

# BENEFITS LAW

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# JOURNAL

## Helping the Other Half Save: Model State Auto-IRA Act

How does the “other half”—the 50 percent of private sector workers not covered by a 401(k), pension, or other workplace plan—save for retirement? While they have the option of squirreling away money on their own in a Roth or traditional individual retirement account (IRA), they don’t. For example, only one of 20 middle income workers (those earning between \$30,000 and 50,000) without a workplace retirement plan make regular IRA contributions.

The vast majority of the 55 million uncovered workers have zero saved for retirement, because people are genetically wired to spend now rather than put away money for tomorrow. To counter the human urge against delayed gratification, saving needs to be easy, convenient, and painless. Thus, 80 percent of employees who are automatically enrolled in an employer 401(k) plan at a minimum contribution rate, with an opt-out, are regularly saving for retirement. Crucially, this hefty participation level crosses income, gender, racial, and ethnic lines; when it comes to savings, we are all alike.

Ideally we’d have a national solution giving all workers the needed nudge of a workplace retirement plan (like the United Kingdom’s highly successful National Employment Savings Trust (NEST) program). But, with the Democrats and Republicans unable to agree on a Mother’s Day resolution, yet alone an actual program, that seems unlikely to happen any time soon.

Enter state auto-IRAs. Using institutional recordkeepers, trustees, custodians, and investment funds, states are creating basic IRA savings vehicles by which uncovered private sector workers can voluntarily save through payroll withholding. Auto-IRAs (also known as Secure

Choice) are similar to college savings 529 plans, except employers facilitate their employees' contributions through their payroll systems, and employees can be automatically enrolled unless they decide otherwise. Like 529s, employers are not responsible for designing or operating the program, have no liability, and do not make any contributions. (Note: as I've written in these pages, I strongly believe that auto-IRAs are exempt from Employee Retirement Income Security Act (ERISA regulation), but as of yet, the question has not been answered by the federal courts. However, the California auto-IRA program, known as CalSavers, has been challenged in the District Court for the Eastern District of California by the Howard Jarvis Taxpayers Association. As we go to print, no decision has been issued. ERISA would add an unnecessary layer of regulations to IRAs and stymie states from mandating coverage.)

Three states—Oregon (first out of the gate), Illinois, and California—have active auto-IRA programs. Several others, including Maryland and Connecticut, have passed legislation and are working to establish their programs.

For the states that have yet to act, below is a Model Act to create an auto-IRA program. I first developed the model with the assistance of the National Conference on Public Employee Retirement Systems in 2017 and have since refined the model based on experiences working with Oregon, Illinois, California, and others. Most important, the model would enable a multistate collaboration, such as one state using another state's existing program or creating a joint program, rather than having to go it alone. A multistate approach could substantially reduce per-capita operational costs and quicken implementation.

Auto-IRAs are just one of several solutions currently percolating among the states to bring a measure of retirement security to their citizens—open multiple employer plans, turn-key single employer 401(k) plans, and Web-based plan marketplaces being others. Over time, success in enabling retirement savings will determine which solution works best. The only bad choice would be to wait for the federal government to act.

*The views set forth herein are the personal views of the author and do not necessarily reflect those of the law firm with which he is associated.*

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## MODEL STATE AUTO-IRA ACT

*Section 1. **Title of Act.*** This Act may be cited as the [State] Secure Choice Retirement Savings Program Act.

*Section 2. **Statement of Purpose and Policy.*** The [Legislature] finds: that large numbers of households in this State have no or inadequate retirement savings and many of those households do not have access to any savings plan at work; that this lack of retirement savings and coverage is more prevalent among low-income households; and that it is well-established that most workers will save for retirement if they are offered a workplace savings program using an opt out approach. [State] is deeply concerned about the retirement prospects of its citizens and the strain that large numbers of ill-prepared retirees may impose on taxpayer-financed elderly assistance programs for housing, food, medical care, and other necessities. Accordingly, this Act will facilitate voluntary retirement savings by workers in this State by establishing an “auto-IRA” savings program and requiring employers in this State that do not offer a retirement plan to make the Program available to their employees.

