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# ERISA Preempts Certain State Wage Withholding Laws

Charmaine Naut | Capital Management Enterprises, Inc | 610-265-9677 | [cnaut@cme-group.com](mailto:cnaut@cme-group.com)

A recently-released U.S. Department of Labor (DOL) letter, dated December 4, 2018, restates the DOL's long-held position that ERISA preempts state laws that require employers to obtain written consent before withholding amounts from employees' wages for contributions to an ERISA-covered plan.

Generally, most private sector employers offering health and welfare benefits are subject to ERISA regardless of size. Plans sponsored by government entities (federal and state), tribal governments and church plans are generally not subject to ERISA.

Specifically, the letter responds to the question of whether ERISA would preempt a state law if the law prohibits employers from adopting and implementing automatic enrollment arrangements under which the employer automatically enrolls eligible employees in a disability benefit plan and contributes part of the employee's wages as contributions to the plan, unless the employee affirmatively elects not to participate.

Referencing prior DOL Advisory Opinions, the Department restates its position that a state law would be preempted by ERISA to the extent the law is interpreted to limit, prohibit, or regulate an employer's adoption of automatic enrollment arrangements in connection with a disability benefit plan or other ERISA welfare benefit plan covered, or making related deductions from wages for contribution to such a plan. The letter includes two important restrictions:

- If a state criminal law prohibits deductions from employees' wages under an automatic enrollment arrangement, then employers in that state must obtain an employee's written authorization before withholding contributions from the employee's wages to pay for coverage under the ERISA plan.

- The letter does not address the types of notice and disclosure requirements that a plan fiduciary would need to adopt and implement for an automatic enrollment arrangement to be operated in a manner that is consistent with the fiduciary's prudence and loyalty obligations under ERISA.
- If an employer is an applicable large employer, subject to the Employer Mandate, generally the employer must allow employees the opportunity to opt-out of health insurance coverage that is not of a minimum value and not affordable coverage. Employers with an automatic enrollment process will want to ensure there is a meaningful opportunity to "opt-out" of health insurance coverage.

## Employer Action

- Nothing in this letter or the guidance requires an employer to do away with the employee approval of wage withholding for certain ERISA covered benefits. In fact, it is a best practice to have employees sign off on any wage withholding associated with their benefit elections as it provides documentation that the employee elected to participate in (or waive) the programs. The letter simply provides that, as it relates to an ERISA benefit plan, a state law cannot generally require employee authorization of wage withholding to pay for ERISA covered benefits, which is a helpful clarification when an employer has an automatic enrollment process.
- Not all benefits offered by an employer will benefit from ERISA's preemption power. For example, dependent care flexible spending accounts, commuter transit programs (e.g., parking and transit passes) and certain voluntary benefits not subject to ERISA. Thus, state wage withholding laws will continue to control when dealing with non-ERISA benefits.
- Benefit programs sponsored by government and church entities must comply with state payroll laws requiring them to obtain an employee's written authorization before withholding contributions from wages to pay for coverage (ERISA preemption is not available).