AMERICAN RETIREMENT ASSOCIATION

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Working for America's Retirement

November 8, 2024

Mr. Jeff Turner
Acting Director, Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue NW Washington, DC 20210

Via electronic mail

Re: Guidance requested regarding the impact of the automatic enrollment mandate in Section 101 of the SECURE 2.0 Act on 403(b) plans.

Dear Mr. Turner:

As discussed in our October 1 and October 15, 2024, meetings with you and members of your staff, we write to address concerns regarding the implications of Section 101 of the SECURE 2.0 Act on 403(b) plans, particularly for tax-exempt entities aiming to leverage limited employer involvement to maintain exemption from ERISA coverage. The American Retirement Association (ARA) strongly urges the Department of Labor (DOL) to provide guidance clarifying that a 403(b) plan sponsor will not be deemed to have sufficient employer involvement to subject a plan to ERISA solely because it includes an automatic enrollment feature and allows the employer to select a Qualified Default Investment Alternative (QDIA) for the automatic enrollment funds, contingent upon certain conditions being met.

As you are aware, DOL Reg. §2510.3-2(f) specifies that certain 403(b) plans are not regarded as a plan maintained by the employer for purposes of Title I of ERISA.[1] This exemption hinges on the criteria of limited employer involvement and fully voluntary participation. Although the DOL previously issued a regulation concerning state-mandated automatic enrollment IRA savings programs—later revoked by Congress[2]—this context underscores the importance of clear guidance regarding the automatic enrollment requirements imposed by the SECURE 2.0 Act.

The SECURE 2.0 Act mandates that certain qualified plans, including 403(b) arrangements, implement an automatic enrollment feature. This requirement applies to plans established on or after December 29, 2022, with exceptions for smaller employers and entities operational for less than three years. The automatic enrollment feature necessitates adherence to minimum deferral percentages and the inclusion of a QDIA to manage participant contributions that are not explicitly directed. Our primary concern is whether these stipulations will be interpreted as employer involvement, thereby triggering Title I of ERISA for plans that would otherwise qualify for the exemption due to limited employer engagement. [3]

Currently, without a reporting standard akin to the Form 5500 for ERISA plans, quantifying the potential impact on existing plans is challenging. However, our informal data suggests that approximately 750 to 1,000 new

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[1] Additional guidance was provided in Advisory Opinion 94-30A, FAB 2010-01
[2] DOL Reg. §2510.3-2(h) was revoked by H.J. Res. 66 (May 17, 2017).
[3] DOL's guidance on Health Savings Accounts describes activities which would mean the HSA does not involve "employer control" and is completely voluntary on employees' parts. *See* Field Assistance Bulletins 2006-2 and 2004-1.

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plans meeting these criteria are established annually. This data was gathered by polling those organizations that are most active in this market and asking them to estimate, on average, how many new plans they bring on each year that would fit this model.

The financial implications of compliance with Title I of ERISA are significant. Our members estimate that the administrative costs to the plan sponsor are 2-3 times higher for an ERISA-covered 403(b) plan when compared to a limited-exception plan that is exempt from ERISA. Tax-exempt entities are especially sensitive to the costs associated with retirement plans. If the SECURE 2.0 Act's automatic enrollment mandate inadvertently subjects these plans to Title I of ERISA, many employers may reconsider offering retirement savings options, which runs counter to Congressional intent to enhance retirement savings access.

To that end, ARA requests that the DOL confirm that the safe harbor exemption outlined in DOL Reg. §2510-3(f)(2) remains applicable to plans that adopt an automatic enrollment feature under the following conditions:

1) The plan is subject to the automatic enrollment requirements established in Section 101 of the SECURE 2.0 Act.

2) Default percentages for the automatic enrollment feature are either: (A) set at 10% (to avoid escalation), or (B) initiated at 3% and escalate by 1% annually up to a maximum of 10%.

3) The investment provider(s) selects the default investment that satisfies the requirements of a QDIA for each contract, with the employer merely selecting which payroll slot provider will receive automatic contributions, without influencing the investment choice itself.

4) The employer's engagement with the investment provider(s) is otherwise compliant with the conditions outlined in DOL Reg. §2510-3(f)(2).

We commend the Department for its ongoing efforts to bridge the retirement income gap and enhance plan coverage nationwide. We believe that clarifying this exemption within Title I of ERISA will further encourage small non-profit organizations to establish retirement plans and incorporate automatic enrollment features, thereby advancing the objectives of both closing the retirement coverage gap and improving retirement income security.

Thank you for your consideration of our concerns. We look forward to your prompt attention to this important matter.

Sincerely,

/s/

Brian H. Graff, Esq., APM
Executive Director/CEO
American Retirement Association

/s/

Allison Wielobob
General Counsel
American Retirement Association