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States Dive Headfirst Into Retirement Coverage Debate – But Will Their Initiatives Run Afoul of Federal Law?



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Congress's inability to enact comprehensive legislation mandating retirement plan coverage has prompted advocates to take the fight to state capitals. Over the past few years, state policymakers have been elbowing their way into the coverage debate, as proposals to create statewide retirement savings plans for private-sector workers have mushroomed. Most proposals would require private employers that operate in the state and do not offer a retirement plan to automatically enroll employees in a payroll deduction savings vehicle. In most cases, that savings vehicle would be an individual retirement account (IRA). On Jan. 4, 2015, Illinois Governor Pat Quinn (D) signed into law the Secure Choice Savings Program Act, which is similar to a bill enacted by California in 2012. But federal law could very well inhibit implementation of these arrangements, and this reality—along with concerns about unexpected costs and risks to the state—has prompted most states to transform their proposals into ''study bills,'' which set up commissions to examine the state's role. Meanwhile, some states have considered allowing private employers (or a subset of employers, such as nonprofits of a particular size) to participate in tax-qualified plans established for public employees. In such instances, the state's role would be tantamount to that of a service provider.

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This article examines these state-level developments within the context of federal law and policy. Part I assesses the federal landscape by reviewing Washington, D.C.'s coverage debate and, in particular, the Automatic IRA proposal that has been a primary focus for nearly a decade—but which shows no signs of imminently gaining traction. Part II considers the development of state-level proposals and those proposals' key attributes. Part III looks at the interplay between the Employee Retirement Income Security Act (ERISA) and the state proposals. Finally, Part IV provides a summary chart of the various state-level proposals.

I. Federal Backdrop: Auto IRA's Dwindling Traction

For more than a generation, retirement policy for nonpublic workers has been the exclusive province of the federal government. Indeed, since its enactment in 1974, ERISA has generally preempted states from imposing rules on private employers with respect to retirement plans. But while federal policymakers have long debated comprehensive solutions to expand retirement plan coverage, the laws and regulations they have enacted to date have focused on creating *incentives*, rather than mandates, for private employers to offer plans (often through safe harbors insulating employers from liability) and for employees to participate (generally through tax preferences). For instance, the most recent comprehensive retirement policy bill to be enacted, the Pension Protection Act of 2006, created safe har-

 ISSN

bors that enable sponsoring employers to (a) automatically enroll employees in plans, (b) automatically escalate employee deferrals, and (c) rely on default investment alternatives.[1] Other significant retirement legislation, such as the Comprehensive Retirement Security and Pension Reform Act of 2001, enacted as part of larger tax legislation, raised contribution limits and expanded tax incentives.[2]

Still, some Washington policymakers have long taken issue with the voluntary nature of our workplace retirement system, and advocate instead for mandatory coverage. For nearly a decade, the Automatic IRA has been these policymakers' primary proposal. The concept was initially developed and promoted by Mark Iwry, then a nonresident fellow at the Brookings Institution (and since 2009 the Obama Administration's lead retirement policy advisor at the Treasury Department) and David John, then a Senior Research Fellow with the Heritage Foundation (and now deputy director for the Retirement Security Project at Brookings and a senior strategic policy advisor at the AARP Public Policy Institute).[3]

In brief, the (federal) Automatic IRA proposal would require all but the newest and smallest employers to automatically enroll employees in a payroll deduction IRA. Under the initial conception, contributions would be held and managed in dedicated accounts custodied by a newly created ''Thrift Savings Plan II,'' modeled after the low-cost defined contribution (DC) plan for federal employees.

The first bills to create the Automatic IRA were introduced in Congress in 2006,[4] and enjoyed bipartisan support. Upon re-introduction in 2007, the bills gained even further bipartisan traction.[5] During the 2008 presidential campaign, then-Senator Barack Obama (D-Ill.) adopted the Automatic IRA as his solution to the coverage gap, and Obama's opponent, Senator John McCain (R-Ariz.), expressed conceptual support.[6]

Since taking office, President Obama has stuck to this election plank. Indeed, the Automatic IRA has been the centerpiece of his administration's retirement policy and has been included in every annual budget proposal that he has sent to Congress. But despite this inclusion, the President generally has not vocally advocated for the Automatic IRA. A recent exception was in his 2014 State of the Union Address, where he expressly called on Congress to adopt Automatic IRA legislation: ''Let's do more to help Americans save for retirement. . . . [I]f this Congress wants to help, work with me to fix an upside-down tax code that gives big tax breaks to help the wealthy save, but does little to nothing for middle-class Americans. Offer every American access to an automatic IRA on the job, so they can save at work just like everyone in this chamber can.''[7] It remains unclear whether this call signifies that the White House will put more muscle into the Automatic IRA during the final years of the president's term. While the Automatic IRA was featured in materials released by the White House in advance of the President's 2015 State of the Union address, the proposal was not explicitly mentioned in the speech.[8] Any advancement of tax reform, for instance, could create a window for the Automatic IRA proposal.

Meanwhile, the Automatic IRA proposal has lost its veneer of bipartisan support. Despite the bill sponsors' agreement (as requested by retirement industry groups) to modify the bill so that accounts would be managed by private providers (rather than a Thrift Savings Plan II), during the Obama presidency the bills have attracted *zero* Republican cosponsors in the Senate or the House.[9] What gives? First, many of the Republicans who previously sponsored the Auto IRA are no longer in Congress. As for the others, it would seem that in the wake of ''Obamacare''—which requires many employers to newly provide health insurance coverage to employees or face steep monetary penalties—the prospect of new mandates on employers has become universally anathema among Republicans in Congress. Democrats seem to recognize this reality dims the bills' prospects and, accordingly, are committing less time to the initiative. In fact, with the retirement at the end of 2011 of Sen. Jeff Bingaman (D-N.M.), the longtime Senate sponsor of the Automatic IRA bill, there was no Auto IRA bill introduced in the Senate during the 113th Congress (2013-2014).

With the Auto IRA idea stalled, in his January 2014 State of the Union address, President Obama announced the creation of a new program called *my*RA—essentially Roth IRAs to which individuals contribute at work through payroll deductions. The Department of the Treasury (Treasury) will administer the program,

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[1] Pub. L. No. 109-280, 120 Stat. 780 (2006).

[2] Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38 (2001).

[3] J. Mark Iwry & David C. John, The Retirement Security Project, No. 2009-3, Pursuing Universal Retirement Security Through Automatic IRAs July 2009, *available at* http://www.brookings.edu/~/media/research/files/papers/2009/7/automatic%20ira%20iwry/07_automatic_ira_iwry.pdf.

[4] The Automatic IRA Act of 2006 was introduced by Senators Jeff Bingaman (D-N.M.) and Gordon Smith (R-Ore.) (109th Cong., S. 3952); its House companion was introduced by Rep. Phil English (R-Pa.) and cosponsored by Rep. Rob Simmons (R-Conn.) (109th Cong., H.R. 6210).

[5] The Automatic IRA Act of 2007 was introduced by Sen. Jeff Bingaman (D-N.M.) and cosponsored by three Republican and four Democratic Senators (110th Cong., S. 1141); its House companion was introduced by Rep. Richard Neal (D-Mass.) and cosponsored by five Republican and 21 Democratic Representatives (110th Cong., H.R. 2167).

[6] Senator John McCain, Response to Questionnaire by the American Society of Pension Professionals and Actuaries, *available at* http://www.pionline.com/article/20081027/ONLINE/810249957 (''[W]e should make it easier for people who work for small employers, for whom it is too costly to provide a pension plan, to save for their own retirement. Auto-IRAs are a natural way to achieve that.'').

[7] President Barack Obama, State of the Union Address (Jan. 28, 2014), *available at* www.whitehouse.gov/the-press-office/2014/01/28/president-barack-obamas-state-union-address.

[8] Fact Sheet, The White House, A Simpler, Fairer Tax Code That Responsibly Invests in Middle Class Families (Jan. 17, 2015), *available at* http://www.whitehouse.gov/the-press-office/2015/01/17/fact-sheet-simpler-fairer-tax-code-responsibly-invests-middle-class-fami.

