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STATE INITIATIVES TO COVER UNCOVERED PRIVATE SECTOR WORKERS

By Alicia H. Munnell, Anek Belbase, and Geoffrey T. Sanzenbacher*

Introduction

At any given moment, only about half of private sector workers are covered by any sort of employer-sponsored retirement plan. This lack of coverage has two implications. First, a substantial share of households – roughly one-third – end up with no coverage at all during their worklives and must rely exclusively on Social Security in retirement. And, even under current law, Social Security will provide less in the future relative to pre-retirement earnings than it has in the past. Second, with median job tenure of about four years, many employees move in and out of coverage so that they end up with inadequate 401(k) balances.

Since most of those without coverage work for small employers, policymakers for decades have tried to solve the problem by introducing simplified retirement plans. But these initiatives have not improved coverage because plan administration costs are only one of several reasons that small businesses do not offer plans. Equally important considerations include too few employees, lack of employee interest, and unstable business income. Recognizing the difficulty in getting small businesses to adopt plans, the Obama Administration proposed "Automatic IRAs" in 2009 to cover the uncovered, and others have come up with alternative proposals. But no progress has been made in passing federal legislation. Into this breach have stepped the states. This *brief* provides an overview of retirement savings initiatives at the state level.

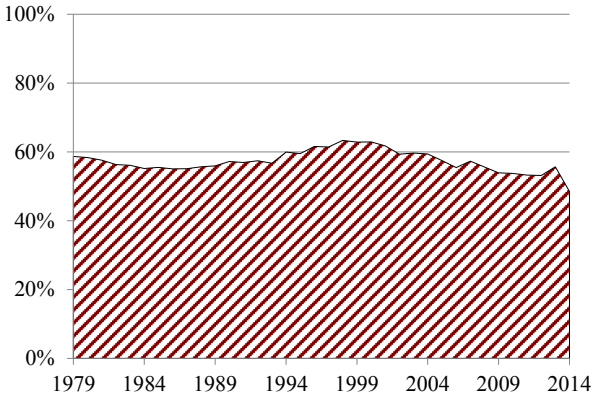
The discussion proceeds as follows. The first section describes the nature of the coverage problem. The second section provides a summary of the state initiatives, separating the states into those moving ahead with a plan, those with legislation currently in play, and those where no legislation has been proposed or legislation has been rejected. It also describes the two approaches that states have adopted to date – an employer mandate to auto-enroll their employees in an IRA or the creation of a "marketplace" – as well as a third option, a state multiple employer plan, that some are considering. The third section pokes at the data to see if any systematic relationship exists between the initiatives and the characteristics of the states involved. The fourth section describes the U.S. Department of Labor's efforts to clear away the regulatory underbrush, which should ease the path toward implementing the state programs. The final section concludes that, while the expansion of coverage could best be done at the federal – not the state – level, those states that require their employers to auto-enroll employees will significantly improve the retirement security of their citizens.

* The authors are all with the Center for Retirement Research at Boston College. The authors wish to thank Angela Antonelli, Keith Brainard, David Blitzstein, David John, Elizbeth Kellar, Michael Kreps, and Nari Rhee for helpful comments.

The Problem

The percentage of private sector workers offered any type of employer-sponsored plan – traditional defined benefit or 401(k) – has not increased at all since 1979 (see Figure 1).[1] An increase in coverage for women, as their presence in the labor force has grown, has been more than offset by a decline in coverage for men.

Figure 1. Percentage of Private Sector Workers Ages 25-64 Offered an Employer-Sponsored Retirement Plan, 1979-2014

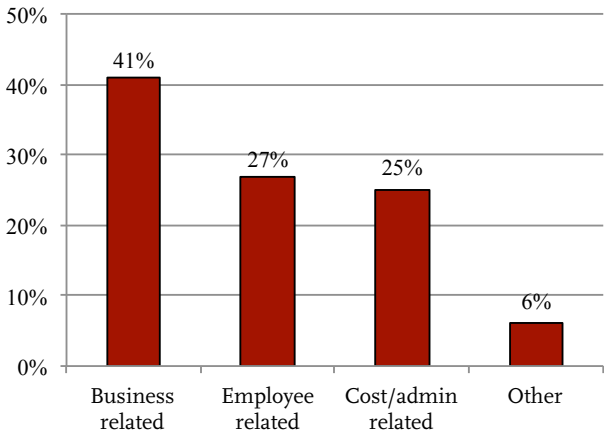


Source: U.S. Census Bureau, *Current Population Survey Annual Social and Economic Supplement*, 1980-2015.

