DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2509

RIN 1210-AB74

Interpretive Bulletin Relating to State Savings Programs that Sponsor or Facilitate Plans Covered by the Employee Retirement Income Security Act of 1974

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Interpretive bulletin.

SUMMARY: This document sets forth the views of the Department of Labor (Department) concerning the application of the Employee Retirement Income Security Act of 1974 (ERISA) to certain state laws designed to expand the retirement savings options available to private sector workers through ERISA-covered retirement plans. Concern over adverse social and economic consequences of inadequate retirement savings levels has prompted several states to adopt or consider legislation to address this problem. The Department separately released a proposed regulation describing safe-harbor conditions for states and employers to avoid creation of ERISA-covered plans as a result of state laws that require private sector employers to implement in their workplaces state-administered payroll deduction IRA programs (auto-IRA laws). This Interpretive Bulletin does not address such state auto-IRA laws.

DATES: This interpretive bulletin is effective on November 18, 2015.

FOR FURTHER INFORMATION CONTACT: Office of Regulations and Interpretations, Employee Benefits Security Administration, (202) 693-8500. This is not a toll-free number.

SUPPLEMENTARY INFORMATION: In order to provide a concise and ready reference to its interpretations of ERISA, the Department publishes its interpretive bulletins in the Rules and Regulations section of the Federal Register. The Department is publishing in this issue of the Federal Register, ERISA Interpretive Bulletin 2015-02, which interprets ERISA section 3(2)(A), 29 U.S.C. 1002(2)(A), section 3(5), 29 U.S.C. 1002(5), and section 514, 29 U.S.C. 1144, as they apply to state laws designed to expand workers' access to retirement savings programs. Some states have adopted laws or are exploring approaches designed to expand the retirement savings options available to their private sector workers through ERISA-covered retirement plans. One of the challenges the states face in expanding retirement savings opportunities for private sector employees is uncertainty about ERISA preemption of such efforts. ERISA generally would preempt a state law that required employers to establish and maintain ERISA-covered employee benefit pension plans. The Department also has a strong interest in promoting retirement savings by employees. The Department recognizes that some employers currently do not provide pension plans for their employees. The Department believes that it is important that employees of such employers be encouraged to save for retirement, and it is in the interest of the public that employers be encouraged to provide opportunities for their employee retirement savings. The Department therefore believes that states, employers, other plan sponsors, workers, and other stakeholders would benefit from guidance on the application of ERISA to these state initiatives.

List of Subjects in 29 CFR Part 2509

Employee benefit plans, Pensions.

For the reasons set forth in the preamble, the Department is amending Subchapter A, Part 2509 of Title 29 of the Code of Federal Regulations as follows:

Subchapter A—General

PART 2509—INTERPRETIVE BULLETINS RELATING TO THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

1. The authority citation for part 2509 continues to read as follows:

AUTHORITY: 29 U.S.C. 1135. Secretary of Labor's Order No. 1-2011, 77 FR 1088 (Jan. 9, 2012). Sections 2509.75-10 and 2509.75-2 issued under 29 U.S.C. 1052, 1053, 1054. Sec. 2509.75-5 also issued under 29 U.S.C. 1002. Sec. 2509.95-1 also issued under sec. 625, Pub. L. 109-280, 120 Stat. 780.

2. Add § 2509.2015–02 to read as follows:

§ 2509.2015-02 Interpretive bulletin relating to state savings programs that sponsor or facilitate plans covered by the Employee Retirement Income Security Act of 1974

(a) Scope. This document sets forth the views of the Department of Labor (Department) concerning the application of the Employee Retirement Income Security Act of 1974 (ERISA) to certain state laws designed to expand the retirement savings options available to private sector workers through ERISA-covered retirement plans. Concern over adverse social and economic consequences of inadequate retirement savings levels has prompted several states to adopt or consider legislation to address this problem.[1] An impediment to state adoption of such measures is uncertainty about the effect of ERISA's broad preemption of state laws that "relate to" private sector employee benefit plans. In the Department's view, ERISA preemption principles leave room for states to sponsor or facilitate ERISA-based retirement savings options for private sector employees, provided employers participate voluntarily and ERISA's requirements, liability provisions, and remedies fully apply to the state programs.

