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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

HOWARD JARVIS TAXPAYERS ASSOCIATION, JONATHAN COUPAL, and DEBRA DESROSIERS,

Plaintiffs,

vs.

THE CALIFORNIA SECURE CHOICE RETIREMENT SAVINGS PROGRAM and JOHN CHIANG, IN HIS OFFICIAL CAPACITY AS CHAIR OF THE CALIFORNIA SECURE CHOICE RETIREMENT SAVINGS INVESTMENT BOARD,

Defendants.

Case No. 2:18-cv-01584 MCE-KJN

SUPPLEMENTAL BRIEF BY DEFENDANTS CALSAVERS RETIREMENT SAVINGS PROGRAM AND JOHN CHIANG IN SUPPORT OF MOTION TO DISMISS [Dkt. #9]

Original Hearing Date and Time:

DATE: September 6, 2018
TIME: 2:00 P.M.
CTRM: 7, 14th Floor

JUDGE: Hon. Morrison C. England, Jr.

.

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The Court has requested supplemental briefing on two issues: (1) interpretation of the "completely voluntary" requirement of the Department of Labor's ("DOL") 1975 safe harbor regulation, 29 C.F.R. §2510.3-2(d) (the "1975 Safe Harbor"), and how this requirement applies, if at all, to a State-mandated retirement savings plan such as CalSavers, and (2) how principles of conflict and field preemption apply, if at all, to CalSavers. Defendants address these issues in turn

I. Interpretation of the 1975 Safe Harbor "Completely Voluntary" Requirement.

As set forth in the Motion to Dismiss (Dkt. #9) at pp. 16-18, CalSavers is not an "employee benefit plan." "Employee pension benefit plan" as defined by ERISA means any "plan, fund, or program … *established or maintained by an employer or by an employee organization.*" ERISA § 3(2)(A), 29 U.S.C. § 1002(A) (emphasis added). CalSavers is not "established or maintained" by any employer that may be subject to its provisions. Rather, it is established by the State. Because CalSavers is not an employee benefit plan, it is not subject to ERISA, and ERISA does not preempt the California law pursuant to which it is established. *See generally Fort Halifax Packing Co. v. Coyne,* 482 U.S. 1 (1987); *Winterrowd v. Am. Gen. Life Ins. Co.,* 321 F.3d 933, 939 (9th Cir. 2003) (to constitute an employee benefit plan, a program must be "established or maintained" by an employer or employee organization). Defendants submit the analysis should end there, and the Court should dismiss Plaintiffs' Complaint, because CalSavers will be neither "established" nor "maintained" by any employer that may be subject to its provisions.

But if, for any reason, the Court determines that it must analyze the role that employers who are subject to CalSavers will play in carrying out its mandates, the 1975 Safe Harbor may become relevant to determine whether the program constitutes an employee benefit plan. The DOL anticipated that employers may have *some* level of involvement in connection with their employees' IRAs. Otherwise, regulatory guidance on the topic would not have been necessary. The DOL issued the 1975 Safe Harbor to clarify what employers may and may not do in connection with IRA programs without thereby establishing or maintaining an employee benefit plan. The DOL expanded on that guidance in Interpretive Bulletin 99-1 (29 C.F.R. § 2509.99-1), which related more specifically to "payroll deduction programs established by employers for the purpose of

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enabling employees to make voluntary contributions to individual retirement accounts or individual retirement annuities." *Id*., § 2509.99-1(a). The Bulletin states that, provided the conditions of the 1975 Safe Harbor are met, an employer's establishment of a payroll deduction IRA does not create an employee benefit plan. *Id*., § 2509.99-1(b). A brochure published on the DOL website also describes the process by which employers may establish payroll deduction IRAs without creating employee benefit plans. The brochure states that "[a]s long as the employer keeps its involvement to a minimum, the program will not be treated as an employer retirement plan under Federal law, and the employer will not be subject to the requirements for such plans, including annual filings with the government."[1] There is no basis for concluding that IRAs established pursuant to a *state-mandated* program such as CalSavers are employee benefit plans when programs *voluntarily initiated* by an employer are not. Indeed, the opposite is true.

