concern about employers implementing 'opt-out' provisions in employer-endorsed IRA arrangements without having to comply with ERISA duties and consumer protection provisions,"[188] and asserted that the concern is not present with state automatic enrollment IRA programs.

The DOL's interpretation of the term "completely voluntary" in the preamble to the disapproved regulation is not binding.[189] Nevertheless, it merits consideration to the extent the reasoning is persuasive. Congressional disapproval of the regulation has no effect on the underlying authorities cited in the preamble.

iii. Should State Automatic Enrollment IRA Programs be Considered "Completely Voluntary" for Purposes of the IRA Regulatory Safe Harbor?

As previously discussed, there is no definitive answer to the question whether state automatic enrollment IRA programs are completely voluntary for purposes of the IRA regulatory safe harbor. This subsection considers whether state automatic enrollment IRA programs

186. Savings Arrangements Established by States for Non-Governmental Employees, 81 Fed. Reg., 59,464, 59,471 (Aug. 30, 2016).

187. *Id.*

188. *Id.*

189. Even if the regulation had not been disapproved, the preamble would not have been binding. According to Professor Kevin Stack, however, it should have been granted special judicial deference. Kevin M. Stack, *Preambles as Guidance*, 84 GEO. WASH. L. REV. 1252 (2016). Professor Stack has written that, "[w]hile all agree that regulations are primary sources of law, strikingly little attention has been devoted to the method of their interpretation." Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355, 356–57 (2012). He presents a strong argument that regulations should be interpreted based on the purpose defined by the agency, relying on how notice and comment rulemaking defines the content of law. *See generally id.* The Supreme Court has at least on one occasion suggested that, when interpreting a regulation, the agency's intent is properly considered. *See* Gardebring v. Jenkins, 485 U.S. 415, 430 (1988). For a discussion of the general rules governing deference to agency interpretations, see generally William N. Eskridge, Jr. & Lauren E Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083 (2008) (providing a discussion of the general rules governing deference to agency interpretations); *see also* Kent Barnett, *Codifying Chevmore*, 90 N.Y.U. L. REV. 1 (2015); Christopher J. Walker, *Attacking Auer and Chevron Deference: A Literature Review*, 16 GEO. J. L. & PUB. POL'Y 103 (2018).

should be considered completely voluntary. This subsection first applies a plain meaning approach; then it applies a purposive approach. Finally, it considers the persuasiveness of the authorities that commentators and the Department of Labor have cited in support of their positions.

According to the Merriam-Webster dictionary, voluntary means "proceeding from the will or from one's own choice or consent . . . unconstrained by interference . . . acting or done of one's own free will without valuable consideration or legal obligation."[190] It appears clear that employees' participation in state automatic enrollment IRA programs is *voluntary* because employees are not required to participate in state automatic enrollment IRA programs, and employees may readily and without penalty opt out of participation.[191]

On the other hand, state automatic enrollment IRA programs do not appear to be *completely* voluntary. According to the Merriam-Webster dictionary, completely means "total or absolute."[192] Because state automatic enrollment IRA programs are designed to take advantage of employees' natural inertia and affirmatively require employees to opt out if they do not wish to participate, participation does not appear to be *completely* voluntary within the plain meaning of those words. Thus, under a plain meaning approach, it appears that state automatic enrollment IRAs are not completely voluntary for purposes of the IRA regulatory safe harbor.

Determining whether state automatic enrollment IRA programs fall within the regulatory safe harbor for IRAs should not be based solely on the dictionary's definition of the words "completely voluntary." Instead, it is important to consider the purpose of the IRA regulatory safe harbor. As Brian Graff noted, the purpose of the IRA safe

190. *Voluntary*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/voluntary (last visited Apr. 1, 2019).

191. *Cf.* Zelinsky, *supra* note 153, at 181 (stating that "[a] straightforward reading of the relevant DOL regulation indicates that employees' participation in the Illinois plan is 'completely voluntary' since employees may readily and without penalty leave the Illinois plan or may modify their respective contribution levels); Graff Testimony, *supra* note 152, at 4 (arguing that as long as employees have a reasonable opportunity to opt out of participation, enrollment should be considered *voluntary* because employees still control whether or not they participate).

192. *Completely*, MERRIAM-WEBSTER DICTIONARY, available at https://www.merriam-webster.com/dictionary/completely (last visited Apr. 1, 2019).

harbor is to determine whether an *employer* is establishing or maintaining a plan.[193] Indeed, the preamble to the IRA safe harbor states that "[s]ection 2510.3-2(d) makes it clear that individual retirement accounts . . . are not pension plans under section 3(2) of the Act *because they are not established or maintained by an employer or an employee organization*."[194]

In the preamble to the proposed 2016 regulatory safe harbor, the DOL reiterated this view explaining that the completely voluntary condition is:

> [I]mportant because where the employer is acting on his or her own volition to provide the benefit program, the employer's actions—e.g., requiring an automatic enrollment arrangement—would constitute its 'establishment' of a plan within the meaning of ERISA's text, and trigger ERISA's protections for the employee whose money is deposited into an IRA.[195]

To the extent that state automatic enrollment IRA programs mandate that employers automatically enroll employees in the state programs, a strong argument may be made that the plans fall within the intent of the regulation. When the programs are mandated by the state, employers are not "engaging in activities to establish or maintain a plan;" they are simply complying with a state mandate.[196] The state, rather than the employer, is establishing or maintaining the plan. Thus, a purposive approach suggests that state-mandated automatic enrollment IRA programs should be viewed as falling within the IRA safe harbor.

Both commentators and the DOL cited the 2011 ERISA Advisory Council's decision not to recommend that the DOL include an automatic enrollment feature in the IRC § 403(b) safe harbor regulations in support of their view that state automatic enrollment IRAs are not completely voluntary for purposes of the IRA safe harbor. Superficially, the Advisory Council's decision supports the view that automatic enrollment programs should not fall within the safe harbor because the Advisory Council did not recommend that an automatic enrollment feature be included within the IRC § 403(b) safe harbor. A closer look at

193. Graff Testimony, *supra* note 152, at 4–5.
194. Coverage; Reporting and Disclosure Requirements, 40 Fed. Reg. 34,526, 43,528 (Aug. 15, 1975) (to be codified at 29 C.F.R. pt. 2510, 2520) (emphasis added).
195. Saving Arrangements Established by States for Non-Governmental Employees, 80 Fed. Reg., 72,006, 72,008 (Nov. 18, 2015) (to be codified at 29 C.F.R. pt. 2510).
196. *Cf.* Graff Testimony, *supra* note 152, at 5.

the reasoning, however, makes it less persuasive in the context of state-mandated programs.

According to the Advisory Council Report, the Council was concerned voluntary employer-initiated plans would require the employer to perform "actions typically performed by a plan sponsor/fiduciary (e.g., designation of a default investment alternative)."[197] Unlike voluntary plans, state-mandated plans do not require employers to perform actions typically performed by plan sponsors/employers. Instead, those functions are performed by the state. Thus, the Advisory Council's reasoning supports the argument that state automatic enrollment IRA programs are established by the state, not employers, and thus may fall within the IRA regulatory safe harbor.

Professor Zelinsky cited Field Assistance Bulletin (FAB) 2006-02 in support of his argument that state automatic enrollment IRAs may qualify as voluntary.[198] In contrast, in the preamble to the proposed 2016 regulatory safe harbor the DOL asserted that neither FAB 2006-02, nor its predecessor, FAB 2004-01, suggest "that employee contributions to an HSA could be completely voluntary under an opt out arrangement."[199] The two field assistance bulletins address the question of when an HSA may fall within the regulatory safe harbor for employee welfare benefit plans which includes a requirement that the plans be "completely voluntary."

The field assistance bulletins establish that an employer may contribute to a HSA without violating the completely voluntary requirement.[200] The HSAs at issue, however, were not opt-out programs, and the field assistance bulletins do not address the question whether an opt-out program can be viewed as "completely voluntary." Thus, as the DOL recognized, the field assistance bulletins do not support the argument that opt-out arrangements can qualify as completely voluntary. Nor do they support an argument that opt-out arrangements cannot qualify as completely voluntary. They are simply agnostic on the issue.

The six decisions cited by the DOL in its preamble to the proposed regulation are no more helpful on the issue. The three reported deci-

197. ERISA COMPLIANCE REPORT, *supra* note 171, at 17.
198. Zelinsky, *supra* note 153, at 181.
199. Saving Arrangements Established by States for Non-Governmental Employees, 80 Fed. Reg., at 72,008.
200. *Id.*

sions do not involve employee benefit plans and thus are easily distinguishable. The three unreported decisions do involve employee benefits plans, but like the field assistance bulletins, do not involve state-mandated opt-out arrangements. Thus, they are no more persuasive than the field assistance bulletins. Moreover, the opinions are not reported and thus are not binding.

