



## The ERISA Industry Committee

*Driven By and For Large Employers*

701 8<sup>th</sup> Street NW, Suite 610, Washington, DC 20001 • (202) 789-1400 • [www.eric.org](http://www.eric.org)

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August 1, 2018

The Honorable Ben Kallos  
New York City Council  
250 Broadway  
Suite 1807  
New York, NY 10007

The Honorable I. Daneek Miller  
New York City Council  
250 Broadway  
Suite 1810  
New York, NY 10007

Dear Mr. Kallos and Mr. Miller,

The ERISA Industry Committee (“ERIC”) is committed to the financial security of millions of Americans who are facing retirement or have already entered retirement, and represent companies that voluntarily offer retirement benefits to workers and families across the country. ERIC supports proposals and programs run by states and localities designed to promote and facilitate retirement saving by those who are not covered by an employer plan. It is critical that these programs avoid placing any burden on employers that already offer a qualified retirement plan regulated by federal law. We have concerns with your proposal, Int. No. 0888-2018 (“Int. 888”), and how it overlaps and connects with federal law that already governs the administration of private-sector retirement plans. We would like to work with you to ensure that your program is a success, but without hindering employers that already provide a retirement plan that follows federal law.

### **ERIC’S INTEREST IN THE PROPOSAL**

ERIC is the only national association that advocates exclusively for the nation’s largest employers on health, retirement, and compensation public policies at the federal, state, and local levels. Our member companies offer employee benefits to millions of workers and families across the country, and promote retirement savings, financial wellness, and health care value improvements and cost savings. ERIC advocates for public policies that support the ability of large employers to offer benefits effectively and efficiently under the federal regulatory framework of the Employee Retirement Income and Security Act of 1974 (“ERISA”).

ERIC and our member companies support efforts to enhance and promote retirement savings opportunities, including the establishment of state and local retirement plans. However, we oppose state and local rules that conflict with the framework and guidelines set forth by ERISA. ERISA enables employers to tailor voluntary retirement plans that meet the needs of their workforce and sets forth rules

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at the federal level that employers must follow. The U.S. Department of Labor recognizes that “ERISA preempts state and local 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.”<sup>1</sup> ERISA’s broad preemption of state and local laws that relate to employer-sponsored employee benefit plans was intended to serve as a source of uniform administration.

## **SUMMARY OF COMMENTS**

The following is a summary of ERIC’s comments, which are set forth in greater detail below:

- Defining employee with an age requirement of 18 years old is in direct contradiction of federal laws and regulations that allow an employer to wait until age 21 to allow an employee to enroll in the employer retirement plan.
- Employers should be able to limit participation in an employer retirement plan to employees who do not exceed 1,000 hours in a year, in accordance with ERISA, and not have to separately enroll other groups of non-eligible employees into the program.
- The program should automatically exempt employers that provide a retirement plan to employees in accordance with ERISA. We are willing to work with you to provide recommendations, using current available data, that will assist the program in determining which employers already provide a retirement plan.

## **RECOMMENDATIONS**

Retirement plan eligibility requirements are a clear area of core ERISA concern. Under ERISA, Section 202(a) requires an employer to not restrict eligibility for the retirement plan beyond one year of service (1,000 hours in a year) and attainment of age 21. Since the enactment of ERISA, employers have used Section 202(a) as a baseline for employee eligibility. Present day, employers have implemented eligibility criteria that ranges from immediate upon hire to upwards of one year. Each employer determines eligibility criteria based on the unique culture of the company and the market practices within the employer’s industry or region. In many instances, the eligibility to enroll in a retirement plan will coincide with the ability to receive employer contributions to the retirement plan.

