CLOSING THE RETIREMENT SAVINGS GAP: ARE STATE AUTOMATIC ENROLLMENT IRAS THE ANSWER?

Kathryn L. Moore[*]

INTRODUCTION

As the Baby Boom generation reaches retirement age, retirement income security has become an increasingly salient policy issue. The federal government devotes billions of dollars in tax incentives each year toward encouraging employers and their employees to save for retirement.[1] Yet retirement savings in this nation remain woefully inadequate.[2] Analysts, policymakers, and legislators have introduced a host of strategies to address the retirement savings gap.[3] This Article examines one of the more recent and innovative strategies: state automatic enrollment IRAs.

---

[*] Ashland-Spears Distinguished Research Professor of Law, University of Kentucky College of Law. The author would like to thank Tina Brooks, Franklin Runge, Beau Steenken, Ryan Valentine, and Richard Wooldridge for their research assistance and Scott Bauries, Israel Goldowitz, Maria O'Brien Hylton, Stan Panis, Natalya Shnister, Paul Secunda, Norman Stein, Steve Utkus, and Jean Young for their insights and comments.

[1] According to the Joint Committee on Taxation, the favorable tax treatment accorded employer-sponsored pensions, including plans for the self-employed, will result in an estimated $881.5 billion in foregone tax revenues between 2015 and 2019. STAFF OF J. COMM. ON TAXATION, 114TH CONG., ESTIMATES OF FED. TAX EXPENDITURES FOR FISCAL YEARS 2015-2019 39 (Comm. Print 2015).

[2] *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-419, RETIREMENT SECURITY: MOST HOUSEHOLDS APPROACHING RETIREMENT HAVE LOW SAVINGS 7 (2015) (finding, among other things, that about half of households age 55 and older have no retirement savings); Jack VanDerhei, *Auto-IRAs: How Much Would They Increase the Probability of "Successful" Retirements and Decrease Retirement Deficits? Preliminary Evidence from EBRI's Retirement Security Projection Model*, 36 EBRI NOTES (Emp't Benefit Research Inst.), June 2015, at 19–20 (estimating retirement savings shortfalls in present value (in 2014 dollars) at age 65 of $36,387 (per individual) for those ages 60-64 and $54,120 for those ages 35-39 for an estimated aggregate national retirement deficit of $4.13 trillion for all U.S households where head of household is between 35 and 64 years of age); Ruth Helman et al., *The 2014 Retirement Confidence Survey: Confidence Rebounds–For Those With Retirement Plans,* EBRI ISSUE BRIEF no. 397 (Emp't Benefit Research Inst.), Mar. 2014, at 6 (reporting that only 18 and 37 percent of workers were very confident or somewhat confident, respectively, that they would have adequate money in retirement); Alicia H. Munnell et al., *NRRI Update Shows Half Still Falling Short*, CTR. FOR RET. RES. AT B. C., Dec. 2014, at 3 (reporting that National Retirement Risk Index shows that 52 percent of households in 2013 were at risk of being unable to maintain their pre-retirement standard of living in retirement).

[3] For a discussion of various approaches to increasing retirement savings, see, for example, U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-556, RETIREMENT SECURITY: FEDERAL ACTION COULD HELP STATE EFFORTS TO EXPAND PRIVATE SECTOR COVERAGE 9-10 (2015) (describing federal saver's credit and myRA); Alicia H. Munnell, *Falling Short: The Coming Retirement Crisis and What to Do About It*,

Drawing on the insights from behavioral law and economics, coined as one of "the most promising and exciting new developments in public policy-making theory and practice,"[4] automatic enrollment IRAs were officially unveiled in February 2006 by Mark Iwry, then a senior fellow at the Brookings Institution, and David John, then a senior research fellow at the Heritage Foundation.[5] A host of federal bills providing for the creation of an automatic enrollment IRA program have been introduced in Congress since 2006.[6] In addition, each of the President's federal budget proposals has included funding for an automatic enrollment IRA program since 2009,[7] when Mark Iwry became Senior Adviser to the Secretary of the Treasury and Deputy Assistant

---

CTR. FOR RET. RES. AT B. C., Apr. 2015, at 6 (describing three prong approach to addressing retirement crisis); CHRISTIAN E. WELLER & THERESA GHILARDUCCI, CTR. FOR AM. PROGRESS, LAYING THE GROUNDWORK FOR MORE EFFICIENT RETIREMENT SAVINGS INCENTIVES 7–15 (2015), https://cdn.americanprogress.org/wpcontent/uploads/2015/11/17071405/RetirementsIncentives-report.pdf (offering five policy recommendations).

4 Ryan Bubb & Richard H. Pildes, *How Behavioral Economics Trims Its Sails and Why*, 127 HARV. L. REV. 1593, 1595 (2014).

5 J. MARK IWRY & DAVID C. JOHN, PURSUING UNIVERSAL RETIREMENT SECURITY THROUGH AUTOMATIC IRAS 1 (working drft. Feb. 12, 2006), http://www.heritage.org/research/reports/2006/02/pursuing- universal-retirement-security-through-automatic-iras; *see also* Frances Denmark, *Going to War over Retirement Security,* INSTITUTIONAL INV'R. (June 17, 2015), http://www.institutionalinvestor.com/Article/3463046/Going-to-War-over-Retirement-Security.html (Mark Iwry, then a senior fellow the Brookings Institution, and David John, then a senior research fellow at the Heritage Foundation, unveiled their Automatic IRA program at the Heritage Foundation on Valentine's Day 2006.).

6 *See, e.g.*, S. 2472, 114th Cong. (2016); H.R. 506, 114th Cong. (2015); S. 245, 114th Cong. (2015); H.R. 2035, 113th Cong. (2013); H.R. 4049, 112th Cong. (2012); S. 1557, 112th Cong. (2011); H.R. 6099, 111th Cong. (2010); S. 3760, 111th Cong. (2010); H.R. 2167, 110th Cong. (2007); S. 1141, 110th Cong. (2007); H.R. 6210, 109th Cong. (2006); S. 3952, 109th Cong. (2006).

7 *See* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE U.S. GOVERNMENT, FISCAL YEAR 2017 152 tbl.S-9 (2016); OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE U.S. GOVERNMENT, FISCAL YEAR 2016 120 tbl.S-9 (2015); OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE U.S. GOVERNMENT, FISCAL YEAR 2015 189 tbl.S-9 (2014); OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2014 209 tbl.S-9 (2013); OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2013 218 tbl.S-9 (2012); OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE U.S. GOVERNMENT, FISCAL YEAR 2012 183 tbl.S-8 (2011); OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE U.S. GOVERNMENT, FISCAL YEAR 2011 160 tbl.S-8 (2010); OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, A NEW ERA OF RESPONSIBILITY: RENEWING AMERICA'S PROMISE [BUDGET OF THE U.S. GOVERNMENT, FISCAL YEAR 2010] 122 tbl.S-6 (2009); *see also* Derek B. Dorn et al., *States Dive Headfirst Into Retirement Coverage Debate—But Will Their Initiatives Run Afoul of Federal Law?*, 42 PENS. & BEN. REP. (BNA) 219, 220 (2015) ("[T]he Automatic IRA has been the centerpiece of [President Obama's] administration's retirement policy and has been included in every annual budget proposal that he has sent to Congress."); Denmark, *supra* note 5 ("The Automatic IRA has been submitted in every federal budget since 2009 but has yet to pass.").

Secretary (Tax Policy) for Retirement and Health Policy at the Treasury Department.[8] Despite this interest and support, the proposals have not gained traction.[9]

Given the federal gridlock, states have stepped in to fill the breach. Since 2012, more than twenty-five states have considered proposals to study or establish retirement savings programs for private-sector employees.[10] Moreover, five states—California,[11] Illinois,[12] Oregon,[13] Maryland,[14] and Connecticut[15]—have enacted legislation establishing state automatic enrollment IRA programs.[16]

This Article considers whether these programs are likely to fill the retirement savings gap. Part I begins by providing a broad overview of state automatic enrollment IRA programs and describes the legislation enacted in California, Illinois, and Oregon. Part II then addresses the question of whether these programs are "employee benefit plans" for purposes of ERISA. Finally, in Part III, the Article addresses the ultimate question of whether state automatic enrollment IRA programs are likely to fill the retirement savings gap.

Proponents of state automatic enrollment IRA programs point to the positive experience with automatic enrollment in 401(k) plans to contend that these state programs are an answer, or at least a partial answer, to increasing retirement savings in this country. The efficacy of such programs, however,

---

8 Denmark, *supra* note 5.

9 When the first automatic IRA bills were introduced, they enjoyed bipartisan support. Now, however, no Republicans support the concept. Two reasons are offered to explain the loss of Republican support: (1) many of the Republican legislators who supported the first bills are no longer in Congress; and (2) since the enactment of "Obamacare," "the prospect of new mandates on employers has become universally anathema among Republicans in Congress." Dorn et al., *supra* note 7, at 220.

10 *See Look to the States for Innovation,* GEO. UNIV. CTR FOR RET. INITIATIVES, http://cri.georgetown.edu/states (last visited Aug. 8, 2016). *See also State-Based Retirement Plans for the Private Sector,* PENSION RIGHTS CTR., http://www.pensionrights.org/issues/legislation/state-based-retirement-plans-private-sector (last updated May 2016). In some of the states, employer participation would be mandatory while in other states employer participation would be voluntary. In all states, employees would have the opportunity to opt out, that is, choose not to participate in the program. *See, e.g.*, Dorn et al., *supra* note 7, at 229–34 (describing legislation proposed to create a state-run retirement arrangement in eight different states).

11 California Secure Choice Retirement Savings Trust Act, 2012 Cal. Stat. ch. 734 (codified at CAL. GOV'T CODE §§ 100000–100044 (West 2013)).

12 Illinois Secure Choice Savings Program Act, 2015 Ill. Laws 098-1150 (codified as 820 ILL. COMP. STAT. 80/1–95 (2016)).

13 Act of June 25, 2015, 2015 Or. Laws ch. 557 (codified as amended at OR. REV. STAT. §§ 178.200–245 (2015)).

14 Maryland Small Business Retirement Savings Program and Trust, 2016 Md. Laws ch. 323.

15 An Act Creating the Connecticut Retirement Security Program, 2016 Conn. Acts 16-29 (Reg. Sess.).

16 Massachusetts has also enacted legislation, but its program is limited to nonprofit organizations. *See* An Act Providing Retirement Options for Nonprofit Organizations, 2012 Mass. Acts 100–02 (codified at MASS. GEN. LAWS ch. 29, § 64E (2013)).

raises complicated and nuanced questions. The Article identifies both fundamental and a host of subsidiary, sometimes overlapping, questions raised by such programs, and offers important insights on how to answer the many issues implicated by these questions.

I. OVERVIEW OF STATE AUTOMATIC ENROLLMENT IRA PROGRAMS

State automatic enrollment IRA programs are one of a variety of approaches states are considering to address the serious retirement savings gap that this country faces.[17] The programs encourage private-sector employees to establish tax-favored individual retirement accounts (IRAs), which are funded through payroll deductions, to save for retirement. Generally, the state programs require employers that do not offer retirement savings plans to participate in the program.[18] As discussed below, employees in the programs are automatically enrolled in state-administered IRAs, and money is automatically deducted from the employees' paycheck and deposited in the IRAs. The programs identify a default contribution amount (*e.g.*, 3 percent of compensation) that is automatically contributed to the IRA unless the employee affirmatively elects not to participate in the program. The state is responsible for administering the plan, but employers are responsible for forwarding employee contributions to the plan and for providing employees with information about the program.

This Section describes the automatic enrollment IRA programs enacted in California, Illinois, and Oregon.

A. *California Secure Choice Retirement Savings Program*

In September 2012, S.B. 1234, titled the California Secure Choice Retirement Savings Trust Act of 2012 ("California Act"), was signed into law.[19]

---

[17] States are considering at least three other approaches to increasing retirement savings: (1) small business marketplaces; (2) prototype plans; and (3) multiple employer plans (MEPs). *See* Interpretive Bulletin Relating to State Savings Programs That Sponsor or Facilitate Plans Covered by the Employee Retirement Income Security Act of 1974, 80 Fed. Reg. 71,936, 71,937–38 (Nov. 18, 2015) (to be codified at 29 C.F.R. § 2509) (providing guidance on these three approaches); *see also* DAVID E. MORSE, GEO. UNIV. CTR FOR RET. INITIATIVES, STATE INITIATIVES TO EXPAND THE AVAILABILITY AND EFFECTIVENESS OF PRIVATE SECTOR RETIREMENT PLANS: HOW FEDERAL LAWS APPLY TO PLAN DESIGN OPTIONS 10 (2014), http://cri.georgetown.edu/wpcontent/uploads/2014/12/_Morse_CRIPaper.pdf (describing three different types of retirement plans states may establish for private sector employees: IRAs, 401(k)/defined contribution plans, and defined benefit plans).

[18] *See* discussion *infra* Part I.

[19] California Secure Choice Retirement Savings Trust Act, 2012 Cal. Stat. ch. 734 (codified as amended at CAL. GOV'T CODE §§ 100000–100044 (West 2012)).

The California Act established the California Secure Choice Retirement Savings Program ("California Program"), which is intended to provide a voluntary, low-risk automatic enrollment retirement savings plan for private-sector California workers who currently do not have access to retirement savings plans through their jobs.[20]

Generally, the California Act requires employers with five or more employees to establish a payroll deposit retirement savings arrangement to permit employees to participate in the California Program.[21] Employers, however, are not required to participate in the California Program if they offer an employer-sponsored retirement plan.[22] Eligible employees are automatically enrolled in the program unless they opt out of participation.[23]

The California Act creates the California Secure Choice Retirement Savings Investment Board ("California Investment Board") to administer the program.[24] The Board is composed of the California State Treasurer, the Director of Finance or his or her designee, the Controller, and six other individuals appointed by the Governor or legislators.[25]

The California Investment Board administers the California Secure Choice Retirement Savings Trust ("California Trust"),[26] a trust into which employees' payroll contributions are pooled. Under recently enacted legislation amending and adding to certain sections of the California code, the California Board is authorized to establish managed accounts invested in United States Treasuries or similarly safe investments for the first three years of the Program's operation.[27] During this initial period, the board is authorized to develop investment options that address risk sharing and the smoothing of market losses and gains.[28] Authorized options include custom pooled, professionally managed funds that minimize costs and fees, the creation of a reserve fund, or the establishment of investment products.[29] The California Board is directed to strive to implement program features that provide the maximum

---

20 *See id.* at § 3 (codified as CAL. GOV'T CODE § 100004); *California Secure Choice: Making Workplace Retirement Savings Possible for Millions of Californians*, CAL. STATE TREASURER JOHN CHIANG, http://www.treasurer.ca.gov/scib/index.asp (last visited Aug. 19, 2016).

21 CAL. GOV'T CODE § 100000(d) (West 2013) (defining "[e]ligible employer" as "a person or entity engaged in a business, industry, profession, trade, or other enterprise in the state, whether for profit or not for profit, excluding the federal government, the state, any county, any municipal corporation, or any of the state's units or instrumentalities, that has five or more employees and that satisfies the requirements to establish or participate in a payroll deposit retirement savings arrangement").

22 *Id.* § 100032(d), (f).

23 *Id.* § 100032(e), (g).

24 *Id.* § 100002.

25 *Id.* § 100002(a)(1).

26 *Id.* § 100004.

27 An Act to Amend Sections of the Government Code and the Welfare and Institutions Code, 2012 Cal. Stat. ch. 804 (codified as CAL. GOV'T CODE § 100002(e)(1)(A)).

28 CAL. GOV'T CODE § 100002(e)(2)(B) (West 2013).

29 *Id.*

possible income replacement balanced with appropriate risk in an IRA-based environment.[30]

The default contribution rate is set at 3 percent of wages,[31] although the California Investment Board has the authority to adjust the default rate to between 2 percent and 5 percent.[32] In addition, the California Investment Board may elect to establish different rates within this range for different employees based on how long the employee has been participating in the program.[33] Employer contributions are permitted so long as they "would not cause the program to be treated as an employee benefit plan" under ERISA.[34]

The California Investment Board was charged with conducting a market analysis and feasibility study and reporting to the California legislature its recommendations as to whether legislation implementing the California Program should be enacted.[35] The market analysis and feasibility study, finding the program to be "feasible, sustainable, and legally permissible,"[36] was issued on January 31, 2016.[37] Legislation approving the program and implementing it as of January 1, 2017, was approved on September 29, 2016.[38]

B. *Illinois Secure Choice Savings Program*

In January 2015, Illinois Governor Pat Quinn signed into law the Illinois Secure Choice Savings Program Act ("Illinois Act").[39] The Illinois Act is intended to provide employees with the opportunity and tools to save for retirement through "an automatic enrollment payroll deduction IRA."[40]

---

30 *Id.* § 100002(e)(2)(A).

31 *Id.* § 100032(h).

32 *Id.* § 100032(i).

33 *Id.* § 100032(h).

34 CAL. GOV'T CODE § 100012(k) (West 2013).

35 *See* The California Secure Choice Retirement Savings Trust Act, 2012 Cal. Stat. ch. 734 (codified as CAL. GOV'T CODE §§ 100040, 100042) (charging the California Investment Board with conducting the market analysis and feasibility study). *But see* S.B 1234, Gen. Assemb. ch. 804, §§ 12, 13 (Cal. 2016) (repealing §§ 100040, 100042 after the report and recommendation were issued).

36 *See* Letter from Cal. Secure Choice Ret. Sav. Inv. Bd. to Hon. Kevin de Leon (Mar. 28, 2016), http://www.treasurer.ca.gov/scib/recommendations/index.asp.

37 The feasibility study was issued on January 31, 2016. *See* Overture Financial LLC, California Secure Choice Market Analysis, Feasibility Study, and Program Design Consultation Services 5 (2016), http://www.treasurer.ca.gov/scib/report.pdf.

38 S.B 1234, Gen. Assemb. ch. 804, § 16 (Cal. 2016).

39 Illinois Secure Choice Savings Program Act, 2015 Ill. Laws 098-1150 (codified as 820 ILL. COMP. STAT. 80/1–95 (2016)). *See also* Michael Bologna, *Illinois Governor Signs Into Law Groundbreaking Automatic IRA Bill*, 42 PENS. & BEN. REP (BNA) 33, 37 (2015) ("Gov. Pat Quinn (D) on Jan. 4 signed S.B. 2758, which creates the Illinois Secure Choice Savings Program.").

40 820 Ill. Comp. Stat. 80/10 (2016).

All employers subject to the Illinois Act must enroll each of their employees in the Illinois Program unless the employee opts out.[41] Employers[42] with twenty-five or more employees[43] are subject to the Illinois Act unless they have offered their employees an employer-sponsored tax-favored retirement plan[44] in the preceding two years.[45]

The Illinois Act calls for the creation of a trust fund ("Illinois Fund") that is separate from the State Treasury.[46] Moneys in the Illinois Fund are to consist of the employee contributions to the fund, which are accounted for as individual accounts.[47] Employee contributions may be made either through automatic payroll deductions or through an employee's affirmative election to contribute to the Illinois Program.[48] Amounts held in the Illinois Fund are not to be commingled with State funds and the State is to have no claim to or against, or any interest in, money held in the fund.[49]

The Illinois Secure Choice Savings Board ("Illinois Board") is charged with designing, establishing, and operating the Illinois Fund.[50] The Illinois Board is required to engage an investment manager or managers to invest the Illinois Fund.[51] At the minimum, a single investment option must be established and offered: a life-cycle fund with a target date based upon the age of the employee enrolled in the plan.[52] In addition, four other investment options may be established and offered: (1) a conservation principal protection fund, (2) a growth fund, (3) a "secure return" fund, and (4) an annuity fund.[53] The

---

41 *Id.* § 80/60(b).

42 Employers who have been in business for less than two years are not subject to the Act. *See id.* at § 80/5 (defining "Employer" to include requirement that employer have been in business for at least 2 years).

43 The Illinois Act applies a one-year look back period to determine whether the 25-employee threshold is satisfied. *See id.* (defining "Employer" to include requirement that employer has "at no time during the previous calendar year employed fewer than 25 employees in the State.").

44 Technically, the Illinois Act defines "Employer" as including a requirement that the employer have "not offered a qualified retirement plan" in the preceding two years and defines "qualified retirement plan" as a 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."). *Id.*

45 *See id.* at § 80/60(a) (requiring "employers" to "establish a payroll deposit retirement savings arrangement to allow each employee to participate in the Program."); *id.* at § 80/5 (defining "employer").

46 820 ILL. COMP. STAT. 80/15(a) (2016).

47 *Id.*

48 *Id.*

49 *Id.* § 80/15(b).

50 *Id.* § 80/30.

51 820 ILL. COMP. STAT. 80/40(a) (2015).

52 *Id.* § 80/45(a).

53 *Id.* at § 80/45(b) (a "secure return" fund is a fund "whose primary objective is the preservation of the safety of principal and the provision of a stable and low-risk rate of return; if the Board elects to establish a secure return fund, the Board may procure any insurance, annuity, or other product to insure the value of the individuals' accounts and guarantee a rate of return; the cost of such a funding mechanism

life-cycle fund is to serve as the default investment option for employees who do not elect an investment option unless and until a secure return fund is established and the Illinois Board determines that the secure return fund should replace the target date or life-cycle fund as the default investment option.[54]

Employees may select any of the available investment options and may change their investment option at any time, subject to rules promulgated by the Illinois Board.[55] The default contribution level is set at 3 percent of wages.[56] Employees, however, may select a different contribution level, expressed either as a percentage of wages or a dollar amount, up to the IRC § 219(b)(1)(A) limit,[57] which is $5,500 in 2016.[58]

Benefits in the Illinois Program are not guaranteed. Instead, interest and investment earnings and losses are allocated to each individual employee's program account.[59] Each participant's benefit is equal to the participant's individual Illinois Program account balance at the time the participant's retirement savings benefit becomes payable.[60]

C. *Oregon Retirement Savings Plan*

On June 25, 2015, Oregon governor Kate Brown approved legislation (the "Oregon Act") establishing the Oregon Retirement Savings Board, which is charged with developing the Oregon Retirement Savings Plan for Oregon employees.[61] The law is intended to provide a retirement savings vehicle for the million Oregonians who do not have access to a retirement savings plan at work.[62]

The Oregon Retirement Savings Board consists of seven members: the State Treasurer or the Treasurer's designee, four individuals appointed by the

---

shall be paid out of the Fund; under no circumstances shall the Board, Program, Fund, State, or participating employer assume any liability for investment or actuarial risk.").