Dorn et al. point to the fact that proposed federal bills introducing automatic enrollment payroll deduction IRAs have included a statutory exemption from ERISA's definition of a pension plan in support of their position that opt-out arrangements are employee benefit plans for purposes of ERISA.[201] To illustrate, the proposed Automatic Enrollment IRA Act of 2015[202] included a provision amending ERISA's definition of employee pension benefit plan to provide:

> (C) An automatic IRA arrangement described in section 408B(d) of the Internal Revenue Code of 1986 *shall not be treated as an employee pension benefit plan or pension plan* if, under the arrangement, contributions are to be made to an automatic IRA the provider of which is included in the website list established under section 408B(h)(3) of such Code, are to be made to an individual retirement plan designated by the employee, or are to be invested in retirement bonds (whether to the Secretary of the Treasury or to a designated trustee or other agent for that purpose).[203]

Dorn et al. assert that this proposed provision shows that without this exemption, "an automatic enrollment IRA, even one required by [federal law], would be treated as an ERISA plan."[204]

Undoubtedly, this claim, based on the rule against surplusage,[205] has superficial appeal. It is, however, not entirely convincing. Simply because the bills included a provision clarifying that a federal automatic enrollment IRA program is not preempted by ERISA does not mean that a federal automatic enrollment IRA program would be

201. Dorn et al., *supra* note 137.

202. H.R. 2035, 113th Cong. (2013).

203. H.R. 2035, 113th Cong. § 2(d) (2013) (adding new § (C) to ERISA § 3(2)'s definition of employee pension benefit plan) (emphasis added).

204. Dorn et al., *supra* note 137.

205. *See* WILLIAM N. ESKRIDGE, JR., ET AL., CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY 677 (5th ed. 2014) ("Under the whole act rule, the presumption is that every word and phrase adds something to the statutory command. Accordingly, it is a cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant.") (internal quotations and citation omitted). For cases in which the Supreme Court has applied this rule against superfluity, *see* Circuit City Stores, Inc., v. Adams, 532 U.S. 105 (2001); ICC v. Oregon-Washington R. & Nav. Co., 288 U.S. 14, 25–26 (1933).

preempted in the absence of such a provision. The drafters may have simply included the provision because they recognized there would be some uncertainty as to whether the federal automatic enrollment IRA program would be preempted in the absence of such a provision. No negative inference should be drawn when Congress includes a provision that seeks to clarify an otherwise ambiguous situation.[206]

As their final cited authority, Dorn et al. referred to a letter issued by the DOL to the federal government regarding the federal myRA program established by the Obama Administration in support of their argument that state automatic enrollment IRA programs are not "completely voluntary" for purposes of the IRA safe harbor regulation.[207] In contrast, Professor Zelinsky contends that reading the letter in such manner "stretches [it] inordinately."[208]

Unveiled by President Obama in his 2014 State of the Union address,[209] the myRA program, like the state automatic enrollment IRA programs, created Roth IRAs to assist individuals without access to an employer-sponsored retirement plan to save for retirement.[210] Like the state automatic enrollment IRA programs, employees could contribute directly to the myRA program by payroll deductions through their employer.[211] Unlike the state programs, the myRA program did not provide for automatic enrollment.[212]

The DOL letter did not focus on the IRA safe harbor and its requirements in determining whether the myRA program was exempt from ERISA. Indeed, the letter only referred to the regulation once, in a footnote, where it found that the myRA program did not fail the IRA

206. *See* Circuit City Stores, Inc., v. Adams, 532 U.S. at 140 (Souter, J., dissenting) (rejecting an argument based on the rule against superfluity); *see also* Fort Stewart Sch. v. Fed. Labor Relations Auth., 495 U.S. 641, 646 (1990) (describing "two [statutory] exceptions [that] are indeed technically unnecessary, and were inserted out of an abundance of caution—a drafting imprecision venerable enough to have left its mark on legal Latin (*ex abundanti cautela*)"); Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation and the Canons: Part I*, 65 STAN. L. REV. 901, 934 (2013) (noting that "drafters intentionally err on the side of redundancy to 'capture the universe' or 'because you just want to be sure you get it'").

207. Canary Letter, *supra* note 174.

208. Zelinsky, *supra* note 153, at 182.

209. Kristen Ricaurte Knebel, *Obama Administration Fleshes Out Plan For 'Starter' Retirement Account for Workers*, 41 Pension & Benefits Rep. 238, 242 (2014).

210. *myRA*, *supra* note 175.

211. *Id.*

212. *Id.*

safe harbor requirement that the employer not "endorse" an IRA.[213] Instead, citing *Massachusetts v. Morash*,[214] the DOL focused on Congress's intent in determining whether the program should be subject to ERISA.[215]

The Department of Labor letter concluded:

> Thus, given the character of the program, including its voluntary nature, its establishment, sponsorship, and administration by the federal government, and the absence of any employer funding or role in its administration or design, the Department is of the view that an employer would not be establishing or maintaining an "employee pension benefit plan" within the meaning of section 3(2) of ERISA based solely on the facts that employees participate through payroll withholding contributions and that the employer distributes information, facilitates employee enrollment, and otherwise encourages employees to make deposits to myRA accounts owned and controlled by employees.[216]

As Professor Zelinsky contends, reading the letter to provide that state automatic enrollment IRAs are employee benefit plans for purposes of ERISA stretches it inordinately. Indeed, if anything, the letter could be read to support a conclusion that state automatic enrollment

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213. Specifically, the third of the four regulatory requirements is that the sole involvement of the employer is "without endorsement" to permit the sponsor to publicize the program to an employee, to contributions through payroll deductions and to remit them to the sponsor. 29 C.F.R. § 2510.3-2(d)(3) (2018). The Canary letter declares:

> Allowing employers to recommend a specific IRA or provider, but then to claim no responsibility to prudently select the IRA or monitor the provider would undercut the protections offered by ERISA. The above concerns do not arise where the employer, without representing that the myRA is an employee benefit plan sponsored by the employer, is encouraging employees to take advantage of services or benefits offered by the federal government.

Canary Letter, *supra* note 174, at 2 n.2.

214. Massachusetts v. Morash, 490 U.S 107 (1989).

215. Specifically, the letter states:

> Although the myRA program is designed to provide retirement income to individuals, including employees, we do not believe that Congress intended in enacting ERISA that a federal government retirement savings program created and operated by the U.S. Department of the Treasury would be subject to the extensive reporting, disclosure, fiduciary duty, or other requirements of ERISA, which were established to ensure against the possibility that employees' expectations of a promised benefit would be defeated through poor management by the plan sponsor and other plan fiduciaries.

Canary letter, *supra* note 174, at 2.

216. *Id.*

IRA programs are not employee benefit plans because the state automatic enrollment IRA programs, like the federal myRA program, are established, sponsored, and administered by the government, and the employer does not fund the IRAs and plays no role in the administration or design of the program.

In conclusion, no authority is directly on point, and thus no authority unequivocally establishes whether or not state-mandated automatic enrollment IRAs fall within the IRA safe harbor. Based on the intent of the regulatory safe harbor for IRAs, a strong argument can be made that state automatic enrollment IRAs are "completely voluntary" for purposes of the safe harbor. Such an interpretation, however, would be inconsistent with the plain meaning of the words, completely voluntary. Moreover, it would require that the words "completely voluntary" be given a totally different meaning when applied to voluntary employer-initiated plans than to state-mandated plans. Thus, a strong argument can be made that state mandated automatic enrollment IRAs should not be considered "completely voluntary" for purposes of the IRA safe harbor.

3. ERISA'S DEFINITION OF EMPLOYEE BENEFIT PLAN

Yet, even if state-mandated automatic enrollment IRAs do not fall within the IRA safe harbor, that does not mean that they must be viewed as employee benefit plans for purposes of ERISA.[217] Instead, state-mandated automatic enrollment IRAs are only employee benefit plans if they fall within the meaning of employee benefit plans under ERISA's definition of employee benefit plans.

Section 3(3) of ERISA defines an "employee benefit plan" as "an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee

217. As the Morse letter notes, "[a] regulatory safe harbor is just that: it provides a bright-line standard for identifying programs that are not covered by ERISA, but does not cover the landscape for what is or is not an ERISA plan. Morse Letter, *supra* note 120, at 6; *see also* Gross v. Sun Life Assurance Co. of Can., 734 F.3d 1, 6 (1st Cir. 2013) (stating that "[a] benefits program that fails the safe harbor test will not necessarily be deemed an ERISA plan . . . Exemption also may result from application of the 'conventional tests' for determining whether ERISA governs"); Morse, *supra* note 118, at 81 (stating that "[a] safe harbor guarantees compliance for described behavior, without foreclosing the possibility that activities outside the safe harbor are also compliant").

pension benefit plan."[218] Section 3(2)(A), in turn, defines an "employee pension benefit plan" in relevant part as:

> Any plan, fund, or program which was heretofore or is hereafter *established or maintained by an employer or by an employee organization*, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program –
>
> (i) provides retirement income to employees, or
>
> (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating benefits under the plan or the method of distributing benefits from the plan.[219]

Thus, whether state automatic enrollment IRA programs are employee benefit plans[220] for purposes of ERISA depends on whether they are "established or maintained by an employer or by an employee organization."[221]

ERISA does not define the term "established or maintained."[222] It does, however, define the term "employer." Specifically, ERISA § 3(5) defines employer as "any person acting directly as an employer *or indirectly in the interest of an employer*, in relation to any employee benefit plan."[223] In an opinion letter, Eversheds Sutherland points to this definition and suggests that state automatic enrollment IRA programs are established or maintained by employers because the states establish or

218. 29 U.S.C. § 1002(3) (2018).