(b) In General. There are advantages to utilizing an ERISA plan approach. Employers as well as employees can make contributions to ERISA plans, contribution limits are higher than for other state approaches that involve individual retirement plans (IRAs) that are not intended to be ERISA-covered plans,[2] and ERISA plan accounts have stronger protection from creditors.

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[1] For information on the problem of inadequate retirement savings, *see* the May 2015 Report of the United States Government Accountability Office (GAO), RETIREMENT SECURITY -- Most Households Approaching Retirement Have Low Savings (GAO Report-15-419) (available at www.gao.gov/assets/680/670153.pdf). *Also see* GAO's September 2015 Report-15-566, RETIREMENT SECURITY -- Federal Action Could Help State Efforts to Expand Private Sector Coverage (available at www.gao.gov/assets/680/672419.pdf).

[2] Some states are developing programs to encourage employees to establish tax-favored IRAs funded by payroll deductions rather than encouraging employers to adopt ERISA plans. Oregon, Illinois, and California, for example, have adopted laws along these lines. Oregon 2015 Session Laws, Ch. 557 (H.B. 2960) (June 2015); Illinois Secure Choice Savings Program Act, 2014 Ill. Legis. Serv. P.A. 98-1150 (S.B. 2758) (West); California Secure Choice Retirement Savings Act, 2012 Cal. Legis. Serv. Ch. 734 (S.B. 1234) (West). These IRA-based initiatives generally require specified employers to deduct amounts from their employees' paychecks, unless the employee affirmatively elects not to participate, in order that those amounts may be remitted to state-administered IRAs for the employees. The Department is addressing these state "payroll deduction IRA" initiatives separately through a proposed regulation that describes safe-harbor conditions for employers to avoid creation of ERISA-covered plans when they

Tax credits may also allow small employers to offset part of the costs of starting certain types of retirement plans.[3] Utilizing ERISA plans also provides a well-established uniform regulatory structure with important consumer protections, including fiduciary obligations, automatic enrollment rules, recordkeeping and disclosure requirements, legal accountability provisions, and spousal protections.

The Department is not aware of judicial decisions or other ERISA guidance directly addressing the application of ERISA to state programs that facilitate or sponsor ERISA plans, and, therefore, believes that the states, employers, other plan sponsors, workers, and other stakeholders would benefit from guidance setting forth the general views of the Department on the application of ERISA to these state initiatives. The application of ERISA in an individual case would present novel preemption questions and, if decided by a court, would turn on the particular features of the state-sponsored program at issue, but, as discussed below, the Department believes that neither ERISA section 514 specifically, nor federal preemption generally, are insurmountable obstacles to all state programs that promote retirement saving among private sector workers through the use of ERISA-covered plans.

Marketplace Approach

One state approach is reflected in the 2015 Washington State Small Business Retirement Savings Marketplace Act.[4] This law requires the state to contract with a private sector entity to establish a program that connects eligible employers with qualifying savings plans available in the private sector market. Only products that the state determines are suited to small employers,

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comply with state laws that require payroll deduction IRA programs. This Interpretive Bulletin does not address those laws.

[3] For more information, *see Choosing a Retirement Solution for Your Small Business*, a joint project of the U.S. Department of Labor's Employee Benefits Security Administration (EBSA) and the Internal Revenue Service. Available at www.irs.gov/pub/irs-pdf/p3998.pdf.

[4] 2015 Wash. Sess. Laws chap. 296 (SB 5826)(available at http://app.leg.wa.gov/billinfo/summary.aspx?bill=5826&year=2015).

provide good quality, and charge low fees would be included in the state's "marketplace." Washington State employers would be free to use the marketplace or not and would not be required to establish any savings plans for their employees. Washington would merely set standards for arrangements marketed through the marketplace. The marketplace arrangement would not itself be an ERISA-covered plan, and the arrangements available to employers through the marketplace could include ERISA-covered plans and other non-ERISA savings arrangements. The state would not itself establish or sponsor any savings arrangement. Rather, the employer using the state marketplace would establish the savings arrangement, whether it is an ERISA-covered employee pension benefit plan or a non-ERISA savings program. ERISA's reporting and disclosure requirements, protective standards and remedies would apply to the ERISA plans established by employers using the marketplace. On the other hand, if the plan or arrangement is of a type that would otherwise be exempt from ERISA (such as a payroll deduction IRA arrangement that satisfies the conditions of the existing safe harbor at 29 CFR 2510.3-2(d)), the state's involvement as organizer or facilitator of the marketplace would not by itself cause that arrangement to be covered by ERISA. Similarly, if, as in Washington State, a marketplace includes a type of plan that is subject to special rules under ERISA, such as the SIMPLE-IRA under section 101(h) of ERISA, the state's involvement as organizer or facilitator of the marketplace would not by itself affect the application of the special rules.