54 *Id.* 80/45(a), (c).

55 *Id.* § 80/60(d).

56 820 ILL. COMP. STAT. 80/60(c) (2016).

57 *Id.*

58 Internal Revenue Service, *IRS Announces 2016 Pension Plan Limitations; 401(k) Contribution Limit Remains Unchanged at $18,000 for 2016* (Oct. 21, 2015), https://www.irs.gov/uac/Newsroom/IRS- Announces-2016-Pension-Plan-Limitations%3B-401(k)-Contribution-Limit-Remains-Unchanged-at-$18,000-for-2016.

59 820 ILL. COMP. STAT. 80/50 (2016).

60 *Id.*

61 Act of June 25, 2015, 2015 Or. Laws ch. 557 § 2 (codified as amended at OR. REV. STAT. § 178.205 (2015)).

62 *See* Jennifer Dowling & KOIN 6 News Staff, *No Way to Save for Retirement? Oregon Changing That: Oregon Retirement Savings Plan Takes Effect July 1, 2017*, KOIN 6 NEWS (Mar. 23, 2016), http://koin.com/2016/03/23/no- way-to-save-for-retirement-oregon-changing-that/.

Governor, a member of the Senate, and a member of the House of Representatives.[63] The Oregon Retirement Savings Board is tasked with developing the Oregon Retirement Savings Plan.[64] The Board is granted the power to establish, implement, and maintain the plan, to adopt rules for the general administration of the plan, to direct the investment of the funds contributed to the plan, to collect fees to defray the cost of administering the plan, and to make and enter into contracts as needed to implement the plan.[65]

The Oregon Act broadly outlines the requirements for the Oregon Retirement Savings Plan. Like the California and Illinois laws, the Oregon Act calls for mandatory participation by employers unless the employer offers a "qualified retirement plan"[66] and provides for automatic enrollment but permits employees to opt-out of participation.[67] The Oregon Act does not set a default contribution rate, but instead leaves it to the Board to establish the rate.[68] It authorizes automatic escalation of contributions,[69] prohibits employer contributions,[70] requires that the plan be professionally managed,[71] and requires that fees be low.[72]

Unlike the California and Illinois laws, the Oregon Act does not expressly exempt employers of a minimum size.[73] The Oregon Act is further distinguished from the California and Illinois laws in that it does not explicitly call for the creation of IRAs. Instead, it calls for the creation of a defined contribution plan.[74] In advising the Oregon Board, however, the Center for Retirement Research at Boston College ("CRR") has said that Oregon must decide which type of IRA to use in its program and has recommended the Roth IRA.[75]

---

63 OR. REV. STAT. § 178.200(1) (2015).

64 *Id.* § 178.205(1).

65 *Id.* § 178.205(2).

66 Act of June 25, 2015, 2015 Or. Laws ch. 557 § 3(1)(b) (codified as amended at OR. REV. STAT. § 178.210(1)(b) (2015)) (stating a "qualified retirement plan" is defined to include "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").

67 *Id.* § 3(1)(c).

68 *Id.* § 3(1)(d).

69 *Id.* § 3(1)(e).

70 *Id.* § 3(1)(h).

71 *Id.* § 3(1)(m).

72 Act of June 25, 2015, 2015 Or. Laws ch. 557 § 3(1)(q) (codified as amended at OR. REV. STAT. § 178.210 (2015)).

73 *Id.* § 2(1) (codified as amended at OR. REV. STAT. § 178.205 (2015)).

74 *Id.*

75 Memorandum from Ctr. for Ret. Research at Boston College to Or. Ret. Sav. Plan (May 22, 2016), https://www.oregon.gov/treasury/ORSP/Documents/CRR%20Memo%20%20Roth%20vs%20Conventional%20IRA%201JUNE16%20-%20BC.pdf. For a discussion of the distinctions between traditional and Roth IRAs and their implications for state automatic enrollment IRA programs, see Kathryn L.

II. ARE STATE AUTOMATIC ENROLLMENT IRA PROGRAMS "EMPLOYEE BENEFIT PLANS" UNDER ERISA

Originally enacted in 1974, and amended multiple times since then, the Employee Retirement Income Security Act of 1974 ("ERISA") regulates "employee benefit plans."[76] Among other things, it imposes reporting and disclosure requirements,[77] vesting[78] and funding[79] rules, and fiduciary provisions[80] to protect plan participants.

Section 4(a) of ERISA provides that ERISA generally applies to any "employee benefit plan" established or maintained by an employer "engaged in commerce or in any industry or activity affecting commerce" or any plan established or maintained by unions representing employees engaged in commerce.[81] Section 514(a) of ERISA preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan."[82] Thus, if state automatic enrollment IRA programs are viewed as creating employee benefit plans, ERISA will preempt the state law creating the programs and the law may not be enforced.

In light of the importance of this issue, the Illinois Act directs the Illinois Board to request a determination from the Department of Labor as to the applicability of ERISA to the Program[83] and prohibits the Board from implementing the Illinois Program "if it is determined that the Program is an employee benefit plan and State or employer liability is established under the federal Employee Retirement Income Security Act."[84] The California Act contains a similar admonishment.[85]

On May 18, 2015, twenty-six U.S. Senators, including the ranking members of the Senate Committee on Health, Education, Labor and Pensions and the Senate Finance Committee, sent a letter to President Barack Obama encouraging the President to take action as soon as possible to facilitate state

---

Moore, *A Closer Look at the IRAs in State Automatic Enrollment IRA Programs*, 23 CONN. INS. L.J. (forthcoming 2016-2017).

76 Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, § 2(b), 88 Stat. 829 (1974) (codified as amended at 29 U.S.C. § 1001(b) (2012)) [hereinafter ERISA].

77 ERISA, 29 U.S.C. §§1021–25 (2012).

78 *Id.* § 1053.

79 *Id.* §§ 1081–85.

80 *Id.* §§ 1101–14.

81 *Id.* § 1003(a).

82 ERISA, 29 U.S.C. § 1144(a) (2012).

83 Illinois Secure Choice Savings Program Act, 2015 Ill. Laws 098-1150 § 95 (codified as 820 ILL. COMP. STAT. 80/95 (2015)). ("The Board shall request in writing an opinion or ruling from the appropriate entity with jurisdiction over the federal Employee Retirement Income Security Act regarding the applicability of the federal Employee Retirement Income Security Act to the Program.").

84 *Id.*

85 The California Secure Choice Retirement Savings Trust Act, 2012 Cal. Stat. ch. 734 § 3 (codified as CAL. GOV'T CODE § 100043 (2012)).

automatic IRA programs.[86] Among other things, the Senators requested that the President ask the Department of Labor to clarify that the California, Illinois, and similar programs are not "plans" subject to ERISA.[87]

At a White House Conference on Aging on July 13, 2015, President Obama announced that states would have clarity on the issue by the end of 2015.[88] That same day, referring to President Obama's directive,[89] Secretary of Labor Perez announced that the Department of Labor would issue guidance that would "safeguard worker retirement savings and offer pathways for states to adopt retirement savings programs that are consistent with federal law."[90] The Department of Labor released the promised guidance on November 18, 2015 by proposing a regulation creating a new safe harbor.[91] The proposed safe harbor was modestly amended and finalized in a final regulation published on August 30, 2016.[92]

A. *ERISA's Definition of Employee Benefit Plan*

Section 3(3) of ERISA defines an "employee benefit plan" as an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan."[93] Section 3(2)(A), in turn, defines an "employee pension benefit plan" in relevant part as:

> [A]ny plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program—
>
> (i) provides retirement income to employees, or

---

86 Letter from Senator Patty Murray et al., S. Comm. on Health, Educ., Labor, & Pensions & S. Comm. on Fin., to President Barack Obama (May 18, 2015).

87 *Id.*

88 Hazel Bradford, *Clarity on State-Run Private-Sector Retirement Savings Coming by Year-End*, BUS. INS. (July 14, 2015), http://www.businessinsurance.com/article/20150714/NEWS03/150719940.

89 Press Release, White House, Office of the Press Secretary, Fact Sheet: The White House Conference on Aging (July 13, 2015), https://www.whitehouse.gov/the-press-office/2015/07/13/fact-sheet-white-house-conference-aging.

90 Tom Perez, *Clearing a Path for State-Based Retirement Plans*, DEP'T. OF LABOR BLOG (July 13, 2015), http://blog.dol.gov/2015/07/13/clearing-a-path-for-state-based-retirement-plans/.

91 Savings Arrangements Established by States for Non-Governmental Employees, 80 Fed. Reg. 72,006 (Nov. 18, 2015) (proposing a regulation that would establish safe harbor excluding from the definition of plan under ERISA certain payroll deduction savings programs, including automatic enrollment); Interpretive Bulletin Relating to State Savings Programs That Sponsor or Facilitate Plans Covered by the Employee Retirement Income Security Act of 1974, 80 Fed. Reg. 71,936 (Nov. 18, 2015).

92 Savings Arrangements Established by States for Non-Governmental Employees, 81 Fed. Reg. 59,464 (Aug. 30, 2016) (to be codified at 29 C.F.R. § 2510).

93 29 U.S.C. § 1002(3) (2012).

> (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating benefits under the plan or the method of distributing benefits from the plan.[94]

B. *Express Exemptions Under Section ERISA § 4(b)*

Section 4(b) of ERISA expressly exempts five types of plans from ERISA: (1) governmental plans, (2) church plans, (3) plans established to comply with workers' compensation, unemployment compensation, or disability insurance laws, (4) plans maintained outside the United States primarily for the benefit of nonresident aliens, and (5) funded excess benefit plans.[95]

State automatic enrollment IRA programs are clearly not church plans,[96] plans established to comply with workers' compensation, unemployment compensation, or disability insurance laws, plans maintained outside the United States primarily for the benefit of nonresident aliens,[97] or funded excess benefit plans.[98]

Superficially, state automatic enrollment IRA programs might appear to be "governmental plans" because they are enacted by state legislatures. Section 3(32) of ERISA, however, defines a "governmental plan" as a plan established for governmental employees.[99] Because these state programs are established to cover private-sector employees[100] rather than state employees,

---

94 *Id.* § 1002(2)(a).

95 *Id.* § 1003(b)(1)–(5).

96 *Cf. id.* § 1002(33)(A), (B) (defining church plan as a plan "established and maintained" by a church for its employees). For a detailed discussion of the church plan exception, see David Pratt, *Church Pension Plans, in* N.Y.U. REV. OF EMP. BENEFITS & EXECUTIVE COMPENSATION (Alvin D. Lurie ed., LexisNexis 2015).

97 *Cf., e.g.*, Illinois Secure Choice Savings Program Act, 820 ILL. COMP. STAT. 80/5 (2016) (defining "employee" as "any individual who is 18 years of age or older, who is employed by an employer, and who has wages that are allocable to Illinois during a calendar year under the provisions of Section 304(a)(2)(B) of the Illinois Income Tax Act.").

98 *See* 29 U.S.C. § 1002(36) ("'[E]xcess benefit plan' means a plan maintained by an employer solely for the purpose of providing benefits for certain employees in excess of the limitations on contributions and benefits imposed by [I.R.C. § 415] . . . .").

99 *Id.* § 1002(32).

100 *Cf.* CAL. GOV'T CODE § 100000(d) (West 2013) (excluding governmental employers from definition of eligible employers subject to the Act); 820 ILL. COMP. STAT. 80/5 (2016) (defining employers subject to the Act as "a person or entity engaged in a business, industry, profession, trade, or other enterprise in Illinois, whether for profit or not for profit" that employs 25 or more employees, has been in business for at least two years and does not otherwise provide a tax-favored retirement savings plan to its employees); *Id.* § 80/10 (establishing the program "for the purpose of promoting greater retirement savings for private-sector employees in a convenient, low-cost, and portable manner").

they are not "governmental plans" expressly exempt from ERISA under ERISA § 4(b).[101]

Thus, state automatic enrollment IRA programs are not expressly exempt from ERISA under any of ERISA's five statutory exemptions.

C. *Regulatory Safe Harbors*

The Department of Labor has long provided regulatory safe harbors exempting certain types of arrangements from the definition of plan under ERISA. Prior to November 2015, the regulations expressly identified six types of plans, funds, and programs which do not constitute employee pension benefit plans for purposes of ERISA: (1) severance pay plans, (2) bonus programs, (3) individual retirement accounts, (4) gratuitous payments to pre-ERISA retirees, (5) tax sheltered annuities, and (6) supplemental payment plans.[102]

State automatic enrollment IRA programs clearly do not fall within five of the six regulatory safe harbors. Specifically, they do not qualify as severance pay plans, bonus programs, gratuitous payments to pre-ERISA retirees, tax sheltered annuities, or supplemental payment plans.

Whether the state programs fall within the regulatory safe harbor for individual retirement accounts, was a hotly debated question prior to November 2015. In November 2015, the Department of Labor issued a proposed regulation. The preamble to the proposed regulation clarified that in the Department's view, state automatic enrollment IRA programs do not qualify for the safe harbor for individual retirement account.[103] The proposed regulation, however, proposed a seventh safe harbor for savings arrangements established by states for non-governmental employees.[104] The new safe harbor was modestly amended and finalized on August 31, 2016.[105]

---

101 Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, § 4(b), 88 Stat. 829 (1974) (codified as amended at 29 U.S.C. §1003(b) (2012)); *See also* Dorn, *supra* note 7, at 223 (concluding that state automatic enrollment IRA programs like the Illinois program were not "governmental plans" exempt from ERISA because they do not cover a governmental entity's employees).

102 Employee Pension Benefit Plan, 29 C.F.R. § 2510.3-2(a)–(g) (2015).

103 Savings Arrangements Established by States for Non-Governmental Employees, 80 Fed. Reg. 72,006, 72,008 (Nov. 18, 2015).

104 *Id.* at 72,009.

105 Savings Arrangements Established by States for Non-Governmental Employees, 81 Fed. Reg. 59,464 (Aug. 30, 2016) (to be codified at 29 C.F.R. pt. 2510).

1. Overview of the Regulatory Safe Harbor for IRAs

The Department of Labor regulations provide that an individual retirement account under IRC § 408(a) will not constitute a "pension plan" for purposes of ERISA if four requirements are satisfied:

> (i) No contributions are made by the employer or employee association;
> (ii) Participation is completely voluntary for employees or members;
> (iii) The sole involvement of the employer or employee organization is without endorsement to permit the sponsor to publicize the program to employees or members, to collect contributions through payroll deductions or dues checkoffs and to remit them to the sponsor; and
> (iv) The employer or employee organization receives no consideration in the form of cash or otherwise, other than reasonable compensation for services actually rendered in connection with payroll deductions or dues checkoffs.[106]

In 1999, the Department of Labor issued an interpretive bulletin clarifying "the circumstances under which an employer may facilitate employees' voluntary contributions to IRAs by providing an IRA payroll deduction program without . . . inadvertently establishing or maintaining an employee pension benefit plan within the scope of section 3(2) of ERISA."[107]

Interpretive Bulletin 99-1 clarifies that an employer will not be viewed as endorsing an IRA so long as it maintains neutrality with respect to the IRA sponsor in communications with its employees.[108] The employer may provide its employees with information about the program and encourage its employees to save, but it must make clear to its employees that its involvement is limited to collecting the deducted amounts and promptly remitting them to the IRA sponsor. The employer must make it clear that it does not provide any additional benefits or promise any particular return on any investment.[109]

The Interpretive Bulletin also clarifies that an employer may limit the number of IRA sponsors to which employees may make payroll deduction contributions. But, any limitations on or costs or assessments associated with an employee's ability to transfer or roll over IRA contributions to another IRA sponsor must be fully disclosed before the employee decides to participate in the program.[110] Furthermore, the employer may not negotiate to obtain special terms for its employees that are not generally available and may not exercise any influence over the investments made or permitted by the IRA sponsor.[111]

---

106 29 C.F.R. § 2510.3-2(d).

107 Interpretive Bulletin 99-1, Payroll Deduction Programs for Individual Retirement Accounts, 64 Fed. Reg. 33,000, 33,001 (June 18, 1999) (codified at 29 C.F.R. pt. 2509).

108 *Id.* at 33,002.

109 *Id.*

110 *Id.*

111 *Id.*

2. State Automatic Enrollment IRA Programs and the IRA Regulatory Safe Harbor

State automatic enrollment IRA programs can easily satisfy three of the four requirements. First, they can prohibit employer contributions.[112] Second, the programs can limit the employers' involvement to educating employees about the program and enrolling them,[113] collecting employees' contributions through payroll deduction, and remitting contributions to the program's fund.[114] Finally, the programs can easily provide language that prohibits compensation for employers in excess of reimbursement for the cost of rendering services to the program.[115]

Prior to November 2015, there was considerable debate as to whether state automatic enrollment IRA programs could satisfy the fourth requirement that employee participation be "completely voluntary."[116] Neither the regulation nor the Interpretive Bulletin expressly address the question of whether a state automatic enrollment IRA with an opt-out feature satisfies the "completely voluntary" requirement, and no other binding authority answered the question.[117] Some commentators argued that a state law that requires automatic enrollment with an opt-out feature should be considered

---

112 *See, e.g.*, 820 ILL. COMP. STAT. 80/65 (2016) (providing for employee contributions to be deducted through payroll deductions and not authorizing employer contributions). Indeed, recognizing that employer contributions are not possible under current federal law, the Act's lead sponsor, Illinois Senator Daniel Bliss, has said that he would like to see future reforms to allow employer contributions to increase the savings rate. Josh Barro, *Illinois Will Introduce Automatic Retirement Savings*, N.Y. TIMES (Jan. 6, 2015), at B3. The Oregon program prohibits employer contributions. OR. REV. STAT. § 178.210(1)(h) (2015). The California program authorizes employer contributions, but provides that they are only permitted if they would not cause the program to be treated as an employee benefit plan under ERISA. CAL. GOV'T CODE § 100012(k) (West 2013).

113 *See, e.g.*, 820 ILL. COMP. STAT. 80/55(a) (directing participating employers to supply employees with information packet about Program); *Id.* at § 80/60(a), (b) (directing employer to establish payroll deposit retirement savings arrangement and automatically enroll employees who do not opt out of participation).

114 *See, e.g.*, *id.* § 80/65 (requiring employers to use payroll deposit savings arrangements to collect employee contributions and pay them to the Fund).

115 *Cf. id.* § 80/30(m) (directing Board to make provision for the payment of administrative costs and expenses for the creation, management, and operation of the program and cross-referencing eight different types of administrative costs and expenses, none of which include reimbursement of employer's expenses for participating in program).

116 29 C.F.R. § 2510.3-2(d)(ii) (2016); Savings Arrangements Established by States for Non-Governmental Employees, 80 Fed. Reg. 72,006, 72,008 (Nov. 18, 2015).

117 *Cf. Hearing on State-Required Automatic Enrollment IRA Arrangement Before the Conn. Ret. Sec. Bd.* 4 (Conn. Feb. 4, 2015) (testimony of Brian H. Graff, American Society of Pension Professionals and Actuaries) ("ASPPA, [National Association of Plan Advisors, and National Tax-Deferred Savings Association] are not aware of legal guidance that directly addresses whether a payroll deduction IRA that includes an automatic enrollment with opt out design will trigger employee benefit plan status under ERISA.").

"completely voluntary" for purposes of the safe harbor for IRAs.[118] Other commentators were less sanguine.[119]

Finally, in November 2015, the Department of Labor clarified that, in its view, automatic enrollment with an opt-out provision does not satisfy the completely voluntary requirement. In the preamble to the proposed regulation, the Department of Labor explained that it intended the term completely voluntary "to mean considerably more than that employees are free to opt out of participation in the program. Instead, the employee's enrollment must be self-initiated."[120] According to the preamble, the completely voluntary

> condition is important because where the employer is acting on his or her own volition to provide the benefit program, the employer's actions—*e.g.*, requiring an automatic enrollment arrangement—would constitute its 'establishment' of a plan within the meaning of ERISA's text, and trigger ERISA's protections for the employee whose money is deposited into an IRA.[121]

In the preamble to the final regulation issued in August 2016, the Department of Labor confirmed that it intended the term completely voluntary to mean self-initiated by the employee and that, in its view, state automatic enrollment IRA programs that provide for automatic enrollment do not satisfy the completely voluntary requirement even if employees are permitted to opt out of participation.[122] Thus, according to the Department of Labor, state automatic enrollment IRA programs do not qualify as "completely voluntary" under the safe harbor for IRAs.[123]

---

118 *See, e.g.*, Edward A. Zelinsky, *Retirement in the Land of Lincoln: The Illinois Secure Choice Savings Program Act*, 2016 U. ILL. L. REV. 173, 181 (2016) ("A straightforward reading of the relevant DOL regulation indicates that employees' participation in the Illinois plan is 'completely voluntary' since employees may readily and without penalty leave the Illinois plan or may modify their respective contribution levels.") (footnotes omitted); MORSE, *supra* note 17, at 10 ("Since the employee was not *required* to contribute and could opt out at any time, participation should be considered voluntary."); Graff, *supra* note 117, at 4 ("[S]o long as employees have a reasonable opportunity to opt out [from participation], enrollment should still be considered *voluntary* . . . because the employee still controls whether or not to participate.").

119 *E.g.*, Dorn, *supra* note 7, at 224 ("[I]t is generally thought that the inclusion of an automatic enrollment feature results in employer involvement in excess of that allowed under the safe harbor.").