*Section 3. **Definitions.*** As used in this Act:

- (a) “Administrative Fund” shall mean the [State] Secure Choice Retirement Savings Administrative Fund established under Section 7.
- (b) “Board” means the [State] Secure Choice Retirement Savings Board established under Section 4.
- (c) “Compensation” means compensation within the meaning of Section 219(f)(1) of the Internal Revenue Code that is received by a Covered Employee from a Covered Employer.
- (d) “Contribution Rate” means the percentage of a Covered Employee’s Compensation that is withheld from his or her Compensation and paid to the IRA established for the Covered Employee under the Program.
- (e) “Covered Employee” means [any individual who is 21 years of age or older, who is employed by a Covered Employer, and who has Compensation that is allocable to the State. *[Consider cross reference to State workers compensation or*

*other law definition for determining whether compensation is allocable to the State.]* For purposes of the investment, withdrawal, transfer, rollover or other distribution of an IRA, the term Covered Employee also includes the beneficiary of a deceased Covered Employee and an “alternate payee” under State domestic relations law.

- (f) “Covered Employer” means an Employer that either:
  - (i) satisfies all of the following requirements:
    - (A) has at no time during the previous calendar year employed fewer than [NN] employees in the State;
    - (B) has been in business for at least [NN] years; and
    - (C) has not been a participating or contributing employer in a retirement plan under Sections 401(a), 401(k), 403(a), 403(b), 408(k), or 408(p) of Internal Revenue Code at any time during the preceding two calendar years; or
  - (ii) elects to be a Covered Employer if and as permitted in accordance with rules and procedures established by the Board.
- (g) “Employer” means a person or entity engaged in a business, profession, trade or other enterprise in the State, whether for profit or not for profit, that employs one or more individuals in the State; provided that a federal or state entity, agency or instrumentality (or any political subdivision thereof) shall not be an Employer.
- (h) “Internal Revenue Code” means the federal Internal Revenue Code of 1986, as amended.
- (i) “Investment Adviser” means (i) an investment adviser registered as such under the U.S. Investment Advisers Act of 1940 (“Advisers Act”), or (ii) a bank or other institution exempt from registration under the Advisers Act.
- (j) “Investment Fund” means each investment portfolio established by the Board within the Trust for investment purposes.

- (k) “IRA” means either an individual retirement account or individual retirement annuity established under Section 408 (traditional) or 408A (Roth) of the Internal Revenue Code.
- (l) “Program” means the [State] Secure Choice Retirement Savings Program established under this Act.
- (m) “State” means the [state/commonwealth] of [State].
- (n) “Trust” means the IRA retirement trust (or annuity contract) established under Section 8.
- (o) “Trustee” means the trustee of the Trust (including an insurance company issuing an annuity contract) selected by the Board under Section 8.

**Section 3. [State] Secure Choice Retirement Savings Board.**

- (a) There is hereby created the [State] Secure Choice Retirement Savings Board.
- (b) The Board shall consist of [NN] members as follows:
  - (i) The State Treasurer or his or her designee.
  - (ii) The following [NN] members appointed by the Governor:
    - (A) [Placeholder]
    - (B) [Placeholder]
    - (C) [Placeholder]
  - (iii) An individual appointed by [Placeholder]
- (c) The term of office of each member of the Board appointed by the Governor or [Placeholder] shall be four years, but each such member serves at the pleasure of the Governor or [Placeholder], as the case may be. [*Consider providing: for staggered terms; Board members only may be dismissed during their term for cause; and requirement that at least one Board member be experienced in small business, investment, retirement or employment matters.*] If there is a vacancy by

any such member, the Governor or [Placeholder] shall appoint a replacement to serve for such member's unexpired term.

- (d) The State Treasurer or his or her designee shall serve as the Chairperson of the Board.
- (e) A majority of the members of the Board shall constitute a quorum for the transaction of business.
- (f) Members of the Board shall serve without compensation but may be reimbursed for reasonable and appropriate expenses incurred in connection with their Board duties from the Administrative Fund.

*Section 4. Powers and Duties of the Board.* The Board shall have the following powers and duties:

- (a) To design, establish, and operate the Program in accordance with the requirements set forth in Section 5.
- (b) To collect fees to defray the costs of administering the Program.
- (c) To enter into contracts necessary or desirable for the establishment and administration of the Program.
- (d) To hire, retain and terminate third party service providers as the Board deems necessary or desirable for the Program, including, but not limited to, consultants, investment managers or advisors, trustees, custodians, insurance companies, recordkeepers, administrators, actuaries, counsel, auditors and other professionals, provided that each service provider shall be authorized to do business in the State.
- (e) To determine the type[s] of IRAs to be offered, the default Contribution Rate and automatic escalation rate.
- (f) To employ a Program Director and such other individuals as the Board determines to be necessary or desirable to administer the Program and the Administrative Fund.
- (g) To develop and implement an outreach plan to gain input and disseminate information regarding the Program and retirement and financial education in general, to employees, employers and other constituents in the State.

