STATE OF CONNECTICUT
RETIREMENT SECURITY BOARD
CO-CHAIRS: STATE COMPTROLLER KEVIN LEMBO & STATE TREASURER DENISE L. NAPPIER

Staff Report to CRSB

Re: Legal Memo to NCPERS (National Conference on Public Employee Retirement Systems) and AARP

January 5, 2015 CRSB Meeting

Segal Consulting firm, in coordination with K&L Gates, drafted a legal memo addressed to NCPERS and AARP on November 5, 2014 on the application of ERISA to the different types of plans states have considered for offering state-sponsored retirement plans for private sector workers. Below, please find the text from the sections of the memo that are relevant to the Connecticut plan:

IRA Payroll-Deduction Exception from ERISA

IRAs are not covered by ERISA (although they are covered by the Code) unless there is employer involvement. DOL regulations provide that an IRA made available by an employer to its employees will not be considered a pension plan covered by ERISA if

- there are no contributions made by an employer,
- employees participate in the IRA on a completely voluntary basis,
- the employer's activities with respect to the IRA are limited solely to –
  - permitting, without endorsement, the IRA sponsor to publicize its program to employees,
  - collecting contributions through payroll deductions or dues checkoffs, and
  - remitting those contributions to the IRA sponsor.

These are known as "payroll-deduction" IRAs.

Payroll-Deduction IRA.

The arrangement is designed to fall under the payroll-deduction IRA exception from ERISA coverage. It would not require federal legislation. An employer's only duty would be to withhold the IRA contribution and then submit the contribution to the trust (public-private arrangement) running the program. Employee participation would be automatic at a set amount but employees could opt out (or increase the amount). The trust entity could be designed to qualify as a permitted IRA sponsor under the Code or it could just serve as a middleman that transmits the payroll deductions

as they arrive to a default IRA or to an IRA provider of the participant's choice from a pre-designated list. Once in the IRA, the normal IRA rules on moving IRA money would apply.

In the case of the default IRA (for those that did not give specific instructions), the IRA provider would invest the money conservatively (perhaps in a target fund). Fees of the state trust entity/middleman would be paid before each amount was forwarded and IRA providers could charge their normal set up fees. Annual tax reporting would come from the private IRA providers. (It should be noted that the payroll IRA ideas proposed as federal legislation by the President would work in a somewhat similar manner if it was voluntary, but without state involvement. That bill has not moved in Congress because of opposition to the mandatory nature.)

If establishing the payroll IRA was voluntary for each employer, it is highly likely that there would be no issue of ERISA preemption of the state law because the state would just be making the vehicle available. Some states are considering requiring employers that do not maintain any retirement plan to offer the payroll-deduction IRA. It is not clear whether such a state mandate would trigger ERISA preemption on the argument that it requires an employer to have a retirement vehicle. One argument against preemption would be that since the state law wasn't mandating creation of an ERISA plan (the payroll-deduction IRA would be designed to fall within the ERISA exception for payroll-deduction IRAs), ERISA preemption would not apply. Whether the DOL and the courts would agree is uncertain.

Please find complete legal memo here: http://www.dllr.state.md.us/retsecurity/retsecurityerisa.pdf

STATE OF CONNECTICUT
RETIREMENT SECURITY BOARD
CO-CHAIRS: STATE COMPTROLLER KEVIN LEMBO & STATE TREASURER DENISE L. NAPPIER

Staff Report to CRSB

Re: ERISA Fiduciary Liability

March 4, 2015 CRSB Meeting

Brian Graff, CEO of ASPPA, and Roberta Ufford, Groom Law Group, graciously provided further guidance on another ERISA question. Other states have started looking to provide ERISA protections and fiduciary liability on behalf of the state board, without placing such liability on the employers whose employees participate in the plan.

Providing ERISA protections would alleviate the concerns about the lack of a fiduciary standard of care around the participants' investments. Illinois provides for such fiduciary liability on its Board, but requires that employers not be subject to ERISA liability in its Secure Choice statute.

So how can Connecticut do the same?

- The program can require the Board to comply with an "ERISA like" standard of care.
- The program must still follow the DOL safe harbor regulations for employers offering payroll deduction IRAs, as described by Brian Graff in his testimony before the Board.
- The Board would be subject to a fiduciary standard of care that is similar to the ERISA standard, but it would be enforceable under state law rather than in an action under ERISA.
- Enforcing an "ERISA like" standard of care does not mean that ERISA itself would apply, therefore, the plan would still satisfy the statutory requirement that ERISA not apply.
- Most state and local pension boards are already regulated in this way - a state or local statute imposes "ERISA-like" fiduciary duties that are enforceable under state laws but not enforced under ERISA because governmental plans are exempted from ERISA.

Attorney Ufford's full guidance is below:

It should be possible to design a state required automatic enrollment IRA program that requires the Board to comply with an "ERISA like" standard of care enforceable under state law (not ERISA), without imposing ERISA or other fiduciary liability on employers who comply with the mandate to offer a payroll deduction IRA if no other plan is offered.

Connecticut law mandates that the Board design a program that avoids ERISA, which means that the program must be designed so that employers will not be viewed as "establishing or maintaining" a pension plan as described by ERISA. If employers do not establish or maintain an ERISA plan, no person - including any employer or the Board - will have any duties or responsibilities under ERISA, or any related ERISA liability. ASPPA's comments to the Board earlier this month discussed that, to avoid treatment as an ERISA-covered plan, it will be important to adhere as closely as possible to the DOL safe harbor regulation for payroll deduction IRAs.

Even though ERISA would not apply to the Board, the Board can still be subject to a fiduciary standard of care that is very similar to the standard imposed under ERISA, but enforceable under state law rather than in an action under ERISA. This is how the Illinois Secure Choice Savings Program is structured. Specifically, Section 25 describes the "fiduciary duty" of the State Board that administers the Program, and the members of the Board and its staff, using wording very similar to the words that are used in ERISA to define the fiduciary standard of care. Using similar words does not, however, make ERISA apply. Instead, if there is a breach of fiduciary duty by the Illinois Board, a claim must be brought in state court under state law. It's worth noting that most state and local pension boards are already regulated in this way - a state or local statute imposes "ERISA-like" fiduciary duties that are enforceable under state laws but not enforced under ERISA because governmental plans are exempted from ERISA.