THE ERISA INDUSTRY COMMITTEE
Shaping benefit policies before they shape you.

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September 23, 2019

New York City Council
Committee on Civil Service and Labor
City Hall Park, New York, NY 10007

RE: New York City Int. No. 0888-2018 – New York City Retirement Savings Program

Dear Chairman Miller and Members of the Committee on Civil Service and Labor:

The ERISA Industry Committee ("ERIC") is writing to submit comments regarding New York City Council Int. No. 0888-2018 ("Int. 888") to reinforce the importance of ensuring that the city-run retirement plan created by the bill conforms with the preemption protection afforded by federal law—the Employee Retirement Income Security Act of 1974 ("ERISA")—and does not impose benefit, reporting, or administrative requirements on employers sponsoring a retirement plan. Our letter builds upon comments that we submitted on August 1, 2018, when Int. 888 was initially proposed.

I. ERIC's Interest in Int. No. 0888-2018

Representing companies that voluntarily offer retirement benefits to workers and families across the country, ERIC is committed to the financial security of millions of Americans who are facing retirement or have already entered retirement. 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. However, it is critical that these programs avoid placing any burden on employers that already offer a qualified retirement plan regulated by federal ERISA law. We have concerns with Int. 888 as currently drafted, and how it overlaps and connects with federal law that already governs the administration of private-sector retirement plans. We want to work with you to ensure that your program is a success without hindering employers that voluntarily provide generous retirement benefits under federal law.

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. ERIC member companies are leaders in every sector of the economy, with employees in every state and locality in the nation. These 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 statutory and regulatory framework of ERISA.

ERIC shares your goal of increasing retirement savings access to employees who are employed by 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 burdens of offering and operating a plan. However, 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 Int. 888 to ensure that no burdens or requirements are imposed on employers that are already providing a qualified retirement plan to employees.

II. Summary of Comments

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

- Int. 888 should provide a complete exclusion for all *employers* that offer a retirement plan under ERISA and not base the exclusion on the definition of an "eligible employee".
- In the alternative, the definition of an "eligible employee" should be amended to conform with the employee eligibility requirements under ERISA. Such coordination includes setting the eligibility age at 21 and allowing employers to limit participation in the retirement plan to employees who do not exceed 1,000 hours of service in a year.
- The program should automatically exempt—without a reporting requirement—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, and can base the exemption on ones that exists with respect to the OregonSaves and Illinois Secure Choice Savings programs.

III. ERIC Comments

Int. 888 should provide a complete exclusion for all *employers* that offer a retirement plan under ERISA and not base the exclusion on the definition of an "eligible employee". ERISA enables employers to tailor voluntary retirements plans that meet the needs of their workforce and sets forth rules 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."[1] ERISA's broad preemption of state and local laws that relate to employer-sponsored employee benefit plans is intended to serve as a source of uniform administration. For employers that operate in multiple states and cities, ERISA preemption is critical to the ability to provide uniform and consistent benefits across an employer's workforce. Therefore, ERIC recommends that Int. 888 provide a complete exclusion for employers operating an ERISA-covered plan.

The following language was used to create the Illinois Secure Choice Savings program (emphasis added):

> "Employer" means a person or entity engaged in a business, industry, profession, trade, or other enterprise in Illinois, whether for profit or not for profit, that (i) has at no time during the previous calendar year employed fewer than 25 employees in the State, (ii) has been in business at least 2 years, and (iii) *has not offered a qualified retirement plan, including, but not limited to, a plan qualified under Section 401(a), Section 401(k), Section 403(a), Section 403(b), Section 408(k), Section 408(p), or Section 457(b) of the Internal Revenue Code of 1986 in the preceding 2 years.*[2]

ERIC recommends that Int. 888 be amended to include similar language that completely exempts employers that offer a retirement plan under ERISA.

In the alternative, the definition of an "eligible employee" should be amended to conform with the employee eligibility requirements under ERISA. Retirement plan eligibility requirements are a clear area of core ERISA concern. 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. Within this framework, each employer determines eligibility criteria based on the unique culture of the company and the market practices within the

[1] 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).
[2] Illinois Secure Choice Savings Program Act (Public Act 098-1150).

employer's industry or region. In many instances, 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 ensure that employers that currently sponsor a tax-qualified retirement plan subject to ERISA are not subject to different and potentially conflicting rules in different states and cities, and to ensure that the New York City proposal does not violate federal law, we request that the New York City Council specifically exclude employers that sponsor plans with eligibility conditions that comply with ERISA from the requirement to facilitate the city's plan.

If Int. 888 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 of service 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 federally regulated 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. Similarly, plan sponsors already offering a federally regulated retirement plan should not be forced to auto-enroll employees into a city or state-run plan with the compliance and cost burdens that would impose.

ERIC requests that Int. 888 be amended such that the program automatically exempts—without a reporting requirement—employers that provide a retirement plan to employees in accordance with ERISA. Several state jurisdictions have attempted to implement rules that require an employer that provides a retirement plan to report to the state that such a plan is provided to employees, or apply for an exemption from the state-run plan. We believe these requirements are a clear violation of ERISA preemption principles and have objected to these program rules. In fact, we brought a federal lawsuit on behalf of ERIC member companies in 2017 against the Oregon Retirement Savings Board over its reporting requirement and reached a favorable settlement that relieves ERIC member company employers from these reporting requirements. In 2019 we entered into a Memorandum of Understanding with the Illinois Secure Choice Program establishing a similar exemption for ERIC member companies from its employer reporting requirements. We are willing to work with you to craft exemptions and to

provide recommendations, using current available data, that will assist the program in determining which employers already provide a retirement plan.

IV. Conclusion

ERIC appreciates the opportunity to provide comments on your proposal and welcomes 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 arobinson@eric.org.

Sincerely,

Aliya Robinson
Senior Vice President, Retirement and Compensation Policy