[9] *See* Automatic IRA Act of 2011 introduced by Sen. Jeff Bingaman (D-N.M.) and cosponsored by Sen. John Kerry (D-Mass.) (112th Cong., S. 1557); Automatic IRA Act of 2012 introduced by Rep. Richard Neal (D-Mass.) and co-sponsored by 16 Democratic Representatives (112th Cong., H.R. 4049); Automatic IRA Act of 2010 introduced by Rep. Richard Neal (D-Mass.) and cosponsored by seven Democratic Representatives (111th Cong., H.R. 6099); Automatic IRA Act of 2010 introduced by Sen. Jeff Bingaman (D-N.M.) and cosponsored by Sen. John Kerry (D-Mass.) (111th Cong., S. 3760).

  ISSN

and an individual's Social Security Number will identify the accounts. In 2014, Treasury indicated that it would be developing the program, with a target national launch in 2015.[10] Through a competitive bidding process, Treasury has selected Comerica as custodian of the *my*RA accounts, but Treasury has yet to release details on current enrollment or participating employers, other than to confirm participation of the U.S. Office of Personnel Management.[11] The President did not mention *my*RA in his January 2015 State of the Union address.

Under *my*RA's terms, an individual can open only one *my*RA account, with a minimum starting contribution of $25, and subsequent contributions by payroll deduction in increments of at least $5. The accountholder would have the option of maintaining the account upon changing jobs, and participation in 2015 will be limited to individuals with an adjusted gross income (AGI) of $131,000 or less, and couples with AGI of $193,000 or less. Contributions to a *my*RA would be held in the form of Treasury debt securities with principal protection. As the Treasury has described: ''Savers will earn interest at the same variable interest rate as the federal employees' Thrift Savings Plan (TSP) Government Securities Investment Fund''—which invests exclusively in a non-marketable short-term U.S. Treasury security that is specially issued to the TSP.[12]

Because the *my*RA program was created by administrative action rather than legislation (*i.e.*, Congress did not amend ERISA), participation will be completely voluntary: Employers will not be required to offer the opportunity for employees to open and contribute to a *my*RA through payroll deduction, nor will employees of participating employers be automatically enrolled or opted in.[13]

Given the administration's action on *my*RAs and the waning congressional focus on Automatic IRAs, it seems some members of Congress may be giving up on expanding coverage through mandates. But in May 2014, Sen. Marco Rubio (R-Fla.) made headlines when, in a speech at the National Press Club, he called to open the federal government's defined contribution (DC) plan for public employees (the Thrift Savings Plan) to Americans whose workplaces do not currently offer plans. He noted the ''twisted irony . . . that members of Congress—who are employees of the citizens of the United States—have access to a superior savings plan, while many of their employers—the American people—are often left with access to no plan at all.''[14] A fact sheet released by Rubio's office notes the TSP has ''shockingly low costs and high rates of return.''[15] That Rubio is making this proposal is notable for several reasons—among them that his call comes at a time when efforts to open states' public DC plans to private-sector workers have gained traction in numerous state capitals.[16] Also in 2014, Sen. Tom Harkin (D-Iowa), who chaired the Senate Health, Education, Labor and Pensions (HELP) Committee, introduced the Universal, Secure, and Adaptable (USA) Retirement Funds Act of 2014, which (among other provisions) would require all but the smallest employers to enroll workers in ''USA Retirement Funds'' unless the employer offers (1) a defined benefit plan *or* (2) a defined contribution plan that includes both automatic enrollment and a lifetime income option.[17] Yet with Harkin having retired at the end of the 113th Congress, it remains to be seen whether Harkin's coverage ideas will be taken up in the new Congress.

II. States Seek To Accomplish What Washington Has Not

With waning prospects for a federal Automatic IRA, advocates have turned their attention to states to fill the gap. Most significant in this movement has been AARP, which has long lobbied Congress for a Federal Auto

[10] The White House has suggested that the *my*RA program is intended to correct for the market failure of private providers having minimum balance requirements that are too high for modest savers. As the authors of an R-Bond proposal have written, accounts along the lines of *my*RA would ''have several benefits for new and low-income savers. The simple structure and low to nonexistent fees would help them build retirement balances that are both more interesting to private providers and likely to be large enough so that fees would not consume the principal.'' William G. Gale et al., AARP Public Policy Institute, New Ways to Promote Retirement Security 13 (Oct. 2012), *available at* http://www.aarp.org/content/dam/aarp/research/public_policy_institute/econ_sec/2012/new-ways-promote-retirement-saving-AARP-pp-econ-sec.pdf.

[11] Jeanna Smialek, *Comerica Helping Manage Treasury's 'MyRA' Retirement Program*, Bloomberg, Dec. 22, 2014, *available at* http://www.bloomberg.com/news/2014-12-22/comerica-managing-u-s-treasury-s-myra-retirement-program.html.

[12] Fact Sheet, The White House, Opportunity for All: Securing a Dignified Retirement for All Americans (Jan. 29, 2014), *available at* http://www.whitehouse.gov/the-press-office/2014/01/28/fact-sheet-opportunity-all-securing-dignified-retirement-all-americans. As of December 2013, the one-year rate of return for TSP's Government Securities Investment Fund was 189 basis points. See Thrift Savings Plan, Fund Information 3 (March 2014), *available at* https://www.tsp.gov/PDF/formspubs/tsplf14.pdf.

[13] As discussed in Part III, below, on Dec. 15, 2014, the Department of Labor issued an Information Letter to Treasury concluding that retirement accounts established under the *my*RA program will not be covered under Title I of ERISA.

[14] Senator Rubio, Remarks at the National Press Club: A Secure Retirement for 21st Century Seniors (May 13, 2014), remarks as prepared for delivery *available at* http://www.rubio.senate.gov/public/index.cfm/press-releases?ID=9a5e63c8-ded6-4b61-820a-f6f90a30dc00.

[15] Fact Sheet, Office of Senator Marco Rubio, Reforms To Ensure A Secure Retirement For 21st Century Seniors (May 13, 2014), *available at* http://www.rubio.senate.gov/public/index.cfm/press-releases?ID=fcd59947-235b-4220-b622-03cdb08dc389.

[16] Of course, this might not be the most significant reason. First, Rubio has a national profile and is a potential presidential candidate. As such, even though he is not currently viewed as a leading voice on tax and retirement policy, his proposal could generate considerable attention. Second, Rubio essentially urged an expansion of government even as he criticized government's expanded role in health care (calling in the same speech, for instance, to dismantle ''ObamaCare'' and to preserve Medicare Advantage, which he called ''a shining success story'' that ''has encouraged providers to compete for business by tacking on all sorts of value-added services for seniors''). Third, opening the Thrift Savings Plan (TSP) to private-sector workers has been proposed in legislation before, most prominently in early iterations, discussed above, of Automatic IRA legislation (which would have created a ''TSP II'' to hold and manage Automatic IRA contributions). But as noted above, the Democratic sponsors of the Automatic IRA legislation abandoned the TSP II in favor of an account structure that relies on private service providers.

[17] USA Retirement Funds Act, S. 1979, 113th Cong. (2014).

IRA,[18] and has more recently organized its state chapters to promote the introduction of bills at the state level.[19]

The first significant development to date was the enactment, in 2012, by California of the California Secure Choice Retirement Savings Trust Act,[20] which creates a pathway for requiring all private California employers with five or more employees and that do not offer a retirement plan to automatically enroll employees in a state-run IRA program. Also in 2012, Massachusetts passed legislation to create a voluntary state-sponsored retirement plan for nonprofit employers with up to 20 employees. Then, in late 2014, Illinois also enacted legislation, which Gov. Pat Quinn (D) signed in his last days in office, to set up a mandatory automatic Roth IRA program. The California, Illinois and Massachusetts plans require various nods of approval from the federal government prior to their implementation. Specifically, California's and Illinois' Secure Choice programs may not be implemented if either the IRA arrangements fail to qualify for the favorable IRA tax treatment provided under the Internal Revenue Code (Code), or if it is determined that the program is an employee benefit plan under ERISA. Similarly, the Massachusetts legislation requires that the state treasurer ''obtain approval from the Internal Revenue Service with respect to the plan and shall ensure the administration of the plan is in compliance with the Code and other applicable federal and state laws including [ERISA].''[21] Further legislative action will be required by California before its plan is implemented. Illinois's program does not explicitly require further legislative action, but start-up funding for the program must be secured either through the state appropriations process or from other sources prior to implementation.[22] (For more information on these laws, see further details in the chart in Part IV).