219. 29 U.S.C. § 1002(2)(A) (2018) (emphasis added).

220. In the leading case of *Donovan v. Dillingham*, the 11th Circuit set forth a four prong test for determining whether there is a "plan" for purposes of ERISA. Donovan v. Dillingham, 688 F.2d 1367, 1372 (11th Cir. 1982). Under this four prong test, there must be (1) intended benefits, (2) intended beneficiaries, (3) a source of financing, and (4) a procedure to apply for and collect benefits. *Id.* The state automatic enrollment IRA programs appear to satisfy this test. The harder question, discussed in the text, is whether any such plan is established or maintained by an employer or an employee organization.

221. In its complaint, the HJTA alleges that the California program is an employee benefit plan under ERISA. HTJA Complaint, *supra* note 120, at ¶ 22. The complaint, however, does not explain how the program is "established or maintained by an employer or by an employee organization." It simply alleges that it is "a pension benefit plan or both a pension benefit plan and a welfare benefit plan" and thus an "'employee benefit plan' under ERISA." *Id.*; *See infra.* Section V.B. (discussing this issue in text).

222. *See* U.S. Dep't of Labor, Emp. Benefits Sec. Admin., Opinion Letter 2012-02A (May 25, 2012) (stating that "[t]he phrase 'establish or maintain' is not defined in ERISA.").

223. 29 U.S.C. § 1002(5) (2018) (emphasis added).

maintain them "in the interest of an employer." [224] Howard Jarvis Taxpayers Association ("HJTA") makes a similar argument in a lawsuit challenging the California program.[225]

It is not, however, entirely clear that state automatic enrollment IRA programs are established in the interest of employers. Rather, a strong argument can be made that they are established in the interest of employees. First, given the relatively low barrier to establishing certain types of retirement plans, an employer would have already voluntarily established a retirement plan if it were in the employer's interest to do so. As HJTA points out, the state laws *mandate* employer participation;[226] the mandate only applies to employers that have elected not to voluntarily establish a plan. More significantly, the statutory language of the state statutes establishing the state automatic enrollment IRAs indicate that the laws are intended to benefit employees who do not have access to employer-provided pensions, rather than to benefit employers who choose not to establish plans. For example, California's law provides that "the California Secure Choice Retirement Savings Trust [is] to be administered by the board for the purpose of promoting greater retirement savings for California private *employees* in a convenient, voluntary, low-cost, and portable manner."[227] Similarly, Illinois' law states that the Illinois Secure Choice Savings Program "is hereby established and shall be administered by the Board for the purpose of promoting greater retirement savings for private-sector *employees* in a convenient, low-cost, and portable manner."[228]

Moreover, the language in the statutes establishing the programs, indicates that the programs are established by the state law, or by an entity created by the state law, rather than the employer. For example, Connecticut's law provides that "[t]he Connecticut Retirement Security Authority shall provide for the establishment and maintenance of an individual retirement account for each program participant."[229] Similarly, Maryland's law provides that the Maryland Small Business Retirement Savings Board "shall cause the Program or payroll deposit

224. Sutherland Letter, *supra* note 120, at 3.
225. Plaintiff's Opposition to Defendant's Motion to Dismiss ¶ 8, Howard Jarvis Taxpayers Ass'n v. Cal. Secure Choice Ret. Savings Program, No. 2:18-cv-01584 (Aug. 30, 2018) [hereinafter HJTA Opposition to Defendant's Motion to Dismiss].
226. *Id.*
227. *See* CAL. GOV'T CODE § 10004(a) (West 2018).
228. 820 ILL. COMP. STAT. 80/10 (2018) (emphasis added).
229. *See* CONN. GEN. STAT. § 31-420(a) (2018).

IRA arrangements established under the Program to be designed, established, and operated."[230]

While relevant, statutory language creating the state automatic enrollment IRA programs is not determinative. Courts consider the purpose of the established or maintained requirement as well as the purposes of ERISA and its preemption provision in determining whether a specific arrangement is established or maintained by an employer.[231]

According to the frequently cited[232] Tenth Circuit decision *Peckham v. Gem State Mutual of Utah*,[233] "[t]he 'established or maintained' requirement appears designed to ensure that the plan is part of an employment relationship."[234] Courts look "at the degree of participation by the employer in the establishment or maintenance of the plan" in determining whether the plan is part of an employment relationship.[235] In the case of state automatic enrollment IRA programs, there is a strong argument that state automatic enrollment IRAs are not part of an employment relationship because the employer plays no more than a ministerial role in the administration of the plans.

In *Golden Gate Restaurant Association v. City and County of San Francisco*,[236] the Ninth Circuit held that a San Francisco health care pay-or-play mandate was not preempted by ERISA.[237] The ordinance required covered employers to spend a specified amount of "health care expenditures to or on behalf of" certain employees.[238] Covered employers were permitted to satisfy the requirement by spending a defined amount on health care for their employees through their own ERISA-covered plans

230. MD. CODE ANN. LAB. & EMPL. § 12-204(a)(1) (West 2018).

231. *Cf.* Belanger v. Wyman-Gordon Co., 71 F.3d 451, 455 (1st Cir. 1995) (noting that "[t]here is no authoritative checklist that can be consulted" to determine whether an employer's actions establish an ERISA plan).

232. As of June 2018, *Peckham* had been cited in 130 opinions. For recent citations to *Peckham* for the proposition that the established or maintained requirement "appears to be designed to ensure that the plan is part of an employment relationship," *see, e.g.*, Saunders v. Provident Life & Accident Ins. Co., 2018 WL 1952580, at *1 (D. Colo. Mar. 1, 2018); Charles Schwab & Co. v. Debickero, 593 F.3d 916, 921 (9th Cir. 2010).

233. Peckham v. Gem State Mut., 964 F.2d 1043 (10th Cir. 1992).

234. *Id.* at 1049.

235. *Id.*

236. Golden Gate Rest. Ass'n v. City of San Francisco, 546 F.3d 639 (9th Cir. 2008).

237. *Id.* at 661.

238. *Id.* at 643 (quoting S.F. ADMIN. CODE § 14.3(a)).

or by paying a required amount to the city.[239] Payments made to the city did not go into a general fund; instead, they were to be used either to fund membership in the city's Health Access Program for uninsured San Francisco residents or to establish and maintain medical reimbursement accounts for covered employees.[240]

In an amicus brief filed with the Ninth Circuit, the DOL argued that the Health Access Program ("HAP") was an employee benefit plan under ERISA.[241] The Ninth Circuit rejected the argument and found that the city of San Francisco, rather than the employer, established and maintained the HAP.[242] Among the reasons identified for finding the city, rather than the employer, established the HAP was the fact that "neither the employer nor the covered employee ha[d] any control over the kind and level of benefits provided by the HAP."[243]

The DOL announced that it had reconsidered its position in an amicus brief it filed in opposition to a petition for certiorari in *Golden Gate*.[244] In the brief, the DOL announced that it was planning to "issue a proposed regulation 'clarify[ing] the circumstances under which health care arrangements established or maintained by state or local

239. *Id.* at 644–45.

240. *Id.*

241. Brief for the United States as Amicus Curiae, Golden Gate Rest. Ass'n v. City of San Francisco, 546 F. 3d 639 (9th Cir. 2008) (No. 08-1515).

242. Golden Gate Rest. Ass'n, 546 F.3d at 653–54.

243. *Id.* at 654. The court offered three other reasons in support of its finding that the HAP was established by the city rather than the employer. First, funding for the HAP comes primarily from taxpayers. Golden Gate Rest Ass'n, 546 F. 3d. at 653. Second, "[t]he HAP exists, and will continue to exist, whether or not any covered employer makes a payment to the City under the Ordinance." *Id.* Third, employers have no control over the eligibility of their employees; eligibility depends on income level, age, uninsured status, and City residence, and the City is free to change the eligibility criteria. *Id.* at 653–54. The first two reasons are clearly inapplicable to state automatic enrollment IRAs. Arguably, the third reason applies because the states have the power to change the eligibility criteria at any time. On the other hand, the third reason does not unequivocally apply to state automatic enrollment IRAs because employers have total control over the eligibility of their employees. If the employer elects to offer an employer-sponsored plan, its employees are not eligible for the state automatic enrollment IRA program. If the employer elects not to offer an employer-sponsored pension plan, its employees are generally eligible to participate in a state-mandated automatic enrollment IRA program. Thus, although *Golden Gate* offers support for the proposition that state automatic enrollment IRAs should not be considered employee benefit plans, the case can be distinguished from state automatic enrollment IRA programs.