120 Savings Arrangements Established by States for Non-Governmental Employees, 80 Fed. Reg. at 72,008.

121 *Id.*

122 Savings Arrangements Established by States for Non-Governmental Employees, 81 Fed. Reg. 59,464, 59,465 (Aug. 30, 2016) (to be codified at 29 C.F.R. pt. 2510).

123 *Id.*

3. Proposed Safe Harbor for Savings Arrangements Established by States for Non-Governmental Employees

Recognizing that the situation is very different when the state government, rather than the employer, sets the terms and administers the program, the Department of Labor proposed a new safe harbor for savings arrangements established by states for non-governmental employees.[124] The proposed safe harbor replaced the "completely voluntary" standard for employer-sponsored IRAs with a "voluntary" standard for state automatic enrollment IRA programs.[125] In addition, it imposed eleven other conditions that a state program must satisfy in order to fall within the safe harbor. The conditions were intended to assure that the employer's involvement in the program is limited to the ministerial tasks required to implement the program under state law.[126] In addition, the conditions were intended to give employees meaningful control over their IRAs and sufficient freedom not to enroll or to discontinue their participation in the program.[127]

Specifically, the proposed safe harbor provided that for purposes of Title I of ERISA, the terms "employee pension benefit plan" and "pension plan" do not include an IRA established and maintained pursuant to a state payroll deduction savings program if the program satisfies the following requirements:

> (i) The program is established by a State pursuant to State law;
> (ii) The program is administered by the State establishing the program, or by a governmental agency or instrumentality of the State, which is responsible for investing the employee savings or for selecting investment alternatives for employees to choose;
> (iii) The State assumes responsibility for the security of payroll deductions and employee savings;
> (iv) The State adopts measures to ensure that employees are notified of their rights under the program, and creates a mechanism for enforcement of those rights;
> (v) Participation in the program is voluntary for employees;
> (vi) The program does not require that an employee or beneficiary retain any portion of contributions or earnings in his or her IRA and does not otherwise impose any restrictions on withdrawals or impose any cost or penalty on transfers or rollovers permitted under the Internal Revenue Code;
> (vii) All rights of the employee, former employee, or beneficiary under the program are enforceable only by the employee, former employee, or beneficiary, an authorized representative of such person, or by the State (or the designated governmental agency or instrumentality . . .);
> (viii) The involvement of the employer is limited to the following:
> A) Collecting employee contributions through payroll deductions, and remitting them to the program;

---

124 Savings Arrangements Established by States for Non-Governmental Employees, 80 Fed. Reg. at 72,009.

125 *Id.*

126 *Id.*

127 *Id.*

> B) Providing notice to the employees and maintaining records regarding the employer's collection and remittance of payments under program;
> C) Providing information to the State (or designated governmental agency or instrumentality..) necessary to facilitate the operation of the program; and
> D) Distributing program information to employees from the State (or designated governmental agency or instrumentality..) and permitting the State or such entity to publicize the program to employees;
> (ix) The employer contributes no funds to the program and provides no bonus or other monetary incentive to employees to participate in the program;
> (x) The employer's participation in the program is required by State law;
> (xi) The employer has no discretionary authority, control, or responsibility under the program; and
> (xii) The employer receives no direct or indirect consideration in the form of cash or otherwise, other than the reimbursement of the actual costs of the program to the employer of the activities [permitted in paragraph (8) above].[128]

The proposed regulation further provided that a state automatic enrollment IRA program will not be treated as failing to meet the safe harbor merely because it:

> (i) Is directed toward those employees who are not already eligible for some other workplace savings arrangement;
> (ii) Utilizes one or more service or investment providers to operate and administer the program so long as the state or other designated authority retains full responsibility for the operation and administration of the program; or
> (iii) Treats employees as having automatically elected to participate in the program at the program's default rates, including automatic increases in contributions, as specified under state law until the employee specifically opts out or makes a different election provided that the employee is given adequate notice of the right to make such elections.[129]

4. Reactions to the Proposed Safe Harbor

More than sixty-seven comment letters were submitted in response to the proposed safe harbor.[130] Not surprisingly, reactions were mixed. Entities with a vested interest in the current system were generally critical.[131] Among

---

128 *Id.* at 72,014.

129 *Id.*

130 The Department of Labor's website identifies 67 different comment letters. U.S. Dep't of Labor, Employee Benefits Security Administration, *Savings Arrangements Established by States for Non-Governmental Employees—Proposed Rule*, http://www.dol.gov/ebsa/regs/cmt-1210-AB71.html (last visited Aug. 19, 2016). One comment refers to form letters received from 14 individuals. *See* Fourteen Individuals—Illinois, Comment Letters on Proposed Rule regarding Saving Arrangements Established by States for Non-Governmental Purposes (Dec. 2015) (RIN 1210-AB71, Comment #2), http://www.dol.gov/ebsa/regs/cmt-1210-AB71.html.

131 *See, e.g.*, Lisa J. Bleier, Sec. Indus. & Fin. Mkt. Assoc., Comment Letter on Proposed Rule regarding Saving Arrangements Established by States for Non-Governmental Employees (Jan. 19, 2016) (RIN 1210-AB71, Comment #29), at 2, https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB71/00006.pdf; Miriam Lohmann, Standard Ret.

other things, they argued that it was contrary to the Congressional intent of ERISA[132] and could create an uneven playing field for the private-sector.[133]

In contrast, entities or individuals representing the states tended to be more supportive.[134] Nevertheless, the states requested amendments or "clarifications" to six of the twelve requirements of the proposed safe harbor. Specifically, the states requested that the requirement that state law mandate participation in the state program be eliminated, or at least softened, and that the regulation be "clarified" to (1) permit the States to delegate responsibility to

---

Servs., Inc., Comment Letter on Proposed Rule regarding Saving Arrangements Established by States for Non-Governmental Employees (Jan. 19, 2016) (RIN 1210-AB71, Comment #34), at 4, https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB71/00034.pdf; David W. Blass, Inv. Co. Inst., Comment Letter on Proposed Rule regarding Saving Arrangements Established by States for Non-Governmental Employees (Jan. 19, 2016) (RIN 1210-AB71, Comment #62), at 2, https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB71/00062.pdf.

[132] *See, e.g.*, Catherine J. Weatherford, Insured Ret. Inst., Comment Letter on Proposed Rule regarding Saving Arrangements Established by States for Non-Governmental Employees (Jan. 19, 2016) (RIN 1210-AB71, Comment #40), at 2, https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB71/00040.pdf; Amanda Austin, Nat'l Fed'n of Indep. Bus., Comment Letter on Proposed Rule regarding Saving Arrangements Established by States for Non-Governmental Employees (Jan. 19, 2016) (RIN 1210-AB71, Comment #40), https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB71/00046.pdf; Blass, *supra* note 131, at 2.

[133] *See, e.g.*, Defined Contribution Inst. Inv. Assoc., Comment Letter on Proposed Rule regarding Saving Arrangements Established by States for Non-Governmental Employees (Jan. 19, 2016) (RIN 1210-AB71, Comment #30), at 4, 6, https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB71/00030.pdf; Gary A. Sanders, Nat'l Assoc. of Ins. & Fin. Advisors, Comment Letter on Proposed Rule regarding Saving Arrangements Established by States for Non-Governmental Employees (Jan. 19, 2016) (RIN 1210-AB71, Comment #35), at 2, https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB71/00035.pdf; Tim Rouse, The SPARK Inst., Inc., Comment Letter on Proposed Rule regarding Saving Arrangements Established by States for Non-Governmental Employees (Jan. 19, 2016) (RIN 1210-AB71, Comment #50), at 9, https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB71/00050.pdf.

[134] *See, e.g.*, Ted Wheeler, Ore. Ret. Sav. Bd., Comment Letter on Proposed Rule regarding Saving Arrangements Established by States for Non-Governmental Employees (Jan. 19, 2016) (RIN 1210-AB71, Comment #54), at 2, https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB71/00054.pdf; John Chiang et al., Cal. Secure Choice Ret. Sav. Inv. Bd., Comment Letter on Proposed Rule regarding Saving Arrangements Established by States for Non-Governmental Employees (Jan. 12, 2016) (RIN 1210-AB71, Comment #12), at 9, https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB71/00012.pdf; Kevin Lembo & Denise A. Nappier, Conn. Ret. Sec. Bd., Comment Letter on Proposed Rule regarding Saving Arrangements Established by States for Non-Governmental Employees (Jan. 7, 2016) (RIN 1210-AB71, Comment #11), at 1, https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB71/00013.pdf; Michael Frerichs et al., Ill. Secure Choice Sav. Bd., Comment Letter on Proposed Rule regarding Saving Arrangements Established by States for Non-Governmental Employees (Jan. 6, 2016) (RIN 1210-AB71, Comment #16), at 1, https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB71/00016.pdf.

third parties, (2) reduce or eliminate state liability in certain instances, and (3) loosen the restriction on withdrawals.[135]

5. Final Safe Harbor for Savings Arrangements Established by States for Non-Governmental Employees

On August 30, 2016, the Department of Labor issued a final regulation modifying the proposed safe harbor in five ways First, the Department of Labor added regulatory text[136] to make it clear that the regulation establishes a safe harbor and does not "prohibit states from taking additional or different action or from experimenting with other programs or arrangements."[137] Second, it eliminated the condition prohibiting states from imposing restrictions on employees' ability to withdraw from their IRAs.[138] Third, it modified the condition prohibiting employers from receiving compensation for more than their actual costs of complying with state programs.[139] Under the final safe harbor, there is no need to calculate actual employer cost; instead, compensation is limited to a reasonable approximation of employer costs under the program.[140] Fourth, it modified the provision that stated that a state program would not fail to qualify for the safe harbor because the program is "directed toward those employees who are not already eligible for some other workplace savings arrangement."[141] It replaced that provision with a statement that a state program would not fail to qualify for the safe harbor because it is "directed toward those employers that do not offer some other workplace

---

135 *E.g.*, John Chiang et al., Representatives from four states—California, Connecticut, Illinois, and Oregon, Comment Letter on Proposed Rule regarding Saving Arrangements Established by States for Non-Governmental Employees (Jan. 12, 2016) (RIN 1210-AB71, Comment #52), https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB71/00052.pdf.

136 Savings Arrangements Established by States for Non-Governmental Employees, 81 Fed. Reg. 59,464, 59,476 (Aug. 30, 2016) (to be codified at 29 C.F.R. pt. 2510) (adding language to 29 C.F.R. § 2510.3-2(a) stating that "[t]he safe harbors in this section should not be read as implicitly indicating the Department's views on the possible scope of section 3(2).").

137 *Id.* at 59,466 (stating that "[a] safe harbor approach to these arrangements provides to states clear guide posts and certainty, yet does not by its terms prohibit states from taking additional or different action of from experimenting with other programs or arrangements.").

138 *See id.* at 59,467 (explaining why the condition contained in paragraph (h)(1)(vi) was removed). For a more detailed discussion of this change, *see infra* Section III.D.

139 *Id.* at 59,467–68 (explaining why the condition was modified).

140 *Id.* at 59,477 (providing that "[t]he employer receives no direct or indirect consideration in the form of cash or otherwise, other than consideration (including tax incentives and credits) received directly from the State (or governmental agency or instrumentality of the State) that does not exceed an amount that reasonably approximates the employer's (or a typical employer's) costs under the program.") (to be codified as 29 C.F.R. pt. 2510.3-2(h)(xi)).

141 *Id.* at 59,468.

savings arrangement."[142] Finally, it amended language to clarify that as long as a program is specifically established under state law, the program can qualify for the safe harbor even if a wide array of implementation and administrative authority is delegated to a board, committee, authority, office, or similar governmental agency or instrumentality.[143]

III. ARE STATE AUTOMATIC ENROLLMENT IRAS THE ANSWER TO THE RETIREMENT SAVINGS GAP?

Relying on the insights from behavioral economics, proponents of automatic enrollment IRA programs contend that automatic enrollment IRAs are an answer, or at least a partial answer, to increasing retirement savings in this country. Advocates of the programs note that participation rates are much higher in automatic enrollment 401(k) plans than in traditional 401(k) plans, and expect that those results would be replicated in automatic enrollment IRA programs.[144]

Determining whether state automatic enrollment IRAs would fill the retirement savings gap, however, is not as simple as looking at the participation rates in automatic enrollment 401(k) plans and concluding that they will necessarily increase retirement savings. Instead, how effective the programs would be depends on the answers to two fundamental questions: (1) Will workers be covered by these programs; and (2) If workers are covered by these programs, will they lead to adequate retirement savings? The answers to those two questions, in turn, depend on the answers to a host of subsidiary and sometimes overlapping questions, including: (1) How many states will establish state automatic IRA programs?; (2) Who will be covered by these programs?; (3) How many covered employees will opt out?; (4) How expensive will the plans to be to administer?; (5) Will participants' interests be adequately protected under the state programs?; (6) Will employers shift from existing private-sector plans with higher limits and matching contributions to state automatic enrollment IRAs with lower limits and no matching provisions?; and finally (7) Will the plans be preempted by ERISA?

---

142 Savings Arrangements Established by States for Non-Governmental Employees, 81 Fed. Reg. 59,464, 59,468 (Aug. 30, 2016) (to be codified as 29 C.F.R. pt. 2510.3-2(h)(2)(i)). For a discussion of this amendment, *see infra* Section III.G.3.c.

143 *Id.* The proposed regulation was unclear and inconsistent as to the specific meaning and role of the States. *See* Savings Arrangements Established by States for Non-Governmental Employees, 80 Fed. Reg. 72,006, 72,009 (Nov. 18, 2015) (stating in part that State "in the proposed regulation has the same meaning as in Title 1 of ERISA," but then going on to say "[t]he state must also administer the program either directly or through a governmental agency or other instrumentality."). The final regulation clarifies the States' role, declaring that "State (or other governmental agency or instrumentality of the State)" will be used throughout the final regulation. *See* Savings Arrangements Established by States for Non-Governmental Employees, 81 Fed. Reg. 59,464, 59,468 (Aug. 30, 2016).

144 *E.g.*, Chiang et al., Cal. Secure Choice Ret. Sav. Inv. Bd., *supra* note 134, at 3.

This section does not, and cannot, offer a definitive answer to these questions. It does, however, offer insights on how the questions might be answered and the many interrelated issues they raise.

A. *How Many States Will Establish State Automatic Enrollment IRA Programs?*

In order for state automatic enrollment IRAs programs to fill the retirement savings gap, states must, of course, enact such programs. It is not clear, however, how many states will elect to establish them.

First, not all states are interested in establishing an automatic enrollment IRA program. For example, some states, such as Washington[145] and New Jersey,[146] have decided to use a "marketplace approach"[147] rather than automatic enrollment IRAs to increase retirement savings. Second, although a number of states have enacted legislation studying and/or creating automatic enrollment IRA programs, the question of whether such programs qualify as employees benefit plans subject to ERISA has been a major stumbling block to

---

145 For a discussion of the political maneuvering that led to the Washington marketplace, see Denmark, *supra* note 5.

146 *See* Leslie A. Pappas, *N.J. Retirement Proposal Revamped, Headed Back to Governor's Desk*, 43 PENS. & BENEFITS REP. (BNA) 61 (Jan. 19, 2016) (noting that the New Jersey legislature originally approved a mandatory automatic enrollment IRA program modeled after the Illinois Secure Choice program but the legislature replaced it with a market place approach after Governor Christie conditionally vetoed the original legislation).

147 In an Interpretive Bulletin, the Department of Labor announced that a state marketplace is not itself an employee benefit plan under ERISA and the arrangement available to employers in a marketplace could include employee benefit plans subject to ERISA. Interpretive Bulletin Relating to State Savings Programs That Sponsor of Facilitate Plans Covered by the Employee Retirement Income Security Act of 1974, 80 Fed. Reg. 71,936, 71,937 (Nov. 18, 2015). Under the marketplace approach, the state "provides employers with education on plan availability and makes pre-screened plans available through a central website to promote participation in low-cost, low- burden retirement plans." ALICIA H. MUNNELL ET AL., CTR. FOR STATE & LOCAL GOV'T EXCELLENCE, ISSUE BRIEF: STATE INITIATIVES TO COVER UNCOVERED PRIVATE SECTOR WORKERS 5 (2016), http://slge.org/wp-content/uploads/2016/02/State-Initiatives-Brief.pdf.

the implementation of such programs.[148] By creating a safe harbor, the Department of Labor has arguably facilitated the adoption of such programs by more states and sooner than might have occurred absent the regulation.[149]

Nevertheless, it remains unclear how many states will implement a state automatic enrollment IRA program under the new guidance. The Illinois Board indicated that it could move forward with its program under the proposed safe harbor.[150] The Chair of the Illinois Board and representatives and entities from other states ("the States"), however, were less enthusiastic and asked for a number of amendments and/or clarifications to the proposed safe harbor's requirements.[151] Their most significant concern was the requirement that state law mandate employer participation.[152]

There were two principle objections to the mandate requirement. First, the mandate requirement prohibits voluntary state programs. Some states, such as North Dakota,[153] Utah,[154] and Indiana,[155] are opposed to mandatory programs but are considering voluntary automatic enrollment IRA programs. Second, and arguably more importantly, the mandate requirement raises significant uncertainty, and potentially significant administrative costs, for programs that mandate that some, but not all, employers participate in the program.

---

148 Another significant question is whether such a program is financially feasible. *See, e.g.,* Act of June 25, 2015, 2015 Or. Laws ch. 557 § 7 (codified as amended at OR. REV. STAT. § 178.230 (2015)) (requiring market analysis determining feasibility of plan before Oregon Retirement Savings Plan may be established); California Secure Choice Retirement Savings Trust Act, 2012 Cal. Stat. ch. 734 § 3 (codified as CAL. GOV'T CODE § 100042 (West 2013)) (providing that program may become operative only if board determines, based on market analysis, that program will be self-sustaining). Studies done for California and Connecticut show that such programs can be financially viable and self-sustaining if properly structured). *See* OVERTURE FINANCIAL, LLC, *supra* note 37, at 34; CONN. RET. SEC. BD., REPORT TO LEGISLATURE 5, 34 (2016).

149 Marti Fisher, Cal. Chamber of Commerce, Comment Letter on Proposed Rule regarding Saving Arrangements Established by States for Non-Governmental Employees (Jan. 19, 2016) (RIN 1210-AB71, Comment #60), at 2, https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB71/00060.pdf; Dory Rand, Woodstock Inst., Comment Letter on Proposed Rule regarding Saving Arrangements Established by States for Non-Governmental Employees (Jan. 12, 2016) (RIN 1210-AB71, Comment #19), at 2, https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB71/00021.pdf.

150 Frerichs et al., *supra* note 134, at 1.

151 Chiang et al., Representatives from four states—California, Connecticut, Illinois, and Oregon, *supra* note 135, at 1.

152 *See, e.g.*, Lembo & Nappier, *supra* note 134, at 3–4 (expressing concern that technically challenging questions that arise as a result of the mandate requirement "will derail establishment of a program").

153 *See* H.B. 1200, 64th Leg. Assemb. § 1 (N.D. 2015).

154 *See* David C. Damschen, Utah State Treasurer, Comment Letter on Proposed Rule regarding Saving Arrangements Established by States for Non-Governmental Employees (Jan. 19, 2016) (RIN 1210-AB71, Comment #64), at 1, https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB71/00064.pdf.

155 *See* H.B. 1279, Gen. Assemb. § 1 (Ind. 2015); S.B. 555, Gen. Assemb. § 1 (Ind. 2015).

For example, the California Program only mandates that employers with five or more employees participate;[156] the Illinois Program mandate only applies to employers with twenty-five or more employees.[157] The mandate requirement raises significant issues for employers with a fluctuating workforce. For example, an Illinois employer may have twenty-five employees one year, and the following year, the employer may only have twenty-three employees. What must the employer do? May its employees who were enrolled in the program the preceding year remain in the program on an opt-out basis? Must they be shifted to an opt-in basis? Must their participation be terminated? What happens if the employer, not realizing it is no longer subject to the mandate, inadvertently enrolls a new employee in the program on an opt-out basis? On a related note, what happens if an employer intentionally enrolls its employees in the program on an opt-out basis even though the employer knows that it is not subject to the mandate?

The States asked that the Department of Labor eliminate the mandate requirement in order to avoid these issues or, at a minimum, provide clear guidance on how these issues would be resolved.[158]

In its explanation of the proposed safe harbor, the Department of Labor took great pains to explain that in its view, the term "completely voluntary" means "considerably more than that employees are free to opt-out of participation in the program."[159] According to the Department of Labor, the completely voluntary condition applicable to the traditional regulatory safe harbor for IRAs is important because the employer "establishes" a plan within the meaning of ERISA when the employer, acting on its own volition, provides the benefit program.[160]

In providing a looser "voluntary" standard for state programs, the Department of Labor explained that "[w]here states require employers to offer savings arrangements, undue employer influence or pressure to enroll is far less of a concern. Moreover, the state's active involvement and the limitations on the employers' role removes the employer from the equation" so that

---

156 CAL. GOV'T CODE § 100000(d) (West 2013).

157 820 ILL. COMP. STAT. 80/5 (2015).

158 The Illinois and California commenters were far from the only commenters to request that the employer mandate be eliminated. Indeed, requesting that the employer mandate be either eliminated or softened was one of the most frequent comments made to the Department of Labor in response to the proposed regulation. Chiang et al., Representatives from four states—California, Connecticut, Illinois, and Oregon, *supra* note 134, at 2; Frerichs et al., *supra* note 134, at 1. Only one commenter, the American Federation of Labor-Congress of Industrial Organizations, expressly opposed expansion to voluntary participation. Shaun C. O'Brien, AFL-CIO, Comment Letter on Proposed Rule regarding Saving Arrangements Established by States for Non-Governmental Employees (Jan. 19, 2016) (RIN 1210-AB71, Comment #36), at 5, https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB71/00036.pdf.