Over the past two years, several additional states have proposed similar legislation that, in many cases, is based on California's model. As reflected on the chart in Part IV, these legislative proposals generally set a default contribution rate (such as 3 percent of pay) that employers must deduct from an employee's pay, unless the employee opts out or selects a different rate. These proposals purport to

utilize IRAs as the funding vehicle to receive contributions under the arrangement. Thus, for example, the contribution limits that apply to IRAs, which are lower than the limits for contributions to qualified plans, would apply.

In some cases, including California, Maine, and Ohio, the proposals appear to operate like a defined benefit (DB) cash balance plan by creating ''accounts'' that receive stated interest credits added as declared over time. Unlike in a traditional DC plan, the participant's account benefit is based on contributions and the stated declared rate of return and not the actual investment returns of the assets held with respect to the arrangement. Participants do not receive the actual return of the assets set aside in the trust and have no claim on any specific assets. Thus, the arrangement does not have the primary features of a DC plan or an IRA. These proposals create a segregated asset account that holds assets in order to support the stated rate of return. The segregated asset account receives ''excess'' earnings that are used in years when investment earnings held outside the segregated asset account are insufficient to support the promised interest rate. Other proposals—such as the one recently enacted in Illinois—lack this feature, but instead would offer a number of investment options from which enrollees can choose, designating a default investment that is used if an enrollee fails to select another alternative.

These arrangements give rise to many complex federal law questions, among them whether these arrangements will be treated as plans subject to ERISA requirements (which the plans likely cannot satisfy). Some proposals, such as that described above for Massachusetts, recognize the ERISA overlay, essentially acknowledging the state would operate like any other service provider to an ERISA-sponsored plan. Similarly, Washington state's proposal says that the director must determine if Section 404(c) of ERISA applies to the plans and, if so, take advantage of safe harbor provisions whenever possible.

Along similar lines, the National Conference on Public Employee Retirement Systems (NCPERS) has called for a public-private partnership whereby states would establish a cash balance pension plan for the benefit of private-sector workers. NCPERS, which calls its model proposal the Secure Choice Pension (SCP), explains:

> The concept is that each state (or possibly a group of states) would enact enabling legislation to establish an SCP. SCPs would be multiple employer hybrid defined benefit pension plans. It would have a board of trustees composed of state, private employer, and private employee representatives. The board would hire a chief executive officer and administrative staff to administer the SCP. The board and staff would have fiduciary duty to the SCP trust.[23]

Specifically, the envisioned cash balance plan would provide a 6 percent pay credit and interest credits based on 10-year Treasury bills plus 200 basis points, and would be open voluntarily to private-sector workers. Participants would receive their benefit in the form of a joint and survivor variable annuity. It would be subject to ERISA.[24] But this concept does not yet appear to

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[18] *See, e.g.*, Walter Alarkon, *Democrats and AARP Want to Make IRA Enrollment Automatic*, The Hill, July 13, 2010, *available at* http://thehill.com/homenews/administration/108319-dems-aarp-want-to-make-ira-enrollment-automatic.

[19] *See, e.g.*, Sample testimony for H.B. 4497, *available at* http://povertylaw.org/sites/default/files/webfiles/AARP%20HB%204497%20Auto%20IRA%20testimony%204-24-12.pdf (''AARP has long been a supporter of implementation of the Automatic IRA program at both the state and national levels, and we are strong supporters of [the Illinois Automatic IRA Act]'').

[20] California Secure Choice Retirement Savings Trust Act, S.B. 1234, 2011-2012 Leg. (Cal. 2012) (enacted); *see also* S.B. 923, 2011-2012 Leg. (Cal. 2012) (enacted).

[21] Mass. Acts ch. 60, § 1 (2012).

[22] *See generally* Illinois Asset Building Group, *SB 2758: Frequently Asked Questions, available at* http://illinoisassetbuilding.org/sites/default/files/Secure Choice FAQ.pdf.

[23] *See* Hank H. Kim, Exec. Dir., NCPERS, *The Secure Choice Pension*, The Pension Rights Center, *available at* http://www.pensionrights.org/what-we-do/events/re-imagining-pensions/secure-choice-pension.

[24] *See generally* Hank H. Kim, Exec. Dir., NCPERS, *The Secure Choice Pension (SCP)*, Presentation to The Labor and Worklife Program at Harvard Law School's Tenth Annual Pensions and Capital Stewardship Conference (Mar. 30, 2012),

have gained as considerable traction in state legislatures as have state Automatic IRA proposals.

Throughout the country, these proposals have been met with a significant opposition from a broad range of national and local provider groups.[25] These groups point out that there is no shortage of options in states for a small business to adopt a modest retirement plan for its employees, and no shortage of IRA options for an individual not offered a plan at work. Whether a state plan is mandatory or voluntary, the groups claim that it would threaten to compete with an already robust and competitive marketplace for retirement savings services. Other concerns have been raised repeatedly about the cost assumptions used by proponents of the state arrangements and about the possibility of increasing the underfunding of the state's retirement plan for its own workers. Retirement savings plans for federal, state and local employees often report very low costs, but it is far from certain that those low costs would exist in a program that would receive very modest contributions from possibly thousands of small employers and hundreds of thousands of employees. Finally, concerns have been expressed about the state entanglement in ERISA, based on the legal issues described in the next section.

Opposition groups have also begun to point out that oft-cited data about the ''coverage gap'' can be misleading. These data typically include ''uncovered'' workers who are much less likely to have a desire to save to supplement Social Security (for example, because they are over age 65; are younger and saving for other things; are very low wage; or have a spouse with retirement coverage). They note that closer examination of the data shows that workers who are not offered a retirement plan at work are more likely to be younger, have lower earnings, and have less attachment to the workforce.[26]

III. The Federal Overlay: ERISA

Each of the state proposals raise a series of related questions about how it would be treated under ERISA—particularly where an element of mandatory employer participation is involved. There is, of course, no direct guidance from the Department of Labor (DOL) or courts on this point yet. Some of these questions are more difficult to parse than others. Nonetheless, concerns about entanglement with ERISA prompted California to include a provision in its California Secure Choice Retirement Savings Trust Act that the program cannot move forward until the state obtains an advisory opinion from the DOL that the arrangement is not an employee benefit plan under ERISA. A similar provision appears in Illinois's law. As explained below, to reach that conclusion, DOL would need to backtrack on analysis and conclusions in its own recent guidance.[27] DOL would also be, essentially, ceding jurisdiction to the states forever to tell employers what kind of retirement plans they must offer, undercutting the uniform regulation of employee benefits that ERISA envisions.

In the authors' view, based on a well-accepted understanding of ERISA and guidance that DOL has already released, an analysis of these arrangements under ERISA would proceed as follows.

These plans would not be ''governmental plans'' exempt from ERISA. With certain exceptions, ERISA applies to any ''employee pension benefit plan,'' which is defined to mean ''any 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 (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond.''[28] ERISA does not apply to a ''governmental plan,''[29] defined to mean ''a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing.''[30] But for a plan to be a ''governmental plan'' exempt from ERISA, it must be a plan established or maintained by a government entity *for its employees*. Applying this rule, in 2012, DOL issued an advisory opinion to Connecticut addressing a proposal by the state to make its group health plan established for state employees, retirees and their families available for certain private nonprofit organizations.[31] DOL had little trouble concluding that such a plan would not be a governmental plan for ERISA purposes.[32]

available at http://www.law.harvard.edu/programs/lwp/pensions/conferences/pensions3_12/Hank Kim.pdf.