244. Brief for United States as Amicus Curiae Opposing Writ of Certiorari at 12, Golden Gate Rest. Ass'n v. City of San Francisco, 546 F.3d 639 (9th Cir. 2008) (no. 08-1515).

governments for the benefit of non-governmental employees do not constitute an employee welfare benefit plan' under ERISA."[245] Ultimately, in light of the enactment of the Affordable Care Act, the Department of Labor never issued the proposed regulation.[246] The fact that the DOL never issued the proposed regulation does not detract from the fact that the Ninth Circuit's decision in *Golden Gate* as well as the DOL's position on reconsideration support the view that state automatic enrollment IRA programs are established or maintained by the state, rather than the employer, because the employer has no control over the terms of a state automatic enrollment IRA.[247]

In *Massachusetts v. Morash*,[248] the Supreme Court announced that Congress' primary concern in enacting ERISA "was with the mismanagement of funds accumulated to finance employee benefits and the failure to pay employee benefits from accumulated funds."[249] There is little risk of employer mismanagement of accumulated funds in state automatic enrollment IRA programs because employers play no role in the management of the funds. Instead, the programs are managed and administered by entities created by the state to manage and administer the programs.[250] Of course, there is a risk of mismanagement by the entities charged with managing and administering the programs.[251] In or-

245. *Id.* (quoting Health Care Arrangements Established by State and Local Governments for Non-Governmental Employees, 74 Fed. Reg. 64,275, 64,276 (Dec. 7, 2009) (to be codified at 29 C.F.R. § 2510.3-1) (2016).

246. Because the ACA imposed individual, IRC § 5000A, and large employer IRC § 4980H mandates, it substantially reduced the likelihood that state and local governments would enact additional health care mandates and thus made the proposed regulation less pressing. For a discussion of the large employer pay-or-play mandate, see Kathryn L. Moore, *The Future of Employment-Based Health Insurance after the Patient Protection and Affordable Care Act*, 89 NEB. L. REV. 885, 903-906 (2011).

247. As discussed in footnote 243 *supra*, this support is not unequivocal because the Ninth Circuit relied on four factors in finding that the HAP was not an employee benefit plan, and only one of the four factors is clearly applicable to state automatic enrollment IRA programs. *See* Golden Gate Rest. Ass'n, 546 F. 3d at 647–54.

248. Massachusetts v. Morash, 490 U.S. 107.

249. *Id.* at 112.

250. *See* PEW CHARITABLE TRS., WORKER REACTIONS TO STATE SPONSORED AUTO-IRA PROGRAMS 1 (2017), https://www.pewtrusts.org/-/media/assets/2017/10/retirement_savings_worker_reactions_v5.pdf ("Under these plans, workers without access to a workplace retirement plan would see regular deductions from their paychecks sent to an IRA managed by a private financial services firm.").

251. One of the justifications offered by the sponsors of the resolutions disapproving the 2016 regulatory safe harbor and a similar safe harbor for local government plans was that the regulations would "ultimately force workers into government-run IRAs without the consumer protections provided by ERISA." INDIVIDUAL

der to address that risk, all of the state automatic enrollment IRA programs include express fiduciary provisions that parallel ERISA's fiduciary provisions.[252]

There is some limited risk that employers will not forward employee contributions to the state IRA programs.[253] There is a similar risk that employers may not forward employees' Social Security contributions to the federal government, or that employers may not forward employees' contributions to traditional payroll deduction IRAs to the financial institution offering the IRAs and neither Social Security[254] nor traditional payroll deduction IRAs[255] are employee benefit plans for purposes of ERISA. Thus, to the extent that Congress' primary concern in ERISA is to protect against employers' mismanaging the funds of employee benefit plans, state automatic enrollment IRAs need not be considered employee benefit plans for purposes of ERISA.

Congress' second principal purpose in enacting ERISA was to protect employers from "the threat of conflicting and inconsistent State and local regulation of employee benefit plans."[256] Whether the state automatic enrollment IRA programs give rise to the threat of inconsistent state and local regulation depends on what effect, if any, they

RETIREMENT PLANS GUIDE LETTER NO. 424, *supra* note 97, at 4. For a discussion of how effective the 2016 regulatory safe harbor was in protecting against misfeasance and malfeasance at the plan level, see Moore, *supra* note 21, at 76–79.

252. *See* CAL. GOV'T CODE § 100002(d) (West 2018); 820 ILL. COMP. STAT. § 80/25 (2018); CONN. GEN. STAT. § 31-421 (2018); MD. CODE ANN., LAB. & EMPL. § 12-203(a) (West 2018); OR. REV. STAT. § 178.205(2)(c) (2018). The state programs differ from private programs governed by ERISA in a couple of significant ways, but it appears that the state programs provide a reasonable level of protection against mismanagement by the entities charged with administering the programs. *See* Moore, *supra* note 21, at 79.

253. *Cf.* George v. Junior Achievement of Cen. Ind., 694 F.3d 812 (7th Cir. 2012) (concerning employer, who facing financial difficulties, fails to deposit money withheld from employee's paychecks into employee's 401(k) account).

254. Since Social Security is established by the federal government and not by individual private employers, Social Security is not an employment benefit plan for purposes of ERISA. *See* 29 U.S.C. § 1002(2)(A) (defining employee benefit plan as plan established by employer or employee organization).

255. 29 C.F.R. § 2510.3-2(d) (2019).

256. Saunders v. Provident Life & Accident Ins. Co., No. 16-w-1474-JLK, 2018 WL 1952580 at *6 (D. Colo. Mar. 1, 2018) (In passing ERISA, Congress' purpose was twofold: to protect employees and to protect employers. Congress wanted to safeguard employee interests by reducing the threat of abuse or mismanagement of funds that had been accumulated to finance employee benefits, while at the same time safeguarding employer interests by eliminating the threat of conflicting and inconsistent State and local regulation of employee benefit plans.); Demars v. CIGNA Corp., 173 F.3d 443, 446 (1st Cir. 1999) (identifying same two purposes).

have on employer-sponsored pension plans. That issue is addressed in the following subsection which considers whether state automatic enrollment IRA programs impermissibly relate to other employee benefit plans.

In sum, looking at the plain language of ERISA's definition of employee benefit plan, the plain language of the state automatic enrollment IRA statutes, as well as ERISA's purpose of protecting against employer mismanagement of funds, a strong argument can be made that state automatic enrollment IRA programs should not be viewed as employee benefit plans for purposes of ERISA.

B. Even If State Automatic Enrollment IRAs are Not Employee Benefit Plans for Purposes of ERISA, Do They Nevertheless Impermissibly Relate to Other Employee Benefit Plans?

Even if the state automatic enrollment IRA programs are not employee benefit plans for purposes of ERISA, the state laws establishing the programs are preempted by ERISA if they impermissibly "relate to" other employee benefit plans. Under the Supreme Court's two-prong test, a state law relates to an employee benefit plan if it has (1) a reference to or (2) a connection with an employee benefit plan.[257]

This subsection begins by discussing whether state automatic enrollment IRA programs have an impermissible reference to employee benefit plans. It then considers whether they have an impermissible connection with employee benefit plans.

1. STATE AUTOMATIC ENROLLMENT IRA PROGRAMS AND THE REFERENCE TO PRONG

The Supreme Court explained in *Gobeille v. Liberty Mutual Insurance Company*[258] that a state law has a "reference to" an employee benefit plan if the state law "acts immediately and exclusively upon ERISA plans . . . or . . . the existence of ERISA plans is essential to the law's operation."[259] If the state automatic enrollment IRA programs are found to be employee benefit plans for purposes of ERISA, then it seems clear

257. *See* N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 656 (1995).

258. Gobeille v. Liberty Mut. Ins. Co., 136 S. Ct. 936 (2016).

259. *Id.* at 943 (quoting Cal. Div. of Labor Standards Enf't v. Dillingham Constr., N.A., Inc., 519 U.S. 316, 825, 325 (1997)).

that the laws establishing the programs have an impermissible reference to the programs because the existence of the state automatic enrollment IRA program is essential to the law's operation. Indeed, it is the very purpose of the law.