159 Savings Arrangements Established by States for Non-Governmental Employees, 80 Fed. Reg. 72,006, 72,008 (proposed Nov. 18, 2015).

160 *Id.*

the arrangement is not "established or maintained" by the employer as required under ERISA's definition of employee benefit plan.[161]

In response to the Department of Labor's reasoning, the California Board asserted that as long as an employer has no discretion in choosing investments, default contribution rates, the IRA custodian, and similar elements of the program, an employer who voluntarily joins a state program is no more able to influence employee choice than an employer subject to a mandate. Moreover, there is no reason why an employer who voluntarily chooses to join a state program would want to unduly influence its employees to participate in the program. Most significantly, employees would not be subject to any greater risk from the employer's activities if the employer voluntarily decided to join a program than if the employer were required to participate in the program.[162]

Although the California Board made a strong argument that the Department of Labor could have and should have dropped its requirement that participation in state automatic enrollment IRA programs be mandatory, the Department declined to do so. The final safe harbor retains the mandate requirement.[163]

In the preamble to the final regulation, the Department of Labor provided some clarity on how the mandate is to be applied. The Department stated that the administrative difficulties raised by the states in their comments were a result of the operation of a particular state law and were a matter for the states to address.[164] According to the Department, a state law with a small employer exemption could require that an employer, once subject to a mandate, remain subject to it without regard to future changes in workforce size.[165] Or, the Department noted, a state might require an employer to maintain payroll deductions for employees who were enrolled when the employer was subject to the requirement, but not for new employees until the workforce again reaches the threshold size for coverage.[166]

The Department of Labor announced that if an employer that ceases to be subject to a state mandate continues to make payroll deductions or automatically enroll new participants, the employer would be acting outside of the boundaries of the safe harbor.[167] This is because the employers' continued

---

161 *Id.* at 72,009.

162 Chiang et al., Cal. Secure Choice Ret. Sav. Inv. Bd., *supra* note 134, at 4–5. The California Secure Choice Retirement Savings Investment Board also distinguished the cases and materials the Department of Labor cited in footnote 12 in support of its contention that opt-out arrangements are not "completely voluntary" for purposes of the traditional IRA safe harbor.

163 Savings Arrangements Established by States for Non-Governmental Employees, 81 Fed. Reg. 59,464, 59,470 (Aug. 30, 2016) (to be codified at 29 C.F.R. pt. 2510(h)(1)(x)).

164 *Id.* at 59,471.

165 *Id.*

166 *Id.*

167 *Id.*

participation in the program would be a voluntary decision to provide benefits pursuant to a particular plan, fund, or program, and thus the employer would be establishing an ERISA-covered plan.[168]

The Department further noted that if a state allows, but does not require, an exempted small employer to participate in the state program, the employer might be able to do so without creating a plan subject to ERISA if the employer satisfies the requirements for the IRA payroll deduction safe harbor.[169] In order to satisfy that safe harbor, among other things, employees must affirmatively consent to payroll deductions and the employer may not automatically enroll the employees in the program.[170]

Finally, the Department noted that if an employer establishes its own ERISA-covered plan under a state program, that plan would be subject to ERISA's requirements.[171] Generally, the employer would be considered the "plan sponsor" and "administrator" for purposes of ERISA.[172] The establishment of an ERISA plan by one employer, however, would not affect the availability of the safe harbor for other participating employers.[173]

Although the Department of Labor did not eliminate the mandate requirement, it did provide some clarity on how the mandate requirement is to be applied. In light of this guidance, it is likely that those states that have already introduced automatic enrollment IRA programs will move forward with their programs. In addition, some other states, and perhaps even some cities,[174] may introduce such programs. It is highly unlikely, however, that all states will enact state automatic enrollment IRA programs. In sum, it is not entirely how many states will enact such programs.

B. *Who Will Be Covered?*

State automatic enrollment IRA programs are intended to address the retirement savings gap by providing a retirement savings vehicle for individuals who do not have access to an employer-sponsored pension plan.[175] Thus,

---

168 *Id.*

169 Savings Arrangements Established by States for Non-Governmental Employees, 81 Fed. Reg. 59,464, 59,471 (Aug. 30, 2016) (to be codified at 29 C.F.R. pt. 2510).

170 *Id.*

171 *Id.*

172 *Id.*

173 *Id.*

174 On the day the Department of Labor finalized the safe harbor, it proposed expanding the safe harbor to cover "qualified political subdivisions." Savings Arrangements Established by States for Non-Governmental Employees, 81 Fed. Reg. 59,464, 59,471 (Aug. 30, 2016).

175 Individuals who are not covered by an employer-sponsored pension plan are eligible to receive favorable income tax treatment for retirement savings if they participate in an IRA. As a practical matter, however, few individuals contribute to IRAs outside the employment context. *See, e.g.*, PEW CHARITABLE TRUSTS, HOW STATES ARE WORKING TO ADDRESS THE RETIREMENT SAVINGS CHALLENGE: AN

how successful the programs are likely to be necessarily depends, in part, on whether they will cover those individuals who currently do not have access to an employer-sponsored pension plan.

It can be difficult to identify precisely how many workers do not have access to an employer-sponsored pension plan. Estimates of pension plan access and participation rates vary across data sources. For example, according to a recent study by The Pew Charitable Trusts, 58 percent of full-time, full-year private-sector workers between the ages of eighteen and sixty-four have access to an employer-sponsored retirement plan while 49 percent participate in one.[176] In contrast, the Bureau of Labor Statistics reports that 76 percent of full-time private-sector workers have access to an employer-sponsored pension plan while 59 percent participate in one.[177] The variations in the data are due, in part, to methodological differences, such as the make-up of the underlying sample and the way in which questions are phrased.[178] In addition, research suggests that individuals responding to surveys tend to underreport access and participation rates compared to data as reported on W-2 forms.[179]

Despite the discrepancies, it is clear that a sizeable portion of the U.S. working population does not currently have access to an employer-sponsored pension plan. Drs. Constanijin Panis and Michael Brien prepared a study identifying the target populations of the California and Illinois Secure Choice Programs.[180] They found that the California Secure Choice Program should cover about 7.8 million workers who are not currently covered by an employer-sponsored pension plan,[181] while the Illinois Secure Choice Program

---

ANALYSIS OF STATE-SPONSORED INITIATIVES TO HELP PRIVATE SECTOR WORKERS SAVE 1-2 (June 2016), http://www.pewtrusts.org/~/media/assets/2016/06/howstatesareworkingtoaddress theretirementsavingschallange.pdf.

176 PEW CHARITABLE TRUSTS, WHO'S IN, WHO'S OUT: A LOOK AT ACCESS TO EMPLOYER-BASED RETIREMENT PLANS AND PARTICIPATION IN THE STATES 1–2 (Jan. 2016), http://www.pewtrusts.org/~/media/assets/2016/01/retirement_savings_report_jan16.pdf (based on data from pooled version of 2010-14 Minnesota Population Center's Integrated Public Use Microdata Series Current Population Survey, Annual Social and Economic Supplement).

177 Press Release, U.S. Dep't of Labor, Bureau of Labor Statistics, Employee Benefits in the United States—March 2015 (July 24, 2015), at 5, http://www.bls.gov/news.release/pdf/ebs2.pdf (based on data from National Compensation Survey).

178 PEW CHARITABLE TRUSTS, WHO'S IN, WHO'S OUT, *supra* note 176, at 2.

179 *See* Irena Dushi et al., Assessment of Retirement Plan Coverage by Firm Size, Using W-2 Tax Records, 71 SOC. SECURITY BULL. 53–54 (2011).

180 CONSTANTIJN W.A. PANIS & MICHAEL J. BRIEN, TARGET POPULATIONS OF STATE-LEVEL AUTOMATIC IRA INITIATIVES 1 (2015), https://www.dol.gov/sites/default/files/ebsa/researchers/analysis/retirement/targetpopulationsofstatelevelautomaticirainitiatives.pdf.

181 *Id.* at 6. Relying on the U.C. Berkeley estimates, Overture Financial, LLC found in its feasibility study that about 6.3 million workers were potentially eligible for the California Program. *Compare* OVERTURE FINANCIAL, LLC, *supra* note 37, at, *with* NARI RHEE, U.C. BERKELEY CTR. FOR LABOR RES. & EDUC., 6.3 MILLION PRIVATE SECTOR WORKERS IN CALIFORNIA LACK ACCESS TO A RETIREMENT PLAN ON THE JOB 1-2 (2012), http://laborcenter.berkeley.edu/pdf/2012/ca_private_pension_gap12.pdf.

should cover about 1.7 million workers who are not covered by an employer-sponsored pension plan.[182]

Although the California and Illinois Secure Choice Programs will provide access for a significant number of workers who do not currently have access to an employer-sponsored pension plan, they will not cover all workers who are not currently covered. First, the California and Illinois programs only apply to employers of a minimum size. As discussed, the California program does not apply to employers with fewer than five employees and the Illinois program does not apply to employers with fewer than twenty-five employees.[183] Based on these thresholds, Drs. Panis and Brien estimate that the California program excludes about 1.8 million individuals who work at firms with between one and four employees,[184] and the Illinois program excludes about 1.2 million individuals who work at firms with fewer than twenty-five employees.[185]

In addition, the California, Illinois, and Oregon programs exempt employers that offer an employer-sponsored pension plan.[186] At first blush, this exemption might seem to be irrelevant: if an employer offers a pension plan, then its employees must have access to an employer-sponsored pension plan. In fact, however, employers that offer pension plans do not always permit all employees to participate in the plan. For example, employers often exclude part-time workers from participating in their pension plans.[187]

---

182 PANIS & BRIEN, *supra* note 180, at 12.

183 Daniel Bliss, the sponsor of the Illinois legislation, would have liked the program to apply to even smaller employers. He described the twenty-five employee floor as an especially painful concession to the financial industry. *See* Denmark, *supra* note 5.

184 PANIS & BRIEN, *supra* note 180, at 6 tbl.5.

185 *Id.* at 12 tbl.16.

186 *See* 820 ILL. COMP. STAT. 80/5 (2015) (defining employer); CAL. GOV'T CODE § 100032(d), (f) (West 2013) (excluding from mandate employers that offer an employer-sponsored retirement plan or automatic enrollment payroll deduction IRA); OR. REV. STAT. §§ 178.210(1)(b), 178.215(8) (2015) (exempting employers that offer qualified plans).

187 In order to receive favorable income tax treatment, a "qualified" employer-sponsored pension plan must satisfy a host of qualification requirements set forth in section 401(a) of the Internal Revenue Code. Among the qualification requirements are requirements that the plan not discriminate against non-highly compensated employees in coverage or benefits. I.R.C. § 401(a)(3)–(4) (2015). The nondiscrimination rules limit an employer's ability to exclude workers from its plan. The nondiscrimination rules, however, do not prohibit employers from excluding some workers from their plans. For example, the nondiscrimination rules permit employers to exclude part-time employees, defined as those who work less than 1,000 hours per year, or about 20 hours per week, in determining whether the plan satisfies the nondiscrimination requirements. I.R.C. § 410(b)(4)(A) (2015). In addition, the nondiscrimination rules do not require employers to cover all employees. They simply require that employers cover a sufficient number of non-highly compensated employees relative to the number of highly compensated employees covered by the plan. The nondiscrimination rules applicable to qualified plans are among the most complex and technical rules in all of tax law. For an overview of the rules, see, for example, KATHRYN L. MOORE, UNDERSTANDING EMPLOYEE BENEFITS LAW ch. 9 (2015).

Unfortunately, data on the number of employees who work for an employer that offers a plan but who are not eligible to participate in the plan is not readily available. The surveys generally distinguish between whether an employer offers a pension plan and whether an employee participates in a plan.[188] The surveys, however, do not use a uniform definition of participation,[189] and more importantly, they do not distinguish between employees who choose not to participate in a plan and employees who are not eligible to participate in the plan.[190] Thus, due to data limitations, it is not clear exactly how many workers the California and Illinois Secure Choice Programs would not cover because the workers' employer offers a pension plan even though the workers are ineligible to participate. Nevertheless, it is clear that some number of workers will be excluded because their employer offers a plan even though they are not eligible to participate in the plan.[191]

In theory, a state automatic enrollment IRA program could cover employees of an employer who are excluded from their employer's plan.[192] For

---

188 *See, e.g.*, RHEE, *supra* note 181, at 15 (noting that Current Population Survey asks two questions about pension plan coverage: (1) whether employer offered a pension plan, and (2) whether employee participated in the plan).

189 *See* John Turner et al., *Defining Participation in Defined Contribution Pension Plans*, 126 MONTHLY LAB. REV. 36, 36–37 (2003) (describing three different definitions of participation used in empirical studies); Craig Copeland, *Employment-Based Retirement Plan Participation: Geographic Differences and Trends, 2013*, EBRI ISSUE BRIEF no. 405 (Emp't Benefit Research Inst.), Oct. 2014, at 8 ("[d]efining the '[c]orrect' [r]etirement [p]articipation [l]evel").

190 *Cf.* Copeland, *supra* note 189, at 8 (recognizing importance in distinction between percentage of workforce participating in plan and percentage of eligible workforce participating in plan and using terms "participation level" or "percentage participating" rather than "participation rate" to refer to former).

191 *Cf.* U.S. Dep't of Labor, Bureau of Labor Statistics, *Employee Benefits Survey: Retirement benefits: Access, Participation, and Take-Up Rates* (Mar. 2014), http://www.bls.gov/ncs/ebs/benefits/2014/ownership/civilian/table02a.htm (reporting that among civilian workers, 78 percent of full-time workers compared to 37 percent of part-time workers have access to an employer-sponsored pension plan and 64 percent of full-time workers and 21 percent of part-time workers participate in such plans); Peter Brady & Michael Bogdan, *Who Gets Retirement Plans and Why, 2013*, ICI RES. PERSP., Oct. 2014, at 6 ("60 percent of employees who worked full-time for a full year reported that their employer sponsored a retirement plan in 2013, compared with 26 percent of workers who worked part-time for part of the year.").

192 The proposed regulation made it clear that a state automatic enrollment IRA could cover employees of an employer who are excluded from the employer's plan by providing that a state automatic enrollment IRA program would not be treated as failing to meet the proposed safe harbor merely because it was "directed toward those employees who are not already eligible for some other workplace savings arrangements." Savings Arrangements Established by States for Non-Governmental Employees, 80 Fed. Reg. 72,006, 72,014 (Nov. 18, 2015) (codified at 29 C.F.R. pt. 2510). The final regulation amended that provision to state that a state automatic enrollment IRA program will not fail to satisfy the safe harbor merely because it is "directed toward those employers that do not offer some other workplace savings arrangement." Savings Arrangements Established by States for Non-Governmental Employees, 81 Fed. Reg. 59,464, 59,468 (Aug. 30, 2016) (codified at 29 C.F.R. pt. 2510). The preamble to the regulation explains that the Department amended the language in response to comments that the provision "could encourage states to focus on whether particular employees of an employer are eligible to participate in a workplace savings arrangement" and such a focus could be overly burdensome for certain employers. *Id.* The Department stated that the amended language "will reduce employer involvement in determining employee

example, when a Connecticut bill creating an automatic enrollment IRA program was initially introduced, it extended the program to certain workers who were not eligible to participate in the plan offered by their employer.[193] The proposed program applied to employers with plans that excluded workers who were reasonably expected to complete one thousand hours of service in a calendar year or who had completed at least five hundred hours of service for the employer in each of the past two consecutive years.[194] The provision, however, did not last long. A week after it was introduced, the provision was dropped,[195] presumably in response to vehement opposition the provision engendered.[196]

In sum, automatic enrollment IRA programs are likely to provide access to workplace savings arrangements to some workers who would otherwise not have access to such savings arrangements. They are, however, unlikely to extend access to all such workers. How many workers would still be without access to workplace savings arrangements depends on the design of the particular program.

C. *How Many Covered Employees Will Opt Out?*

A host of studies show that participation rates are higher in automatic enrollment 401(k) plans than in traditional 401(k) plans in which workers must affirmatively elect to participate in the plan. For example, in the seminal study on the subject, behavioral economists Briggite Madrian and Dennis Shea found that automatic enrollment dramatically increased the participation rate of newly hired employees. Specifically, the economists found that only 37 percent of new hires enrolled in a company's 401(k) plan when the company required workers to affirmatively opt in, compared to 86 percent

---

eligibility for the state program, and . . . accurately reflects current state law." *Id.* The Department, however, did not state that the provision prohibits a state from establishing a state automatic enrollment IRA program that covers employees excluded from an employer's plan. Indeed, as the Department noted at the outset of its discussion of this issue, the provision "is not a requirement or condition of the safe harbor but is only an example of a feature that states may incorporate when designing their automatic enrollment IRA programs." *Id.*

193 CONN. RET. SEC. BD., REPORT TO LEGISLATURE, *supra* note 148, at 19–20.

194 H.B. 5591 § 7(a)(4)(B), 2016 Gen. Assemb., Feb. Sess. (Conn. 2016), https://www.cga.ct.gov/2016/TOB/h/pdf/2016HB-05591-R00-HB.pdf. *See also* CONN. RET. SEC. BD., REPORT TO LEGISLATURE, *supra* note 148, at 19–20 ("By framing the employer mandate in these terms, the legislature would provide coverage to the growing ranks of part-time workers, many of whom work multiple part-time jobs.").

195 *Problematic Connecticut Coverage Proposal Withdrawn,* NAT'L ASSOC. OF PLAN ADVISORS (Mar. 14, 2016), http://www.napa-net.org/news/technical-competence/legislation/problematic-connecticut-coverage-proposal-withdrawn/?mqsc=E3829119.

196 Connecticut Retirement Security Program Act (H.B. 5591): Hearing on H.B. 5591 Before the J. Labor & Pub. Emps. Comm., 2016 Sess. 2–3 (Conn. 2016) (statement of Andrew J. Remo, Am. Retirement Ass'n).

when the plan was amended to provide for automatic enrollment.[197] Overall, the differential was not as dramatic as these figures suggest, as employees with longer tenure had much higher participation rates than newly hired employees under the conventional approach.[198] Nevertheless, there was still evidence indicating that automatic enrollment increases participation rates.

Subsequent studies have confirmed that automatic enrollment does indeed increase participation rates. A Prudential study found that Prudential plans with automatic enrollment have 90 percent participation rates compared to 62 percent participation rates for plans with conventional enrollment.[199] In a study based on data from the U.S. Bureau of Labor's National Compensation Survey, Barbara Butrica and Nadia Karamcheva found that the participation rates in automatic enrollment plans were 77.1 percent compared to 67.3 percent in traditional opt-in plans.[200]

This evidence associated with automatic enrollment 401(k) plans lends support to the argument that state automatic enrollment IRAs will increase retirement savings.[201] How much such programs will increase retirement sav-

---

197 Brigitte C. Madrian & Dennis F. Shea, *The Power of Suggestion: Inertia in 401(k) Participation and Savings Behavior*, 116 Q.J. ECON. 1149, 1159 (2001).

198 For example, more than 80% of employees who had worked for the company for ten or more years had enrolled in the plan under the opt-in approach. *See, e.g., id.* at 1163. This plan is not unique in having participation rates increase as employees' tenure with the firm increases. *See, e.g.*, Julie R. Agnew et al., *Literacy, Trust and 401(k) Savings Behavior* 10 n.2 (Ctr. for Ret. Research at Boston Coll., Working Paper No. 2007-10, 2007) (noting that overall participation rates in voluntary 401(k) plan increased from "38% for eligible employees with tenure of 0-1 years; 54% for eligible employees with tenure of 2-3 years; and 66% for eligible employees with tenure of 4-6 years").

199 Veronica Charcalla & Gary Crawford, Prudential Financial, Inc., Overcoming Participant Inertia: Automatic Features That Improve Outcomes While Improving Your Plan's Bottom Line 6 (2015), http://www.prudential.com/media/managed/overcoming-participant-inertia.pdf.

200 Barbara A. Butrica & Nadia S. Karamcheva, *Automatic Enrollment, Employee Compensation, and Retirement Security* 11, 14 (Ctr. for Ret. Research at Boston Coll., Working Paper No. 2012-25, 2012) (noting that the "coefficient on automatic enrollment is positive and highly significant"). *See also* VANGUARD GRP., INC., HOW AMERICA SAVES 2015: A REPORT ON VANGUARD 2014 DEFINED CONTRIBUTION PLAN DATA 31 fig. 27 (reporting overall participation rate of 89 percent for employees in plans with automatic enrollment feature compared to rate of 61 percent for employees hired under plans with voluntary enrollment); J.J. McKinney, *401(k) Plans: Automatic Enrollment*, 20 J. PENSION BENEFITS 60, 63 (2013) (stating that according to a study of Schwab plans, automatic enrollment plans had an average participation rate of 87.59 percent compared to 73.04 percent for conventional enrollment plans); James J. Choi, *Contributions to Defined Contribution Pension Plans* 12 (Nat'l Bureau of Econ. Research, Working Paper No. 21467, 2015), http://www.nber.org/papers/w21467.pdf (showing that only 71 percent of workers had ever contributed to 401(k) plan by 4 years after hire under traditional opt-in enrollment compared to 99 percent of workers under automatic enrollment).