The Court has requested briefing on one of the four elements of the 1975 Safe Harbor: that "[p]articipation [in the IRA program] is completely voluntary for employees or members." 29 C.F.R. §2510.3-2(d)(2)(ii).[2] "The purpose of the 'voluntariness' prong is to identify programs *sponsored by the employer and meant to be a benefit of employment*." *Ames v. Jefferson Pilot Fin. Co.*, 515 F. Supp. 2d 1050, 1055 (D. Ariz. 2007) (emphasis added); *Meadows v. Empl'rs Health Ins.*, 826 F. Supp. 1225, 1229 (D. Ariz. 1993). To Defendants' knowledge, there is no case law interpreting the "completely voluntary" prong of the 1975 Safe Harbor relating to IRAs. And there is no authority as to whether state-mandated retirement saving programs, or IRAs created pursuant to those programs, meet the "completely voluntary" prong of the 1975 Safe Harbor. This is to be expected, since state-mandated retirement saving programs have only relatively recently been established, and by only a few states.[3]

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[1] *See* https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/publications/payroll-deduction-iras-for-small-businesses.pdf. A true and correct copy of the brochure is attached to the Request for Judicial Notice ("RJN") filed concurrently herewith as Exhibit 1.

[2] It is undisputed that CalSavers satisfies the other prongs of the safe harbor analysis. 29 C.F.R. §2510.3-2(d)(2)(i), (iii) and (iv).

[3] Connecticut, Illinois, Maryland and Oregon have established programs similar to CalSavers. *See* Conn. Gen. Stat. Ann. §§ 31-416-31-429; 820 Ill. Comp. Stat. Ann. 8/10-8/95; Md.

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However, DOL has promulgated a safe harbor provision with respect to "group or group-type insurance programs" which includes language identical to that of the 1975 Safe Harbor, including the "completely voluntary" prong. 29 C.F.R. § 2510.3-1(j). Courts have interpreted the "completely voluntary" language in the context of that safe harbor provision. Those cases demonstrate that CalSavers satisfies the 1975 Safe Harbor's "completely voluntary" requirement.[4]

In *Byard v. QualMed Plans for Health, Inc.*, 966 F. Supp. 354, 358 (E.D. Pa. 1997), the court found compliance with the "completely voluntary" prong where employees could unilaterally discontinue their membership in a group insurance plan just by not making monthly payments toward insurance premiums. Similarly, in *Welch v. New York Life Ins. Co.*, 2001 WL 1256816, at * 4 (N.D. Cal. 2001), the court held that participation in a long-term disability program was completely voluntary where the insurance policy at issue indicated that "the employee can terminate the insurance by failing to make his required contributions." The court stated that the policy "at least implies that coverage is voluntary," and "does not indicate expressly that coverage is mandatory." *Id.* at *4. In *Vazquez v. Paul Revere Life Ins. Co.*, 289 F. Supp. 2d 727, 731 (E.D. Va. 2001), the Court held that participation in a long-term disability insurance program was "completely voluntary" where employees could purchase one of several coverages or could choose not to participate. As in these cases, under CalSavers, employees will be able to unilaterally decide whether to participate and, if they do participate, may subsequently stop their payroll deduction contributions to their IRA at any time.

Also relevant is *Ames v. Jefferson Pilot Fin. Co.*, 515 F. Supp. 2d at 1056, in which the court held that a group insurance plan was completely voluntary for employees even though the plan required participation by at least 10 employees or 25% of eligible employees. The court noted that

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Code Ann. §§ 12-101-12-502 and Or. Rev. Stat. §§ 178.200-178.245.