On the other hand, if the state automatic enrollment IRA programs are found not to be employee benefit plans for purposes of ERISA, then the state laws creating the programs will not violate the "reference to" prong of the test if they do not operate immediately and exclusively upon ERISA plans. In *Mackey v. Lanier Collection Agency & Service, Inc.*,[260] the Supreme Court held that a state statute that expressly exempted ERISA welfare plans from a generally applicable state garnishment statute violated the "reference to" prong because the statute expressly referred to and solely applied to ERISA employee benefit plans.[261] In contrast, in *California Div. of Labor Standards v. Dillingham Construction*, the Court held that a California law that permitted contractors to pay a lower wage to workers participating in state-approved apprenticeship programs did not violate the "reference to" prong.[262] The Court recognized that many or even most of the apprenticeship programs were covered by ERISA.[263] Nevertheless, it held that the law did not contain a prohibited reference to ERISA plans because it functioned in the same manner regardless of whether a particular apprenticeship program was covered by ERISA.[264]

Accordingly, whether the state laws' exemption provisions violate the reference to prong depend on whether they apply exclusively to ERISA plans. Although none of the state statutes use the term "ERISA-covered plans" or similar terminology expressly referring to plans covered by ERISA, all of the state statutes' exemption provisions clearly exempt employers that offer ERISA-covered plans.[265] Whether

260. *See* Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825 (1988).

261. *Id.* at 830 (holding that "GA. CODE ANN. 18-4-22.1 (2018), which singles out ERISA employee welfare benefit plans for different treatment under state garnishment procedures is preempted under section 514(a). The state statute's express reference to ERISA plans suffices to bring it within the federal law's preemptive reach.").

262. Cal. Div. of Labor Standards v. Dillingham Constr. N.A., Inc., 519 U.S. 316, 319 (1997).

263. *Id.* at 327 n.5.

264. *Id.* at 332–33.

265. *See* CAL. GOV'T CODE § 100032(g)(1) (West 2018); 820 Ill. Comp. Stat. 80/5 (2018); CONN. GEN. STAT. § 31-422(a)(4)(A) (2018); MD. CODE ANN., LAB. & EMPL. § 12-101(d)(2)(v) (West 2018); OR. REV. STAT. § 178.210(1)(b) (2018). For example, the California, Illinois, and Oregon statutes expressly exempt employers that offer

state laws also exempt employers that offer retirement savings arrangements that are not covered by ERISA is less clear.

As discussed above, traditional payroll deduction IRAs are clearly exempt from ERISA under the regulatory safe harbor for IRAs. Thus, if the state laws exempt employers that offer traditional payroll deduction IRAs from coverage, then the state laws' exemption provisions do not violate the reference to prong. None of the state laws expressly exempt employers that offer traditional payroll IRAs. All of the state laws, however, can be arguably interpreted to exempt either employers that offer traditional payroll IRAs, or other arrangements that are exempt from ERISA, or both.

Two of the state laws can easily be interpreted to exclude employers that offer traditional payroll IRAs. First, Maryland's statute exempts "an employer that currently offers an employer-offered savings arrangement that was established separately from the requirements of this title."[266] Undoubtedly, a traditional payroll deduction IRA can be considered "an employer-offered savings arrangement" established separately from the requirement of the Maryland mandate, and Maryland law directs the Maryland Board "to take any action necessary to ensure that the Program is not preempted by federal law."[267] Second, Connecticut's statute exempts "[a] qualified employer that (i) maintains a retirement plan or retirement arrangement described under Section 219(g)(5) of the Internal Revenue Code of 1986, or any other corresponding internal revenue code of the United States as amended from time to time, or (ii) *any other retirement arrangement approved by the authority*."[268] This statutory language clearly grants power to the Connecticut Retirement Security Authority to exempt employers that offer traditional payroll deduction IRAs.

401(k) plans, and 401(k) plans are subject to ERISA's regulation. *Cf.* Tibble v. Edison Int'l, 135 S. Ct. 1823 (2015) (applying ERISA's fiduciary statute of limitations to 401(k) plan). Although the Connecticut and Maryland statutes do not expressly identify the types of employer-sponsored retirement plans that exempt an employer from the statute, most employer-sponsored retirement plans are governed by ERISA. *See* William A. Schmidt, *ERISA Overview for Investment Advisers*, SJ058 ALI-ABA 27 (2004) (stating that "ERISA covers most privately sponsored employee pension benefit plans, including jointly trusteed Taft-Hartley plan, individual employer sponsored plans, and plans established or maintained by tax-exempt entities").

266. MD. CODE ANN. LAB. & EMPL. § 12-101(d)(2)(v) (West 2018).

267. MD. CODE ANN. LAB. & EMPL. § 12-204(c) (2018).

268. CONN. GEN. STAT. § 31-422(4)(A) (2018) (emphasis added).

The Illinois and Oregon laws can also be interpreted to exclude employers that offer traditional payroll IRAs. Specifically, the Illinois statute exempts employers that have "offered a qualified retirement plan including, *but not limited to*, a plan qualified under section 401(a), 401(k), 403(a), 403(b), 408(k), 408(p), or 457(b) of the Internal Revenue Code."[269] The Oregon statute contains similar "including, but not limited to" language.[270] Because these two statutes provide that "qualified plans" include, but are not limited to, the plans listed in the statute, it is not unreasonable to interpret the statutes to extend exemptions to employers that offer traditional payroll deduction IRAs that are exempt from ERISA under the safe harbor for IRAs. Moreover, the DOL regulations exempt from ERISA "tax sheltered annuities," that is, IRC § 403(b) annuities that meet certain requirements.[271] The Illinois and Oregon statutes' reference to IRC 403(b) could reasonably be interpreted to exempt employers that offer 403(b) plans that are exempt from ERISA under the regulatory safe harbor for tax sheltered annuities. Similarly, the broad exemption language found in the Maryland and Connecticut statutes could also be interpreted to exempt employers that offer 403(b) annuities that satisfy the regulatory safe harbor for tax-sheltered annuities.

It would be more difficult to interpret the California statute to exempt employers that offer traditional payroll deduction IRAs. The California statute expressly exempts employers that offer "*automatic enrollment* payroll deduction IRAs."[272] The maxim "*expression unius est exclusion alterius*"[273] suggests that California's statute should be interpreted to exclude employers that offer automatic enrollment, but not traditional, payroll deduction IRAs. As discussed above,[274] there is a serious question as to whether the regulatory safe harbor for IRAs ap-

269. 820 ILL. COMP. STAT. § 80/5 (2018).

270. *See* OR. REV. STAT. § 178.210(1)(b) (2018) ("[U]nless the employer offers a qualified retirement plan, *including but not limited to* a plan qualified under section 401(a), section 401(k), section 403(a), section 403(b), section 408(k), section 408(p), or section 457 of the Internal Revenue Code") (emphasis added).

271. *See* 29 C.F.R. § 2510.3-2(f) (2018).

272. *See* CAL. GOV'T CODE § 100032(g)(1) (West 2018) ("[a]n employer that . . . offers an *automatic enrollment* payroll deduction IRA, shall be exempt from the requirements of the California Secure Choice Retirement Savings Program.") (emphasis added).

273. *See, e.g.*, NLRB v. SW General, Inc., 137 S. Ct. 929, 940 (2017) (discussing canon).

274. *See supra*, Section III(A)(2)(b)(iii) & III(A)(3).

plies to automatic enrollment IRAs voluntarily initiated by an employer. The California statute could, however, reasonably be interpreted to exempt employers that offer IRC § 403(b) annuities that qualify for the safe harbor for tax-sheltered annuities because the statute uses non-exclusive language to enumerate the types of plans employers may offer to qualify for the exemption. Specifically, the California statute exempts "[a]n employer that provides an employer-sponsored retirement plan, *such as* a defined benefit plan or a 401(k), Simplified Employee Pension (SEP) Plan, or Savings Incentive Match Plan for Employees (SIMPLE) plan . . . if the plan . . . qualifies for favorable income tax treatment under the federal Internal Revenue Code."[275] This "such as" language can reasonably encompass section 403(b) annuities that qualify for the regulatory safe harbor for tax-sheltered annuities.

In sum, a strong argument can be made that none of state automatic enrollment IRA programs violate the first "reference to" prong of the relates to element of ERISA preemption. Each of the state statutes can reasonably be interpreted to exempt employers that offer plans that are not regulated by ERISA. Specifically, most of the state statutes can reasonably be interpreted to exclude employers that offer traditional payroll deduction IRAs that are exempt from ERISA under the regulatory safe harbor for IRAs. In addition, all of the statutes can be interpreted to exempt employers that offer 403(b) annuities that are exempt from ERISA under the regulatory safe harbor for tax-sheltered annuities. Thus, a strong argument can be made that none of the state statutes' exemption provisions act exclusively upon ERISA-covered plans and thus none of the statutes are preempted under the reference to prong.

C. State Automatic Enrollment IRA Programs and the Connection With Prong

In *New York State Conference of Blue Cross and Blue Shield Plans v. Travelers Insurance Co.* ("*Travelers*"),[276] the Supreme Court announced that it must look "to the objectives of the ERISA statute as a guide to the

275. CAL. GOV'T CODE § 100032(g)(1) (West 2018) (emphasis added). The California regulations confirm that employers that offer traditional payroll deduction IRAs are not exempt but employers that offer 405(b) annuities are exempt. CAL. CODE REGS. tit. 10, chp. 15, §1000(x).