[25] *See, e.g.*, Memorandum in Opposition from the Securities Industry and Financial Markets Association (March 20, 2014), *available at* http://documents.sifma.org/State_Gov_Relations/StatE_News/2014/IL_SB_2758_testimony/ (stating and describing reasons for opposition to S.B. 2758, a bill to establish an Automatic Enrollment Individual Retirement Account (IRA) Program run by Illinois); News Release, American Council of Life Insurers, Coalition Opposes Plan For Costly State-Run Retirement Program That Duplicates Private-Sector Options (June 24, 2013), *available at* https://www.acli.com/Newsroom/News%20Releases/Pages/NR13-025.aspx; National Association of Insurance Financial Professionals, *NAIFA State Associations Oppose Ill-Conceived Government-Run Retirement Plans*.

[26] *See Retirement Savings 2.0: Updating Savings Policy for the Modern Economy: Hearing Before the S. Comm. on Finance*, 113th Cong. (Sept. 16, 2014) (statement of the Investment Company Institute given by Brian Reid, Chief Economist) *available at* http://www.ici.org/pdf/14_senate_sfc_retirement.pdf (collecting research).

[27] *See* DOL Advisory Op. Letter 2012-04A (May 25, 2012); DOL Advisory Op. Letter 2012-01A (Apr. 27, 2012).

[28] ERISA § 3(2)(A).

[29] ERISA § 4.

[30] ERISA § 3(32). Governmental plans are also exempt from the requirement to participate in, and pay premiums to, the federal pension insurance program administered by the Pension Benefit Guaranty Corporation under Title IV of ERISA. ERISA § 4021(b)(2).

[31] *See* DOL Advisory Op. Letter 2012-01A (April 27, 2012).

[32] One issue in the Advisory Opinion was whether the number of nongovernmental employees might be considered *de minimis*. Connecticut had stated that the total number of employees of private nonprofit employers that would be eligible to enroll in the plan would be 175,000 (the State was unable to predict how many would ultimately enroll), and the number of State employees and retirees currently in the plan is approximately 100,000. Acknowledging that earlier DOL guidance states that *de minimis* participation of private employers does not affect a plan's status as a governmental plan, DOL concludes that the participation of this many private nonprofit employers in the plan is more than *de minimis*, and, therefore,

The use of an IRA as a funding vehicle would not automatically prevent the state arrangement from being subject to ERISA. A plan that otherwise meets the definition of a pension plan under ERISA does not fail to be governed by ERISA simply because the contributions are made to IRAs instead of a single qualified trust. Contributions under ERISA pension plans are funded in a variety of ways, including trusts, group insurance contracts, individual 403(b) contracts and custodial accounts, and IRAs.

DOL regulations provide a safe harbor for certain payroll deduction arrangements in connection with IRAs.[33] In order to satisfy the safe harbor, however, the arrangement must be ''completely voluntary'' for the employee and the involvement of the employer must be extremely minimal, essentially limited to collecting contributions through payroll deductions and remitting them to the IRA. Although DOL has not addressed the issue directly, it is generally thought that the inclusion of an automatic enrollment feature results in employer involvement in excess of that allowed under the safe harbor.[34] In fact, the federal Automatic IRA bills have included a specific exception from ERISA because, otherwise, an automatic enrollment payroll deduction IRA, even one required by law, would be treated as an ERISA plan.[35]

In a Dec. 15, 2014, letter from DOL to Treasury, DOL addressed whether the federal *my*RA program is subject to ERISA.[36] DOL concluded that it ''do[es] not believe Congress intended in enacting ERISA that a federal government retirement savings program created and operated by . . . Treasury would be subject to the extensive reporting, disclosure, fiduciary duty, or other requirements of ERISA, which were established to ensure against the possibility that employees' expectation of a promised benefit would be defeated through poor management by the plan sponsor and other plan fiduciaries.'' But as the letter does not squarely address state-run arrangements, it is not immediately clear whether the letter supports arguments that ERISA coverage extends to these state-run arrangements. On the one hand, DOL's reasoning appears to rest on government sponsorship of *my*RAs as the basis of the exemption from ERISA. If this reasoning is extended to state-run arrangements, DOL could conclude that state-run arrangements are not subject to ERISA. On the other hand, DOL points out that *my*RA is completely voluntary for both the employer and employee and does not involve automatic enrollment. And this difference could be key. Unlike *my*RA, the California and Illinois programs involve wages being deducted from an employee's pay without affirmative action by the employee and then held in an investment the employee has not selected. One critical reason for ERISA coverage is to ensure that there are strong fiduciary duties imposed on those that invest pension assets, and legal recourse for a fiduciary breach.

The state arrangements would be separate ERISA-governed plans by an employer, not a single plan for ERISA purposes. In Advisory Opinion 2012-04A, DOL addressed whether a retirement plan arrangement that provides for participation by numerous unrelated employers would be considered a single ''plan'' for purposes of ERISA, or, instead, an arrangement under which each participating employer establishes and maintains a separate employee benefit plan for the benefit of its own employees. DOL's position is that, where an arrangement allows participation by multiple employers whose only relationship to each other is common participation in the arrangement, then separate ERISA plans have been created, not a single ''multiple employer plan.'' (There have been bills introduced in Congress to facilitate these so-called open multiple employer plans, but none has been enacted to date.[37]) This means that each employer that participates in the state arrangement could be subject to ERISA's reporting and disclosure rules.

Interestingly, in the same Advisory Opinion, DOL also concluded that ERISA's fiduciary rules—some of the highest standards in the law—would apply *both* to ''persons who operate the arrangement'' (here, the state and its service provider) and to ''each employer sponsor of a plan that participates in the arrangement.''[38] From here, the tentacles of ERISA would spread in unexpected ways. For example, ERISA prohibits a wide range of transactions between a plan and certain ''parties in interest'' to the plan, and prohibits fiduciaries from acting in a variety of ways that could be viewed as

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such participation would adversely affect the plan's status as governmental under ERISA.

[33] 29 C.F.R. § 2510.3-2(d).

[34] For instance, in its recent Information Letter concerning the *my*RA program, DOL concluded that the plan is not subject to ERISA. The letter points out that *my*RA does not involve automatic enrollment. Letter from John J. Canary, Director of Regulations and Interpretations, U.S. Department of Labor Employee Benefits Security Administration to J. Mark Iwry, Senior Advisor to the Secretary and Deputy Assistant Secretary for Retirement and Health Policy, U.S. Department of Treasury, Dec. 15, 2014, *available at* http://www.dol.gov/ebsa/regs/ILs/il121514.html. A similar issue arises with respect to a safe harbor for 403(b) plans in the same DOL regulation. *See Advisory Council on Employee Welfare and Pension Benefit Plans, Current Challenges and Best Practices for ERISA Compliance for 403(b) Plan Sponsors*, 2011 Report, *available at* http://www.dol.gov/ebsa/publications/2011ACreport1.html (''The Council also considered, but is not recommending, that DOL permit the inclusion of an automatic enrollment feature within the context of an ERISA safe harbor 403(b) plan. The majority of Council members concluded that automatic enrollment would require actions typically performed by a plan sponsor/fiduciary (*e.g.*, designation of a default investment alternative), and consequently, an automatic enrollment option in the plan may not be viewed as voluntary even in light of the participant's right to opt out of the automatic contributions.''); McKay Hochman, *On the Subject of Being a Non-ERISA 403(b)*, Email Alert 2010-13 (Aug. 26, 2010), *available at* http://www.pentegra.com/media/20830/pentegra_403bpers_su10_final.pdf; *see also* DOL Field Assistance Bulletin 2007-02 (July 24, 2007) (stating that an employer may enter into ''salary reduction agreements'' with employees consistent with the 403(b) safe harbor, but not mentioning automatic enrollment); DOL Advisory Opinion 2012-02A (May 25, 2012) (contributions are not completely voluntary if an employer makes matching contributions).

[35] *See* Automatic IRA Act of 2011, S. 1557, 112th Cong. (2011).

[36] Letter from John J. Canary to J. Mark Iwry, *supra* note 34.

[37] *See* Retirement Security Act of 2014, S. 1970, 113th Cong. § 3 (2014); SAFE Retirement Act of 2013, S. 1270, 113th Cong. § 207 (2013).

