

AMERICAN PAYROLL ASSOCIATION

April 23, 2018

The Honorable Jenny A. Durkan
Mayor, City of Seattle
P.O. Box 94749
Seattle, WA 98124-4749

The Honorable Bruce A. Harrell
Council President, City of Seattle
P.O. Box 34025
Seattle, WA 98124-4025

Re: Ordinance 125467, Retirement Savings Program for Employees Working in Seattle

Dear Mayor Durkan and Council President Harrell:

The American Payroll Association (APA) is offering the City of Seattle assistance as the city works to implement Ordinance 125467, Chapter 14.36 of the Municipal Code, which establishes a retirement savings program for certain employees working in Seattle.

ABOUT APA AND ITS INTEREST IN RETIREMENT PLANNING

APA is a nonprofit professional association and the leading private sector advocate for payroll management issues in the United States. Association membership consists of more than 20,000 payroll professionals who manage payroll functionality for more than 17,000 employers and payroll service providers, who in turn process the payrolls of an additional 1.5 million employers. Among other activities, APA works with the legislative and executive branches of government to find ways to help employers satisfy their legal obligations, while minimizing the administrative burden on government, employers, and workers.

APA and its members recognize the significance of retirement financial planning and the ability to save regularly through payroll deductions. However, APA agrees with the language in Seattle's ordinance that automatic payroll deduction is perhaps the most important success factor in retirement preparedness and that automatic enrollment may critically overcome employee inertia to begin the savings process.

Because retirement planning is important and directly impacts payroll functions, APA's Subcommittee on Retirement Accounts has engaged in discussions at the federal, state, and local levels concerning retirement savings programs. APA collaborated with the administrative boards to implement plans in California and Oregon. We are assisting other states in preliminary stages of retirement plan development, such as in Connecticut, Illinois, and Maryland. In addition, APA worked with the U.S. Department of the Treasury to develop and implement the *myRA* (*my Retirement Account*) program. In addition, APA participates with The Pew Charitable Trusts in discussing data, laws and regulations, and a variety of other retirement planning topics.

SPECIFIC QUESTIONS FOR CONSIDERATION

APA welcomes the opportunity to work with city officials to discuss Seattle's retirement savings program. Below are questions with some recommendations regarding Seattle's ordinance that APA members bring to your attention as an initial step. Each of the questions will require further analysis. Some answers may be more complex than others.

Definition of Covered Employer

In the definition of "covered employer" in the ordinance, the city exempts employers with a qualified plan as defined by the federal Internal Revenue Code and as applied to employees working within the Seattle city limits. However, the ordinance does not use the term "Seattle city limits" when in defining employers covered by the Seattle Retirement Savings Plan. This raises several questions:

1. Does the plan only apply to employers that have a physical presence within the city limits?
2. Does the plan apply to employers that do not have physical presence, but do have employees who work in Seattle? If so, does the plan only apply to those workers?

APA recommends that Seattle consider a narrow approach of applying the ordinance to those employers that have physical presence within the city limits of Seattle. This defines the jurisdiction of Seattle to prevent challenges for overreach. In addition, employers will clearly understand whether they are covered by the ordinance.

Definition of Eligible Employee

The ordinance defines employee as "customarily employed for compensation by a covered employer in the Seattle city limits." The Plan Board of Administration also is required to

consider whether eligible employees are those “customarily working a certain number of hours per month within the Seattle city limits.” This raises the following questions:

1. How will the law apply to employees that telecommute from locations outside the city limits or who otherwise work outside the city limits (i.e., regional sales people and remote employees)?
2. How will the law apply to employees with temporary presence within the Seattle city limits, such as management employees who travel to a Seattle location several times per year or seasonal workers?
3. What is the definition of “customarily employed for compensation?” Is this 20, 30, or 40 hours per week or some other measurement? How does this term apply to employees with inconsistent monthly schedules? Will this be measured over a period of time and, if so, what is that period? Should the definition be based on a 12-month period and 1,000 hours, the same as a federally defined qualified plan?
4. While measuring by hours worked for hourly or salaried employees can be accomplished effectively, how will hours be measured for the variety of other methods employers use to pay workers, including but not limited to, commissions, incentive pay, merit-based pay, piecework, warrant pay, or by project?
5. How will Seattle categorize employees who fluctuate in and out of eligibility, for example, participating employees who accept reduced hours for a period of time, thus making them ineligible?