Int. 888 defines “eligible employee” as anyone 18 years of age or older who is employed full or part-time by an employer that has not been offered to participate in a retirement plan. Such a requirement would not only circumvent employee benefit structures that follow ERISA, but, by binding employers to particular plan features, would function to regulate ERISA plans. This measure conflicts with the provisions of ERISA that allow employers to exclude employees from the employer’s retirement plan if the employee is less than age 21 or works less than 1,000 hours in a year. To assist those employers that currently sponsor a tax-qualified retirement plan that is subject to ERISA from being subject to different rules in different states and cities and to ensure that the NYC proposal does not violate federal law, we respectfully request that the NYC City Council exclude employers that sponsor plans with eligibility conditions that comply with ERISA from the requirement to facilitate the city’s plan.

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<sup>1</sup> 80 Fed. Reg., at 72007, citing *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers*, 514 U.S. 645, 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).

Otherwise, we request that Int. 888 be revised to mirror ERISA Section 202(a). As noted above, ERISA Section 202(a) allows an employer that provides a retirement plan to limit participation as late as attainment of age 21. If the proposal passes as is, confusion will ensue on whether employers that sponsor a tax-qualified retirement plan are able to receive an exemption if they limit participation until attainment of age 21. In addition, some employers that sponsor a retirement plan will limit immediate eligibility to workers who have not satisfied an hours requirement (seasonal or temporary); similarly, plans may exclude collectively bargained employees unless their bargaining unit negotiates for their participation in the plan. A plan sponsor of a retirement plan should not be forced to alter their plan to increase coverage to other groups of employees (i.e. temporary or seasonal workers who work less than 1,000 a year or collectively bargained employees whose bargaining unit does not bargain for participation) if it is not a market practice to provide such a benefit to a specific group.

We respectfully request that Int. 888 be amended to state that an employer-provided retirement plan in compliance with ERISA is automatically exempt from Int.88 and that employees who are ineligible for the employer plan under ERISA do not need to be enrolled into the NYC program. In the alternative, we request that the definition of employee be clearly defined to more closely track federal law by including only those employees who work 1,000 hours in a year (and attained age 21) and explicitly exclude temporary or seasonal workers who work less than 1,000 hours a year, independent contractors, and collectively bargained employees whose bargaining units do not successfully bargain for participation.

Furthermore, ERIC requests that Int. 888 be amended such that the program automatically exempt employers that provide a retirement plan to employees in accordance with ERISA. Several state jurisdictions have implemented rules that require an employer that provides a retirement plan to report to the state that such a plan is provided to employees. We believe this is a clear violation of ERISA preemption principles and have objected to these rules. In fact, we sued the Oregon Retirement Savings Board over their reporting rule and received a favorable settlement. We are willing to work with you to provide recommendations, using current available data, that will assist the program in determining which employers already provide a retirement plan.

## **CONCLUSION**

Ultimately, we share your goal of increasing retirement access to employees who are employed at an employer that does not provide a retirement plan. We fully understand that employers that do not provide a retirement plan are concerned about the legal risks, costs, and administrative burden of offering and operating a plan. But, for employers that already provide a retirement plan in compliance with federal ERISA law, it is important that they be able to design plans that work effectively and efficiently based on the needs of their workforces and the industries in which they operate. The overwhelming majority of tax-qualified retirement plans sponsored by ERIC's members—employers that have more than 10,000 employees—are complex, individually designed plans that contain unique provisions reflective of individual company benefit priorities and culture. ERIC members' retirement plans generally do not utilize a one-size-fits-all approach to enrollment timeframes, eligibility criteria, auto-enrollment features, or company contribution formulas. These plans comply with ERISA and should not be subject to state and local rules regarding eligibility, reporting, and enrollment of plan participants. We strongly encourage you to revise your proposal to ensure that there no additional burdens are imposed on employers that are already providing a qualified retirement plan to employees.

ERIC appreciates the opportunity to provide comments on your proposal and welcome future discussions on this matter. If you have any questions concerning our comments, or if we can be of further assistance, please contact me at (202) 627-1930 or [whansen@eric.org](mailto:whansen@eric.org).

Sincerely,

A handwritten signature in cursive script that reads "Will Hansen".

Will Hansen  
Senior Vice President, Retirement & Compensation Policy