- (h) Determine the number of days by which an Eligible Employer must make the Program available to a Covered Employee upon first becoming an Eligible Employer or Covered Employee.
- (j) [State agencies to provide assistance to Board.]
- (k) [The Board shall be independent of the State [executive] and may not impose any obligations on the State, nor may it pledge the credit of the State.]
- (l) To adopt rules and procedures for the establishment and operation of the Program and to take such other actions necessary or desirable to establish and operate the Program in accordance with the Act.
- (m) To establish and maintain the Program by: contracting with another state to use that state's auto-IRA program, partner with one or more states to create a joint auto-IRA program that includes the program; or form a consortium with one or more other states in which certain aspects of each state's program are combined for administrative convenience and efficiency, provided that in any such case, the auto-IRA program used, the joint program or the consortium otherwise satisfies the requirements of this Act.

Section 5. ***Consumer Protection; Fiduciary Duties.***

- (a) The Board, the Trustee, and each Investment Adviser or other person which has control of the assets of the Trust shall be a fiduciary with respect to the Trust and IRAs established and maintained under the Program.
- (b) Each Covered Employer shall be required to provide Covered Employees with such information as the Board directs. No Employer acting as such shall be considered a fiduciary with respect to the Trust or an IRA or have fiduciary responsibilities under the Act.
- (c) Each fiduciary shall discharge its duties with respect to the Program solely in the interests of Covered Employees and with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with those matters would use in the conduct of an enterprise of like character and aims.

*Section 6. [State] Secure Choice Retirement Savings Program.*

The [State] Secure Choice Retirement Savings Program shall be designed, established and operated in accordance with the following:

- (a) Each Covered Employer shall be required to offer to each Covered Employee an opportunity to contribute to an IRA established under the Program for the benefit of the Covered Employee through withholding from his or her Compensation. No Employer shall be permitted to contribute to the Program or to endorse or otherwise promote the Program.
- (b) Unless the Covered Employee chooses otherwise, he or she shall be automatically enrolled in the Program and contributions shall be withheld from such Covered Employee's Compensation at a rate set by the Board unless the Covered Employee elects not to contribute or to contribute at a different rate.
- (c) The Contribution Rate of each Covered Employee shall be increased at such rate and at such intervals as from time to time established by the Board, unless the Covered Employee elects not to have such automatic increases apply.
- (d) The IRAs shall qualify for favorable federal income tax treatment under Section 408 and 408A (as appropriate) of the Internal Revenue Code.
- (e) The Board may establish intervals after which a Covered Employee must reaffirm elections (including opt-out elections) with regard to participation or escalation.
- (f) Each Covered Employer shall deposit Covered Employees' withheld contributions under the Program with the Trustee in such manner as is determined by the Board, provided that the Employer shall deliver the amounts withheld to the Trustee in good order within [ten] business days after the date such amounts otherwise would have been paid to the Covered Employee.
- (g) The Board shall determine the rules and procedures for withdrawals, distributions, transfers and rollovers of IRAs and for the designation of IRA beneficiaries.

- (h) The Board shall report annually to the [Governor and Legislature] detailing the Board's activities and the Program's operations and shall submit an annual audited financial report, prepared in accordance with generally accepted accounting principles, on the operations of the Trust to [the governor, the controller, the state auditor, and the Legislature]. The annual audit shall be conducted by an independent certified public accountant.
- (i) The Board shall cause to be furnished to each Covered Employer:
  - (i) Information regarding the Program;
  - (ii) Required disclosures to be furnished to Covered Employees. Such disclosures shall include:
    - (A) A description of the benefits and risks associated with making contributions under the Program.
    - (B) Instructions about how to obtain additional information about the Program.
    - (C) A description of the federal and state income tax consequences of an IRA, which may consist of or include the disclosure statement required to be distributed by the Trustee under the Internal Revenue Code and the Treasury Regulations thereunder.
    - (D) A statement that Covered Employees seeking financial advice should contact their own financial advisors and that Covered Employers are not in a position to provide financial advice and that Covered Employers are not liable for decisions Covered Employees make under the Act.
    - (E) A statement that the Program is not an employer-sponsored retirement plan.
    - (F) A statement that neither the Program nor the Covered Employee's IRA established under the Program is guaranteed by the State.
    - (G) A statement that neither a Covered Employer nor the State will monitor or has an obligation to

monitor the Covered Employee's eligibility under the Internal Revenue Code to make contributions to an IRA or to monitor whether the Covered Employee's contributions to the IRA established for the Covered Employee under the Program exceed the maximum permissible IRA contribution; that it is the Covered Employee's responsibility to monitor such matters; and that neither the State nor the Covered Employer will have any liability with respect to any failure of the Covered Employee to be eligible to make IRA contributions or any contribution in excess of the maximum IRA contribution.