Prototype Plan Approach

Another potential approach is a state sponsored "prototype plan." At least one state, Massachusetts, has enacted a law to allow nonprofit organizations with fewer than 20 employees to adopt a contributory retirement plan developed and administered by the state.[5] Banks, insurance companies and other regulated financial institutions commonly market prototype plans to employers as simple means for them to establish and administer employee pension benefit plans.[6] The financial institutions develop standard form 401(k) or other tax-favored retirement plans (such as SIMPLE-IRA plans) and secure IRS approval. Typically, employers may choose features such as contribution rates to meet their specific needs. Each employer that adopts the prototype sponsors an ERISA plan for its employees. The individual employers would assume the same fiduciary obligations associated with sponsorship of any ERISA-covered plans. For example, the prototype plan documents often specify that the employer is the plan's "named fiduciary" and "plan administrator" responsible for complying with ERISA, but they may allow the employer to delegate these responsibilities to others. The plan documents for a state-administered prototype plan could designate the state or a state designee to perform these functions. Thus, the state or a designated third-party could assume responsibility for most administrative and asset management functions of an employer's prototype plan. The state could also designate low-cost investment options and a third-party administrative service provider for its prototype plans.

[5] The retirement plan will be overseen by the Massachusetts State Treasurer's Office. Mass. Gen. Laws ch.29, §64E (2012). In June 2014, the Massachusetts Treasurer's Office announced that the IRS had issued a favorable ruling on the proposal, but noted that additional approval from the IRS is still needed (*see* www.massnonprofitnet.org/blog/nonprofitretirement/). *See also* GAO's Report 2015 Report-15-566, RETIREMENT SECURITY -- Federal Action Could Help State Efforts to Expand Private Sector Coverage, which included the following statement at footnote 93 regarding the Massachusetts program: "The Massachusetts official told us that each participating employer would be considered to have created its own plan, characterizing the state's effort as development of a volume submitter 401(k) plan, which is a type of employee benefit plan that is typically pre-approved by the Internal Revenue Service." (GAO report is available at www.gao.gov/assets/680/672419.pdf).

[6] *See* IRS Online Publication, *Types of Pre-Approved Retirement Plans* at www.irs.gov/Retirement-Plans/Types-of-Pre-Approved-Retirement-Plans.

Multiple Employer Plan (MEP) Approach

A third approach, (referenced, for example, in the "Report of the Governor's Task Force to Ensure Retirement Security for All Marylanders"),[7] involves a state establishing and obtaining IRS tax qualification for a "multiple employer" 401(k)-type plan, defined benefit plan, or other tax-favored retirement savings program. The Department anticipates that such an approach would generally involve permitting employers that meet specified eligibility criteria to join the state multiple employer plan. The plan documents would provide that the plan is subject to Title I of ERISA and is intended to comply with Internal Revenue Code tax qualification requirements. The plan would have a separate trust holding contributions made by the participating employers, the employer's employees, or both. The state, or a designated governmental agency or instrumentality, would be the plan sponsor under ERISA section 3(16)(B) and the named fiduciary and plan administrator responsible (either directly or through one or more contract agents, which could be private-sector providers) for administering the plan, selecting service providers, communicating with employees, paying benefits, and providing other plan services. A state could take advantage of economies of scale to lower administrative and other costs.