276. N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1997).

scope of the state law that Congress understood would survive" in applying the "connection with" prong.[277] The Court declared that "[t]he basic thrust of the pre-emption clause, then, was to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans."[278]

If the state laws establishing state automatic enrollment IRA programs were to require employers' pension plans to meet certain minimum requirements before the employer was exempt from the automatic enrollment IRA programs, then the state laws would likely have a connection with employee benefit plans. This is because the minimum requirements could impermissibly interfere with nationally uniform plan administration. For example, if the statutes in two states were to require that plans satisfy different specific default investment options, an employer could not have a single uniform pension plan. Instead, an employer would have to have a plan with one type of default investment option in one state and a different type of default investment option in the other state.

At present, however, none of the five states with automatic enrollment IRA programs imposes minimum requirements on pension plans before the employer is exempt from the state law. Instead, all of the state laws simply provide that if the employer offers its employees a pension plan, then the employer is exempt from the state mandate. Thus, as currently structured, none of the state automatic enrollment IRA programs appear to give rise to the risk of conflicting inconsistent state and local regulation of employee benefit plans because none of the programs directly or indirectly regulate employer-sponsored pension plans. The exemptions apply regardless of the terms of any employer-sponsored plans.

The state laws may encourage employers to adopt employee benefit plans in order to avoid the state mandate, and thus may have an indirect influence on employee benefit plans. Such an indirect influence, however, should not fall within the scope of the connection with prong under the Court's reasoning in *Travelers.*

Travelers involved a preemption challenge to a New York statute that required hospitals to collect surcharges from patients covered by commercial insurers but not from patients insured by Blue Cross/Blue Shield, and subjected certain Health Maintenance Organizations

277. *Id.* at 656.
278. *Id.* at 657.

("HMO") to surcharges that varied with the number of Medicaid patients that the HMOs enrolled.[279] The Court distinguished the surcharge law from state laws that mandate employee benefit structures or their administration.[280] The Court recognized the surcharges would make Blue Cross/Blue Shield more attractive to ERISA plans.[281] The Court, however, described their effect as "an indirect economic influence" that "does not bind plan administrators to any particular choice and thus function as a regulation of an ERISA plan itself."[282] According to the Court, "the indirect influence of the surcharges [does not] preclude uniform administrative practice or the provision of a uniform interstate benefit package if a plan wishes to provide one. It simply bears on the cost of benefits and the relative costs of competing insurance to provide them."[283]

The Court concluded, "cost uniformity was almost certainly not an object of preemption, just as laws with only an indirect economic effect on the relative costs of various health insurance packages in a given State are a far cry from those 'conflicting directives' from which Congress meant to insulate ERISA plans."[284] Therefore, according to the Court, the surcharges did not have an impermissible "connection with" employee benefit plans and were not preempted by ERISA.[285] Similarly, because the state automatic enrollment IRA legislation simply encourages employers to establish employee benefit plans but does not impact the terms of the plans, a strong argument can be made that, like the surcharges in *Travelers*, the state automatic enrollment IRA legislation has only an indirect influence on employee benefit plans and thus does not have an impermissible connection with employee benefit plans.

279. N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. at 649.
280. *Id.* at 657–58.
281. *Id.* at 659.
282. *Id.*
283. *Id.* at 660.
284. *Id.* at 662.
285. *Id.*

V. Complaints Challenging State Automatic Enrollment IRAs

At the time this Article went to press, two complaints had been filed challenging state automatic enrollment IRA programs. The first complaint challenged the Oregon law's reporting requirement. The second, broader, complaint contends that the entire California program is preempted by ERISA.[286] This subsection briefly analyzes the merits of each of these complaints.

A. Complaint Challenging Oregon Reporting Requirement

In October 2017, the ERISA Industry Committee ("ERIC") filed the first lawsuit challenging a state automatic enrollment IRA program on preemption grounds.[287] In its suit, ERIC did not challenge the state automatic enrollment IRA program as a whole. Instead, the complaint alleged that the Oregon law's reporting requirement was preempted by ERISA.[288] The Oregon statute requires the Oregon Retirement Savings Board ("Oregon Board") to establish a process for employers to obtain an exemption if the employer offers a qualified retirement plan.[289] Pursuant to this statutory mandate, the Oregon Board promulgated a rule providing that:

> An authorized representative of an Employer may file a Certificate of Exemption with the Program by certifying, through the Program Administrator's internet portal or other means of data transmittal specified and validated by the Program Administrator, that the Employer offers a Qualified Plan to some or all of its Employees.[290]

The regulation further provided that:

> A Certificate of Exemption is valid for three (3) years from the date the Employer files the Certificate with the Program Administrator, so long as the Employer continues to offer a Qualified Plan to some or all of its Employees. A Certificate may be renewed by following a process of recertification to be established by the Board not later than December 31, 2019.[291]

286. The Illinois Program is expected to face a legal challenge when it is implemented. *See* Michael J. Bologna, *Illinois Secure Choice Retirement Program Could Face Legal Challenge*, BLOOMBERG L. (July 20, 2018), https://www.bna.com/illinois-secure-choice-n73014477728/.
287. *See* ERIC Complaint, *supra* note 121.
288. *See id.* at ¶ 1.
289. OR. REV. STAT. § 178.215(8) (2018).
290. OR. ADMIN. R. 170-080-0020(1) (2018).
291. *Id.* at 170-080-0020(2).

In its complaint, ERIC alleged that the state statute and regulation have a "'connection with' ERISA plans because they impose reporting requirements on multi-state plan sponsors operating in Oregon by requiring the filing of a certificate of exemption to avoid the obligation to register to administer the Oregon Retirement Savings Plan."[292] The complaint further alleged that the reporting requirement interferes with nationally uniform ERISA plan administration by requiring plan sponsors to report to the Oregon Board on the sponsors' ERISA activity of providing ERISA-governed retirement benefits."[293]

In *Gobeille*, the Supreme Court reiterated that in considering whether a state statute has an impermissible "connection with" an ERISA plan, the Court will consider "the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive"[294] in addition to "the nature of the effect of the state law on ERISA plans."[295] *Gobeille* involved a challenge to a Vermont law requiring "health insurers, health care providers, health care facilities, and governmental agencies to report any 'information relating to health care costs, prices, quality, utilization, or resources required' by the state agency, including data relating to health insurance claims and enrollment."[296] The implementing regulation required "the submission of 'medical claims data, member eligibility data, provider data, and other information,' . . . in accordance with specific formatting, coding, and other requirements."[297]

The Court announced that "reporting, disclosure, and recordkeeping are central to, and an essential part of, the uniform system of plan administration contemplated by ERISA."[298] It found that "Vermont's reporting regime, which compels plans to report detailed information about claims and plan members, both intrudes upon 'a central matter of plan administration' and 'interferes with nationally uniform

292. ERIC Complaint, *supra* note 121, at ¶ 19.
293. *Id.* at ¶ 20.
294. Gobeille v. Liberty Mut. Ins. Co., 136 S. Ct. 936, 943 (2016) (quoting *Travelers*).
295. *Id.* at 943 (quoting *Dillingham*).
296. *Id.* at 941.
297. *Id.* (citation to regulation omitted).
298. *Id.* at 945.

plan administration.'"[299] The Court held that pre-emption was "necessary to prevent the States from imposing novel, inconsistent, and burdensome reporting requirements on plans."[300]

ERIC's complaint clearly had some merit. Oregon's law required employers to file a Certificate of Exemption in order to be exempt from the law, and the Court in *Gobeille* announced that "reporting, disclosure, and recordkeeping are central to, and an essential part of, the uniform system of plan administration contemplated by ERISA."[301] Because Oregon's law imposed a reporting requirement, and other states may also impose similar, though not identical, reporting requirements, the Oregon reporting requirement arguably fell within the *Gobeille* prohibition.