201 *See, e.g.*, Chiang et al., Cal. Sec. Choice. Ret. Sav. Inv. Bd., *supra* note 134, at 3, 5. Indeed, the architects of the original automatic enrollment IRA program, J. Mark Iwry and David John, cite to increased participation rates in automatic enrollment 401(k) plans in support of their proposed universal automatic enrollment IRA program. J. MARK IWRY & DAVID C. JOHN, THE RET. SEC. PROJECT, PURSUING

ings, however, depends in part on how many workers will opt out of participation. Unfortunately, there is limited data available to answer this question.[202]

Recognizing the dearth of evidence and the importance of the question, the Connecticut Retirement Security Board hired the Center for Retirement Research at Boston College to do a market analysis for a proposed automatic enrollment IRA program.[203] Specifically, the CRR was charged with answering two key questions about workers: (1) at what rate are workers likely to opt out of the program?; and (2) how would program features likely affect opt-out rates?[204] To answer these questions, the CRR performed an online enrollment experiment in which participants were randomly assigned to different programs with different features and asked whether they would remain enrolled in the proposed program or opt out.[205] The CRR found that approximately 19 percent of workers would opt out of the program if it had a 6 percent default contribution rate directed into a Roth IRA with a target date fund as the default investment choice with no guaranteed returns or annuitization at retirement.[206] Opt-out rates decreased to 15.1 percent when the default contribution rate was set at 3 percent rather than 6 percent, and opt-out rates increased to 25.1 percent when a deferred annuity was purchased at retirement.[207]

In another study analyzing the potential for a generic automatic enrollment IRA to increase the probability of a "successful" retirement, Jack VanDerhei of the Employee Benefits Research Institute ("EBRI") recognized that there is not much detailed information on opt-out rates in automatic enrollment 401(k) plans.[208] Thus, he assumed and applied a number of different opt-out rates to determine the likely impact of a generic automatic enrollment IRA on retirement readiness.[209] He noted that EBRI is currently analyzing data from automatic enrollment 401(k) plans without employer matches to determine the most likely opt-out rates for such plans.[210]

A separate study focusing on the populations targeted by the California and Illinois automatic enrollment IRA programs conducted by Constanijin

---

UNIVERSAL RETIREMENT SECURITY THROUGH AUTOMATIC IRAS 3 (2009), https://www.brookings.edu/wp-content/uploads/2016/06/07_automatic_ira_iwry.pdf.

202 *See* Bubb & Pildes, *supra* note 4, at 1626 (noting that there is a "relative dearth of evidence" on why workers opt out of automatic enrollment 401(k) plans in part because behavioral law and economics scholars "have not focused on the question").

203 Ctr. for Ret. Research at Boston Coll., Report on Design of Connecticut's Retirement Security Program 1 (2015), http://www.osc.ct.gov/crsb/meetings.html.

204 *Id.*

205 *Id.* at 32.

206 *Id.*

207 *Id.*

208 VanDerhei, *supra* note 2, at 15.

209 *Id.* at 17 fig. 2.

210 *Id.* at 28 n.23.

Panis and Michael Brien found that those populations tend to have lower earnings and be younger than workers with access to an employer-sponsored pension plan.[211] Based on these characteristics, they speculated that the opt-out rates may be higher than in the average automatic enrollment 401(k) plan because the targeted populations are further from retirement age and entitled to relatively higher benefits from Social Security, and thus have weaker incentives to save for retirement.[212] They did not, however, try to estimate opt-out rates because such an analysis was outside the scope of their study.

A separate study of Vanguard automatic enrollment 401(k) plans supports Panis and Brien's speculation. According to the Vanguard study, opt-out rates are higher than average for individuals with income of less than $30,000, and opt-out rates are higher in automatic enrollment 401(k) plans with no employer matching contribution.[213] In light of the fact that covered employees are likely to have lower incomes and employers are prohibited from contributing to state automatic enrollment IRA programs under the new safe harbor, it seems likely that employees will opt out of a state automatic enrollment IRA program at a higher rate than under the average 401(k) plan.

Finally, in a rare study focusing on why workers opt out of automatic enrollment 401(k) plans,[214] a group of economists affiliated with the CRR asked a series of questions.[215] They found two rational reasons that might explain why some individuals elect to opt out of participating in an automatic enrollment 401(k) plan: (1) individuals who opt out may be financially constrained, and (2) individuals who choose to opt out may be saving through their spouse's 401(k) plan.[216] Specifically, in the survey of participants and nonparticipants in two automatic enrollment 401(k) plans, 51 percent of workers who opted out strongly agreed with the statement, "You can't afford to save in your company's retirement savings plan," and 49 percent of workers who opted out agreed with the statement, "My spouse/partner and I use his/her 401(k) plan to save for retirement."[217] In addition, the economists found two less rational explanations for why workers might opt out. They found that individuals with low financial literacy and low trust in financial institutions were more likely to opt out of participation than individuals with higher levels of financial literacy and trust in financial institutions.[218]

---

211 PANIS & BRIEN, *supra* note 180, at 17.

212 *Id.* at i.

213 Stephen P. Utkus & Jean A. Young, Vanguard Grp., Inc., *How America Saves 2016: Vanguard 2015 Defined Contribution Plan Data* 29–30, 32 (2015).

214 In contrast, much attention has been focused on the question of why workers voluntarily elect to participate in conventional 401(k) plans. *See* Agnew, *supra* note 198, at 3–8 (reviewing the literature).

215 They asked six questions specifically addressing the individuals' reasons for participating or opting out of participation. In addition, they asked questions to gauge the individuals' financial literacy and trust in financial institutions. *Id.* at 14–15, 19, 44 tbl.10 (listing questions used to assess financial literary, level of trust in financial institutions, and reasons for opting out of automatic enrollment plan).

216 *Id.* at 26.

217 *Id.* at 26, 44 tbl.10.

218 *Id.* at 2–3.

Though limited, studies on the subject make it clear that some workers are likely to opt out of participating in a state automatic enrollment IRA program. Opt-out rates appear to depend on a variety of factors, including the program's default contribution rate, investment options, and distribution provisions. Thus, it is hard to say exactly how many workers are likely to opt out of participating in a particular state's program.

D. *How Expensive Will the Plans Be to Administer?*

If the states were willing to pay for the administrative costs of automatic enrollment IRA programs, the expenses would have no impact on workers' accumulation of retirement savings through the programs. In fact, however, the states are unwilling to bear those costs.[219] Instead, they ask the participants to bear the costs.[220]

If workers must bear the administrative costs, they may have a significant impact on workers' ultimate retirement savings. To illustrate, suppose that an individual has an account balance of $25,000 and thirty-five years until retirement. If the individual makes no additional contributions and account earnings average 7 percent per annum, the individual will have an account balance of $227,000 at the end of thirty-five years if fees and expenses are 0.5 percent. In contrast, if fees and expenses are 1.5 percent, the account balance will only grow to $163,000. A difference of 1 percent in fees and expenses reduces the individual's account balance by 28 percent.[221] Put another way, if an individual has an account balance of $100,000 earning a 7 percent annual return over twenty-five years, the individual will pay a total of $141,400 in fees if he is charged 1.2 percent in annual fees. In contrast, if the individual is charged 0.3 percent in annual fees, the individual will only pay a total of $39,275 in fees. The difference between 1.2 percent and 0.3 percent in annual fees over a period of twenty-five years on a $100,000 account balance translates into a difference of just over $100,000 in total fees.[222]

---

219 The state programs typically provide for the state to initially fund the start-up costs, but then provide for the state to be reimbursed for those costs. *See, e.g.*, OR. REV. STAT. § 178 note (2015); Act of June 25, 2015, 2015 Or. Laws ch. 557 §§ 12, 13 (codified as amended at OR. REV. STAT. § 178.225 (2015)); Illinois Secure Choice Savings Program Act, 2015 Ill. Laws 098-1150, § 30 (codified as 820 ILL. COMP. STAT. 80/30(m) (2016)).

220 *See, e.g.*, CAL. GOV'T CODE § 100004(e) (West 2013); 820 ILL. COMP. STAT. 80/30(m); H.B. 5591 § 3(a)(9), 2016 Gen. Assemb., Feb. Sess. (Conn. 2016).

221 DEP'T OF LABOR, EMP. BENEFITS SEC. ADMIN., A LOOK AT 401(K) PLAN FEES 1–2 (2013), http://www.dol.gov/ebsa/publications/401k_employee.html.

222 Ian Salisbury, *The One Retirement Move You Must Get Right*, MONEY, July 2014, at 48. See also Ian Ayres & Quinn Curtis, *Protecting Consumer Investors by Facilitating "Improved Performance" Competition*, 2015 U. ILL. L. REV. 1, 3 ("[A]n individual saving $500 a month from the age of twenty-five to sixty-five could see their end-of-career savings diminished by nearly half as a result of a difference of two percent in fund fees.").

Because plan fees can have such a significant impact on retirement savings, 401(k) plan fees has been the subject of considerable scrutiny in recent years.[223] The Department of Labor has issued a series of regulations mandating fee disclosure,[224] and plan participants have filed a host of lawsuits claiming that excessive plan fees violate ERISA's fiduciary provisions.[225] Of course, the protections under ERISA would not apply to state automatic enrollment IRAs programs that qualify for the safe harbor because such state programs would be exempt from ERISA.

That is not to suggest, however, that states are blind to the importance of plan fees. In recent years, plan fees paid by public sector pension funds have come under increasing scrutiny,[226] and states have been making efforts to regulate, or at least encourage transparency with respect to, plan fees paid by public pensions.[227]

Recognizing the importance of plan fees, state automatic enrollment IRA legislation generally requires that plan fees be kept low. For example, Connecticut law charges the Connecticut Retirement Security Board with proposing a plan with "[l]ow administrative costs that shall be limited to an

---

223 Similarly, mutual fund fees have also been the subjects of concern. *See, e.g.*, Ayres & Curtis, *supra* note 222, at 3.

224 For a discussion of the Department of Labor's initiatives on 401(k) plan fees beginning in the late 1990s, see Kathryn L. Moore, *401(k) Plan Fees: A Trifecta of Governmental Oversight*, *in* 2009 N.Y.U. REV. EMP. BENEFITS & EXECUTIVE COMPENSATION 17-1–17-16 (Alvin D. Lurie ed., LexisNexis 2015).

225 For a summary of the cases, see Groom Law Grp., Chartered, *401(k) Plan Fee Cases* (Sept. 30, 2015), http://www.groom.com/resources-920.html.

226 For a discussion of the recent focus on fees paid to private equity firms and hedge funds, see Timothy W. Martin, *Pensions' Private-Equity Mystery: The Full Cost*, WALL ST. J. (Nov. 22 2015), http://www.wsj.com/articles/pensions-private-equity-mystery-the-full-cost-1448235489; Gretchen Morgenson, *Pension Funds Can Only Guess at Private Equity's Costs*, NY TIMES (May 1, 2015), http://www.nytimes.com/2015/05/03/business/pension-funds-can-only-guess-at-private-equitys-cost.html?_r=0. *See also* SCOTT C. EVANS, NYC COMPTROLLER,THE IMPACT OF MANAGEMENT FEES ON PENSION FUND VALUE, https://comptroller.nyc.gov/wp-content/uploads/documents/BAM_Report_Impact_of_Management_Fees.pdf (New York City Bureau of Asset Management's analysis of total dollar impact of active management fees on value of NYC public pension funds); Len Boselovic, *Gov. Wolf Thinks Pension Funds Paying Too Much in Fees*, PITTSBURGH POST-GAZETTE (April 12, 2015), http://www.post-gazette.com/business/pittsburgh-company-news/2015/04/12/Gov-Wolf-thinks-pension-funds-paying-too-much-in-fees/stories/201504120009 (reporting that PA governor wants to shore up PA public pension funds by significantly reducing the $662 million the funds pay in investment management fees).

227 For a discussion of the use of placement agents by public sector pension funds and efforts to curb their use, see, for example, Edward Siedle, *Billions for Bupkis: Pension Placement Agents*, FORBES (June 25, 2014), http://www.forbes.com/sites#/sites/edwardsiedle/2014/06/25/billions-for-bupkis-pension-placement-agents/#6498a0476aca; Christina M. Sumpio, *Marketing of Investment Advisers to Public Pension Plans: Achieving Transparency Through Lobbying Regulations*, 5 WM. & MARY BUS. L. REV. 243 (2014). *See also* Peter Feltman, *States Call for Better Private Equity Fee Disclosure*, CQ ROLL CALL, 2015 WL 4647868 (Aug. 6, 2015) (reporting that financial officials from 11 states are asking the SEC to require better disclosure about private equity fund fees).

annual, predetermined percentage of the total plan balance."[228] The California legislation caps administrative costs at 1 percent of the program's assets,[229] and the Illinois program caps administrative expenses at 0.75 percent.[230]

Experience in both private-sector and public-sector pensions makes it clear that plan fees in state automatic enrollment IRAs should be transparent.[231] Whether the states' rules/cap-based approach to fees is likely to be more effective than the standards-based approach currently used in private[232] and public-sector pensions[233] is an empirical question with no ready answer. Moreover, whether administrative fees can, in fact, be kept low depends on a host of factors such the size of the program, the structure of the program, and who administers the program.

Due to economies of scale, the larger a state program is, the lower its costs are likely to be. For example, the authors of a Connecticut feasibility study found that the Connecticut program could be "self-sustaining" with combined investment and program management fees of 0.5 percent if program assets totaled $1 billion.[234] The size of the state program, in turn, depends on a variety of factors, such as the number of covered workers and design features like the default contribution rate. The analysts studying the proposed Connecticut program recommended that the program's default contribution rate be set at 6 percent rather than 3 percent in order to ensure that the program could reach its goal of $1 billion in a relatively short time.[235]

In order to keep administrative costs down, states are likely to outsource the day-to-day administration of the plans. The California Secure Choice Retirement Savings Investment Board advised the Department of Labor in a comment letter that it "anticipates outsourcing the day-to-day administration, investment, and custody/trustee duties to qualified third parties selected from the private sector after competitive bidding."[236] The preamble to the final regulation clarifies that such delegation is permissible. It explains that the Department of Labor amended the safe harbor to use the phrase "State (or governmental agency or instrumentality of the State)" throughout the safe harbor to clarify that, as long as the state program is established under state law, the "program is eligible for the safe harbor even if the state law delegates a wide array of implementation and administrative authority (such as . . . contracting

---

228 CONN. GEN. STAT. § 31-415(a)(7) (2014).

229 CAL. GOV'T CODE § 100004(d) (West 2013).

230 820 ILL. COMP. STAT. 80/30(m) (2016).

231 *Cf.* Keith Overly & Michael J. Studebaker, *Best Practices for Public Sector DC Plans*, BENEFITS MAG. 42, 46 (Aug. 2015) (stating that "disclosure of fees is considered a best practice").

232 *See, e.g.*, ERISA, 29 U.S.C. §1108(b)(2) (2012) (exempting services by party-in-interest from general prohibited transaction provisions if no more than "reasonable" compensation paid).

233 *See, e.g.*, Overly & Studebaker, *supra* note 231 (stating that "fees should be reasonable and equitable").

234 CONN. RET. SEC. BD., REPORT TO LEGISLATURE, *supra* note 148, at 5, 37–38.

235 *Id.* at 5.

236 Chiang et al., Cal. Sec. Choice. Ret. Sav. Inv. Bd., *supra* note 134, at 3.

with third-party vendors . . .) to a board, committee, department, authority . . . ."[237] Moreover, the express text of the safe harbor provides that a program will not fail to satisfy the safe harbor merely because it uses service providers to operate and administer the program, so long as the state (or governmental agency or instrumentality) "retains full responsibility for the operation and administration of the program."[238]

The proposed safe harbor contained a provision that could have had an adverse impact on administrative costs. It provided that the state program must "not require that an employee or beneficiary retain any portion of contributions or earnings in his or her IRA and [must] not otherwise impose any restrictions on withdrawals or impose any cost or penalty on transfers or rollovers permitted under the Internal Revenue Code."[239]

In comment letters to the Department of Labor, the States expressed concern that this requirement could limit a program's ability to authorize certain types of investments, such as annuities, and to impose reasonable restrictions on withdrawals in order to limit administrative costs.[240] The States requested that the requirement be modified to permit the States to provide investment options with less liquidity and to impose reasonable restrictions on withdrawals to increase administrative efficiency and limit costs.[241] In addition, the California Board asked that that requirement be modified to provide the Board with the flexibility to impose a hardship withdrawal standard,[242] like the hardship withdrawal standard found in many 401(k) and 457 plans. In response to these concerns, the Department of Labor eliminated this condition from the final safe harbor.[243]

It is not clear exactly how expensive the state automatic enrollment IRA programs will be to administer. It is clear, however, that states are cognizant of the importance of fees and will make an effort to minimize administrative costs.

---

237 Savings Arrangements Established by States for Non-Governmental Employees, 81 Fed. Reg. 59,464, 59,468 (Aug. 30, 2016) (to be codified at 29 C.F.R. pt. 2510).

238 Although the states are in favor of delegating administration of their programs, they seek to limit their liability with respect to the third parties' actions. Employee Pension Benefit Plans, 80 Fed. Reg. 72,006, 72,014 (Nov. 18, 2015) (to be codified at 29 C.F.R pt 2510.3-2 (h)(xii)(2)(ii)).

239 Savings Arrangements Established by States for Non-Governmental Employees, 80 Fed. Reg. 72,006, 72,014 (Nov. 18, 2015) (to be codified at 29 C.F.R. pt. 2510.3-2(h)(1)(vi)).

240 *See, e.g.*, Lembo & Nappier, *supra* note 134, at 5.

241 Chiang et al., Cal. Sec. Choice. Ret. Sav. Inv. Bd., *supra* note 134, at 6–8.

242 *Id.* at 8. Under the Treasury Regulations, a hardship distribution is a distribution made on account of an immediate and heavy financial need of an employee or his or her spouse or dependent and is necessary to satisfy that financial need. Treas. Reg. § 1.401(k)-1(d)(3) (2014). The regulations set forth six situations in which a distribution will be deemed to satisfy an immediate and heavy need. Treas. Reg. § 1.401(k)-1(d)(3)(iii)(B).

243 *See* Savings Arrangements Established by States for Non-Governmental Employees, 81 Fed. Reg. 59,464, 59,476 (Aug. 30, 2016) (explaining why the condition was eliminated).

E. *Will the Interests of Participants be Adequately Protected?*

Whether state automatic enrollment IRA programs will lead to increased retirement savings depends, in part, on whether participants' interests will be adequately protected against misfeasance or malfeasance. Concerns can arise at two different levels: (1) at the employer level; for example, employers may withhold contributions from wages but fail to direct the contributions to the plan; and (2) at the plan level; for example, the plan's investment manager may mismanage or even embezzle funds.

ERISA contains explicit fiduciary standards of conduct, responsibility, and obligations to address these concerns.[244] ERISA's fiduciary provisions are enforced through private civil actions and through the Department of Labor's civil investigations, criminal investigations, voluntary correction program, and informal complaint program. In 2015 alone, the Department of Labor closed 2,441 civil investigations, with 67 percent of the cases ending in monetary recoveries for plans or other corrective action and 275 criminal investigations leading to the indictment of 67 individuals.[245]

Since ERISA's fiduciary protections would not apply to state programs exempt from ERISA under the Department of Labor's new safe harbor, it is neither surprising nor unreasonable that state programs must satisfy the following requirements in order to qualify for the safe harbor: (1) "[t]he state [must] assume[] responsibility for the security of payroll deductions and employee savings"[246] and (2) "[t]he state [must] adopt measures to ensure that employees are notified of their rights and create a mechanism for the enforcement of those rights."[247]

This section focuses on these requirements and whether state law is likely to adequately protect participants' interests.[248]

---

244 ERISA, 29 U.S.C. §§1101-1114 (2012). Indeed, as the Supreme Court has noted, one of Congress' primary concerns in enacting ERISA was with the mismanagement of funds. Massachusetts v. Morash, 490 U.S. 107, 115 (1989). *See also* H.R. REP. NO. 93-1280, at 306-09 (1974) (Conf. Rep.) (explaining that one of the motivations for the enactment of ERISA was to protect employee benefit funds from being exploited for the benefit of employers who maintain them).

245 *See Fact Sheet: EBSA Restores Over $696.3 Million to Employee Benefit Plans, Participants and Beneficiaries,* U.S. DEP'T OF LABOR, EMP. BENEFIT SEC. ADMIN. (Mar. 13, 2016), http://www.dol.gov/ebsa/newsroom/fsFYagencyresults.html (describing EBSA's various programs and monetary recoveries).

246 Savings Arrangements Established by States for Non-Governmental Employees, 80 Fed. Reg. 72,006, 72,014 (Nov. 18, 2015) (to be codified at 29 C.F.R. 2510.3-2(h)).

247 *Id.*

248 It is worth noting that even though ERSIA will not apply to state automatic enrollment IRA programs, federal law will still provide some level of protection. Specifically, the Internal Revenue Code's prohibited transaction rules, contained in IRC § 4975, will apply to the state automatic enrollment IRAs. *See* Savings Arrangements Established by States for Non-Governmental Employees, 81 Fed. Reg. 59,464, 59,467 (Aug. 30, 2016) (clarifying that prohibited transaction rules under the Internal Revenue Code apply

1. Protection Against Misfeasance and Malfeasance at the Employer Level

A number of states submitted comment letters in response to the safe harbor's requirements intending to ensure that employees' rights are protected.[249] The states expressed the belief that the first of these two requirements was intended to protect employees against employer fraud and ensure that the employees' withholdings are transmitted in a timely and proper fashion. The states were concerned, however, that this requirement could be construed as requiring states to act as a guarantor where the states would be held accountable for the misfeasance or malfeasance of employers. The states asserted that they would, of course, use their police powers to enforce their laws to correct any misfeasance or malfeasance and punish wrongdoers. They asked that the first requirement be eliminated or amended to make clear that states are not to be held accountable for the wrongdoing of employers and/or payroll vendors.[250]

As for the second requirement, the states requested clarification that they are not responsible for "ensuring" that employees are notified of their rights, and that they are not required to adopt new laws to enforce employees' rights.[251] The states contended that the appropriate party (typically the plan administrator), rather than the state, should be required to provide employees with notice, and that no new laws need to be enacted to enforce employees' rights. Instead, existing wage and employment laws should be adequate to protect employees' rights.

The Department of Labor retained the two disputed conditions in the final safe harbor.[252] In the preamble to the final regulation, the Department clarified that the first of these "conditions does not make states guarantors or hold them strictly liable for any and all employers' failures to transmit payroll deductions."[253] Rather, according to the Department, the condition is satisfied

---

to IRAs used in state enrollment IRA programs). The prohibited transaction rules under the Internal Revenue Code are similar, though not identical to ERISA's prohibited transaction rules. *See* BENDER'S FEDERAL INCOME TAXATION OF RETIREMENT PLANS, § 20 (Alvin D. Lurie, ed., 2008) (providing a detailed discussion of the similarities and differences between ERISA and IRC prohibited transaction rules).

