

PUBLICATION

Maryland Enacts Mandatory Private-Sector Retirement Program That Impacts Most Maryland Employers [Ober|Kaler]

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Maryland joins California, Connecticut, Illinois, and Oregon in leading state initiatives to set up state-sponsored retirement plans for employees. The Maryland Small Business Retirement Savings Program and Trust (“the Program”), which is effective on July 1, 2016, requires covered private-sector employers to participate in the Program. Covered employers will be required to remit employee payroll contributions into an IRA, and the State will act as the Program's fiduciary.

An 11-member board (“the Board”) will implement and administer the Program. Although the Program takes effect on July 1, 2016, it may not be implemented until the Board determines that the Program qualifies for favorable tax treatment under the Internal Revenue Code and that it is exempt from the provisions of the federal Employee Retirement Income Security Act of 1974 (“ERISA”). In that regard, in November 2015, the U. S. Department of Labor proposed a rule (RIN: 1210-AB71), entitled “Savings Arrangements Established by States for Non-Governmental Employees” (“the Rule”). The Rule proposes to set forth a safe harbor under which a state could establish a payroll deduction savings program without giving rise to an employee benefit plan under ERISA. It appears that the Rule may take effect in or around September 2016. As such, employers may not have to comply until sometime after the final Rule takes effect.

Covered and Participating Employers

The definition of “covered employer” under the Program is broad. *All* non-governmental for-profit and nonprofit employers that pay their employees through a payroll system or service are covered under the Program. Accordingly, although the Program ostensibly was enacted to cover small businesses, it may impact almost every employer in Maryland. A “participating employer” is defined as a “covered employer” that provides a payroll deposit retirement savings arrangement under the Program for its covered employees.

An employer is exempted from participation if it: (1) currently offers an employer-sponsored savings arrangement; (2) offered an employer-sponsored plan within preceding two calendar years; or (3) has not been in business during the current and preceding calendar years. The Program provides that *an employee of a non-participating employer may elect to participate* in the Program as authorized by the Board. Although the language of the law is not clear, this may mean that employers who already maintain a retirement savings plan, or who are otherwise non-participating employers, may be required to participate if an employee elects to participate in the Program.

Rather than participate in the Program, covered employers may elect to establish alternative savings arrangement for their employees. An employer's participation in the Program, however, does not create fiduciary liability for the employer. Specifically employers are not liable for employees' decisions to participate or to opt out of the Program, or for employees' investment decisions. Further employers are not responsible for program design, administration, investment, or performance.

Covered Employees

Generally, “covered employees” are employees without access to an employer-sponsored retirement plan who are at least 18 years old. Employees who are exempted from coverage are employees: (1) who are eligible to participate in an employer-sponsored plan and (2) who are covered by a collective bargaining agreement that expressly provides for a multiemployer retirement plan, and employees under age 18. Although not expressly stated in the law, the definition of “covered employee” suggests that those employees who do not yet have access to their employer’s retirement plan due to, for example, service and/or hours eligibility requirements, may be eligible to participate in the Program.

Employee Contributions and Automatic Enrollment

After the Board establishes the Program and opens it for enrollment, covered employers must establish a payroll deposit savings program that allows for employee participation in the Program. Employers will be required to automatically enroll covered employees in the Program. The Program will consist of one or more payroll deposit IRA arrangements.

Unless employees indicate otherwise, they must contribute a default fixed percentage or dollar amount to be determined by the Board. Employers will be responsible for remitting employee contributions pursuant to regulations and/or procedures that the Board will establish. Employees may opt out of the Program in accordance with procedures that will be established by the Board.

Role of the Board

The Board must act solely in the interest of the program participants, and establish a written investment policy that includes a risk management and oversight program. The Board must also enter into an agreement delegating the administration of the Program to a third-party administrator.

Additionally, the Board must adopt regulations and take any other action necessary to implement the Program consistent with the federal Internal Revenue Code and ensure that the program meets the criteria for tax-deferral or tax-exempt status, or both. The Program establishes additional requirements and authority related to the Board’s administration of the Program, including without limitation:

- the authority to borrow funds from the State or any other entity for start-up costs until the board becomes self-sufficient;
- a requirement to establish a range of investment options, including a default option, that minimize the risk of significant investment losses and that are consistent with other specifications in the bill;
- a requirement to establish minimum and maximum employee contribution levels in accordance with federal limits on IRAs;
- a requirement to take any action necessary to ensure that the program is not preempted by federal law;
- a requirement to establish procedures and disclosures to protect the interests of participants and employers; and
- a requirement to design and disseminate information regarding the program to employers and employees. The information must include appropriate background and disclosures about the program and other retirement savings options, including information on how employees can opt out of the program.

Employer Incentives

Employers that participate in the program or otherwise offer an employer-sponsored retirement plan are exempted from Maryland's annual filing fee collected by the State Department of Assessments and Taxation for corporations and business entities, which is generally \$300 per year.

As noted above, another incentive for employers is that they are not fiduciaries under the Program. The Program expressly provides that “an employer is not a fiduciary, and may not be considered to be a fiduciary” of the Program. Further, an employer may not be held liable for: (1) an employee's decision to participate in or opt out of the program; (2) the investment decisions of employees; (3) the administration, investment, or investment performance of the Program; or (4) the Program design or benefits paid to participating employees.

Although much is yet to be done before the Program takes effect, one thing is clear: Maryland employers will be required to sponsor their own retirement plan or automatically enroll their employees into the Program. Notably, the Program does not contain any penalties for employers who fail to comply, nor does it suggest that the Board would be authorized to impose such penalties.