The Asset Management Industry
SERVING INDIVIDUAL INVESTORS
INVESTMENT COMPANY INSTITUTE

MEMO# 31977

September 24, 2019

US Department of Justice Files Statement of Interest in Litigation Challenging California Auto-IRA Program

[31977]

September 24, 2019 TO: ICI Members
Pension Committee
Pension Operations Advisory Committee SUBJECTS: Pension RE: US Department of Justice Files Statement of Interest in Litigation Challenging California Auto-IRA Program

The US Department of Justice (DOJ) has filed the attached Statement of Interest in *Howard Jarvis Taxpayers Association et al., v. California Secure Choice Retirement Savings Program et al.* (Case No. 2:18-cv-01584-MCE-KJN), in the US District Court for the Eastern District of California. In *Jarvis*, a taxpayer group challenges the CalSavers automatic IRA program (created under the California Secure Choice Retirement Savings Trust Act ("Secure Choice" or "legislation"))[1] as preempted by ERISA. Pursuant to the legislation, California employers with five or more employees generally must automatically enroll workers into the CalSavers program, unless the employer otherwise offers a tax-qualified retirement savings plan to employees. The district court previously ruled in favor of CalSavers on a motion to dismiss, but allowed the plaintiff to file an amended complaint.[2] DOJ filed its Statement of Interest after CalSavers filed a new motion to dismiss on the amended complaint. It urges the court to deny the defendant's new motion to dismiss, because, by its reasoning, the Secure Choice legislation is preempted by ERISA.

In the Statement of Interest, DOJ concludes that the CalSavers program requires employers to either maintain their own ERISA-covered plans or participate in the state's program, which itself is covered by ERISA. As a result, DOJ concludes that the CalSavers program is preempted under ERISA section 514 (which provides that ERISA supersedes any state laws that "relate to any employee benefit plan"). The Statement of Interest provides the following reasons for its conclusions:

- The legislation makes improper "reference to" ERISA plans (and thus is preempted) because the law presents employers with the false choice of establishing an ERISA plan or maintaining California's equivalent.
    - The legislation forces employers who do not sponsor their own ERISA plans to enroll workers in plans that function just like those plans.
    - The legislation requires employers to have an ongoing administrative program to

meet their obligations under the law; i.e., employers must continuously monitor their workforce for eligibility and coverage purposes, and monitor and change deferral elections, among other things.

- Alternatively, the legislation is preempted because the employers' ongoing maintenance of CalSavers plans makes them ERISA-covered plans.
  - CalSavers payroll deduction arrangements constitute a "plan, fund, or program" under ERISA (DOJ noted that if the identical functions of the CalSavers board were performed instead by a third-party administrator and investment manager voluntarily hired by an employer, the arrangement clearly would fall within the scope of ERISA).
  - Employers are required to ensure enrollment, set up payroll deductions, and send payroll deductions to CalSavers.
  - Eligibility determinations are made by employers, not CalSavers.
  - The non-voluntary nature of the program does not change the conclusion that the program is maintained by employers within the meaning of ERISA.
- The CalSavers automatic payroll deduction arrangements do not fall within the Department of Labor's (DOL) 1975 safe harbor for payroll deduction IRAs.[3]
  - Opt-out arrangements are not "completely voluntary" under the 1975 safe harbor.
  - It was for this reason that California needed DOL's 2016 regulation providing a safe harbor for state-run automatic IRA programs (which was later rescinded by Congress).[4]
- The legislation also is preempted because it has an impermissible "connection with" ERISA-covered plans.
  - Secure Choice governs a central matter of plan administration and mandates employee benefit structures by requiring maintenance of ERISA plans as specifically described in the law.
  - It interferes with nationally uniform plan administration by potentially subjecting multi-state employers to numerous disparate retirement plan laws.
- Traditional conflict preemption principles also lead to the conclusion that CalSavers is preempted by ERISA.

Elena Barone Chism
Associate General Counsel - Retirement Policy

Attachment

endnotes

[1] *See* ICI Memorandum No. 30196, dated September 1, 2016. Available at: https://www.ici.org/my_ici/memorandum/memo30196.

[2] The district court's order is available at: https://www.govinfo.gov/content/pkg/USCOURTS-caed-2_18-cv-01584/pdf/USCOURTS-caed-2_18-cv-01584-1.pdf.

[3] 29 C.F.R. section 2510.3-2(d).

[4] *See* ICI Memorandum No. 30711, dated May 19, 2017. Available at: https://www.ici.org/my_ici/memorandum/memo30711.
