STATE-RUN RETIREMENT PLANS FOR PRIVATE SECTOR EMPLOYEES

After consideration in more than 30 states since 2014, only five states have approved a mandatory state-run retirement plan for private workers, and no state has fully implemented such a plan. These “Secure Choice” plans have been rejected because they pose significant costs, risks, and legal liabilities for both the state and private employers, and because there is already a vibrant private marketplace for employer and individual retirement plans.

Beginning in 2007, several states conducted studies of a potential state-run retirement plan for private sector employees. These studies consistently point to legal and tax obstacles, as well as significant setup and ongoing costs and liabilities. In 2012, Massachusetts passed a 401(k) plan for small non-profit employers, which was just launched on October 12, 2017. In 2012, California passed a mandatory state-run IRA plan for private small businesses but has not been able to implement the plan. In 2014, Illinois passed a similar mandatory auto-enrollment Roth IRA for medium-sized employers but it is also pending. Oregon directed the creation of a mandatory IRA plan in 2015 and launched a pilot phase in July 2017. Large employers have already challenged the plan in federal court. Connecticut and Maryland passed mandatory auto-enrollment IRA plans in 2016. In 2017, Vermont passed a type of multiple-employer plan (Open MEP) not available to private sector employer groups. Each of these programs has faced budgetary, legal, and administrative hurdles.

For the states, several questions loom over these Secure Choice plans:

- How to impose an employee benefit mandate without risking pre-emption by ERISA?
- How to require auto-enrollment without triggering ERISA compliance and liabilities?
- How to assess potential litigation costs and liabilities to the state and private employers?
- How to ensure the plan is financially self-sustaining and not a threat to the General Fund?
- How to finance startup costs, ranging from $18 million (Illinois) to $170 million (California)?

To resolve some of these difficult questions, the proponents urged the Obama Administration through the U.S. Department of Labor to issue guidance on a new type of ERISA safe harbor that would apply to state- or city-run retirement plans for private workers. The DOL responded by adopting rules in August 2016 that outlined an ERISA safe harbor for a state-run, auto-enrollment IRA plan, but only if the sponsoring state met certain requirements, such as taking responsibility for the safety of worker contributions and savings, and providing a mechanism for enforcement of worker rights.

With the election of a new Administration, Republicans in Congress acted to overturn the DOL’s safe harbor rules by using the Congressional Review Act. House Joint Resolutions 67 (municipal plans) and 66 (state-run plans) were passed by both houses and signed by the President. These actions permanently repealed the special safe harbor for city- and state-run plans. The five states that had approved a Secure Choice plan (CA, CT, IL, MD, OR) say they will continue to move forward. However, they will now face even greater potential risk of liability and conflict with federal ERISA requirements.

ACLI encourages states to embrace workable approaches to increasing retirement savings, such as financial literacy programs, voluntary public/private partnerships and employer and worker incentives. Washington and New Jersey have adopted Small Business Retirement Marketplace programs, connecting small employers to existing, low-cost private plans. There is no employer mandate and no state liability, and workers retain all the protections of ERISA. Utah this year adopted a simple $500 tax credit for any employer who sets up a new plan. ACLI also supports congressional action to create “starter 401(k)s” for small employers and allow private employer groups to create Open MEPs for diverse businesses.

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