As a state-sponsored multiple employer plan ("state MEP"), this type of arrangement could also reduce overall administrative costs for participating employers in large part because the Department would consider this arrangement as a single ERISA plan. Consequently, only a single Form 5500 Annual Return/Report would be filed for the whole arrangement. In order to participate in the plan, employers simply would be required to execute a participation agreement. Under a state MEP, each employer that chose to participate would not be considered to have

[7] Governor's Task Force to Ensure Retirement Security for All Marylanders, *1,000,000 of Our Neighbors at Risk: Improving Retirement Security for Marylanders* (February 2015) (available at www.dllr.state.md.us/retsecurity/).

established its own ERISA plan, and the state could design its defined contribution MEP so that the participating employers could have limited fiduciary responsibilities (the duty to prudently select the arrangement and to monitor its operation would continue to apply). The continuing involvement by participating employers in the ongoing operation and administration of a 401(k)-type individual account MEP, however, generally could be limited to enrolling employees in the state plan and forwarding voluntary employee and employer contributions to the plan. When an employer joins a carefully structured MEP, the employer is not the "sponsor" of the plan under ERISA, and also would not act as a plan administrator or named fiduciary. Those fiduciary roles, and attendant fiduciary responsibilities, would be assigned to other parties responsible for administration and management of the state MEP.[8] Adoption of a defined benefit plan structure would involve additional funding and other employer obligations.[9]

For a person (other than an employee organization) to sponsor an employee benefit plan under Title I of ERISA, such person must either act directly as the employer of the covered employees or "indirectly in the interest of an employer" in relation to a plan.[10] ERISA sections 3(2), 3(5). A person will be considered to act "indirectly in the interest of an employer, in relation to a plan," if such person is tied to the contributing employers or their employees by

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[8] A state developing a state sponsored MEP could submit an advisory opinion request to the Department under ERISA Procedure 76-1 to confirm that the MEP at least in form has assigned those fiduciary functions to persons other than the participating employers. ERISA Procedure 76-1 is available at www.dol.gov/ebsa/regs/aos/ao_requests.html.

[9] State laws authorizing defined benefit plans for private sector employers (as prototypes or as multiple employer plans) might create plans covered by Title IV of ERISA and subject to the jurisdiction of the Pension Benefit Guaranty Corporation (PBGC). Subject to some exceptions, the PBGC protects the retirement incomes of workers in private-sector defined benefit pension plans. A defined benefit plan provides a specified monthly benefit at retirement, often based on a combination of salary and years of service. PBGC was created by ERISA to encourage the continuation and maintenance of private-sector defined benefit pension plans, provide timely and uninterrupted payment of pension benefits, and keep pension insurance premiums at a minimum. More information is available on the PBGC's website at www.pbgc.gov.

[10] Different rules may apply under the Internal Revenue Code for purposes of determining the plan sponsor of a tax-qualified retirement plan.

genuine economic or representational interests unrelated to the provision of benefits.[11] In the Department's view, a state has a unique representational interest in the health and welfare of its citizens that connects it to the in-state employers that choose to participate in the state MEP and their employees, such that the state should be considered to act indirectly in the interest of the participating employers.[12] Having this unique nexus distinguishes the state MEP from other business enterprises that underwrite benefits or provide administrative services to several unrelated employers.[13]

(c) ERISA Preemption. The Department is aware that a concern for states adopting an ERISA plan approach is whether or not those state laws will be held preempted. ERISA preemption analysis begins with the "presumption that Congress does not intend to supplant state law." *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995). The question turns on Congress's intent "to avoid a multiplicity of regulation in order to permit nationally uniform administration of employee benefit plans." *Id.* at 654, 657. *See also Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 11 (1987) (goal of ERISA preemption is to "ensure . . . that the administrative practices of a benefit plan will be governed by only a single set of regulations.").

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[11] *See, e.g.,* Advisory Opinion 2012-04A. *See also MDPhysicians & Associates, Inc. v. State Bd. Ins*., 957 F.2d 178,185 (5th Cir.), *cert. denied*, 506 U.S. 861 (1992) ("the entity that maintains the plan and the individuals that benefit from the plan [must be] tied by a common economic or representation interest, unrelated to the provision of benefits." (quoting *Wisconsin Educ. Assoc. Ins. Trust v. Iowa State Bd.*, 804 F.2d 1059, 1063 (8th Cir. 1986)).

[12] The Department has also recognized other circumstances when a person sponsoring a plan is acting as an "employer" indirectly rather than as an entity that underwrites benefits or provides administrative services. *See* Advisory Opinion 89-06A (Department would consider a member of a controlled group which establishes a benefit plan for its employees and/or the employees of other members of the controlled group to be an employer within the meaning of section 3(5) of ERISA); Advisory Opinion 95-29A (employee leasing company may act either directly or indirectly in the interest of an employer in establishing and maintaining employee benefit plan).