Not surprisingly, the lack of coverage is particularly prevalent among those at the lower end of the income distribution, so many low earners end up dependent solely on Social Security for their retirement income.[2] Even those with a 401(k) plan often end up heavily reliant on Social Security because they lack continuous coverage and retire with very low balances.[3] This outcome would not be a problem if Social Security provided enough for low-income households to maintain their standard of living. But the Social Security replacement rate – benefits as a percentage of pre-retirement earnings – for low earners retiring at 62 will be only 41 percent. If low earners could work until 65 or 67, they would fare better.[4] Many in this group, however, are unable to stay in the labor force that long.

The bulk of those without retirement plan coverage work for small employers (firms with fewer than 100 employees).[5] For decades, policymakers have tried to solve the problem by introducing simpler products that could be adopted by small business.[6] The trend data on coverage shown in Figure 1, however, clearly indicate that these efforts have not moved the needle. This outcome is not surprising as costs and administrative concerns are only one of several reasons that small businesses do not offer plans. Other reasons include business-related concerns, such as uncertain revenue, and employee considerations, such as high turnover or a preference for cash wages (see Figure 2).[7]

Figure 2. Reasons Cited by Small Employers as the Most Important for Not Offering a Retirement Plan, 2003



Source: Employee Benefits Research Institute (2003).

Recognizing the difficulty in getting small employers to introduce employer-sponsored plans, a number of proposals have emerged at the federal level to improve coverage.[8] Perhaps the best known is the Obama Administration's proposed Automatic IRAs, which grew out of a 2006 study for the Retirement Security Project and reflect the success of auto-enrollment at increasing participation rates in 401(k) plans.[9] The Auto-IRA program would require employers without workplace retirement plans to automatically enroll their workers in IRAs, with contributions from payroll deductions. Employees would be free to opt out, but eligible employees who did contribute would have their contributions matched by the Saver's Tax Credit. Unfortunately, no legislation has been enacted at the federal level to solve the coverage problem.[10] Instead, the states have stepped into the breach.

The State Initiatives

The current efforts by several states to set up a state-sponsored plan represents the culmination of work by several policy, labor, and consumer organizations, beginning in the late 2000s.[11] The first successful effort, which occurred in California, also drew on specific proposals not only by researchers but by the National Conference on Public Employee Retirement Systems (NCPERS).[12] The NCPERS plan reflected the recognition by public employees that the quality of their own retirement coverage could be at risk if their counterparts in the private sector lack access to a retirement system.

The California legislation enacted in 2012 – the California Secure Choice Retirement Savings Program – looked quite different than the hybrid pension proposal included in the first draft of the bill.[13] Most importantly, the vehicle moved from a cash balance plan to an IRA, which avoided subjecting employers or other fiduciaries to the Employee Retirement Income Security Act (ERISA). While the IRA approach precluded employer contributions to the program, it allowed the bill to retain the critical employer mandate. The legislation also retained language to allow for participant risk pooling and guarantees, if feasible without imposing liability on the state. At this point, California has completed a market and feasibility study but needs final legislation to get its Auto-IRA program underway.

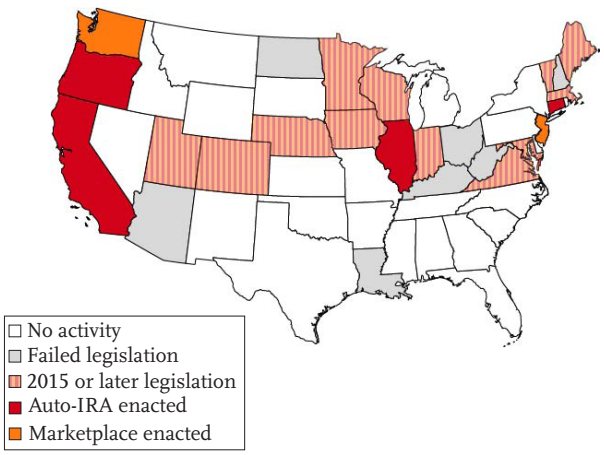
Three other states – Connecticut, Illinois, and Oregon – have also passed legislation following the Auto-IRA model.[14] Connecticut has completed its feasibility study and will ask the legislature for approval to get the program up and running. Illinois does not have to go back to the legislature, but has not yet completed a feasibility study. Oregon started a little later but is aiming at completing its study by the fall of 2016 and having its program up and running by 2017.

Two states – Washington and New Jersey – have followed a different path.[15] These states have adopted a marketplace approach, which does not involve an employer mandate to automatically enroll uncovered workers, but rather 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.