[4] In most cases, however, the litigants do not dispute whether the program at issue satisfies the "completely voluntary" prong of the safe harbor provision. Rather, most cases addressing the safe harbor focus on the "endorsement," i.e., employer neutrality, requirement. *See Edwards v. Prudential Ins. Co. of Am.*, 213 F. Supp. 2d 1376, 1382 (S.D. Fla. 2002). Indeed, the DOL has called employer neutrality "the key to the rationale for not treating such a program as an employee benefit plan." *Johnson v. Watts Regulator Co.*, 63 F.3d 1129, 1134 (1st Cir. 1995).

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the minimum participation level was set by the insurer, not the employer, and therefore "does not suggest [the employer's] intent to offer the Plan as a benefit of employment."[5] Here, too, the CalSavers's enrollment/opt-out procedure is set by the State, not the employers, and does not in any way suggest the employers' intent to offer a benefit of employment.

At the other end of the spectrum, courts have held that when employers *require* that their employees enroll in their group insurance plans as a condition of their employment, it is not "completely voluntary." *See, e.g., Qualls v. Blue Cross, Inc.*, 22 F.3d 839, 844 (9th Cir. 1994); *Ivanciw v. UNUM Life Ins. Co. of Am.*, 1996 WL 396685, at * 2 (9th Cir. 1996) (where employee policy manual stated that participation in the company's long term disability insurance plan was "required by the Company upon employment," employee participation was not "completely voluntary"); *Pachuta v. Unumprovident Corp.*, 242 F. Supp. 2d 752, 765 n. 3 (D. Haw. 2002) (holding insurance plan "was not completely voluntary because participation was a condition of employment for doctors"); *Rome v. HCC Life Ins. Co.*, 323 F. Supp. 3d 862, 868 (N.D. Tex. 2018) (holding that participation in an insurance policy issued to the National Hockey League for its players pursuant to a collective bargaining agreement was not "completely voluntary," because the players "have no option to decline" coverage).[6]

The CalSavers program could not be more different from the programs at issue in this latter group of cases. Not only is participation not mandatory, but employers are not responsible for administering the plan. Cal. Gov't Code § 100034. Employees must be told that the plan is not

[5] *Accord Manduca v. Unum Life Ins. Co*, 1996 WL 117016 at *3 (N.D. Cal. 1996) (holding that plan was "completely voluntary" even though it could be cancelled by the insurer if participation fell below 25 employees or 25% of employees); *Pemberton v. Reliance Standard Life Ins. Co.*, 2008 WL 4498811 at *3 (E.D. Ky. 2008) (holding that plan was "completely voluntary" even though the insurer set a minimum participation rate of 75%). *Cf. Meadows v. Empl'rs Health Ins.*, 826 F. Supp. at 1129 (holding that plan that required 100% participation was not "completely voluntary"); *Chamblin v. Reliance Std. Life Ins. Co.*, 168 F. Supp. 2d 1168, 1171 (N.D. CA. 2001) (holding that plan was not "completely voluntary" where there was a minimum participation rate of 75%, and that the employer also failed the "non-endorsement" prong of the safe harbor).

[6] In *Menkes v. Prudential Life Ins. Co. of Amer.*, 762 F.3d 285, 293 (3rd Cir. 2014), the Court found that where employees were automatically enrolled in an insurance policy paid for by the employer, neither the "completely voluntary" nor the "no employer contributions" requirements of the safe harbor were met.

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sponsored by their employer, and that "the employer is not responsible for the plan or liable as a plan sponsor." *Id.* § 100014(c)(2). The information packet given to employees must by statute include an opt-out form and information about the employee's ability to opt-out. *Id.* § 100014(b)(3), (d)-(g). No employee reasonably could believe that his employer intends CalSavers as a benefit of employment.