APA recommends that the ordinance cover employees that report to the employer’s Seattle physical location even if the employees telecommute or work from other locations, e.g., regional sales employees. The ordinance should not apply to occasional or temporary employees, such as seasonal workers or managers from other locations that fly in and out to meet with employees.

Despite the difficulty of measuring hours, Seattle should establish a specific number of hours when defining which employees are covered by the ordinance. APA does not take a position on the number of hours, but notes that the fewer hours selected, the less likelihood for meaningful participation. Logically, the fewer hours worked, the less employees will earn sufficient amounts to contribute to a plan through payroll withholding.

Further discussion is needed on how to determine participation for non-hourly or salaried employees. For example, many federal and state laws describe part-time and full-time

workers. These range from health care legislation to labor laws. As described in question 4 above, federal ERISA refers to 1,000 hours for eligibility.

In addition, APA is concerned about the burden on employers to account for the number of hours worked for purposes of eligibility in Seattle's plan. Therefore, APA recommends that once an employee becomes eligible and is participating, even if the employee fluctuates in and out of eligibility, participation should be continuous. The burden on employers and plan administrators to monitor this type of eligibility problem is too high to track.

Potential Conflicts of Law

Employee Retirement Income Security Act

While Seattle's ordinance specifically considers compliance with the Employee Retirement Income Security Act of 1974, APA members are concerned about the section of the ordinance that directs the board to: "Establish rules regarding participation in the SRSP, if any, for ... employees who are not eligible to participate in an employer's qualified retirement plan.... This could affect employers that already sponsor a qualified plan and appears to directly conflict with ERISA. Questions here include:

1. Will Seattle's plan apply to workers in waiting periods under an employer's qualified plan?
2. Will Seattle's plan apply to workers temporarily ineligible for an employer's qualified plan?
3. Will employers be responsible for determining exemption from Seattle's plan on the basis of employer-sponsored plans?

APA recommends that Seattle's plan avoid all conflicts with ERISA. Regardless of the specific status of an employee under an employer's plan (i.e., waiting periods and temporary ineligibility), the exemption from Seattle's plan should apply to that employer. APA also asks Seattle to carefully consider the process to show that an employer already has a plan in place. This was the subject of a lawsuit in Oregon over its OregonSaves Plan. Seattle might consider reviewing federal Form 5500 filings (available electronically) prior to establishing enforcement procedures for non-participating employers. The Form 5500 series was developed by the U.S. Department of Labor, Internal Revenue Service, and Pension Benefit Guaranty Corporation as a means for employers to satisfy annual reporting under ERISA.

Other Jurisdictions

Other state and local governments are developing mandatory, automatic enrollment retirement savings plans that may overlap with Seattle’s plan. For employers and employees that cross jurisdictions, Seattle should consider how its ordinance will apply. For example, an employee covered by Seattle’s ordinance may already be subject to the Oregon Saves Program. Questions include:

1. How will employers and employees know which law applies?
2. If an employee opts out of another jurisdiction’s plan, must the employer then apply Seattle’s plan requirements to that employee?

APA recommends that Seattle adopt an approach that if an employer and employee are already covered by another jurisdiction’s plan, they will not be subject to Seattle’s plan. Employers should not be subject to “plan shopping” by employees. For Seattle plan administrators, tracking “plan shopping” will make the city’s plan too costly.

Enclosed with this letter is a copy of APA’s “State Retirement Savings Programs: Employer Communications Report.” While prepared based on state plans, you may find the employer considerations useful as applied to Seattle’s plan.

To reach APA for further discussion, please contact Alice Jacobsohn, Esq., at 202-248-3901 or ajacobsohn@americanpayroll.org. Thank you.

Sincerely,



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