Other states, such as Massachusetts, are toying with the idea of having both an Auto-IRA system and a state-run system of multiple employer plans (MEPs).[16] MEPs would allow unrelated employers to offer 401(k) plans but offload a portion of the administrative burdens and fiduciary responsibilities to a third party. While employers could not be required to adopt a MEP, the existence of an employer mandate might encourage small employers to opt for a MEP rather than an IRA.

Figure 3 shows where plan activity has taken place. The red and orange colors identify those states with plans underway, the stripes indicate states with active legislation, and the light gray those states with failed legislation. It should be noted that many of the states with active programs today had many failed pieces of legislation before an actual program was enacted. The message from the map is that state activity to cover uncovered workers is widespread.[17]

Figure 3. State Retirement Security Activity, as of March 2016



Source: Authors' analysis.

Why These States

One interesting question is why California, Connecticut, Illinois, and Oregon have taken the lead in setting up Auto-IRA programs. (States with marketplace plans are excluded as their voluntary nature will do

less to close the coverage gap). Does the answer rest in the condition of the state's public plans, the economics of the state, or the political party in charge?

As noted above, a 2011 NCPERS proposal to improve benefits for private sector workers was one of the factors that contributed to the passage of Auto-IRA legislation in California. Hence, one might think that states that require the most from taxpayers, either because their public plans are particularly generous or severely underfunded, would be the most likely to press for a retirement system that ensures adequate retirement income. The numbers in Table 1 for the states with and without Auto-IRA proposals in play somewhat support this notion. The public plans in the Auto-IRA states have a slightly lower funded ratio and a slightly higher normal cost than those without, but the differences are modest.

Table 1. Characteristics of States with and without Auto-IRAs

State characteristic	States with Auto-IRAs	States without Auto-IRAs
State public plans		
Average funded ratio	64%	72%
Average normal cost	13%	11%
State economics		
Share offered a retirement plan	52%	57%
Median income	$37,440	$36,000
Medicaid as percentage of budget	17%	14%
State politics		
Democratic house	100%	26%
Democratic senate	100%	22%
Democratic governor	100%[a]	33%

[a] Although the current governor of Illinois is a Republican, the legislation was passed under a Democratic governor.
Sources: Authors' calculations from U.S. Census Bureau, *Current Population Survey March Supplement*, 2010-2014 and *Public Plans Database*, 2012.

Another possible explanation is that the economics of the state are driving the initiatives. That is, those states with more workers who may be unprepared for retirement are the ones leading the effort. Again the data somewhat support the notion. The states with Auto-IRAs have a smaller percentage of the workforce offered a plan, have slightly higher incomes and therefore lower Social Security replacement rates, and devote a larger share of their budgets to Medicaid, suggesting they could be more concerned about a future increase in elderly poverty.

Although covering the uncovered is not a politically charged issue, the question of imposing a mandate on employers can be. So it is not surprising that the states in the vanguard have a Democratic house and senate and a Democratic governor (the current governor of Illinois is a Republican but a Democrat was governor when the law was passed). This seemingly partisan interest is countered by recent actions in states like Utah, which is deeply Republican, and Iowa, which has a Republican governor and a Republican house. In the end, the Auto-IRA movement will likely end up being a bipartisan effort.

Attempting to Clear Up the Regulatory Environment

Until recently, one obstacle in the path of all the state initiatives was an uncertain regulatory environment. However, in July 2015, President Obama instructed the Department of Labor (DOL) to provide clarifying guidance so that the states could develop plans without running afoul of ERISA. In November 2015, the DOL issued guidance that would exempt state Auto-IRA programs from ERISA and sought to clarify the treatment of other types of plans that would fall under ERISA. These efforts should provide new momentum for the adoption and implementation of state savings initiatives, although the situation remains uncertain until the regulations are finalized.

Auto-IRAs

Many involved in the state-based initiatives were concerned that a state-run Auto-IRA program would fall under the auspices of ERISA. While ERISA offers many consumer protections, it also involves significant reporting and disclosure requirements and stringent conduct standards for plan fiduciaries. Several states have indicated that if employers in their plan were subject to ERISA regulations, they would not proceed.[18]

In an effort to lift the ERISA cloud, the DOL has issued a proposed rule for "Savings Arrangements Established by States for Non-Governmental Employees."[19] The rule seeks to establish a safe harbor whereby state-run payroll deduction programs with automatic enrollment would not be covered by ERISA.

The original DOL 1975 regulation said that ERISA does not cover an IRA payroll deduction arrangement if four conditions are met: 1) the employer makes no contributions; 2) employee participation is "completely voluntary;" 3) the employer does not endorse the program and acts as a mere facilitator; and 4) the employer receives no consideration for his expense.