In sum, ERISA does not apply at all to CalSavers, since CalSavers was not established by and will not be maintained by any employer, but rather by the State; therefore, it is not an "employee benefit plan" within the meaning of ERISA. To the extent the 1975 Safe Harbor comes into play at all, CalSavers satisfies the "completely voluntary" prong of the 1975 Safe Harbor.[7] The minimal burden of opting out of coverage does not make an employee's decision to participate in the CalSavers program less than "completely voluntary."[8]

II. How Principles of Conflict and Field Preemption Apply in This Case.

The Court has inquired how principles of conflict and field preemption apply here. At the outset, because CalSavers is not an employee benefit plan as that term is defined by ERISA, ERISA

[7] In 2016 DOL promulgated a regulation that provided an express safe harbor for state-sponsored plans with automatic enrollment like CalSavers. 81 Fed. Reg. 59464. The purpose of the regulation was to pave the way for states to establish payroll deduction savings programs without thereby establishing employee pension benefit plans. See 81 Fed.Reg. 59464 at 59476. It expressed the DOL's beliefs, at the time, of how states could do so. In 2017 Congress disapproved the regulation. See 82 Fed. Reg. 29236-37. Plaintiffs argued in their Opposition (Dkt. # 16) at page 16 that the preamble of the withdrawn regulation supports a conclusion that an opt-out program cannot be "completely voluntary." As discussed in Defendant's Motion (Dkt. # 9) at page 16 and the Reply (Dkt. # 18) at page 2, footnote 2, Congress's disapproval renders the entire regulation, including the preamble, of no force and effect, and entitled to no deference. Plaintiff's reliance on the statements in one portion of a withdrawn regulation (and merely the preamble at that) as probative of the DOL's thinking on the requirements of ERISA, while rejecting the rest of the regulation, is misplaced. Congress' subsequent disapproval voided all of the regulation, not just some of it. And although in the preamble DOL stated that the 1975 Safe Harbor did not cover state-sponsored programs, by its very act of promulgating the regulation, DOL implicitly found that allowing state programs like CalSavers was consistent with exempt IRAs and not preempted by ERISA. Plaintiffs do not, because they cannot, point to any authority for the proposition that a Court should consider a portion of a preamble to a regulation when the regulation itself has been withdrawn.

[8] Notably, the relevant cases focus on whether, as a practical matter, participation in the program was voluntary or mandatory; they do not purport to parse a distinction between "voluntary" and "completely voluntary." Indeed, the terms "voluntary" and "completely voluntarily" appear redundant.

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does not expressly preempt the California state law that enacted the program. ERISA's express preemption provision provides in relevant part that "… the provisions of this subchapter and subchapter III shall supersede any and all State laws insofar as they may now or hereafter relate to any *employee benefit plan described in [Section 4(a)]* and not exempt under [ERISA § 403(b)]." 29 U.S.C. § 1144(a). Section 4(a) of ERISA, in turn, refers to any employee benefit plan "*if it is established or maintained*" (1) by any *employer* engaged in commerce or in any industry or activity affecting commerce; or (2) by any *employee organization* or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or (3) by both. 29 U.S.C. §1003(a) (emphasis added.) Here, the program has been established by and will be maintained by the State, which does not qualify as either an "employer" or an "employee organization" under ERISA.[9] Therefore, ERISA's express preemption provision does not apply. This also demonstrates that neither field nor conflict preemption applies, either.

The Supreme Court has made clear that the "field" preempted by ERISA does not extend to every state law that may have a literal "connection with" an ERISA plan. *Dist. of Columbia v.*