[13] *See* Advisory Opinion 2012-04A (holding that a group of employers can collectively act as the "employer" in sponsoring a multiple employer plan only if the employers group was formed for purposes other than the provision of benefits, the employers have a basic level of commonality (such as the participating employers all being in the same industry), and the employers participating in the plan in fact act as the "employer" by controlling the plan).

Section 514 of ERISA provides that Title I "shall supersede any and all State laws insofar as they . . . relate to any employee benefit plan" covered by the statute. The U.S. Supreme Court has held that "[a] law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983) (footnote omitted); *see, e.g., Travelers*, 514 U.S. at 656. A law has a "reference to" ERISA plans if the law "acts immediately and exclusively upon ERISA plans" or "the existence of ERISA plans is essential to the law's operation." *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A.*, 519 U.S. 316, 325-326 (1997). In determining whether a state law has a "connection with ERISA plans," the U.S. Supreme Court "look[s] both to 'the objectives of the ERISA statute as a guide to the scope of the state laws that Congress understood would survive,' as well as to the nature of the effect of the state law on ERISA plans," to "determine whether [the] state law has the forbidden connection" with ERISA plans. *Egelhoff v. Egelhoff*, 532 U.S. 141, 147 (2001) (quoting *Dillingham*, 519 U.S. at 325). In various decisions, the Court has concluded that ERISA preempts state laws that: (1) mandate employee benefit structures or their administration; (2) provide alternative enforcement mechanisms; or (3) bind employers or plan fiduciaries to particular choices or preclude uniform administrative practice, thereby functioning as a regulation of an ERISA plan itself.[14]

In the Department's view, state laws of the sort outlined above interact with ERISA in such a way that section 514 preemption principles and purposes would not appear to come into play in the way they have in past preemption cases. Although the approaches described above involve ERISA plans, they do not appear to undermine ERISA's exclusive regulation of ERISA-covered plans. The approaches do not mandate employee benefit structures or their

[14] *Travelers*, 514 U.S. at 658 (1995); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990); *Egelhoff v. Egelhoff*, 532 U.S. 141, 148 (2001); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 14 (1987).

administration, provide alternative regulatory or enforcement mechanisms, bind employers or plan fiduciaries to particular choices, or preclude uniform administrative practice in any way that would regulate ERISA plans.

Moreover, the approaches appear to contemplate a state acting as a participant in a market rather than as a regulator. The U.S. Supreme Court has found that, when a state or municipality acts as a participant in the market and does so in a narrow and focused manner consistent with the behavior of other market participants, such action does not constitute state regulation. *Compare Building and Construction Trades Council v. Associated Builders and Contractors of Massachusetts/Rhode Island, Inc.*, 507 U.S. 218 (1993); *Wisconsin Department of Industry, Labor and Human Relations v. Gould*, 475 U.S. 282 (1986); *see also American Trucking Associations, Inc. v. City of Los Angeles*, 133 S. Ct. 2096, 2102 (2013) (Section 14501(c)(1) of the Federal Aviation Administration Authorization Act, which preempts a state "law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier," 49 U.S.C. 14501(c)(1), "draws a rough line between a government's exercise of regulatory authority and its own contract-based participation in a market"); *Associated General Contractors of America v. Metropolitan Water District of Southern California*, 159 F.3d 1178, 1182-84 (9th Cir. 1998) (recognizing a similar distinction between state regulation and state market participation). By merely offering employers particular ERISA-covered plan options[15] (or non-ERISA plan options), these approaches (whether used separately or together as part of a multi-faceted state initiative) do not dictate how an employer's plan is designed or operated or make offering a plan more costly for employers or

[15] In the Department's view, a state law that required employers to participate in a state prototype plan or state sponsored multiple employer plan unless they affirmatively opted out would effectively compel the employer to decide whether to sponsor an ERISA plan in a way that would be preempted by ERISA.

employees. Nor do they make it impossible for employers operating across state lines to offer uniform benefits to their employees.[16] Rather than impair federal regulation of employee benefit plans, the state laws would leave the plans wholly subject to ERISA's regulatory requirements and protections.