[38] A.O. 2012-04A (May 25, 2012).

self-dealing or a conflict of interest.[39] Indeed, ERISA's prohibited transaction rules are so broad and so strict that virtually any transaction involving a plan could run afoul of the prohibited transaction rules. Thus, nearly every transaction involving a ''party in interest'' generally needs to be the subject of a statutory or administrative exemption. As such, DOL would need to examine the implications of a state serving as a fiduciary or other party-in-interest. What might it mean, for example, for a state to control its own compensation—normally a prohibited transaction for fiduciaries under ERISA Section 406(b)—by determining the fees charged to accounts in the plan through legislative or administrative action?

ERISA preemption looms over the proposals. ERISA preempts any state law that ''relate[s] to'' any employee benefit plan.[40] Thus, if DOL or a court were to conclude that these state arrangements are ERISA-governed employee benefit plans, the next natural question is whether the state mandate regarding employer participation is preempted. This is a question of some complexity, but a few observations are in order.

First, depending on how the state arrangement is structured, one way to think about these arrangements is similar to the so-called ''pay or play'' health mandates that some state and local governments enacted prior to the mandate of the Affordable Care Act. Courts have come to different conclusions in those cases. The U.S. Court of Appeals for the Fourth Circuit struck down a Maryland law that required employers with 10,000 or more Maryland employees to spend 8 percent of their total payrolls on employees' health insurance benefits or pay the shortfall in spending to the state.[41] In contrast, the Ninth Circuit upheld a San Francisco ordinance requiring employers to pay a tax, but giving employers a dollar-for-dollar credit for any amount paid by that employer for health care for its employees.[42] It is not clear that the Ninth Circuit opinion can be reconciled (even though the court tried to do so) with the Fourth Circuit or, for that matter, with a 1992 Supreme Court decision that struck down a District of Columbia ordinance that required employers to provide workers' compensation benefits to their employees and measured the level of required benefits by reference to the existing health insurance coverage provided by the employer.[43]

Second, while these proposals are largely aimed at small employers within the state that do not offer a retirement plan, they could impose obligations on employers with employees in multiple states. For example, the California and Illinois Secure Choice programs appear to require an employer not headquartered in the state to participate with respect to employees located in the state. For example, if a large employer located in Texas had a few non-benefit-eligible employees working remotely in California, the employer would need to set up a payroll arrangement to forward contributions to California on behalf of the California employees. If one imagines a patchwork of similar rules across individual states, then one of the core reasons for ERISA's preemption provision comes to light: giving employers administrative uniformity in offering benefits to employees in different states.[44] This very threat of ''conflicting or inconsistent State and local regulation of employee benefit plans'' was cited by ERISA's Congressional architects.[45]

IV. Reviewing the Proposals

The below chart summarizes recent state legislative activity concerning state-run retirement plans for the private sector along with some of the key provisions contained in recent state proposals to create such plans. Although California, Illinois and Massachusetts are the only states to have enacted such legislation to date, other states have come very close, and we expect similar proposals to surface in upcoming legislative sessions. In addition, several additional states have either enacted or considered proposals to conduct studies on the need to develop a statewide retirement savings solution for private sector employees. The parameters of those study bills are summarized in the third section of the chart.[46]

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[39] ERISA § 406. Near-identical rules are set forth in Section 4975 of the Internal Revenue Code. The prohibited transaction rules apply to IRAs under Code Section 4975 regardless of whether the IRA is used in a plan governed by ERISA.

[40] ERISA § 514(a).

[41] *Retail Indus. Leaders Ass'n v. Fielder*, 475 F.3d 180 (4th Cir. 2007).

[42] *Golden Gate Rest. Ass'n v. City and Cnty. of San Francisco*, 546 F.3d 639 (9th Cir. 2008).

[43] *Dist. of Columbia v. Greater Wash. Bd. of Trade*, 506 U.S. 125 (1992). *See Golden Gate Rest. Ass'n v. City and Cnty. of San Francisco*, 558 F.3d 1,000 (9th Cir. 2009) (Fletcher, J., concurring in denial of rehearing en banc).

[44] *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 9 (1987) (''The most efficient way to meet these responsibilities is to establish a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits. Such a system is difficult to achieve, however, if a benefit plan is subject to differing regulatory requirements in differing States.'').

[45] *See* 120 Cong. Rec. 29,933 (1974) (statement of Sen. Harrison A. Williams, Jr.). *See also* 120 Cong. Rec. 29,197 (1974) (statement of Rep. John H. Dent) (''With the preemption of the field [of employee benefits], we round out the protection afforded participants by eliminating the threat of conflicting and inconsistent State and local regulation.''); 120 Cong. Rec. 29,942 (1974) (statement of Sen. Jacob K. Javits) (''[T]he emergence of a comprehensive and pervasive Federal interest and the interests of uniformity with respect to interstate plans required—but for certain exceptions—the displacement of State action in the field of private employee benefit programs.'').

[46] The chart generally only encompasses recent legislative activity at the state level; similar bills proposed several years ago were not included. In addition, while the chart is intended to be a complete accounting of recent state activity concerning state-run retirement plans for the private sector, it may not be exhaustive.

Status of Recent Proposals for State-Run/State-Mandated Retirement Arrangements

State	Legislative & Other Activity	Arrangement Features	ERISA and Code Concerns
I. Legislation Enacted to Establish a State-Run/State-Mandated Retirement Arrangement			
California *	On Sept. 28, 2012, Governor Jerry Brown (D) signed S.B. 1234[1] and S.B. 923[2] into law, authorizing the establishment of the *California Secure Choice Retirement Savings Program* (Program). The California Secure Choice Retirement Savings Investment Board (Board) is required to conduct a market analysis to determine whether the conditions necessary for implementation can be met. A subsequent authorizing statute is required prior to the implementation of the Program. In late 2013, the Board received responses to its Request for Information (RFI) on how to design and administer the Program. In June 2014, the Board issued a Request for Proposal (RFP) seeking a law firm to conduct the legal analysis for the	■ Private employers with five or more employees must participate unless they already offer a retirement plan; others may participate. ■ The Program would offer payroll deposit IRA arrangements. ■ Employees would be automatically enrolled at a default contribution level of 3 percent unless they opt out or select a different contribution level. ■ Individuals or employees of nonparticipating employers may participate. ■ Investment levels would be set in accordance with the Code's contribution limits for IRAs. ■ Participant accounts would be credited by an interest rate that is set annually. ■ A Gain and Loss Reserve Account may be used to receive excess earnings and to allocate interest at the stated interest rate for Program years in which investment earnings are too low. ■ Expenses paid by the administrative fund may not exceed 1 percent of the total Program fund. ■ Employers are not to be	The Program may not be implemented if (1) the IRA arrangements fail to qualify for the favorable IRA tax treatment provided under the Code, or (2) it is determined that the Program is an employee benefit plan under ERISA. Employer contributions are allowed as long as they are permitted under the Code and would not cause the Program to be treated as an employee benefit plan under ERISA. The Board shall adopt regulations it deems necessary to implement the Act consistent with the Code and its regulations to ensure the Program meets all criteria for federal tax-deferral or tax-exempt benefits, or both. The Board has the power and authority to facilitate compliance with the Code, including providing or

State	Legislative & Other Activity	Arrangement Features	ERISA and Code Concerns
	Program, including drafting ruling or opinion requests for the Departments of Labor and Treasury. As of Nov. 21, 2014, the Board reported that it is in the process of contracting with a law firm. The legal feasibility study is projected to be completed in early Fall 2015. In November 2014, the Board issued an RFP for a market analysis, financial feasibility study, and program design consultant services. That RFP was rescinded in mid-January and subsequently re-issued on Jan. 22, 2015.	considered fiduciaries of the Program or Trust. ■ The Board may establish options to convert account balances into retirement income. ■ The state shall have no liability for benefit payments.	arranging for assistance to Program sponsors and individuals.
Illinois *	On April 9, 2014, the Illinois Senate passed S.B. 2758,[3] the Illinois Secure Choice Savings Program Act. The act would establish the Illinois Secure Choice Savings Program (Program) to promote greater retirement savings for private-sector employees. It would also establish the Illinois Secure Choice Savings Board (Board) to	*The proposal is generally modeled after California's S.B. 1234.* ■ Private employers with 25 or more employees throughout the previous calendar year that have been in business more than two years and have not offered a qualified plan in the preceding two years would be required to participate. ■ The Program would consist of automatic enrollment payroll deduction IRAs. ■ The initial default	The Program may not be implemented if (1) the IRA arrangements fail to qualify for the favorable IRA tax treatment provided under the Code, or (2) it is determined that the program is an employee benefit plan under ERISA. The Board shall appoint a trustee to the IRA Fund in compliance with Code § 408. The Board shall facilitate