[9] ERISA defines "employer" as "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan." 29 U.S.C. § 1002(5). Clearly, the CalSavers program was not established and, once operational, will not be maintained "directly" by any employer who may be subject to its terms. Thus, the issue comes down to whether, in establishing and maintaining CalSavers, the State of California acts "indirectly in the interest of an employer." It does not. It makes no sense whatsoever to stretch the phrase to include a governmental entity, such as the State of California, that simply imposes its traditional power upon an employer to withhold payroll deductions, subject to its employees' right to elect not to have those deductions taken. The plain text of the phrase naturally assumes some sort of contractual or organizational relationship between the employer and the person that is purportedly acting "indirectly in the interest of an employer," and, not surprisingly, courts have so found. *See, e.g., Kopalow & Girisgen v. Payroll Solutions,* 2006 WL 2583226 at *5 (D. Az. 2006) (employee leasing companies that maintain responsibility for employee payroll, taxes, unemployment, and providing an optional employee benefit package act indirectly in the interest of an employer); *Raines v. Integrity Acoustic Solutions, Inc.*, 2015 WL 2402523 at *2 (D. Minn. 2015) (persons who agree to be personally bound to an employer's obligations to contribute to union fringe benefit funds under a collective bargaining agreement act indirectly in the interest of the employer).

Nor is the State of California an "employee organization," which is defined to mean, in relevant part, "any labor union or any organization of any kind, or any agency or employee representation committee, association, group, or plan, in which employees participate and which exists for the purpose . . . of dealing with employers concerning an employee benefit plan . . . ." 29 U.S.C. § 1002(4). That language is clear on its face; the State of California, which established and will maintain the CalSavers program, is not an "employee organization."

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Greater Wash. Bd. of Trade, 506 U.S. 125, 129-130 (1992). Rather, an allegedly preempted state law must actually "'*govern*[] a central matter of plan administration' or '*interfere*[] with nationally uniform plan administration.'" *Board of Trustees of Glazing Health and Welfare Trust v. Chambers*, 903 F.3d 829, 847 (9th Cir. 2018) (quoting *Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 943 (2016)). "Similarly, a state law is no longer preempted simply because it makes literal 'reference to' an ERISA plan." *Id.* "Instead, it must both identify ERISA plans and act immediately and exclusively upon ERISA plans or make the existence of ERISA plans … essential to the law's operation." *Id.* Further, a state law does not "impermissibly act upon an ERISA plan" unless it invades ERISA's "regulatory domain," which covers four main areas: fiduciary obligations to participants and reporting, disclosure, and record-keeping requirements. *Id.* at 847-48 (quotation marks and citation omitted). Specifically, plans annually must file a financial report with the Secretary of Labor, and must keep detailed records showing compliance with ERISA's reporting and disclosure requirements. *Id*. at 848. "If a state law encroaches on these areas of federal concern, it is preempted. Conversely, *state laws that do not target these ERISA functions, nor 'regulate[ ] a key [facet] of plan administration,' are likely not preempted*." *Id.* (emphasis added) (quoting *Gobeille*, 136 S. Ct. at 944-945).

Applying these principles here, field preemption does not apply. Even if CalSavers could be said to give rise to an "employee benefit" for employees that do not opt out, that would not infringe upon the field that ERISA regulates: employee benefit *plans*. *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. at 7 (rejecting an argument that "… any state law pertaining to a type of employee benefit listed in ERISA necessarily regulates an employee benefit plan, and therefore must be pre-empted"). As explained above, CalSavers does not create or regulate in any way an employee benefit plan, because the State of California does not meet the definition of an "employer" or an "employee organization" under ERISA.

Nor does CalSavers "stand[] as an obstacle to ERISA's purposes and objectives" under a conflict preemption analysis. *Chambers*, 903 F.3d at 847. To be preempted on such a theory, "a state law must 'reach in one way or another the 'terms and conditions of employee benefit plans.'"