249 *See, e.g.*, Chiang et al., Cal. Sec. Choice. Ret. Sav. Inv. Bd., *supra* note 134, at 3-4; Lucy Mullany & John Bouman, Illinois Asset Bldg. Grp., Comment Letter on Proposed Rule regarding Saving Arrangements Established by States for Non-Governmental Employees (Jan. 15, 2016) (RIN 1210-AB71, Comment #25), at 2, https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB71/00023.pdf.

250 *See, e.g.*, Chiang et al., Cal. Sec. Choice. Ret. Sav. Inv. Bd., *supra* note 134, at 4.

251 *Id.* at 7.

252 Savings Arrangements Established by States for Non-Governmental Employees, 81 Fed. Reg. 59,464, 59,476 (Aug. 30, 2016) (to be codified at 29 C.F.R. §§ 2510.3-2(h)(1)(iii)&(iv)).

253 *Id.* at 59, 470.

if a state establishes and follows "a process to ensure that employers transmit payroll deductions safely, appropriately and in a timely fashion."[254]

The Department of Labor further declared that no single approach was necessary to satisfy the requirement.[255] It noted that some states have in place wage withholding and theft laws to protect employees from wage theft and similar problems.[256] According to the Department, wage theft laws and enforcement programs would ordinarily satisfy the requirement if they are applicable to the state automatic enrollment IRA programs and are enforced by state agents.[257] The Department also noted that some states, such as Connecticut, are considering specific enforcement provisions for their programs.[258] According to the Department, this approach would be permissible under the final safe harbor as well.[259]

It is worth noting that wage theft, broadly defined, refers to the failure to pay workers the wages they are owed.[260] It may include paying workers less than the legally mandated minimum wage or less than the contractually agreed-upon wage, requiring workers to work "off the clock" without pay, stealing tips, illegally deducting fees from wages or simply not paying a worker anything at all.[261]

Wage theft claims may be pursued in a variety of ways. For example, the U.S. Department of Labor's Wage and Hour Division is charged with enforcing the right to a minimum wage under the Fair Labor Standards Act,[262]

---

254 *Id.*

255 *Id.*

256 *Id.*

257 *Id.*

258 The Department of Labor cited §§ 7(e) and 10(b) of the Connecticut law. Savings Arrangements Established by States for Non-Governmental Employees, 81 Fed. Reg. 59,464, 59,470 n.32 (Aug. 30, 2016). Section 7(e) imposes a timing requirement. Specifically, it requires that withholdings be transmitted no later than the fifteenth business day of the month following the month in which the contribution is withheld. Section 10(b) amends Connecticut's general wage withholding law to extend to the state automatic enrollment IRA program.

259 *Id.*

260 Stephen Lee, *Policing Wage Theft in the Day Labor Market*, 4 U.C. IRVINE L. REV. 655, 656 (2014). (stating that "wage theft" generally refers to "the nonpayment of wages for work that has already been performed.") Narrowly defined, wage theft refers to paying workers less than the federally required minimum wage under the Fair Labor Standards Act. Todd A. Palo, *Minimum Wage, Justifiably Unenforced?*, 35 SETON HALL LEGIS. J. 36, 39 (2010) (using the term in its narrow sense and contending that the failure of the U.S. Department of Labor Wage and Hour Division to enforce the minimum wage is justified because it is a non-basic human right and the Division does not have sufficient resources to enforce the right).

261 EUNICE HYUNHYE CHO ET AL., NAT'L EMP'T. LAW PROJECT, HOLLOW VICTORIES: THE CRISIS IN COLLECTING UNPAID WAGES FOR CALIFORNIA'S WORKER 4 (2013), http://www.labor.ucla.edu/publication/hollow-victories-the-crisis-in-collecting-unpaid-wages-for-californias-workers/.

262 29 U.S.C. § 204 (2012).

and state agencies, such as the California Division of Labor Standards Enforcement, are charged with enforcing state wage laws.[263] In addition, workers may file wage theft claims in court.

Wage theft is an endemic problem,[264] and wage theft laws do not provide workers with as robust a remedy as the states suggest.[265] First, the state and federal agencies charged with enforcing wage laws are often underfunded and understaffed and thus slow in pursuing claims.[266] Second, workers, particularly low-income workers, often have difficulty finding an attorney to represent them if they choose to pursue their claims in court.[267] Indeed, according to a study by the UCLA Labor Center's National Employment Project, "a shocking percentage of workers are unable to recover their unpaid wages in California . . . workers and state officials alike lack sufficient legal tools to enforce the law and to recover unpaid wages from employers who engage in unscrupulous business practices to avoid payment."[268] For example, even though the California Division of Labor Standards Enforcement

---

263 *See* CAL. LAB. CODE § 95 (West 2016); CAL. DIV. OF LABOR STANDARDS ENF'T, THE 2002 UPDATE OF THE DLSE POLICIES AND INTERPRETATION MANUAL (REVISED) 1-1 (2006) (containing enforcement standards for the California Division of Labor Standards Enforcement (DLSE)).

264 *See What Is Wage Theft?: Frequently Asked Questions,* WAGETHEFT.ORG, http://www.wagetheft.org/faq/ (last visited Aug. 11, 2016) ("Wage theft is endemic, and no group of workers is immune. . . ."); ANNETTE BERNHARDT ET AL., BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA'S CITIES 12 (2009), http://www.labor.ucla.edu/wage-theft/ (documenting wage theft in three American cities).

265 *See* William Petroski, *Senate Democrats Offer State Plan to Stop Iowa Wage Theft,* DES MOINES REG. (Jan. 27, 2015), http://www.desmoinesregister.com/story/news/politics/2015/01/27/iowa-wage-theft-senate/22430863/ (According to Democratic State Senator Bisignano, "Iowa's wage theft laws don't protect Iowa workers from being ripped off and don't protect honest businesses who pay their employees.").

266 *See, e.g.*, N.Y. STATE OFFICE OF THE STATE COMPTROLLER, WAGE THEFT INVESTIGATIONS, REPORT 2013-S-38 1, 7 (2014) (finding among other things that the State's Division of Labor Standards does not complete wage theft investigations in a timely manner and its management system does not provide accurate or useful case management reports); Palo, *supra* note 260, at 56 (using the term in its narrow sense and contending that the failure of the U.S. Dep't of Labor Wage & Hour Div. to enforce the minimum wage is justified because it is a non-basic human right and the Division does not have sufficient resources to enforce the right).

267 While, in theory, workers may file suit, workers, particularly low-income workers, may have difficulty finding attorneys to represent them. *See Effective Strategies and Tool for Wage Enforcement: Hearing Before the S. Interim Comm. on Workforce & Gen. Gov't,* 2015-2016 Leg., 78th Sess. 4–5 (Or. 2016) (testimony of Laura Huizar, Nat'l Emp't Law Project), http://www.nelp.org/content/uploads/NELP-Testimony-Laura-Huizar-Wage-Theft-Enforcement.pdf ("A civil legal needs assessment in Washington State found that 'only half of low-income people with employment problems were able to get advice or representation from an attorney.'"); CHO ET AL., *supra* note 261, at 7 (noting that hiring an attorney to file a civil suit is "not typically a viable option for many low-wage workers" who may not be able to convince an attorney "to take a case where low to no attorney fees are likely").

268 CHO ET AL., *supra* note 261, at 2.

issued awards of more than $282 million between 2008 and 2011, workers were only able to collect $42 million, or about 15 percent, of the awards.[269]

2. Protection Against Misfeasance and Malfeasance at the Plan Level

A few commenters submitted letters to the Department of Labor arguing that, given the states' track record with public pensions, states should not be trusted to manage pensions for private-sector employees. In one example, Standard Retirement Services, Inc. asserted that insulating state automatic enrollment IRA programs from ERISA's fiduciary protections is "particularly troublesome in that some states have a questionable track record in protecting their own employees' pension assets."[270] Similarly, the Manhattan Institute for Policy Research pointed to the states' track record with state pensions and noted that state governments have accumulated $1 trillion of debt in their public pensions and officials in some states have aggressively invested public pension funds to help shape political agendas.[271]

Without a doubt, many state pension plans are woefully underfunded. Indeed, according to a recent study by The Pew Charitable Trusts, state pensions have an aggregate unfunded liability of $968 billion.[272] But, simply because many state pension plans are significantly underfunded does not mean

---

269 *Id.*

270 Lohmann, *surpa* note 131, at 2.

271 The Manhattan Inst. for Policy Research, Comment Letter on Proposed Rule regarding Saving Arrangements Established by States for Non-Governmental Employees (Jan. 19, 2016) (RIN 1210-AB71, Comment #67), at 1, 3, https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB71/00067.pdf. Two individuals involved in the financial services industry, Scott Stolz and Christopher Tobe, also submitted comment letters pointing to problems in public sector pensions in support of their objections to state automatic enrollment IRA programs. Scott Stolz, Comment Letter on Proposed Rule regarding Saving Arrangements Established by States for Non-Governmental Employees (Jan. 12, 2016) (RIN 1210-AB71, Comment #15), https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB71/00015.pdf; Christopher Tobe, Comment Letter on Proposed Rule regarding Saving Arrangements Established by States for Non-Governmental Employees (Dec. 15, 2015) (RIN 1210-AB71, Comment #8), https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB71/00008.pdf. In an interesting twist, the U.S. Chamber of Commerce contends that public pensions have some safeguards that would not be present for state programs for private sector employees. Specifically, some public pensions benefit from the fact that the state officials who are responsible for governing the plan, such as the state treasurer, are also plan participants. In addition, many public pensions are subject to collective bargaining. Randel Johnson & Aliya Wong, U.S. Chamber of Commerce, Comment Letter on Proposed Rule regarding Saving Arrangements Established by States for Non-Governmental Employees (Jan. 19, 2016) (RIN 1210-AB71, Comment #55), at 4–5, https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB71/00055.pdf.

272 *See* THE PEW CHARITABLE TRUSTS, THE STATE PENSIONS FUNDING GAP: CHALLENGES PERSIST 3–4 (2015), http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2015/07/the-state-pensions-

that states cannot and should not be trusted to run automatic enrollment IRA programs.

First, much of the underfunding of state pension plans is due to the fact that they are defined benefit plans, and defined benefit plans raise unique funding issues.[273] Those funding issues would not arise in the context of state automatic enrollment IRA programs. So long as employers actually forward employees' contributions as required under the terms of the program, a state automatic enrollment IRA program will never be "underfunded" in the way that a state defined benefit pension plan can be.

Second, most state pensions are funded, in part, by the state. State funding of public pensions gives rise to political accountability issues because funding must go through the budget process, a highly political process, and those who are affected will not realize harm or benefit until the future.[274] In contrast, under the new safe harbor, only employees may contribute to the programs. Thus, the political accountability issues that arise when states must make contributions to fund state pension plans do not apply to state automatic enrollment IRA programs.

Nevertheless, proper governance of state automatic enrollment IRA programs is important; there have been numerous instances of criminal misconduct with respect to the management of public pensions.[275] Although "structures, standards, and regulations can never be a complete defense against in-

---

funding-gap-challenges-persist (showing that state pensions have a total unfunded liability of $968 billion and showing unfunded liability in each state).

273 For an explanation of the unique funding issues that arise in public defined benefit pension plans, see, for example, Thomas J. Fitzpatrick IV & Amy Monahan, *Who's Afraid of Good Governance?: State Fiscal Crises, Public Pension Underfunding, and the Resistance to Governance Reform*, 66 FLA. L. REV. 1317, 1323–25 (2014).

274 *See* Amy B. Monahan, State Fiscal Constitutions and the Law and Politics of Public Pensions, 2015 U. ILL. L. REV. 117, 128; *see also* Maria O'Brien Hylton, The Case for Public Pension Reform: Early Evidence from Kentucky, 47 CREIGHTON L. REV. 585, 596 (2014) (explaining the moral hazard that arises in public pensions where "political actors, often in exchange of promises of support at the polls, commit to more generous benefits that taxpayers can realistically afford").

275 Fitzpatrick & Monahan, *supra* note 273, at 1356 n.253 (citing sources discussing pay-for-play scandals in New York and Illinois). *See also* Steven Davidoff Solomon, *Pension Funds' Middlemen Come Under Scrutiny*, INT'L N.Y. TIMES, May 14, 2015, 2015 WLNR 14022557 (noting that former chief executive of the California Public Employees' Retirement System pled guilty to committing bribery and fraud because he steered more than $3 billion in funds to a private equity firm after being bribed by a placement agent firm headed by the former deputy mayor of Los Angeles); James Drew, *Secrecy Cloaks Placement Agents' Role in Texas Public Pension Fund Investments*, DALL. MORNING NEWS (Oct. 3, 2013), http://www.dallasnews.com/investigations/headlines/20120721-secrecy-cloaks-placement-agents-role-in-texas-public-pension-fund-investments.ece (noting that Dallas money manager pled guilty to corruption charges in New York for paying kickbacks to a placement officer who also served as the chief fundraiser for the state's comptroller); Press Release, SEC, SEC Charges State Street for Pay-to-Play Scheme (Jan. 14, 2016), https://www.sec.gov/news/pressrelease/2016-8.html (reporting that State Street Bank and Trust Company agreed to pay the Securities and Exchange Commission $12 million to settle charges that it conducted a pay-to-play scheme to win contracts to service Ohio pension funds).

dividuals determined to do wrong . . . [t]hey are nonetheless our best assurance that savers, investors, and employees are protected against problems of this kind",[276] and research indicates that governance can have a significant impact on the performance of public pensions.[277] Recent studies have shown that pension fund board composition is strongly related to the performance of public pensions' private equity investments[278] and that increasing political appointees and employee members on public pension boards increases the funding performance of public pensions.[279]

Both the California Act and the Illinois Act call for diverse representation on the state boards. The California Act provides for the appointment of an individual with retirement savings and investment expertise by the Senate Committee on Rules, the appointment of an employee representative by the Speaker of the Assembly, and the appointment of a public member by the Governor.[280] The Illinois Act charges the Governor with appointing two public representatives with expertise in retirement savings plan administration or investment, a representative of participating employers, and a representative of enrollees.[281]

In addition, the state laws impose express fiduciary duties, which are drawn from ERISA's fiduciary provisions.[282] California law, similar to

---

276 Anne Maher, *Transparency and Accountability of Public Pension Funds*, in Public Pension Fund Management: Governance, Accountability, and Investment Policies, Proceedings of the Second Public Pension Fund Management Conference May 2003 91–92 (Alberto R. Musalem and Robert J. Palacios eds. 2004). *Cf.* John K. Wald & Hongxian Zhang, *Corruption, Governance, and Public Pension Funds* (Jan. 8, 2015) (finding that having a new state treasurer can lead to higher public pension returns in states with corrupt governments); David Hess and Gregorio Impavido, *Governance of Public Pension Funds: Lessons from Corporate Governance and International Evidence* 26–27 (World Bank Pol. Res. Working Paper No. 3110, Aug. 2003) (discussing importance of information and transparency in governance of public pension funds).

277 Maher, *supra* note 276, at 93 (citing K. Amgachtseer, *A Framework for Public Pension Fund Management* (Paper presented at the First World Bank Conference on Managing Public Pension Reserves, Sept. 20-21, 2001, Washington, D.C)).

278 Aleksander Andonov et al., *Pension Fund Board Composition and Investment Performance: Evidence from Private Equity* (March 25 2016), http://ssrn.com/abstract=2754820.

279 *See* Gang Chen et al., *The Effect of Board Composition on Public Sector Pension Funding*, 27 J. PUBLIC BUDGETING, ACCT. & FIN. MGMT. 352 (Fall 2015). See also Natalya Shnitser, *Funding Discipline for U.S Public Pension Plans: An Empirical Analysis of Institutional Design*, 100 IOWA L. REV. 663 (2015) (studying effect of institutional design on funding levels of public pensions). But see Wald & Zhang, *supra* note 276 (finding that board size and board composition have little impact on investment performance).

280 S.B 1234, Gen. Assemb. ch. 804, §§ 12, 13 (Cal. 2016). *Cf.* ERISA, 29 U.S.C. §§1104(a)(1)(A)–(B) (2012)).

281 Illinois Secure Choice Savings Program Act, 2015 Ill. Laws 098-1150 (codified as 820 ILL. COMP. STAT. 80/20 (2016)). Connecticut and Maryland law also call for diverse representation on the board. *See* An Act Creating the Connecticut Retirement Security Program, 2016 Conn. Acts 16-29 §1(b) (Reg. Sess.); Maryland Small Business Retirement Savings Program and Trust, 2016 Md. Laws ch. 323 §12–201(B).

282 For an overview of ERISA's express fiduciary provisions, see Moore, *supra* note 187, at § 6.04.

ERISA §§ 404(a)(1)(A)-(B), provides that the board, program administrator, and staff shall discharge their duties solely in the interest of the program participants (1) for the exclusive purpose of providing benefits to program participants and defraying reasonable administrative expenses, and (2) by investing with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in like capacity and familiar with those matters would use in the conduct of an enterprise of a like character with like aims.[283] Illinois,[284] Connecticut,[285] and Maryland[286] laws impose similar duties.[287]

Still, the state programs differ from private programs governed by ERISA in a couple of significant ways. First, the state programs raise sovereign immunity issues that are not present in private-sector plans.[288] Second, state law may provide for more circumscribed remedies than ERISA.[289] For example, Connecticut law authorizes the Attorney General to investigate any potential fiduciary violation and to bring suit in state court if it finds such a violation, but limits remedies for such breaches to injunctive action and does not authorize private actions.[290] ERISA's fiduciary provisions, in contrast, are enforced principally by private actions,[291] and remedies are not limited to injunctive relief.[292] Overall, it appears that the state programs provide a reasonable level of protection against mismanagement at the plan level. They do not, however, eliminate all such risk.

---

283 S.B 1234, Gen. Assemb. ch. 804, § 2(a)(1)(D)–(F) (Cal. 2016)

284 Illinois Secure Choice Savings Program Act, 2015 Ill. Laws 098-1150 (codified as 820 ILL. COMP. STAT. 80/25 (2016)).

285 An Act Creating the Connecticut Retirement Security Program, 2016 Conn. Acts 16-29 § 6 (Reg. Sess.).

286 Maryland Small Business Retirement Savings Program and Trust, 2016 Md. Laws ch. 323 §12–203(A).

287 Illinois Secure Choice Savings Program Act, 2015 Ill. Laws 098-1150 (codified as 820 ILL. COMP. STAT. 80/25 (2016)). The state laws also expressly limit the use of contributions to paying benefits, administrative expenses, and investments. *See* 21 CA. GOV'T CODE § 100004(e); 820 ILL. COMP. STAT. 80/25 (2016); 2016 Md. Laws ch. 323 §12–301(D).

288 *See* David H. Webber, *Shareholder Litigation Without Class Actions*, 57 ARIZ. L. REV. 201, 245–48 (2015) (discussing approaches states have taken to sovereign immunity claims in fiduciary litigation against public pension trustees).

289 For an overview of ERISA remedies, see Moore, *supra* note 187, at § 7.08.

290 An Act Creating the Connecticut Retirement Security Program, 2016 Conn. Acts 16-29 § 10 (Reg. Sess.).

291 *See* ERISA, 29 U.S.C. §§1132(a)(1)–(3) (2012) (authorizing participants and beneficiaries, among others, to bring suit to enforce ERISA's provisions).

292 *See id.* § 409 (imposing personal liability for breach of fiduciary duty); LaRue v. DeWolff, Boberg & Assocs., Inc., 552 U.S. 248, 250 (2008) (holding that ERISA § 502(a)(2) which provides for appropriate relief under ERISA § 409 authorizes recovery for breach of fiduciary duty that impacts value of plan assets in participant's individual account); Varity Corp. v. Howe, 516 U.S. 489, 510 (1996) (holding that "appropriate" equitable relief under ERISA § 502(a)(3) includes individual equitable relief for breach of fiduciary duty).

F. *Will Employers Shift from Voluntary Private-Sector Pension Plans with Higher Limits and Matching Contributions to State Automatic IRA Programs with Lower Limits and No Matching Contributions?*

Whether state automatic enrollment IRA programs will lead to greater total retirement savings also turns on what effect they will have on private-sector pension plans.

In theory, state automatic enrollment IRA programs may effect private-sector plans in one of three ways: (1) they may have no impact on private-sector pension plans; (2) they may encourage employers that currently do not have private-sector pension plans to establish private-sector pension plans; or (3) they may encourage employers that currently have private-sector pension plans to shift from private-sector pension plans to the new state program.

If state automatic enrollment IRA programs have no effect on private-sector pension plans, and the state programs cause workers who are not currently covered by an employer-sponsored pension plan to contribute to the state program, then the state programs are obviously likely to result in increased retirement savings.[293] In addition, if the state programs encourage employers who do not currently have private-sector pension plans to establish private plans, then total retirement savings are likely to increase. On the other hand, if the state programs encourage employers that currently have private-sector pension plans to shift from private plans to state automatic enrollment IRA programs, the state programs may result in overall lower retirement savings.

Shifting from private-sector pension plans to state automatic enrollment IRAs may result in reduced overall retirement savings for two reasons. First, IRAs are subject to lower contribution limits than private-sector plans. Section 219(b)(5) of the Internal Revenue Code prohibits an individual from contributing more than $5,500[294] to an IRA in 2016.[295] On the other hand, section 402(g) of the Internal Revenue Code permits an individual to contribute up to $18,000 to a 401(k) plan in 2016.[296] Second, employers may contribute to 401(k) and other qualified plans but not to state automatic enrollment IRAs. If an employer elects to make matching or nonelective contributions to a 401(k) plan and/or establish another qualified plan, a total of

---

293 Currently, workers without an employer-sponsored plan may contribute to an IRA. In fact, however, few workers currently do so. *See, e.g.*, *401(k) and IRAs Fact Sheet*, EMP. BENEFIT RESEARCH INST., https://www.ebri.org/surveys/rcs/1997/index.cfm?fa=401k (last visited Aug. 14, 2016).