On the other hand, Oregon's reporting requirement was much less burdensome than the reporting requirements in *Gobeille*. The Vermont law required reporting on member eligibility, medical claims, and pharmacy claims.[302] Depending on the number of individuals an entity served, covered entities could be required to submit data on an annual, quarterly, or even monthly basis.[303] In contrast, under Oregon's law, an employer was only required to file a single Certificate of Exemption once every three years.[304] It is at least arguable that preemption of the Oregon requirement was not "necessary to prevent the States from imposing novel, inconsistent, and burdensome reporting requirements on plans."[305]

Recognizing that there was at least some merit in ERIC's claim, the Oregon Board reached a settlement with ERIC in March 2018. According to a joint negotiated statement, ERIC dismissed its lawsuit, and

> [u]nder the terms of the settlement, ERIC members may inform the State, if it asks that they are ERIC members, and the State will verify their membership with ERIC to confirm their exemption from OregonSaves. In the meantime, ERIC will continue to work with the appropriate federal regulatory agencies to seek changes to existing

299. *Id.* (quoting *Egelhoff*).
300. *Id.* at 945.
301. *Id.*
302. *Id.* at 941.
303. *Id.*
304. OR. ADMIN. R. 170-180-020(2) (2018).
305. Gobeille v. Liberty Mut. Ins. Co., 136 S. Ct. 936, 945 (2016).

reporting forms required under ERISA that can provide Oregon and other states the information they desire.[306]

In October 2018, the Oregon state treasurer announced it would rely on Form 5500 data to automatically exempt employers that already have a retirement plan in place.[307] Form 5500 is an annual report, with information about the plan's financial conditions, investments, and operations, that virtually all employer-sponsored retirement plans must file electronically each year to satisfy federal reporting requirements under ERISA and the Internal Revenue Code.[308] In late 2018, the Oregon state treasurer sent a notice to employers who had filed a Form 5500 linked to their employer identification number that they were exempt and did not need to take any action.[309] Only employers with retirement plans that did not receive an automatic exemption notice were required to complete the online exemption process.[310]

B. Howard Jarvis Taxpayers Association Complaint

On May 31, 2018, the Howard Jarvis Taxpayers Association ("HJTA") filed a complaint in the U.S. District Court for the Eastern District of California challenging the California Secure Choice Retirement Savings Program.[311] Unlike the ERIC complaint, which only challenged Oregon's reporting provision, HJTA's complaint alleges that the entire California program is preempted and seeks a declaration that the program is void.[312]

306. Order Dismissing Without Prejudice, Incorporating Settlement, and Retaining Jurisdiction at Exhibit A ¶9. ERISA Indus. Comm. v. Read, No. 3:17-cv-01605, (Apr. 2, 2018).

307. *Oregon Saves retirement savings program announces new policy regarding employers already providing a retirement plan*, EY (Nov. 1, 2018), https://taxnews.ey.com/news/2018-2183-oregon-saves-retirement-savings-program-announces-new-policy-regarding-employers-already-providing-a-retirement-plan.

308. *See* U.S. DEP'T OF LAB.; *EFAST-2 Welcome*, https://www.efast.dol.gov/welcome.html (last visited Apr. 1, 2019).

309. Samuel Henson, *Retirement Guidance: Changes to State Mandatory IRAs Help Employers Comply*, LOCKTON, https://www.lockton.com/whitepapers/Retirement_Guidance-State_Mandatory_IRAs-Aug18.final.pdf (last visited Feb. 19, 2019).

310. *OregonSaves Reminder—Upcoming Registration Deadline*, PAYLOCITY (Nov. 5, 2018), https://www.paylocity.com/2018/11/05/oregonsaves-reminder-upcoming-registration-deadline/.

311. HJTA Complaint, *supra* note 121.

312. *Id.* at ¶ 2.

The complaint alleges that the California program is an employee benefit plan under ERISA.[313] Specifically, it alleges the California program is "a pension benefit plan or both a pension benefit plan and a welfare benefit plan" and thus an "'employee benefit plan' under ERISA."[314] The complaint, however, does not explain how the program is "established or maintained by an employer or by an employee organization." In its brief in opposition of the defendants' motion to dismiss, HJTA simply states, "[t]he CalSavers program is 'offered by the California Secure Choice Retirement Savings Trust.' (Cal. Gov. Code, § 100000(b).) The Trust acts indirectly in the interest of employers, *mandating* private employer participation. That is enough to invoke ERISA."[315] As discussed above,[316] a strong argument may be made that the California program is not an employee benefit plan under ERISA because it is not "established or maintained by an employer."

The complaint suggests that even if the California program is generally not an employee benefit plan for purposes of ERISA, it necessarily is with respect to employers that establish plans when they have more than five employees and later have workforces that drop below five employees.[317] The complaint cites the preamble to the now-disapproved 2016 regulatory safe harbor for this proposition.[318] The preamble does, in fact, indicate that in the DOL's view, an employer will be considered to be participating in an employee benefit plan for purposes of ERISA if the employer voluntarily participates in an automatic enrollment IRA program established by the state.[319] The preamble is not binding;[320] it is only relevant to the extent that it is persuasive.

According to the DOL's views expressed in the preamble, an "employer, by choosing to participate in the state program, is effectively

313. *Id.* at ¶ 22.
314. *Id.*
315. HJTA Opposition to Defendant's Motion to Dismiss, *supra* note 225, at 8.
316. *See supra*, Section III.A.3.
317. HJTA Complaint, *supra* note 121 at ¶ 24 (alleging that "[b]ecause CalSavers applies to employers of five or more employees, CalSavers subjects small businesses to administrative and legal turmoil should they have five or more employees initially, but later only four or fewer employees. Such employers automatically become ERISA plan administrators with all attendant administrative and legal liabilities.").
318. *Id.*
319. Saving Arrangements Established by Qualified State Political Subdivisions for Non-Governmental Employees, 81 Fed. Reg. 59, 464, 59,470 (Aug. 30, 2016).
320. *See* sources cited, *supra* note 189 (discussing deference that should be accorded preambles).

making plan design decisions that have direct consequences to its employees. Decisions subsumed in the employer's choice include, for example, the intended benefits, source of funding, funding medium, investment strategy, contribution amounts and limits, procedures to apply for and collect benefits, and forms of distribution."[321] The DOL's view on this issue is not entirely persuasive. Undoubtedly, to the extent that an employer is not required by law to participate in a state automatic enrollment IRA program, the employer's decision to participate is voluntary.

It is difficult to see, however, how the employer's voluntary decision to participate in the program constitutes a decision with respect to investment strategy, contribution amounts and limits and related plan design decisions. Those decisions are made by the state, not the employer. The only decision the employer can make is whether or not to participate in the program. The employer has no choice with respect to the terms of the program. Thus, the DOL's view in the preamble to the now-disapproved 2016 regulatory safe harbor is not entirely persuasive, and it is not clear that an employer that chooses to continue to participate in a state automatic enrollment IRA program when the mandate no longer applies should be considered to be participating in an employee benefit plan for purposes of ERISA.

Moreover, even if the preamble is found to be persuasive, the preamble does not clearly establish that employers with fewer than five employees would necessarily operate employee benefit plans for purposes of ERISA. Instead, the preamble asserts that state laws with small employer exemptions raise challenging problems for employers with fluctuating workforces that states can resolve in a variety of ways, including requiring employers to continue to keep employees enrolled in the program and thus continuing to fall within the mandate.[322] According to the preamble, only if the law does not require employers to continue to operate state-mandated automatic enrollment IRA programs when their workforce drops below five employees does the law necessarily cause plans with fewer than five employees to be employee benefit plans for purposes of ERISA.[323]

321. Saving Arrangements Established by Qualified State Political Subdivisions for Non-Governmental Employees, 81 Fed. Reg. at 59,470.
322. Saving Arrangements Established by Qualified State Political Subdivisions for Non-Governmental Employees, 81 Fed. Reg. 59,464, 59,471.
323. *Id.*

At the time this Article was written, neither the California statute nor the regulations required an employer with fewer than five employees to continue to participate in the program.[324] Because the current statute and implementing regulations do not require an employer with a fluctuating workforce that drops below five employees to continue to participate in the program, continued participation by such an employer arguably constitutes participation in an employee benefit plan for purposes of ERISA with respect to that employer. Because ERISA preempts state law that relates to employee benefit plans, to the extent that participation by an employer with fewer than five employees constitutes an employee benefit plan, ERISA preempts California's law with respect to that participation. Preemption itself, however, is hardly significantly because ERISA would simply preempt the state law that did not require the employer to automatically enroll its employees in the program in the first place.

More significantly, according to the preamble to the 2016 regulatory safe harbor, participation in the California Program by an employer with fewer than five employees constitutes participation in an employee benefit program with respect to the employer, and ERISA's reporting and disclosure, vesting, and fiduciary provisions apply with respect to that employer. Applying ERISA's protections solely with respect to employers that are not required to participate in the program could create an administrative quagmire. The California policymakers may wish to avert this potential problem by amending the California program to require employers to continue to participate in the program even if their workforce drops below five employees.

VI. Conclusion

Despite the fact that Congress has disapproved a 2016 regulatory safe harbor providing that state automatic enrollment IRA programs are not employee benefit plans for purposes of ERISA if they satisfy the eleven requirements set forth in the regulation, the five states that have enacted legislation creating state automatic enrollment IRA programs have indicated that they will proceed with their implementation of the

324. *Cf.* CAL. GOV'T CODE § 100000(d)(l) (West 2018) (defining eligible employer as employer that, among other things, has five or more employees); CAL. CODE REGS. tit. 10 § 100001(c) (2018) (requiring participating employers that cease to be eligible employers to notify program within thirty days).

programs. Indeed, two states, Oregon and Illinois, are well into the implementation process.