State	Legislative & Other Activity	Arrangement Features	ERISA and Code Concerns
	administer the Program. (*See also* companion bill H.B. 4595.[4]) The Illinois House passed an amended version of the bill on Dec. 2, 2014, and on Dec. 3, 2014, the Senate passed the bill with the House amendments. Governor Pat Quinn (D) signed the bill on January 4. Pending the appropriation of funds to implement it, the board is set to form in June 2015, and the mandate is to take effect on June 1, 2017.	investment option would be a target date fund with a 3 percent contribution rate. ■ Contribution limits would be established in accordance with the Code's limits for IRAs. ■ Individuals may voluntarily enroll. ■ The program would provide for the decumulation of assets in a way that maximizes financial security in retirement. ■ Expenses paid by the fund may not exceed 0.75 percent of the total trust balance. ■ The state would have no liability for benefit payments. ■ Participating employers would not be Program fiduciaries. ■ If a secure return fund is established, the Board may procure any insurance, annuity or other product to insure the value of individuals' accounts and guarantee a rate of return. ■ Start-up costs must be secured either through the state appropriations process or from other sources.	compliance with all applicable requirements for the Program under the Code, including tax qualification requirements or any other applicable law and accounting requirements.
Massachusetts	On March 22, 2012, Governor Deval Patrick (D) signed H.B. 3754,[5] An Act to Provide Retirement Options for Nonprofit	■ Nonprofit employers with up to 20 employees, regardless of location, may participate. ■ The state may sponsor a qualified DC plan within the meaning of Code	The state shall (1) obtain approval from the IRS with respect to the plan, and (2) ensure that administration of the plan complies with

State	Legislative & Other Activity	Arrangement Features	ERISA and Code Concerns
	Organizations, which allows the state to sponsor a retirement plan for nonprofit organizations, whether based in Massachusetts or elsewhere. (*See also* Mass. Acts ch. 60 (2012). On June 9, 2014, the state treasurer's office announced that the IRS has ruled that the proposal meets federal requirements, but additional approval from the IRS is still needed.[6]	§ 414(i) that not-for-profit employers may adopt in accordance with Code § 401(a) and the regulations and guidance thereunder. ■ Employees and/or employers can make contributions. ■ The employee may choose the investment option for his or her account.	the Code and ERISA. Employers must operate the plan in compliance with the Code and ERISA, and the state treasurer may require that certain employers seek approval of their plans from the IRS.
II. Legislation Proposed to Create a State-Run Retirement Arrangement			
Arizona *	In January 2014, H.B. 2063[7] was introduced to create the Arizona Secure Choice Retirement Savings Program (Program) and the Arizona Secure Choice Retirement Savings Board (Board). The bill failed to pass prior to the session's adjournment.	*The proposal is generally modeled after California's S.B. 1234, except that as compared to the description above for California:* ■ The mandate does not apply to employers that have not been in business at all times during the current and preceding calendar years. ■ The Board would prescribe how interest, earnings and losses would be allocated to Program accounts. (There is no provision for a Gain and Loss Reserve Account.) ■ The 1 percent limit on administrative expenses is absent; the bill implies that such expenses must be reasonable.	*The proposal is generally modeled after California's S.B. 1234, except that:* The Board may explore and establish separate investment options that comply with the Code and ERISA provisions that enable voluntary employer contributions into accounts under section 401(a) (to be managed alongside the program's IRA accounts).
Indiana	In January 2014,	■ Employers that do not	Implementation of

State	Legislative & Other Activity	Arrangement Features	ERISA and Code Concerns
	S.B. 66[8] was introduced to establish a state-assisted retirement plan to ‘‘increase [residents’] rate of savings and to build assets’’ for retirement. The bill would also establish the Indiana Retirement Savings Board (Board). S.B. 66 failed to pass prior to the end of the legislature’s session.	currently offer a retirement plan may choose to participate. ■ Participation for employees of participating employers and self-employed individuals would be voluntary. ■ Each participant would have a separate account to which funds would be contributed via payroll deduction or deduction from a savings or checking account. ■ Participants would select from a list of investment options. ■ Employer contributions would be allowed. ■ A one-time tax credit up to $250 would be provided to certain employees enrolling in the program. ■ Participants may not use account funds as security for a loan.	the plan is subject to obtaining IRS approval that the plan is qualified under section 401(a) or another applicable Code section. The Board shall conform the plan to federal tax advantages or incentives. The Board may request any rulings or determination letters from the IRS that it considers necessary or appropriate to implement or administer the plan.
Louisiana *	In March 2014, S.B. 283[9] was introduced and referred to committee. No further action has been taken on the bill, which would create the Louisiana Retirement Savings Plan (Plan) to provide portable retirement and death benefits to its participants. The bill would also establish the Louisiana Retirement Savings Plan Board of	■ The proposal covers private, non-church employers (a) with 5 or more employees; (b) that have been in existence at least 9 months; and (c) that do not offer a retirement plan. These employers would be required to inform employees of the Plan. Voluntary participation would be allowed for church, small and new employers. Employees would be deemed to have elected to participate unless they opt out.	The Board may promulgate rules to ensure the Plan’s contribution limitations do not conflict with federal law. When the federal government provides for a tax-qualified plan structure that, if applied to the Plan, would allow the participants’ contributions to be exempt from federal taxation, the Board shall take any action

State	Legislative & Other Activity	Arrangement Features	ERISA and Code Concerns
	Trustees (Board) to manage the Plan's funds.	■ Employees may terminate their participation in the Plan or change their contribution level from the minimum default of 3 percent. ■ Employers may contribute up to $5,000 per year to the Plan for each eligible employee; such contributions must not be intended to solely benefit highly compensated employees. ■ Employers would not be a fiduciary with respect to the selection, management or administration of the Plan solely because the employer made the Plan available. ■ The Plan's Board of Trustees would select a minimum of three companies to manage the pool of assets. ■ Benefits would be payable in the form of a qualified joint and survivor annuity (as defined in ERISA § 205(d)(1)) or, if the participant dies before the annuity starting date and has a surviving spouse, a qualified preretirement survivor annuity (as defined in ERISA § 205(d)(2)). ■ Participants must start receiving benefits after reaching age 60 and before age 72. ■ The state shall have no liability for and would not guarantee the funds or	necessary to secure the tax-qualified status for the Plan.