294 If an individual's compensation is less than $5,500, the limit is capped at the individual's compensation. I.R.C. § 219(b)(1)(B) (2015).

295 *See* Press Release, IRS, IRS Announces 2016 Pension Plan Limitations; 401(k) Contribution Limit Remains Unchanged at $18,000 for 2016, IR 2015-228 (Oct. 21, 2015) [hereinafter IRS Press Release], (announcing 2016 limits). An individual age 50 or over may make an additional "catch-up contribution" of up $1,000 to an IRA. I.R.C. § 219(b)(5)(B).

296 *See* IRS Press Release, *supra* note 295.

$53,000, including the employee's elective contributions to the 401(k) plan,[297] may be contributed to a defined contribution plan[298] on behalf of the employee[299] in 2016.[300] In contrast, the new safe harbor prohibits employer contributions to state automatic enrollment IRAs.

What effect state automatic enrollment IRAs will have on private- sector pension plans is subject to considerable debate. Mark Iwry and David John, the architects of the original automatic enrollment IRA program, contend that automatic enrollment IRAs will encourage employers to establish qualified private-sector plans in order to take advantage of the higher contribution ceilings.[301] Similarly, in explaining the reason for President Obama's proposed federal automatic IRA program, the Treasury Department has noted that "requiring automatic IRAs could encourage employers to adopt an employer plan, thereby permitting much greater tax-favored employee contributions than an IRA and offer the option of employer contributions."[302]

On the other hand, private-sector service providers, investment managers, and organizations representing their respective interests argue that state automatic enrollment IRAs could cause employers to shift from private-sector plans to state programs.[303] Standard Retirement Services, Inc., an Oregon-

---

297 *See* I.R.C. § 415(c)(2)(B) (defining annual additions to which I.R.C. § 415(c) limit applies to include employee contributions).

298 In addition, an employer may also establish a defined benefit plan. The annual benefit that a participant may receive under a defined benefit plan is the lesser of $160,000, adjusted for increases in the cost of living, or 100 percent of the participant's average compensation for the 3 consecutive years during which the participant had his or her highest compensation. *Id.* § 1.415(b)-(1)(a). The 2016 limit, adjusted for increases in the cost of living, is $210,000. IRS Press Release, *supra* note 295.

299 I.R.C. § 415(c)(1)(A). Just as contributions to IRAs cannot exceed the individual's compensation if the individual's compensation is less than the I.R.C. § 219 limit, total contributions to a defined contribution plan cannot exceed an individual's compensation if the individual's compensation is less than the I.R.C. § 415(c)(1)(A) limit. I.R.C. § 415(c)(1)(B).

300 *See* IRS Press Release, *supra* note 295.

301 IWRY & JOHN, *supra* note 201, at 8 (stating that the "automatic IRA is designed with a modest contribution limit and no employer contributions to induce employers to graduate to a 401(k) plan or SIMPLE plan").

302 DEP'T OF THE TREASURY, GENERAL EXPLANATIONS OF THE ADMINISTRATIONS' FISCAL YEAR 2017 REVENUE PROPOSALS 135 (2016). The fact that the Treasury Department's position is consistent with that of Mark Iwry and David John is hardly surprising since Mark Iwry was the Treasury Department's senior adviser and deputy assistant secretary for retirement and health policy at the time the budget was introduced.

303 In comment letters to the Department of Labor, this argument was made by The Manhattan Institute for Policy Research, a conservative free market think tank, the SPARK Institute, an organization representing the interests of service providers and investment managers, the Financial Services Roundtable, an organization representing the largest integrated financial services companies, the Securities Industry and Financial Markets Association, the "voice of the U.S. securities industry," and the Defined Contribution Institutional Investment Association. Bleier, *supra* note 131, at 1 n.1, 3; Defined Contribution Inst. Inv. Assoc., *supra* note 133, at 6; Rouse, *supra* note 133, at 2, 7; Richard Foster, Fin. Svcs. Roundtable, Comment Letter on Proposed Rule regarding Saving Arrangements Established by States for Non-Governmental Employees (Jan. 19, 2016) (RIN 1210-AB71, Comment #61), at 7,

based retirement plan services provider, contends that the availability of state automatic enrollment IRA programs could encourage employers to terminate private pension plans in favor of state run plans in order to reduce their responsibility, liability, and costs.[304] BlackRock, "a leading manager of pension assets," asserts that

> [g]iven the daunting administrative burdens and the fiduciary risk associated with ERISA and Code compliance, it is only natural to expect employers, in particular small employers, to embrace a less cumbersome state program as an alternative, even if the program's savings rates are lower and its investment alternatives are more limited.[305]

Ultimately, what effect, if any, state automatic enrollment IRA programs would likely have on employers' willingness to offer private pension plans is an empirical question to which there is no ready answer. As Mark Iwry and David John argue, state programs could encourage employers that do not currently have plans to establish private-sector plans with higher limits once the employers become accustomed to offering plans.[306] But, as those with vested interests in the current system argue, they could cause employers to terminate private-sector plans to avoid regulation under ERISA.

G. *Will State Automatic Enrollment IRA Programs be Preempted by ERISA?*

Section 514(a) of ERISA preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan."[307] Thus, preemption under ERISA § 514(a) applies if there is (1) a "state law" that (2) "relates to" (3) an "employee benefit plan."[308]

In introducing the proposed safe harbor for state automatic enrollment IRAs, the Department of Labor stated, "the objective of the proposed safe harbor is to diminish the chances that, if the issue were ultimately litigated, the courts would conclude that state payroll deduction savings arrangements are preempted by ERISA."[309] The Department of Labor thus recognized that although it may provide guidance on the question, it is ultimately for the

---

https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB71/00061.pdf; The Manhattan Inst. for Policy Research, *supra* note 271, at 2.

304 Lohmann, *supra* note 131, at 4.

305 Barbara Novick, BlackRock, Inc., Comment Letter on Proposed Rule regarding Saving Arrangements Established by States for Non-Governmental Employees (Jan. 19, 2016) (RIN 1210-AB71, Comment #32), at 3, http://www.dol.gov/ebsa/regs/cmt-1210-AB71.html.

306 IWRY & JOHN, THE RET. SEC. PROJECT, *supra* note 201, at 26-27.

307 ERISA, 29 U.S.C. § 1144(a) (2012).

308 *See id.*; 29 U.S.C. §§ 1003(a), (b) (2012).

309 Savings Arrangements Established by States for Non-Governmental Employees, 80 Fed. Reg. 72,006, 72,009 (Nov. 18, 2015).

courts to decide whether state automatic enrollment IRA programs are preempted by ERISA.[310]

Opponents of state automatic enrollment IRA programs contended that the proposed safe harbor contradicted Congressional intent behind ERISA and would create complexity in a system that ERISA preemption is intended to protect against.[311] The Department of Labor did not address this argument in its preamble to the final regulation. It, however, implicitly rejected the argument by retaining a safe harbor in the final regulation. Although the Department of Labor has made it clear that in its view, state automatic enrollment IRA programs that satisfy the terms of the safe harbor are not employee benefit plans for purposes of ERISA, the question remains whether ERISA preempts state laws that mandate automatic enrollment IRAs even if the laws satisfy the requirements of the safe harbor.

1. State Law" Requirement

Section 514(c) of ERISA defines the terms "State" and "State law" broadly for purposes of preemption. Specifically, it defines "State Law" to include "all laws, decisions, rules, regulations, or other State action having the effect of law, of any State,"[312] and "State" to include "a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by [ERISA]."[313]

There is little doubt that a state law creating an automatic enrollment IRA program qualifies as "State Law" for purposes of ERISA preemption.

2. Employee Benefit Plan" Requirement

The Department of Labor's final regulation provides that those state automatic enrollment IRA programs that satisfy the requirements of the safe harbor are not "employee benefit plans" for purposes of ERISA. The Secretary of Labor has broad authority to promulgate regulations that he finds are

---

310 In the preamble to the final regulation, the Department repeated, "By articulating the types of state payroll deduction savings programs that would be exempt from ERISA, the proposal sought to create a safe harbor for the states and employers and thus remove uncertainty regarding Title I coverage of such state payroll deduction savings programs and the IRAs established and maintained pursuant to them. In the Department's view, courts would be less likely to find that statutes creating state programs in compliance with the proposed safe harbor are preempted by ERISA." Savings Arrangements Established by States for Non-Governmental Employees, 81 Fed. Reg. 59,464, 59,466 (Aug. 30, 2016).

311 *See, e.g.*, Johnson & Wong, *supra* note 271.

312 ERISA, 29 U.S.C. § 1144(c)(1) (2012).

313 *Id.* § 514(c)(2).

"necessary or appropriate" to carry out the provisions of title I of ERISA.[314] The Secretary's power includes the authority to promulgate regulations that define what constitutes a "plan" within the meaning of ERISA.[315] The Secretary's reasonable interpretation of what constitutes an ERISA-covered "plan" is entitled to *Chevron*[316] deference upon judicial review.[317] Thus, a court is likely to defer to the Department of Labor's interpretation that state automatic enrollment IRAs that satisfy the requirements of the new safe harbor are not employee benefit plans for purposes of ERISA.[318]

The state automatic enrollment IRAs, however, are not the only potential employee benefit plans at issue. The final regulation provides that "[a] State savings program will not fail to satisfy the [requirements of the safe harbor] merely because the program . . . is directed toward those employers that do not offer some other workplace savings arrangement."[319] The regulation is careful not to expressly refer to employee benefit plans in this provision. Many "workplace savings arrangements," however, are employee benefit plans for purposes of ERISA.[320] For example, 401(k) plans, the most common workplace savings arrangements, are employee benefit plans for purposes of ERISA.[321]

To date, each of the state automatic enrollment IRA programs with employer mandates excludes from the mandate employers that sponsor pension plans.[322] For example, the California program applies to "eligible employers

---

314 *Id.* § 505.

315 *See* Massachusetts v. Morash, 490 U.S. 107, 116–17 (1989).

316 Chevron U.S.A. Inc. v. Nat. Res. Defense Council, Inc., 467 U.S. 837, 843 (1984).

317 *See Morash*, 490 U.S. at 116.

318 *See, e.g.*, William Nelson, *Allowing States to Help Workers Save for Retirement—Department of Labor's Proposed Rulemaking that Provides a Safe Harbor for State Savings Programs under ERISA*, 18 MARQ. BEN. & SOC. WELFARE L. REV. (forthcoming Jan. 2017) (Manuscript at 29–33), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2737068 (discussing agency deference before and after *Chevron*).

319 29 C.F.R. § 2510(h)(2)(i) (2016).

320 25 C.F.R. § 2510.3-2(2)(1) (2007). On the other hand, not all "workplace savings arrangements" are employee benefit plans for purposes of ERISA. Specifically, payroll deduction IRAs are not employee benefit plans for purposes of ERISA if they meet the requirements of the Department of Labor's regulatory safe harbor for IRAs. *Id.* § 2510.3-2(d).

321 *Cf.* Fifth Third Bancorp. v. Dudenhoeffer, 134 S. Ct. 2459, 2468 (2014) (applying ERISA's fiduciary provisions to 401(k) plan).

322 *See* Savings Arrangements Established by States for Non-Governmental Employees, 81 Fed. Reg. 59,464, 59,468 (Aug. 30, 2016)) (stating that "[t]he Department . . . understands that the relevant laws enacted thus far by the states have been directed toward those employers that do not offer any workplace savings arrangement, rather than focusing on employees who are not eligible for such programs.").

that do not offer an employer-sponsored retirement plan or automatic enrollment payroll deduction IRA"[323] The Illinois mandate does not apply to employers that have "offered a qualified retirement plan" in the preceding two years.[324]

Although ERISA's definition of employee benefit plan is circular and has given rise to litigation,[325] there is little doubt that "employer-sponsored retirement plans" as referred to in the California statute and "qualified retirement plans" as defined in the Illinois statute are "employee benefit plans" for purposes of ERISA preemption.[326] Thus, the state automatic enrollment IRA programs may be preempted if the state laws establishing the programs "relate to" these employee benefit plans.

3. Relates to" Requirement

Whether a state law "relates to" an employee benefit plan "is at the heart of the ERISA preemption inquiry."[327] Yet determining whether a state law impermissibly "relates to" an employee benefit plan is fraught with uncertainty.[328] Although the Supreme Court has focused on the term "relates to" in eleven separate cases,[329] the meaning of the term remains "murky."[330]

---

323 CAL. GOV'T CODE § 100032(d) (2013).

324 820 ILL. COMP. STAT. 80/5 (2016) (defining "Employer").

325 For a discussion of the meaning of the term "employee benefit plan" under ERISA and the Supreme Court cases addressing that term, see MOORE, UNDERSTANDING EMPLOYEE BENEFITS LAW, *supra* note 187, at 323–26.

326 *See* discussion *supra* Part II regarding how state retirement plans are "employee benefit plans."

327 David Gregory, *The Scope of ERISA Preemption of State Law: A Study in Effective Federalism*, 48 U. PITT. L. REV. 427, 457 (1987).

328 *See* UNUM Life Ins. Co. v. Ward, 526 U.S. 358, 363 (1999) (stating that the key words "relate to" [and "regulates insurance"] "once again require interpretation for their meaning is not 'plain'"); Peter D. Jacobson, *The Role of ERISA Preemption in Health Reform: Opportunities and Limits*, 37 J.L. MED. & ETHICS (Supp. 2) 88, 91 (2009) (stating that "[f]inding coherence from the myriad ERISA opinions is quite difficult. At best, ERISA doctrine is neither predictable nor stable; it is, rather, largely muddled and most opinions are impenetrable.")

329 *See* Gobeille v. Liberty Mut. Ins. Co., 136 S. Ct. 936, 943 (2016); Egelhoff v. Egelhoff, 532 U.S. 141, 147 (2001); UNUM Life Ins. Co. of Am. v. Ward, 526 U.S. 358, 367 (1999); De Buono v. NYSA-ILA Med. & Clinical Servs. Fund, 520 U.S. 806, 815 (1997); Cal. Div. of Labor Standards Enf't v. Dillingham Constr., N.A., Inc., 519 U.S. 316, 324–25 (1997); N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 668 (1995); District of Columbia v. Greater Wash. Bd. of Trade, 506 U.S. 125, 132 (1992); Ingersoll Rand Co. v. McClendon, 498 U.S. 133, 140 (1990); Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825, 830 (1988); Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96 (1983); Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 524 (1981). The Court has also applied the "relate to" language in cases focusing on the saving and/or deemer clause. *See, e.g.*, FMC Corp. v. Holliday, 498 U.S. 52, 58–61 (1990).

330 *Cf.* Amy B. Monahan, *Pay or Play Laws, ERISA Preemption, and Potential Lessons from Massachusetts*, 55 U. KAN. L. REV. 1203, 1206 (2007) (stating that despite the fact that the Supreme Court

a. *Supreme Court's Interpretation of "Relates to" Requirement*

Initially, the Supreme Court interpreted the term "relates to" quite broadly. Indeed, in *Shaw v. Delta Air Lines,*[331] the Court announced that Congress used the words "relates to" in section 514(a) of ERISA "in their broad sense."[332] According to the Court, "[a] law 'relates to' an employee benefit plan, in the normal sense of the phrase, if has a connection with or reference to such a plan."[333]

After more than a decade, the Court narrowed the reach of the term "relates to" in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*[334] In *Travelers*, the Court recognized that its "prior attempt to construe the phrase 'relate to' [did] not give [the Court] much help drawing the line" in determining whether a state law "relates to" an employee benefit plan for purposes of preemption under ERISA § 514(a).[335] Thus, the Court declared that it "simply must go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive."[336]

Although the Court cut back on the reach of the term in *Travelers*, the Court has continued to use the *Shaw* definition of "relates to" as a two-prong test for determining whether a state law "relates to" an employee benefit plan. Under this two-prong test, a state law relates to an employee benefit plan if it has (1) a reference to or (2) a connection with an employee benefit plan.[337]

The "reference to" prong is relatively easy to apply. As the Supreme Court explained in its most recent preemption decision, *Gobeille v. Liberty Mutual Insurance Company*,[338] a state law has a "reference to" an employee benefit plan if the state law "acts immediately and exclusively upon ERISA

---

has ruled on ERISA preemption cases twenty times in the last thirty years, ERISA preemption jurisprudence remains "murky.").

331 463 U.S. 85 (1983).

332 *Id.* at 96, 98.

333 *Id.* at 97.

334 514 U.S. 645 (1995).

335 *Id.* at 655, 662.

336 *Id.* at 656.

337 *Id.*

338 136 S. Ct. 936 (2016). In *Gobeille*, the Court held that ERISA preempted a Vermont health care information reporting law because the law "compels plans to report detailed information about claims and plan members, [and thus] both intrudes upon 'a central matter of plan administration' and 'interferes with nationally uniform plan administration.'" *Id.* at 945 (quoting Egelhoff v. Egelhoff, 532 U.S. 141, 148 (2001)). The Court declared that the plan reporting, disclosure, and, by implication, recordkeeping, are fundamental components of ERISA's regulation of plan administration, and the Vermont law had to be preempted in order "to prevent the states from imposing novel, inconsistent, and burdensome reporting requirements." *Id.*

plans . . . or . . . the existence of ERISA plans is essential to the law's operation."[339]

The "connection with" prong, on the other hand, is more difficult to apply.

The Supreme Court has considered whether a state law had an impermissible "connection with" an employee benefit plan in four cases since 1995. *Travelers*, the first, bellwether case, involved a preemption challenge to a New York statute that required hospitals to collect surcharges from patients covered by commercial insurers but not from patients insured by Blue Cross/Blue Shield and subjected certain HMOs to surcharges that varied with the number of Medicaid patients the HMOs enrolled.[340]

The Court declared that it should begin its preemption analysis in this ERISA case, like in other areas of the law, with a presumption against preemption.[341] It announced that it must look "to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive" in applying the "connection with" prong.[342] After briefly reviewing the preemption clause's legislative history, the Court stated, "The basic thrust of the pre-emption clause, then, was to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans."[343]

The Court distinguished the surcharge law from state laws that mandate employee benefit structures or their administration.[344] The Court recognized that the surcharges would make Blue Cross/Blue Shield more attractive to ERISA plans.[345] The Court, however, described their effect as "an indirect economic influence" that "does not bind plan administrators to any particular choice and thus function as a regulation of an ERISA plan itself."[346] According to the Court, "the indirect influence of the surcharges [does not] preclude uniform administrative practice or the provision of a uniform interstate benefit package if a plan wishes to provide one. It simply bears on the cost of benefits and the relative costs of competing insurance to provide them."[347]

The Court concluded, "cost uniformity was almost certainly not an object of pre-emption, just as laws with only an indirect economic effect on the relative costs of various health insurance packages in a given State are a far

---

339 *Gobeille*, 136 S. Ct. at 943 (quoting Cal. Div. of Labor Standards Enf't v. Dillingham Constr., N.A., Inc., 519 U.S. 316, 325 (1997)).

340 N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 649 (1995).

341 *Id.* at 654–55.

342 *Id.* at 656.

343 *Id.* at 657.

344 *Id.* at 657–58.

345 *Id.* at 659.

346 N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 659 (1995).

347 *Id.* at 660.

cry from those 'conflicting directives' from which Congress meant to insulate ERISA plans."[348] Thus, the Court held that the surcharges did not have an impermissible "connection with" employee benefit plans and were not preempted by ERISA.

Two years later in *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc*,[349] the Court reaffirmed that in applying the "connection with" prong, it "look[s] both to 'the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive,' as well as to the nature of the effect of the state law on ERISA plans."[350]

In *Dillingham*, a contractor and subcontractor challenged California's prevailing wage law that required payment of prevailing wages to employees in non-state-approved apprenticeship programs, but permitted the payment of lower apprenticeship wages to employees participating in state-approved apprenticeship programs.[351] The Court first noted that states have long regulated apprenticeship standards and wages paid for state public works.[352] The Court then found that wages for state public works and standards "to be applied to apprenticeship programs are . . . quite remote from the areas with which ERISA is expressly concerned—'reporting, disclosure, fiduciary responsibility, and the like.'"[353] The Court found that the apprenticeship portion of the statute, like the surcharge requirement in *Travelers*, did not bind ERISA plans to anything.[354] Like the surcharges in *Travelers*, "[t]he prevailing wage statute alters the incentives, but does not dictate the choices, facing ERISA plans."[355] Thus, the statute did not have a "connection with" employee benefit plans.[356]

---

348 *Id.* at 662.

349 519 U.S. 316 (1997).

350 *Id.* at 325 (quoting *Travelers,* 514 U.S. at 658–59) (citation omitted).

351 Cal. Div. of Labor Standards Enf't v. Dillingham Constr., N.A., Inc., 519 U.S. 316, 319 (1997).

352 *Id.* at 330.

353 *Id.* at 331 (quoting *Travelers*, 514 U.S. at 661).

354 *Id.* at 332.

355 *Id.* at 334.

356 The Court interpreted ERISA § 514(a)'s "relates to" prong in two additional cases decided after *Dillingham* but before *Egelhoff*: *De Buono* and *UNUM Life Ins. Co.* In neither case did the Court expressly apply the two-prong, "reference to" and "connection with" test to determine whether the state law "related to" an employee benefit plan. In the first case, *De Buono,* the Court expressly reaffirmed *Dillingham* and held that a New York state tax on gross receipts of health care facilities operated by ERISA funds was not preempted. The Court held that the statute was "one of 'myriad state laws' of general applicability that impose some burdens on the administration of ERISA plans but nevertheless do not 'relate to' them within the meaning of the governing statute." De Buono v. NYSA-ILA Med & Clinical Servs. Fund, 520 U.S. 806, 815 (1997) (citing *Travelers*, 514 U.S. at 668; *Dillingham*, 519 U.S. at 333–34). In the second case, *UNUM Life Ins. Co.*, the Court held that a state common law agency rule providing that "'the employer is the agent of the insurer in performing the duties of administering group insurance policies' . . . 'relate[d] to' employee benefit plans" and thus was preempted because it "would have a marked effect on plan administration." UNUM Life Ins. Co. v. Ward, 526 U.S. 358, 378–79 (1999) (citing *Travelers*, 415 U.S.