In light of the disapproval of the 2016 regulatory safe harbor, there is a serious question as to whether the state automatic enrollment IRA programs are preempted by ERISA. Focusing on the purpose of a regulatory safe harbor for traditional IRA payroll plans, a strong argument can be made that the state programs are not employee benefit plans for purposes of ERISA because they fall within the purpose of the safe harbor. On the other hand, interpreting state-mandated automatic enrollment IRA programs to fall within the purpose of the safe harbor contradicts the plain meaning of the term "completely voluntary," one of the requirements of the safe harbor. Moreover, the purpose of the regulation suggests that automatic enrollment IRAs voluntarily established by employers should not fall within the safe harbor, and it may be difficult to justify interpreting the term "completely voluntary" differently for state-mandated automatic enrollment IRA plans and voluntary employer-established automatic enrollment IRA programs. Accordingly, a strong argument can be made that state automatic enrollment IRAs should not fall within the protection of the safe harbor for traditional IRA payroll plans.

Even if state-mandated automatic enrollment IRA programs are not entitled to protection under the regulatory safe harbor for traditional payroll IRAs, that does not necessarily mean they are employee benefit plans for purposes of ERISA. Rather, a strong argument can be made that the mandated programs are not employee benefit plans based on the plain meaning of ERISA's definition of employee benefit plans, the plain language of the state statutes creating the mandatory automatic enrollment IRA programs, and ERISA's purpose of protecting against employer mismanagement of accumulated funds in employee benefit plans.

Even if state-mandated automatic enrollment IRA programs are not employee benefit plans for purposes of ERISA, there is a serious question as to whether the programs "relate to" employee benefit plans and thus are preempted by ERISA. A strong argument can be made that none of the state statutes act exclusively upon ERISA-covered plans and thus none of the statutes are preempted under the first "reference to" prong of the "relate to" prohibition. In addition, as currently structured, the state automatic enrollment IRA programs do not appear to violate the second "connection with" prong of the "relate to" prohibition because the state laws do not appear to have any impact on the terms of employee benefit plans. They may encourage employers to establish employee benefit plans in order to avoid the mandate and thus have an impact on the number of employee benefit plans employers elect to establish. They are, however, unlikely to have an impact on the terms of employer-sponsored employee benefit plans.

Nevertheless, particular aspects of the state-mandated automatic enrollment IRA programs may be preempted by ERISA. First, a strong argument may be made that any state-imposed reporting requirement impermissibly relates to employee benefit plans and thus is preempted by ERISA. Second, the Department of Labor's reasoning in the preamble to the 2016 regulatory safe harbor suggests that an employer that voluntarily participates in a state automatic enrollment IRA program creates an employee benefit plan for purposes of ERISA, and thus, the state automatic enrollment IRA program, at least with respect to that employer, may be preempted by ERISA.

States can avoid the reporting issues by automatically exempting employers that have filed Form 5500s, as Oregon has. States can avoid the problem of the inadvertent creation of employee benefit plans by small employers not subject to the mandate by either (1) requiring all employers, regardless of size, to participate in the automatic enrollment IRA program, or (2) requiring an employer, once subject to the mandate, to always participate in the program regardless of its size. Either of these requirements could reduce the risk of small employers that are not subject to the mandate participating in the program creating, intentionally or unintentionally, employee benefit plans subject to ERISA.

Postscript

On March 29, 2019, the district court granted California Secure Choice Retirement Savings Program's ("CalSavers") motion to dismiss Howard Jarvis Taxpayers Association's complaint alleging that CalSavers is preempted by ERISA.[325]

The court first considered whether CalSavers satisfied the regulatory safe harbor for individual retirement accounts.[326] The court noted

325. Howard Jarvis Taxpayers Association v. California Secure Choice Retirement Savings Program, 2019 WL 1430113 (E.D. Ca.). For an analysis of the arguments presented in the complaint, see *supra* Section IV.B.

326. This safe harbor, 29 C.F.R. 2510.3-2(d), is discussed *supra*, Section III.A.2.

that HJTA relied exclusively on the Department of Labor's preamble to the 2016 safe harbor for state automatic enrollment IRA programs to argue that CalSavers does not satisfy the "completely voluntary" requirement of the safe harbor.[327] The court recognized that "[a]n agency's interpretation of its own regulation is given significant deference," but that "in repealing the 2016 [s]afe [h]arbor pursuant to the Congressional Review Act, Congress repealed the DOL's interpretation of the matters at issue here, making congressional intent more difficult."[328] "[B]ased on the record as a whole," the court declined to hold that CalSavers satisfied the regulatory safe harbor for individual retirement accounts.[329]

The court did not stop with the safe harbor. Instead, it looked to the underlying purposes of ERISA to find that CalSavers was not preempted by ERISA.[330] Specifically, the court began by quoting a recent Ninth Circuit decision, *Board of Trustees of the Glazing Health & Welfare Trust v. Chambers*,[331] which cited the Supreme Court's decision in *Gobeille v. Liberty Mutual Ins. Co.*[332] for the proposition that "under the modern approach a state law is not preempted merely because it has a literal 'connection with' an ERISA plan . . . Instead, the law must actually '*govern*[ ] . . . a central matter of plan administration' or '*interfere*[ ] with nationally uniform plan administration.'"[333] The court declared that "because [CalSavers] only applies to employers without existing retirement plans, no ERISA plans are 'governed' or 'interfered' with because of the statute."[334]

The court identified ERISA's primary purposes as (1) protecting employees' interests in receiving benefits promised by an employer, and (2) protecting employers from the burdens of meeting multiple regulatory requirements in the management of ERISA plans.[335] With respect to these two purposes, the court first noted that employers are not

327. *California Secure Choice*, 2019 WL 1430113 at *7.
328. *Id.*
329. *Id.*
330. *Id.* at *7–*8.
331. Board of the Trustees of the Glazing Health & Welfare Trust v. Chambers, 903 F.3d 829 (9th Cir. 2018).
332. Gobeille v. Liberty Mutual Ins. Co., 136 S. Ct. 936 (2016). For a discussion of *Gobeille*, see *supra* pp. 144–45 and 152–53.
333. *Chambers*, 903 F.3d at 847 (emphasis in original) (citations omitted).
334. Howard Jarvis Taxpayers Association v. California Secure Choice Retirement Savings Program, 2019 WL 1430113, *7 (E.D. Ca.).
335. *Id.*

required to make any promises to employees, and found that the employers' ministerial duties of remitting payroll deducted payments to CalSavers fall outside the scope of conduct Congress intended to regulate in ERISA.[336] The court thus declared that the "[f]inding that ERISA preempts CalSavers would be out-of-step with the underlying purposes of the Act. CalSavers does not govern a central matter of an ERISA plan's administration, nor does it interfere with nationally uniform plan administration."[337]

Recognizing the importance of the case, the court offered HJTA leave to amend the complaint within twenty days.[338] On April 11, 2019, HJTA filed an amended complaint.[339] The amended complaint alleges that CalSavers is "an ERISA plan and/or set of ERISA plans under *Donovan v. Dillingham*."[340] The complaint further alleges that CalSavers is established and maintained by employers and identifies the employers to include the CalSavers Board, the CalSavers Trust, and "the actual employers."[341] The complaint points to CalSavers' promotional video and Employer website in support of this allegation.[342] Specifically, the complaint alleges that "[t]he video and Employer website admit that actual employers 'offer' and 'maintain' the Program (or plans). The videos and website express that the employers will be more than ministerial . . . . Thus CalSavers is either one ERISA plan where the Board and/or Trust is statutory ERISA 'Employer'—or—CalSavers requires the actual employers to create thousands of separate ERISA plans."[343]

The amended complaint further alleges that "[t]he CalSavers mandate (with penalty) also conflicts with ERISA by mandating private employee benefit structures, interfering with employer autonomy to postpone or select other options valid under ERISA . . . . Under CalSavers, California employers lose options which should remain available under ERISA's federal guidelines, such as to designate one or more of the many private IRA sponsors on their own pursuant to 29 C.F.R. 25099-1(d)."[344] Thus, in essence, the amended complaint further alleges

336. *Id.*
337. *Id.*
338. *Id.*
339. First Amended Complaint, Howard Jarvis Taxpayers Ass'n v. Cal. Secure Choice Ret. Sav. Program, No. 2:18-cv-01584 (April 11, 2019).
340. *Id.* at ¶ 20. For a discussion of Donovan v. Dillingham, see *supra* note 220.
341. *Id.*
342. *Id.*
343. *Id.*
344. *Id.* at ¶ 24.

that because the California law does exempt employers that offer their employees the opportunity to enroll in payroll deduction IRAs, which are not employee benefit plans for the purposes of ERISA under the regulatory safe harbor for IRAs,[345] CalSavers is preempted by ERISA.

345. 29 C.F.R. 2510.3-2(d). For a discussion of the requirements of this safe harbor, see *supra* Section III.A.2.a.