State	Legislative & Other Activity	Arrangement Features	ERISA and Code Concerns
		benefits of the Plan.	
Maine *	In January 2014, Legis. Doc. 1473[10] failed to make it out of committee. The bill would have established the Maine Secure Choice Retirement Savings Trust for private employees.	*The proposal is modeled after California's S.B. 1234.*	*The proposal is modeled after California's S.B. 1234.*
Maryland *	S.B. 921[11] was introduced in January 2014, and H.B. 1251[12] was introduced in February 2014, to establish the Maryland Secure Choice Retirement Savings Program (Program) for eligible private sector employees. The bills would also establish the Maryland Secure Choice Retirement Savings Board (Board). Neither bill was passed prior to adjournment of the legislature's session.	*The proposals are generally modeled after California's S.B. 1234.* The Board may establish a qualified profit-sharing defined contribution (DC) plan to accept employer contributions, which would be 401(a) accounts segregated from the IRAs.	The Program may not be implemented if (1) the IRA arrangements fail to qualify for the favorable IRA tax treatment provided under the Code, or (2) it is determined that the Program is an employee benefit plan under ERISA. The Board would be required to adopt regulations necessary to implement the Program consistent with the Code and its regulations to ensure that the Program meets the criteria for federal tax deferral and/or tax-exempt benefits. The Board would act as a fiduciary under ERISA with respect to the 401(a) accounts.
Ohio *	In October 2013, S.B. 199[13] was introduced to create the Ohio Secure Choice Retirement	*The proposal is generally modeled after California's S.B. 1234.*	*The proposal is generally modeled after California's S.B. 1234.*

State	Legislative & Other Activity	Arrangement Features	ERISA and Code Concerns
	Savings Program for employees of private employers. The bill failed to move past the Senate Finance Committee.		
Washington	In January 2014, H.B. 2474 was introduced to create the Save Toward a Retirement Today (STaRT) state retirement savings plan for private-sector workers. The House passed an amended version[14] of the bill on Feb. 14, 2014. The Senate failed to pass the bill prior to the end of the legislative session in March.(*See also* companion bill S.B. 6294.[15])	■ Employer participation must be voluntary. ■ A two-tier system of IRS-approved plans would be utilized: (1) employer plans open to all employers who choose to contribute to employees accounts, and (2) workplace-based IRAs open to all employees of participating employers. ■ Any employer sponsored plan would only be open to employers with less than 100 qualified employees at the time of enrollment; self-employed individuals, independent contractors and sole proprietorships without employees may also participate. ■ Employee participation would be voluntary, though automatic enrollment may be utilized. ■ The plans and accounts must allow enrollees the option to roll pretax contributions into an IRA or other eligible plan when an enrollee ceases participation in the STaRT plan. ■ State general funds may be used to fund the program until it reaches self-sustainability through	Prior to any employer or employee enrolling in the STaRT plan, the program director must seek approval, if necessary, from the IRS to operate and offer the plans to employers and employees on a tax-qualified basis. The director must determine if section 404(c) of ERISAapplies to the plans and, if so, take advantage of safe harbor provisions whenever possible to limit liability to the state and participating businesses, including through the use of target date or similar funds. *Several provisions note a requirement to be in compliance with federal law.*

State	Legislative & Other Activity	Arrangement Features	ERISA and Code Concerns
		account holder fees.	
West Virginia	H.B. 4375[16] was introduced in January 2014 to establish the West Virginia Voluntary Employee Retirement Accounts (VERA) Program (Program) for small businesses to provide a "simple, cost-effective way" for workers to save for retirement and for employers to "offer a much needed employee benefit." The House passed an amended version of the bill on Feb. 26, 2014. The Senate failed to pass the bill prior to the end of the legislative session in March. (*See also* companion bill S.B. 488.[17])	■ Employers with up to 100 employees that do not already offer a retirement plan may choose to participate; however, where employees of nonparticipating employers elect to participate, the employer must make payroll deductions. ■ Employer contributions would be voluntary. ■ Employee participation would be voluntary, with contributions going to a program account in the employee's name. ■ Participating employers may require employees to contribute a specific amount or percentage of wages to their accounts. ■ The state treasurer is authorized to invest trust funds in investment products or with financial institutions selected by the treasurer. ■ Start-up costs would be funded by a loan from the Unclaimed Property Trust Fund.	The Program must comply with the Code and other applicable federal law. The bill would require that all federal approvals and filings be received and made before operations begin.
III. Legislation to Require Study on State-Run Retirement Arrangements			
Colorado	H.B. 14-1377[18] was introduced on April 14, 2014, to establish the Colorado Retirement Security Task Force. The Task Force would study options to promote greater retirement security without	The Task Force would consider the following in making its recommendations for establishing a plan for private sector employees: ■ Options that may include a defined contribution (DC) structure. ■ Allowing contributions from participants and	The Task Force shall not include any recommendations that conflict with federal law.

State	Legislative & Other Activity	Arrangement Features	ERISA and Code Concerns
	imposing mandates on Colorado businesses or citizens, and develop recommendations for increasing the percentage of state residents enrolled in a retirement plan. The bill would require a report by Dec. 1, 2015. The bill passed the House but failed in the Senate on May 6, 2014.	employers. ■ Providing options for the payment of guaranteed, lifetime monthly amounts. ■ Providing distributions upon retirement, disability or death. ■ Avoiding any guarantees that cause the state to incur any liability or obligation for contributions or benefits paid.	
Connecticut *	On June 13, 2014, Governor Malloy signed H.B. 5597[19] (a state budget ''implementer'' bill). The bill establishes the Connecticut Retirement Security Board (Board) to conduct and submit a feasibility study by Jan. 1, 2016, regarding implementation of a public retirement plan and to develop a proposal for its implementation by April 1, 2016. Connecticut has allocated $400,000 to establish the Board. Responses to (1) a general Request for Public Comment and (2) a Request for Information from vendors to conduct various consulting,	The proposal to implement a public retirement plan shall include the following design features: ■ Participation by private employers with 5 or more employees in the state would be mandatory unless the employer offers an employer-sponsored retirement plan. ■ Potential plan participants are automatically enrolled unless they opt out. ■ Individuals may participate in the plan. ■ The plan maintains IRAs for each participant. ■ A guaranteed rate of return is set annually. ■ No debts or liabilities are incurred by the state. ■ Benefits are annuitized unless a lump sum is elected. ■ Preretirement death benefits are available.	The feasibility study is to examine the legal compliance necessary to ensure the plan's accounts qualify for favorable tax treatment as IRAs, and that the public retirement plan is not treated as an employee benefit plan under ERISA. The implementation plan must ensure the same outcome.

State	Legislative & Other Activity	Arrangement Features	ERISA and Code Concerns
	design, and feasibility services were both due on Nov. 3, 2014. *The legislature considered S.B. 249,*[20] *which was modeled after California's S.B. 1234. The bill failed to pass prior to the legislature's adjournment in May.*		
Maryland	On May 12, 2014, Governor Martin O'Malley (D) signed Executive Order 01.01.2014.07 to establish the Governor's Task Force to Ensure Retirement Security for All Marylanders (Task Force). The Task Force is to study how the state can improve retirement security for private-sector employees. Governor-Elect Larry Hogan (R) announced that he will not extend the Task Force.	The Task Force's objectives include: ■ Reviewing design features such as lifetime payments, smoothing of returns and low costs. ■ Reviewing approaches used in other states and countries that offer state-sponsored retirement savings plans for private-sector employees. ■ Recommending steps the state can take through legislation, regulation or otherwise.	
Minnesota	On Feb. 27, 2014, S.F. 2078[21] and H.F. 2419[22] were introduced to create the Minnesota Secure Choice Retirement Savings Plan, modeled after California's S.B. 1234. The bills were	Under the relevant provisions of WESA: ■ The state is to have no liability for investment earnings and losses. ■ Individuals would contribute to their own accounts, which would be pooled for investment purposes.	The report must include the effect of federal tax law and ERISA on the potential state-administered plan, employers, and employees. If appropriations allow, the report is to

State	Legislative & Other Activity	Arrangement Features	ERISA and Code Concerns
	amended to become study bills[23] requiring a report by Jan. 15, 2015, on the "potential establishment of a state-administered retirement savings plan" for employees that lack access to a plan. The amended language was included in the Women's Economic Security Act (WESA) (H.F. 2536,[24] substituted for companion bill S.F. 2050[25]), which was enacted on May 11, 2014.	■ If appropriations allow, the report is to address options for the plan to use group annuities to ensure a stable stream of retirement income. ■ A one-time appropriation of $400,000 was made to fund the required report.	address the effect of federal tax law and ERISA on a plan that allows for voluntary employer contributions that are either commingled with or segregated from employee contributions.
Oregon	In 2013, Governor Kitzhaber signed H.B. 3436,[26] establishing the Oregon Retirement Savings Task Force (Task Force). The Task Force was to develop recommendations for increasing the percentage of Oregonians saving for retirement or enrolled in a retirement plan, and for increasing the amount of those savings. A report by the Task Force was published on Sept. 15, 2014.	The Task Force recommended that the legislature develop and make available a retirement savings plan with characteristics that include: ■ Voluntary participation with auto-enroll; ■ Auto-escalation of contribution levels with employee control; ■ Contributions from payroll deductions; ■ Tax benefits (*i.e.*, the plan should meet the qualification requirements to receive federal and state tax deductions for the participants); ■ No required employer contributions; ■ Pooled and professionally managed funds; ■ Account management costs that are paid from	The Task Force was prohibited from recommending plans or products that would subject the state or private sector employers to responsibilities under ERISA, or that would receive less favorable tax treatment than that provided under the Code. Calling compliance with ERISA the "most significant unanswered legal question," the Task Force recommended in its report that the legislature appropriate funds for the state to obtain