In 1999, DOL loosened up on #3 to allow employers to furnish IRA materials, answer employee inquiries, and encourage retirement savings through IRAs generally.

Requirement #2 – the "completely voluntary" language – remained the sticking point. In the past, some have argued that if an employer is required by the state to auto-enroll employees then requirement #2 is met because the employer is not exercising its authority over the employee.[20] In this case, the state initiatives would not seem to trigger ERISA. Yet, in its proposed rule, DOL has indicated that at this time it does not share this interpretation and believes auto-enrollment – even as part of a state initiative – does not meet requirement #2. In this view, the state initiatives may trigger ERISA and, hence, clarification is needed.

To this end, the DOL said that the 1975 requirements were not written with a state-sponsored program in mind. The state mandating that the employer automatically enroll its employees is very different from the employer setting the terms of a program and administering it. Therefore, DOL proposes to introduce a "voluntary" standard that permits automatic enrollment with employee opt-out features, so long as participation is state mandated.[21] This change would remove any uncertainty and make it less likely, if litigated, for the courts to conclude that these state programs are covered by ERISA. DOL's comment period closed on January 19, 2016.

ERISA Plans

DOL also published an interpretive bulletin to assist states interested in helping employers establish ERISA-covered plans for their employees.[22] This bulletin addressed three approaches. The first is the establishment of a marketplace to connect eligible employers with retirement plans available in the private sector market, discussed above. The marketplace would not itself be an ERISA-covered plan, and the arrangements available to employers could include ERISA-covered plans and other non-ERISA savings arrangements.

The second alternative would enable a state to design a "prototype plan" covered by ERISA and make it available to individual employers. The state or a designated third-party could assume responsibility for most administrative and asset management functions of an employer's prototype plan.

The third alternative would allow a state to establish a multiple employer plan that employers could join rather than establishing their own separate 401(k). The MEP would be run by the state or a designated third party. Although not a statutory requirement, DOL has ruled in the past that MEPs are limited to employers that share a nexus of interests. However, in the recent guidance DOL concluded that a "state MEP" is possible because a nexus exists in that the state is tied to the contributing employers and their employees through its interest in the health and welfare of its citizens.

The key point of the interpretative bulletin is that ERISA does not preclude state-based retirement savings options, as long as employers participate voluntarily and ERISA provisions are applied through the state programs.

Conclusion

While employer-sponsored retirement plans can provide an important source of income for some retirees, they cover only about half of the private sector workforce at any given time. This lack of coverage means that about a third of households are not covered at all during their entire worklives, making them entirely dependent on Social Security in retirement. With Social Security providing less in the future, this reliance is likely to produce inadequate income. And with a mobile workforce, people moving in and out of employer-based coverage will end up with far smaller accumulations than one would expect based on spreadsheet calculations.

Clearly, more retirement saving is needed. Designing simpler plans in the hope that they will appeal to small business has not worked in the past and is unlikely to work in the future. The President's proposed "Automatic IRAs," which automatically enroll those with no employer-sponsored plan and require nothing more than payroll deductions by the employer, would help. But no such legislation is even under consideration at the federal level.

Recognizing the seriousness of the problem, states have jumped into the breach. So far, four states – California, Illinois, Connecticut and Oregon – have adopted an Auto-IRA approach. Two states – New Jersey and Washington – are setting up "marketplaces" to make it easier for small businesses to purchase inexpensive plans. Our bias is that simply providing information through a marketplace instead of requiring employers without a plan to automatically enroll their employees in a state-initiated plan will have only a modest effect. A mandate coupled with auto-enrollment is the key to success. Hopefully, many of the states with active legislation will follow the Auto-IRA model.

Even if more states are successful in setting up a tier of retirement income for their citizens, this approach to implementing a retirement program is clearly a second-best alternative. A national Auto-IRA plan would be a much more efficient way to close the coverage gap, offering substantial economies of scale and avoiding the laborious, time-consuming, and expensive process of setting up 50 different state plans. This country needs federal legislation!

Endnotes

1 For more detailed information on trends in retirement plan access, participation, and asset balances, see Rhee and Boivie (2015).

2 See Karamcheva and Sanzenbacher (2010) and Wu, Rutledge, and Penglase (2014).

3 Munnell (2014).

4 U.S. Social Security Administration (2015).

5 For example, in 2014, 55 percent of private sector workers ages 25-64 without coverage worked for a firm with fewer than 100 employees (authors' calculations from the 2015 *Current Population Survey March Supplement*).