Of course, a state must implement these approaches without establishing standards inconsistent with ERISA or providing its own regulatory or judicial remedies for conduct governed exclusively by ERISA. ERISA's system of rules and remedies would apply to these arrangements. A contractor retained by a state using the marketplace approach would be subject to the same ERISA standards and remedies that apply to any company offering the same services to employers. Similarly, a prototype plan or multiple employer plan program that a state offers to employers would have to comply with the same ERISA requirements and would have to be subject to the same remedies as any private party offering such products and services.[17]

Even if the state laws enacted to establish programs of the sort described above "reference" employee benefit plans in a literal sense, they should not be seen as laws that "relate to" ERISA plans in the sense ERISA section 514(a) uses that statutory term because they are completely voluntary from the employer's perspective, the state program would be entirely subject to ERISA, and state law would not impose any outside regulatory requirements beyond ERISA. They do not require employers to establish ERISA-covered plans, forbid any type of plan or restrict employers' choices with respect to benefit structures or their administration.

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[16] The Court in *Travelers* approved a New York statute that gave employers a strong incentive to provide health care benefits through Blue Cross and Blue Shield as opposed to other providers. The Court noted that the law did not "mandate" employee benefit plans or their administration, or produce such acute economic effects, either directly or indirectly, by intent or otherwise "as to force an ERISA plan to adopt a certain scheme of substantive coverage or effectively restrict its choice of insurers." *Travelers,* 514 U.S. at 668. *See also De Buono v. NYSA-ILA Medical and Clinical Services Fund*, 520 U.S. 806, 816 (1997).

[17] State laws relating to sovereign immunity for state governments and their employees would have to be evaluated carefully to ensure they do not conflict with ERISA's remedial provisions.

These laws would merely offer a program that employers could accept or reject. *See Dillingham*, 519 U.S. at 325-28.

In addition, none of the state approaches described above resemble the state laws that the Court held preempted in its pre-*Travelers* "reference to" cases. Those laws targeted ERISA plans as a class with affirmative requirements or special exemptions. *See, e.g., District of Columbia v. Greater Wash. Bd. of Trade*, 506 U.S. 125, 128, 129-133 (1992) (workers' compensation law that required employee benefits "set by reference to [ERISA] plans") (citation omitted); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 135-136, 140 (1990) (common law claim for wrongful discharge to prevent attainment of ERISA benefits); *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 828 & n.2, 829-830 (1988) (exemption from garnishment statute for ERISA plans). In the case of the state actions outlined above, any restriction on private economic activity arises, not from state regulatory actions, but from the application of ERISA requirements to the plans, service providers, and investment products, that the state, as any other private sector participant in the market, selects in deciding what it is willing to offer.

Finally, it is worth noting that even if the state laws implementing these approaches "relate to" ERISA plans in some sense of that term, it is only because they create or authorize arrangements that are fully governed by ERISA's requirements. By embracing ERISA in this way, the state would not on that basis be running afoul of section 514(a) because ERISA fully applies to the arrangement and there is nothing in the state law for ERISA to "supersede." In this regard, section 514(a) of ERISA, in relevant part, provides that Title I of ERISA "shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan. . . . ." To the extent that the state makes plan design decisions in fashioning its prototype plan or state sponsored plan, or otherwise adopts rules necessary to run the plan, those actions would be the same as any other prototype plan provider or employer sponsor of any ERISA-covered plan, and the arrangement would be fully and equally subject to ERISA.

This conclusion is supported by the Department's position regarding state governmental participation in ERISA plans in another context. Pursuant to section 4(b)(1) of ERISA, the provisions of Title I of ERISA do not apply to a plan that a state government establishes for its own employees, which ERISA section 3(32) defines as a "governmental plan." The Department has long held the view, however, that if a plan covering governmental employees fails to qualify as a governmental plan, it would still be subject to Title I of ERISA.[18] In these circumstances, the failure to qualify as a governmental plan does not prohibit a governmental employer from providing benefits through, and making contributions to, an ERISA-covered employee benefit plan.[19] Thus, the effect of ERISA is not to prohibit the state from offering benefits, but rather to make those benefits subject to ERISA. Here too, ERISA does not supersede state law to the extent it merely creates an arrangement that is fully governed by ERISA.

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Billing Code: 4510-29-P

[18] *See, e.g.*, Advisory Opinion 2004-04A.
[19] *See* Information Letter to Michael T. Scaraggi and James M. Steinberg from John J. Canary (April 12, 2004).