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Id. at 849 (quoting *Lane v. Goren*, 743 F.2d 1337, 1339 (9th Cir. 1984)). Here, the Secure Choice Act creates an IRA, not an employee benefit plan. Moreover, it is well settled that state laws that regulate or relate to IRAs, like the Secure Choice Act, do not "reach" employee benefit plans and therefore are not preempted by ERISA. For example, in *Lazar v. Kroncke*, 862 F.3d 1186, 1198-99 (9th Cir. 2017), the court applied a conflict preemption analysis and held that a state law revoking IRA beneficiary designations upon the participant's divorce was not preempted by ERISA. In so holding, the Ninth Circuit expressly distinguished *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141 (2001), in which the Supreme Court held that a similar statute *could not be applied to ERISA-qualified plans*. Similarly, in *Charles Schwab & Co. v. Debickero*, 593 F.3d 916, 919-923 (9th Cir. 2010), the court held that ERISA's provisions protecting surviving spouses do not apply to an IRA that is not an employee benefit plan under ERISA. The Ninth Circuit observed that, "[o]f course, ERISA's surviving spouse provisions may apply *only when an ERISA-qualified plan is implicated*," and, further, that "IRAs are expressly excluded from ERISA's coverage." *Id.* at 919 (emphasis added).

The Secure Choice Act also does not encroach on employers' obligations to file reports with the Secretary of Labor with respect to their existing employee benefit plans, as was the situation in *Gobeille.* Indeed, the Secure Choice Act does not mandate reporting about any employee benefit plan at all.

Nor does CalSavers impose fiduciary obligations upon employers and thereby infringe on ERISA's regulation of plan sponsors' fiduciary relationships to their participants. The statute expressly relieves employers from any fiduciary obligation to manage IRAs established under the program. Cal. Gov't Code § 100034(b). CalSavers also does not mandate any record-keeping relating to ERISA-governed plans. Employers that are subject to CalSavers may have to account for payroll deductions of those employees that do not opt out of the program, but those employers are already obligated to account for deductions that are taken from their employees' pay. *See*, Cal. Lab. Code § 224. To that extent, CalSavers is merely an exercise of the State's traditional power over the payment of wages: "The States have traditionally regulated the payment of wages ….

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Absent any indication that Congress intended such far-reaching consequences, we are reluctant to so significantly interfere with 'the separate spheres of governmental authority preserved in our federalist system.'" *Massachusetts v. Morash,* 490 U.S. 107, 118 (1989)) (quoting *Coyne,* 482 U.S. at 19).

Finally, any contention that conflict (or field) preemption applies here is particularly tenuous given that the Secure Choice Act is an exercise of California's historic police powers, and was enacted to protect the physical and economic health, welfare, and well-being of its residents. *See* U.S. Gov't Accountability Off., GAO 15-419, *Retirement Security: Most Households Approaching Retirement Have Low Savings* 7-10 (2015); U.S. Gov't Accountability Off., GAO 15-556, *Retirement Security: Federal Action Could Help State Efforts to Expand Private Sector Coverage* 1-4 (2015). [10] Inadequate retirement savings affects not only the quality of life and physical health of individuals, but also significantly increases the burden on the State's retirement income support programs. *See id*. at 25 n.63, 52.[11] Accordingly, there is a strong presumption that ERISA does not preempt state law in this case. *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654-55 (1995); *see Medtronic v. Lohr*, 518 U.S. 470, 486 (1996) (in light of federalism concerns and the "historic primacy of state regulation of matters of health and safety," Congressional intent to preempt state law must be "clear and manifest").

Plaintiffs have pointed to nothing that would overcome this presumption against preemption, and there is nothing. As their complaint and their briefing make clear, their sole contention on the issue of preemption is that CalSavers is an employee benefit plan as defined by ERISA. It is not. Plaintiffs have not even suggested, let alone demonstrated, that CalSavers clearly and manifestly interferes with any of ERISA's underlying goals or purposes, nor could they plausibly so contend.

III. Conclusion

CalSavers does not give rise to an employee benefit plan. It creates an IRA program exempt

[10] A copy of these GAO reports are included as Exhibits 2-3 to Defendants' RJN.

[11] This report also notes that the automatic enrollment feature considerably increases participation, and may reduce costs. *Id*. at 31.

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from ERISA that satisfies the requirements of the 1975 Safe Harbor, to the extent that safe harbor provision even applies. Moreover, because CalSavers does not bring about the creation of an employee benefit plan, it is not preempted by ERISA.

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