State	Legislative & Other Activity	Arrangement Features	ERISA and Code Concerns
		employee contributions and/or account earnings such that the plan is self-sustaining.	guidance from legal experts and develop a plan to receive an "expedited opinion" from DOL.
Vermont	In January 2014, S. 193[27] was introduced to create an interim Public Retirement Plan Study Committee (Committee) to "evaluate the feasibility of establishing a public retirement plan." The bill would require a report by Jan. 15, 2015. The bill failed to pass prior to the end of the legislative session.	If the Committee would determine that a public retirement plan is necessary, feasible and effective, the Committee shall study: ■ Whether private employers of a certain size should be required to offer the plan. ■ How to ensure the plan is available to private sector employees not covered by an alternative retirement plan. ■ Whether the plan should include any guarantee by the state or impose any obligation or liability on the state. ■ Whether the plan should impose any liability or obligation on private employers.	
West Virginia	On March 6, 2014, S. Con. Res. 91[28] was introduced and referred to the state Senate Rules Committee. The resolution requests that the Joint Committee on Government and Finance study the "advisability and feasibility" of creating a government-managed retirement savings program for small businesses and their	The study would consider the benefits and implications of creating a new government-managed program versus encouraging and promoting currently available private sector retirement opportunities such as a portable defined contribution plan, Simple IRA, SEP, 401(k), 457, traditional or Roth IRAs, and individual annuities. The proposed resolution states that the Legislature recognizes that a state-run program could be a disincentive for employers to	The study would examine the compliance costs and legal implications to the state and its small businesses that could result from applicable federal law as well as the federal tax treatment under such a government-managed program.

  ISSN

State	Legislative & Other Activity	Arrangement Features	ERISA and Code Concerns
	employees.	consider sponsoring a plan and may cause some employers to drop existing plans. It also states the need to determine if a state-run program would be less expensive and not in direct competition with the "viable and robust employee and employer portable retirement programs" already offered by the private sector.	
Wisconsin	On Feb. 17, 2014, S.B. 611[29] was introduced, and on March 4, 2014, A.B. 838[30] was introduced, to create a Wisconsin private retirement security board (board). The board would conduct a feasibility study on the creation of a private retirement security plan for state residents, submit a report and implement the plan upon the enactment of any necessary legislation. The bills failed to pass on April 8, 2014, pursuant to a Senate joint resolution.	■ Participation would be voluntary. ■ The plan is to be "reasonably commensurate" with the Wisconsin Retirement System (WRS) for public employees. (*Under the WRS, public employees and their employers pay contributions, and the plan provides retirement annuities.*) ■ The State of Wisconsin Investment Board must assist with the management and investment of plan assets. ■ The Employee Trust Funds Board, which administers the WRS, must assist in plan administration. ■ Participants may be charged reasonable fees to cover the cost of administering the plan and investment costs, among others.	

ENDNOTES

*Indicates states that would *mandate* participation in a state-run retirement plan.

1 California Secure Choice Retirement Savings Trust Act, S.B. 1234, 2011-2012 Leg. (Cal. 2012) (enacted).

2 S.B. 923, 2011-2012 Leg. (Cal. 2012) (enacted).

3 Illinois Secure Choice Savings Program Act, S.B. 2758, 98th Gen. Assemb. (Ill. 2014).

[4] Illinois Secure Choice Savings Program Act, H.B. 4595, 98th Gen. Assemb. (Ill. 2014).

[5] An Act to Provide Retirement Options for Nonprofit Organizations, H.B. 3754, 187th Leg., (Mass. 2012) (enacted).

[6] Press Release, Mass. Dept. of the State Treasurer, Grossman and Jakious Announce Major Step Forward in Creation of Non-Profit Retirement Plan (June 9, 2014), *available at* http://www.mass.gov/treasury/about/media-pubs/treas-press-rel/2014/nonprofitirspr.pdf.

[7] Arizona Secure Choice Retirement Savings Trust Act, H.B. 2063, 51st Leg., 2d Reg. Sess. (Ariz. 2014).

[8] S.B. 66, 118th Gen. Assemb., 2d Reg. Sess. (Ind. 2014) (establishing a state-assisted retirement plan).

[9] S.B. 283, 2014 Reg. Sess. (La. 2014) (creating the Louisiana Retirement Savings Plan).

[10] Legis. Doc. 1473, 126th Leg., 1st Reg. Sess. (Me. 2013) (creating a public option pension system).

[11] Maryland Secure Choice Retirement Savings Program and Trust, S.B. 921, Gen. Assemb., 434th Sess. (Md. 2014).

[12] Maryland Secure Choice Retirement Savings Program and Trust, H.B. 1251, Gen. Assemb., 434th Sess. (Md. 2014).

[13] S.B. 199, 130th Gen. Assemb., 2013-2014 Reg. Sess. (Ohio 2013) (creating the Ohio Secure Choice Retirement Savings Program if certain conditions are met).

[14] Substitute H.B. 2474, 63d Leg., 2014 Reg. Sess. (Wash. 2014) (creating the save toward a retirement today (START) state retirement savings plan).

[15] S.B. 6294, 63d Leg., 2014 Reg. Sess. (Wash. 2014) (creating the save toward a retirement today (START) state retirement savings plan).

[16] H.B. 4375, 81st Leg., 1st Sess. (W. Va. 2014) (establishing the West Virginia Voluntary Employee Retirement Accounts Program).

[17] S.B. 488, 81st Leg., 1st Sess. (W. Va. 2014) (establishing the West Virginia Voluntary Employee Retirement Accounts Program).

[18] H.B. 14-1377, 69th Gen. Assemb., 2d Reg. Sess. (Colo. 2014) (creating the Colorado Retirement Security Task Force).

[19] An Act Implementing Provisions of the State Budget for the Fiscal Year Ending June 30, 2015, H.B. 5597, 2014 Reg. Sess. (Conn. 2014) (enacted).

[20] An Act Promoting Retirement Savings, S.B. 249, 2014 Reg. Sess. (Conn. 2014).

[21] S.F. 2078, 88th Leg. (Minn. 2014) (creating the Minnesota Secure Choice Retirement Savings Plan).

[22] H.F. 2419, 88th Leg. (Minn. 2014) (creating the Minnesota Secure Choice Retirement Savings Plan).

[23] S.F. 2078, 88th Leg. (Minn. 2014) (as amended) (requiring a report on the establishment of a state-administered retirement savings plan).

[24] Women's Economic Security Act, H.F. 2536, 88th Leg. (Minn. 2014) (enacted).

[25] Women's Economic Security Act, S.F. 2050, 88th Leg. (Minn. 2014).

[26] H.B. 3436, 77th Legis. Assemb., Reg. Sess. (Or. 2013) (enacted) (establishing the Oregon Retirement Savings Task Force).

[27] S. 193, 2013-2014 Legis. Sess. (Vt. 2014) (establishing an interim Public Retirement Plan Study Committee).

[28] S. Con. Res. 91, 81st Leg., 1st Sess. (W. Va. 2014) (requesting a study on a government-managed retirement savings program for small businesses and their employees).

[29] S.B. 611, 2013-2014 Leg. (Wis. 2013) (creating a Wisconsin private retirement security board and requiring the board to establish a private retirement security plan).

[30] A.B. 838, 2013-2014 Leg. (Wis. 2013) (creating a Wisconsin private retirement security board and requiring the board to establish a private retirement security plan).