In *Egelhoff v. Egelhoff*,[357] the Supreme Court held that ERISA preempted a state statute that, upon divorce, automatically revoked the designation of a spouse as a beneficiary of nonprobate assets.[358] The Court first found that the statute implicated "an area of core ERISA concern" because it regulated "the payment of benefits, a central matter of plan administration."[359] The Court then found that it interfered with one of ERISA's principal goals: nationally uniform administration.[360] "Plan administrators cannot make payments simply by identifying the beneficiary specified by the plan documents. Instead, they must familiarize themselves with state statutes so that they can determine whether the named beneficiary's status has been 'revoked' by operation of law."[361]

Finally, in *Gobeille* the Supreme Court held that ERISA preempted a Vermont health care information reporting law under the "connection with" prohibition because the law "compels plans to report detailed information about claims and plan members, [and thus] both intrudes upon 'a central matter of plan administration' and 'interferes with nationally uniform plan administration.'"[362] The Court declared that plan reporting, disclosure, and, by implication, recordkeeping, are fundamental components of ERISA's regulation of plan administration, thus the Vermont law had to be preempted in order "to prevent the states from imposing novel, inconsistent, and burdensome reporting requirements."[363]

---

at 657–58). Such a rule "would 'forc[e] the employer, as plan administrator, to assume a role, with attendant legal duties and consequences, that it has not undertaken voluntarily'; it would affect not merely the plan's bookkeeping obligations regarding to whom benefits checks must be sent, but [would] also regulat[e] the basic services that a plan may or must provide to its participants and beneficiaries." *Id.* (internal quotations omitted).

357 532 U.S. 141 (2001).

358 *Id.* at 143. Specifically, the statute provided:

> If a marriage is dissolved or invalidated, a provision made prior to that event that relates to the payment or transfer at death of the decedent's interest in a nonprobate asset in favor of or granting an interest or power to the decedent's former spouse is revoked. A provision affected by this section must be interpreted, and the nonprobate asset affected passes, as if the former spouse failed to survive the decedent, having died at the time of entry of the decree of dissolution or declaration of invalidity. *Id.* at 144 (quoting WASH. REV. CODE. § 11.07.010(2)(a) (1994)).

359 *Id.* at 147–48.

360 *Id.* at 148.

361 *Id.* at 148–149 (footnote omitted).

362 *Gobeille*, 136 S. Ct. at 945 (quoting Egelhoff v. Egelhoff, 532 U.S. 141, 148 (2001)).

363 *Id.* at 945.

b. *State Law that Exempts Employers that Maintain Any Employee Benefit Plan*

A state statute that expressly provides that an employer is exempt from its mandated automatic enrollment IRA program if the employer maintains an employee benefit plan should not fail under the first "reference to" prong because such a law would not "act[] immediately and exclusively upon ERISA plans," and "the existence of ERISA plans [would not] be essential to the law's operation."[364] In fact, the existence of an ERISA plan would prevent the law from applying to the employer.[365]

Whether a state statute that expressly exempts an employer that maintains any employee benefit plan fails under the second, "connection with," prong proves a much more difficult question. Critics of state automatic enrollment IRA programs contend that such laws would frustrate the purpose of ERISA preemption—ensuring that plan sponsors are subject to a uniform body of benefit law.

The critics are absolutely right in pointing to the purposes of ERISA preemption in determining whether ERISA preemption should apply. Moreover, the critics are correct that uniformity is a critical value underlying ERISA preemption. Indeed, the Court stated in *Travelers* that the basic purpose of ERISA preemption is "to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans."[366]

On the other hand, a strong argument can be made that, where a state statute expressly provides that an employer is exempt from a state mandated automatic enrollment IRA program if the employer maintains an employee benefit plan, such statute does not interfere with nationally uniform administration of employee benefit plans. As discussed above, as long as the state program qualifies under the safe harbor, the state program itself is not an employee benefit plan. Thus, the fact that different states may choose to have different programs does not raise concerns about the nationally uniform administration of *employee benefit plans* because the state programs themselves are not employee benefit plans for purposes of ERISA. The question is what impact the state law would have on private employee benefits plans, not the programs created by the state.

---

364 *Id.* at 943 (quoting Cal. Div. of Labor Standards Enf't v. Dillingham Constr., N.A., Inc., 519 U.S. 316, 325 (1997)).

365 Professor Zelinsky argues that a state statute might fail under this requirement "since [the] mandate refers to the employers' retirement plans by exempting from the mandate employers sponsoring retirement plans for their respective workforces." Edward A. Zelinsky, *California Dreaming: California Secure Choice Retirement Savings Act*, 20 CONN. INS. L.J. 547, 583–84 (2014). *Gobeille* and *Dillingham*, however, make clear that "reference to" means more than simply "referring to" an employee benefit plan. *Gobeille*, 136 S. Ct. at 943.

366 N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 657 (1995).

If a state law mandating automatic enrollment IRAs exempts employers that offer employee benefit plans, the state law might encourage employers to adopt ERISA plans in order to avoid the state mandate.[367] Thus, the state law may clearly have an impact on the number of plans in the state. It would not, however, appear to have an impact on the terms of employee benefit plans. A strong argument can be made that a state law that simply encourages the formation of employee benefit plans only has an indirect influence on employee benefit plans, which is permissible under the reasoning of *Travelers* and *Dillingham*. So long as a state law does not have an impact on the terms of employee benefit plans, it is likely the case that such a law would not impermissibly "interfere with nationally uniform plan administration."[368]

c. *State Law that Only Exempts Employers that Maintain Employee Benefit Plans Meeting Certain Minimum Requirements*

Yet, if a state law were not to exempt all employers that sponsor employee benefit plans, but instead were to apply to employers with employee benefit plans that do not meet certain minimum requirements, such as minimum default contribution rates or minimum coverage requirements, there is a strong argument that such a state law would be preempted by ERISA.

To illustrate, when originally introduced, a Connecticut bill did not exempt employers with pension plans if the employer's plan did not cover employees who were reasonably expected to complete one thousand hours of service in a calendar year or who had completed at least five hundred hours of service for the employer in the past two consecutive years.[369] Such a provision may very well encourage employers to amend the terms of their plan to avoid the state mandate. Specifically, an employer might amend the terms of its plan to ensure that its plan covered all workers required to be covered in order to avoid the state mandate, that is, all workers who are reasonably expected to complete one thousand hours of service in a calendar year or who had completed at least five hundred hours of service for the employer in the past two consecutive years. More importantly, if different states were to impose mandates with different minimum requirements, such as a 3 percent minimum default contribution rate in one state and a 6 percent minimum default contribution rate in another state, the state laws could "impermissibly

---

367 *Cf.* Wagner Law Group, *The Impact of "Next Generation" IRAs: myRA Accounts, EZ IRA and State-Mandated IRAs* 8 (April 2016) (stating that "[a]s a result of these types of state mandates, affected employers may be more receptive to the idea of establishing their own retirement plan or payroll IRA program" and counseling employers to "consult their legal counsel to determine whether and when they might become subject to a state mandate, and to confirm how the mandate may be avoided by setting up their own retirement plan or program").

368 Egelhoff v. Egelhoff, 532 U.S. 141, 142 (2001).

369 *See* discussion *supra* Part III.B.

interfere[]" with a multi-state employer's ability to sponsor and administer a uniform plan and thus be preempted under ERISA.[370]

The proposed safe harbor expressly provided that programs, such as the one initially proposed in Connecticut, could satisfy the safe harbor. Specifically, it provided that "[a] State savings program will not fail to satisfy the [requirements of the safe harbor] merely because the program . . . is directed toward those employees who are not already eligible for some other workplace savings arrangement."[371] Whether a program like the Connecticut program, as initially introduced, would satisfy the requirements of the final safe harbor is not clear. The final regulation amended the proposed safe harbor to provide that "[a] State savings program will not fail to satisfy the [requirements of the safe harbor] merely because the program . . . is directed toward those employers that do not offer some other workplace savings arrangement."[372] In the preamble to the final regulation, the Department of Labor explained that it amended the regulatory language in response to concerns raised by commenters that the proposed safe harbor's language could "encourage states to focus on whether particular employees of an employer are eligible to participate in a workplace savings arrangement."[373] The commenters were concerned that this could be overly burdensome on employers and cause employers to have to keep track of individual employees as they switched between employer-sponsored plans and state programs.[374] In addition, the commenters asserted that burden could provide an incentive for employers not to maintain an employee benefit plan.[375] Finding merit in the comments, the Department concluded that the amended "language will reduce

---

370 *See Golden Gate,* Transcript of Oral Argument, Golden Gate Rest. Ass'n v. City San Francisco, 546 F.3d 639 (9th Cir. 2008) (No. 07–17370), 2008 WL 3891805 (oral argument of Curtis A. Cole on behalf of Respondent Golden Gate Restaurant Association). Similar arguments were made in a number of comment letters submitted in response to the Department of Labor's proposed regulation. *See, e.g.*, Fredrik Axsater, Street State Global Advisors, Comment Letter on Proposed Rule regarding Saving Arrangements Established by States for Non-Governmental Employees (Jan. 19, 2016) (RIN 1210-AB71, Comment #26), https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB71/00028.pdf; Blass, *supra* note 131, at 1–2; Jan Jacobson, Am. Benefits Council, Comment Letter on Proposed Rule regarding Saving Arrangements Established by States for Non-Governmental Employees (Jan. 19, 2016) (RIN 1210-AB71, Comment #31), at 2, https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB71/00031.pdf; Edmund F. Murphy, III, Empower Retirement, Comment Letter on Proposed Rule regarding Saving Arrangements Established by States for Non-Governmental Employees (Jan. 13, 2016) (RIN 1210-AB71, Comment #16), https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB71/00018.pdf.

371 Savings Arrangements Established by States for Non-Governmental Employees, 80 Fed. Reg. 72,006, 72,009 (Nov. 18, 2015) (to be codified at 25 C.F.R. § 2510.3-2(h)(2)(i)).

372 Savings Arrangements Established by States for Non-Governmental Employees, 81 Fed. Reg. 59,464, 59,477 (Aug. 30, 2016) (to be codified at 29 C.F.R. pt. 2510.3-2(h)(2)(i)).

373 *Id.* at 59,468.

374 *Id.*

375 *Id.*

employer involvement in determining employee eligibility for the state program, and it accurately reflects current state laws."[376]

The Department's amendment to the proposed safe harbor clearly reflects its view that state automatic enrollment IRA programs exempting all employers that offer an employee benefit plan are superior to programs only exempting employers that offer employee benefit plans meeting certain requirements. Nevertheless, the final regulation does not expressly address whether programs that only exempt employers with certain employee benefit plans could still fall within the safe harbor. Nor does it expressly address whether such programs would be preempted by ERISA.[377] The initial position taken by The Department of Labor in *Golden Gate Restaurant Association v. City and County of San Francisco*,[378] however, suggests that such programs would be preempted by ERISA.

In *Golden Gate*, the Ninth Circuit held that a San Francisco health care pay-or-play mandate was not preempted by ERISA.[379] In that case, a San Francisco ordinance required covered employers to spend a specified amount of "health care expenditures to or on behalf of" certain employees.[380] Covered employers were permitted to satisfy the requirement by spending a defined amount on health care for their employees through their own ERISA-covered plans or by paying a required amount to the city.[381] Payments made to the city did not go into a general fund; instead, they were to be used either to fund membership in the city's Health Access Program for uninsured San Francisco residents or to establish and maintain medical reimbursement accounts for covered employees.[382] The Ninth Circuit recognized that an employer might be influenced by the San Francisco ordinance to adopt or change an ERISA-governed plan because the employer might prefer to make a payment to its own plan rather than making a payment to the city.[383] The court nevertheless found such an indirect influence was entirely permissible under *Travelers*.[384]

The court distinguished the San Francisco ordinance from a Maryland pay-or-play mandate that the Fourth Circuit held to be preempted in *Retail Industry Leaders Association v. Fielder*.[385] The Maryland statute required employers with ten thousand or more employees to spend at least 8 percent

---

376 *Id.*

377 The preamble to the final regulation notes that this provision "is not a requirement or condition of the safe harbor but is only an example of a feature that states may incorporate when designing their automatic enrollment IRA programs." *Id.*

378 546 F.3d 639 (9th Cir. 2008).

379 *Id.* at 661.

380 *Id.* at 643 (quoting S.F. Admin. Code § 14.3(a)).

381 *Id.* at 644–45.

382 *Id.*

383 *Id.* at 656.

384 *Golden Gate*, 546 F.3d at 656 (citing New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co., 514 U.S. 645 (1995).

385 *Id.* at 659 (citing Retail Indus. Leaders Ass'n v. Fielder, 475 F.3d 180 (4th Cir. 2007)).

of their total payroll on employee health insurance or to pay the difference between their actual spending and the 8 percent floor to the state.[386] Unlike the San Francisco ordinance, the Maryland law did not impose any restrictions on how the state might spend the funds. Thus, employers who paid the state rather than providing health care benefits to their employees received no benefit from paying the state. The Fourth Circuit found that the only rational choice employers had under the Maryland Act was to structure their employee benefit plans so as to ensure that they spent at least 8 percent of payroll on health care costs,[387] and because the statute effectively required that employers structure their employee health plans to provide a certain level of benefits, the statute had an obvious "connection with" employee benefit plans and was preempted by ERISA.[388]

The Ninth Circuit in *Golden Gate* reasoned that because "the San Francisco Ordinance provide[d] tangible benefits to employees when their employers [chose] to pay the City rather than to establish or alter ERISA plans,"[389] the San Francisco ordinance was distinguishable from the Maryland statute. Unlike employers in Maryland, San Francisco employers had a meaningful alternative to creating or amending their ERISA plans.[390] The Ninth Circuit held that because the San Francisco ordinance did not compel employees to establish or amend their ERISA plans the ordinance was not preempted by ERISA.

The Department of Labor filed an amicus brief in *Golden Gate* arguing that the San Francisco ordinance was preempted under ERISA. The Department of Labor contended that the San Francisco ordinance was preempted for two separate reasons: (1) employers cannot comply with the ordinance without establishing or maintaining an ERISA plan; and (2) the ordinance impermissibly interferes with employers' ability to sponsor and administer uniform plans.[391]

With respect to the first argument, the Department of Labor argued that, to the extent that employers choose to comply with the San Francisco ordinance by contributing money to the city, the ordinance requires employers to enter into an ongoing relationship with the city which constitutes an employee benefit plan established and maintained by an employer under ERISA.[392] With respect to the second argument, the Department of Labor argued that the law impermissibly interfered with employers' ability to sponsor

386 *Retail Indus. Leaders Ass'n*, 475 F.3d at 183.

387 *Id.* at 193.

388 *Id.* at 193–94. The Eastern District of New York reached a similar conclusion with respect to the Suffolk County Fair Share for Health Care Act, which was similar to the Maryland law at issue in *Fielder*. *See* Retail Industry Leaders Ass'n v. Suffolk County, 497 F. Supp. 2d 403, 416 (E.D.N.Y. 2007).

389 *Golden Gate*, 546 F.3d at 660.

390 *Id.* at 660–61.

391 *See* Transcript of *Golden Gate* Oral Argument, *supra* note 370 (oral argument of Edward D. Sieger as Amicus Curiae).

392 *Id.*

and administer uniform plans because other states could adopt mandates with different requirements, such as requirements that plans cover slightly different employees or provide different levels of benefits. The Department declared, "It would be a nightmare for an employer to say, 'I want a uniform plan[] for all my employees and yet I still have to comply with all these requirements.'"[393]

The Department of Labor's new safe harbor—for those savings arrangements established by states for private-sector employees—is clearly inconsistent with the initial position it took in *Golden Gate*.[394] The Department of Labor, however, has publicly acknowledged that it has reconsidered that position. In an *amicus brief* that the Department filed opposing a petition for *certiorari* in *Golden Gate*, the Department of Labor declared that it had reexamined its position in *Golden Gate* and was planning to "issue a proposed regulation 'clarify[ing] the circumstances under which health care arrangements established or maintained by state or local governments for the benefit of non-governmental employees do not constitute an employee welfare benefit plan' under ERISA."[395] Ultimately, the Department of Labor did not issue the proposed regulation because it believed that the passage of the Affordable Care Act substantially reduced the likelihood that states would enact additional health care pay-or-play mandates.

The new safe harbor, setting forth the requirements under which a state automatic enrollment IRA program would not constitute an employee benefit plan, is clearly consistent with the Department of Labor's reconsidered position in *Golden Gate* and, as discussed above, is entitled to deference under *Chevron*. The regulation, however, does not address the Department of Labor's second argument in *Golden Gate*—that a state mandate may impermissibly interfere with employers' ability to sponsor and administer uniform plans. Certainly, in its *amicus brief* opposing the petition for *certiorari*, the Department of Labor made clear that it had reexamined its position on whether compliance with the San Francisco ordinance constituted an employee benefit plan for purposes of ERISA.[396] The Department of Labor, however, did not address the second argument— that the San Francisco mandate impermissibly interfered with employers' ability to sponsor and administer uniform plans. Therefore, no deference need be accorded to the Department of Labor with respect to the question of whether a state mandate that

---

393 *Id.*

394 *See* Blass, *supra* note 131, at 17–18 (arguing that proposed regulation is inconsistent with Department of Labor's position in *Golden Gate*).

395 Brief for United States as Amicus Curiae Opposing Writ of Certiorari at 12, Golden Gate Rest. Ass'n v. City of San Francisco, 546 F.3d 639 (9th Cir. 2008) (No. 08-1515) (quoting Health Care Arrangements Established by State and Local Governments For Non-Governmental Employees, 74 Fed. Reg. 64,275, 64,276 (Dec. 7, 2009) (codified at 29 C.F.R. § 2510.3-1)).

396 *Id.* at 12 (citing Health Care Arrangements Established by State and Local Governments for Non-Governmental Employees, 74 Fed. Reg. 64,275, 64,276 (Dec. 7, 2009) (codified at 29 C.F.R. § 2510.3-1)).

applies to employers with pension plan that do not meet certain minimum requirements is preempted under ERISA.

As discussed above, it is likely that such a mandate would be preempted because it impermissibly interferes with employers' ability to sponsor and administer uniform plans.

d. *Summary*

In sum, a strong argument may be made that none of the existing mandates would be preempted by ERISA. Although they might encourage employers to establish pension plans in order to avoid the mandate, they do not appear to have any effect on the terms of the plan and thus do not appear to impermissibly interfere with uniform plan administration. On the other hand, if a state were to enact a mandate that applies to employers with pension plans that not meet certain minimum requirements, the state mandate might very well be preempted by ERISA because it could influence employers' choice of plan terms and thus impermissibly interfere with uniform plan administration.

CONCLUSION

As originally conceived, automatic enrollment IRAs were intended to serve as a uniform federal retirement savings vehicle for workers without access to a workplace retirement savings plan. Few, if any, proponents of automatic enrollment IRAs would argue that a patchwork of state automatic enrollment IRAs is better than a single, uniform, federal program.[397] By definition, a federal plan can cover more workers than any single state plan. More importantly, a uniform program can benefit from economies of scale and thus lower administrative costs. Furthermore, with a federal program, the federal government can enact legislation to ensure that participants' interests are adequately protected and the program is not preempted by ERISA.

Despite the advantages of a federal program, automatic enrollment IRAs have not gained traction at the federal level. On the other hand, a number of states are at varying stages of adopting automatic enrollment IRAs to fill the retirement savings gap. Whether they can stand up to the task, however, is subject to considerable uncertainty.

First, state automatic enrollment IRAs are unlikely to cover all workers who do not have access to a workplace retirement savings vehicle. Some states have expressed no interest in establishing a state automatic enrollment IRA program, and other states have only expressed interest in establishing voluntary programs that do not satisfy the requirements of the Department of

397 *But see* Zelinsky, *supra* note 365, at 598 (concluding that he "favor[s] state-by-state experimentation rather than any single approach to the task of encouraging greater retirement savings").

Labor's new safe harbor. Moreover, even those states adopting mandatory automatic enrollment IRA programs are unlikely to cover all workers who currently lack access to workplace retirement savings vehicle. Those programs are still unlikely to cover (1) the smallest employers who are the least likely to provide workplace retirement savings plans and (2) employees who are ineligible to participate in their employer's retirement savings plan.

Second, not all workers who have access to a state automatic enrollment IRA program are likely to participate. More workers are likely to opt out of a state automatic enrollment IRA program than currently opt out of employer-sponsored 401(k) plans, though it is difficult to quantify exactly how many workers are likely to opt out of participating in a state automatic enrollment IRA program.

Third, state automatic enrollment IRAs may be costly to administer. How costly they will be depends on, among other things, how they are structured, how many individuals participate, how much individuals contribute, and how money is invested. State programs will undoubtedly be more costly to administer than a single, uniform federal program. Whether their administrative costs would outweigh the benefit of providing a state program is not clear.

How effective state automatic enrollment IRAs are likely to be in closing the retirement gap also depends on whether plan participants' interests are adequately protected and whether employers will shift from existing private-sector plans to state automatic enrollment IRAs. It is not clear whether current state law would adequately ensure the protection of participants' interests. Nor is it clear whether employers would choose to shift from existing private-sector plans to state automatic enrollment IRAs.

Finally, the ability of state automatic enrollment IRAs to increase retirement savings depends on their not being preempted by ERISA. There is a strong argument to be made that programs that do not require participation by employers that already offer a pension plan are not preempted. On the other hand, programs that require participation by employers that offer pension plans that do not meet minimum statutory requirements may very well be preempted by ERISA.