6 The SIMPLE (Savings Incentive Match Plan for Employees of Small Employers) is a prime example. SIMPLE plans, which were introduced in 1996, generally replaced SARSEPs (Salary Reduction Simplified Employee Pensions), which were the earlier pension provisions for small employers. Firms with fewer than 100 employees can offer a SIMPLE, which can be set up as an IRA for each employee or as a 401(k) plan. The SIMPLE has a number of advantages. Firms can either match the contributions or contribute a fixed percentage of their payroll. Once established, the SIMPLE is administered by the employer's financial institution, and does not even require the employer to file an annual financial report. Furthermore, most employers are eligible for tax credits for the first three years after starting the SIMPLE.

7 Studies by financial services providers suggest that lowering administrative and legal costs could potentially increase plan adoption (see Kalamarides, 2010 and AARP, 2015), but it is not clear why this approach would succeed given the lack of impact that similar efforts have had in the past.

8 Senator Tom Harkin in 2014 proposed a plan that would automatically enroll all workers whose employer does not provide an adequate plan in a new government-mandated, privately managed defined

contribution retirement program. The default contribution rate would be 6 percent, contributions would be invested in a commingled portfolio, and payouts from the plan would be in the form of an annuity (U.S. Congress, 2014). The Center for American Progress has proposed "SAFE Retirement Plans" consisting of competing non-profit plans from which workers would choose. Under this proposal, once choosing a provider, participants would be automatically enrolled at a default contribution rate, their contributions would be portable among employers and invested in vehicles that pool money to allow risk sharing and lower fees (Davis and Madland 2013). Another proposal – the "Retirement Savings Plan" by Teresa Ghilarducci and Hamilton James (2016) – would establish a Guaranteed Retirement Account funded by a payroll tax of 3 percent, with a tax credit to offset contributions for poorer Americans. This plan would also provide annuitized income and a guaranteed real rate of return.

9 Iwry and John (2006).

10 The Treasury introduced the *my*RA program in 2015, which is a "starter" savings account to encourage non-savers to acquire the habit of saving. It is voluntary for employers to adopt and does not automatically enroll employees (U.S. Department of the Treasury 2016).

11 The New America Foundation helped design California's first private sector retirement bill, a 401(k) linked to the state employee pension system, introduced in 2007. In 2009, the Economic Opportunity Institute proposed a system of "universal voluntary retirement accounts" in Washington state. During this period, Mark Iwry of the Brookings Institution was also active in efforts to promote pilot Auto-IRA plans in a number of states. Ultimately, political support from key public sector unions, AARP, and other stakeholder groups helped pass private sector retirement bills in state legislatures.

12 Two important studies were the Retirement Security Project's national Auto-IRA (Iwry and John, 2006, 2009) and Teresa Ghilarducci's 2011 California Guaranteed Retirement Accounts (Rhee 2011). The original NCPERS (2011) proposal envisioned a cash balance plan with voluntary contributions and a modest guaranteed return. The program would take advantage of the public sector's economies of scale to deliver investment results in a cost-effective manner and its ability to pool mortality risk over a large number of participants to provide annuities at retirement.

13 State of California Legislature (2012).

14 State of Connecticut General Assembly (2014); State of Illinois General Assembly (2014); and State of Oregon Legislature (2015).

15 State of Washington Legislature (2015); and State of New Jersey Legislature (2016). Actually, New Jersey passed an Auto-IRA bill, but the governor changed it to a marketplace arrangement.

16 Commonwealth of Massachusetts (2015). The system could be either directly run by the state or run by a third party overseen by the state.

17 For additional details on specific states, see AARP (2016), Georgetown University Center for Retirement Initiatives (2016), and Pension Rights Center (2016).

18 Another reason that states are concerned about ERISA is the issue of "preemption" – preemption means that ERISA takes precedent over state law. Preemption poses a problem because ERISA prohibits states from mandating that a private employer offer its employees an ERISA plan. If a state's plan is ERISA covered, then ERISA law takes over and the state cannot mandate that employers offer it.

19 U.S. Department of Labor (2015a).

20 For example, see Toth (2014).

21 It is worth noting that this means employers who are not mandated to offer their employees a retirement savings vehicle – e.g., because they had too few employees to be covered under a mandate – would not fall under the safe harbor were they to enroll their employees in a state plan.

22 U.S. Department of Labor (2015b).

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Contact Information

Center for Retirement Research
Boston College
Hovey House
140 Commonwealth Avenue
Chestnut Hill, MA 02467-3808
Phone: (617) 552-1762
Fax: (617) 552-0191
E-mail: crr@bc.edu
Website: http://crr.bc.edu

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