- (iii) Information, forms and/or instructions to be furnished to Covered Employees at such times as the Board determines that provide the Covered Employee with the procedures for:
  - (A) Making contributions to the Covered Employee's IRA established under the Program, including a description of the automatic enrollment rate, the automatic escalation rate and frequency and the right to elect to make no contribution or to change the Contribution Rate under the Program.
  - (B) Making an investment election with respect to the Covered Employee's IRA established under the Program, including a description of the default investment fund.
  - (C) Making transfers, rollovers, withdrawals and other distributions from the Covered Employee's IRA.
- (i) Each Covered Employer shall deliver or facilitate the delivery of the items set forth in Section 5(k)(ii) and 5(k)(iii) to each Covered Employee at such time and in such manner as determined by the Board.
- (j) The Program shall be designed and operated in a manner that will cause it not to be an employee benefit plan within the meaning of Section 3(3) of the Employee Retirement Income Security Act of 1974.

*Section 7. [State] Secure Choice Retirement Savings Administrative Fund.*

- (a) The [State] Secure Choice Retirement Savings Administrative Fund is hereby established in the State Treasury as a nonappropriated separate and apart from the Trust. The Board shall use moneys in the Administrative Fund to pay for administrative expenses it incurs in the performance of its duties under the Act. The Administrative Fund may receive any grants or other moneys designated for the Administrative Fund from the State, or any unit of federal or local government, or any other person. Any interest earnings that are attributable to moneys in the Administrative Fund must be deposited into the Administrative Fund.
  
- (b) [Method of appropriations/loan to Administrative Fund initial board activities, hire staff, consultants & establish Program.]

*Section 8. [State] Secure Choice Retirement Trust.* There is hereby created as an instrumentality of the State a Trust to be known as the [State] Secure Choice Retirement Savings Trust.

The Board shall appoint an institution qualified to act as trustee of IRA trusts or insurance company issuing annuity contracts under Section 408 of the Internal Revenue Code and licensed to do business in the State to act as Trustee.

The assets of IRAs established for Covered Employees shall be allocated to the Trust and combined for investment purposes. Trust assets shall be managed and administered for the exclusive purposes of providing benefits to Covered Employees and defraying reasonable expenses of administering and maintaining, and managing investments, of the IRAs and the Trust, including the expenses of the Board under Section 4.

The Board shall establish within the Trust one or more Investment Funds, each pursuing an investment strategy and policy established by the Board. The underlying investments of each Investment Fund shall be diversified (to the extent appropriate) so as to minimize the risk of large losses under the circumstances. The Board may, at any time and from time to

time, add, replace, or remove any Investment Fund. [*Consider a requirement that the first \$X (e.g., \$1,000) contributed or amounts contributed during the first X months (e.g., 6 or 12 months) of participation are default invested in a conservative money market-type investment.*]

The Board may allow Covered Employees to allocate assets of their IRAs among such Investment Funds and in such case, the Board also may designate an Investment Fund as a default investment for the IRAs of Covered Employees who do not make an investment choice.

Subject to Section 8(f), the Board, in consultation with such third-party professional investment advisers, manager, or consultants as it may retain, shall select the underlying investments of each Investment Fund. Such underlying investments may include, without limitation, shares of mutual funds and exchange-traded funds, publicly-traded equity and fixed-income securities, and other investments available for investment by the Trust. No Investment Fund shall invest in any bond, debt instrument or other security issued by the State.

The Board may, in its discretion, retain an Investment Adviser to select and manage the investments of an Investment Fund on a discretionary basis, subject to the Board's ongoing review and oversight.

The Trustee shall be subject to directions of the Board under Section 8(e) or an Investment Adviser under Section 8(f) and shall otherwise have no responsibility for the selection, retention, or disposition of Trust investments or assets.

The assets of the Trust shall at all times be preserved, invested, and expended solely for the purposes of the Trust and no property rights therein shall exist in favor of the State or any Covered Employer. Trust assets shall not be transferred or used by the State for any purposes other than the purposes of the Trust or funding the expenses of operating the Program. Amounts deposited with the Trustee shall not constitute property of the State and shall not be commingled with State funds and the State shall have no claim to or against, or interest in, the Trust assets.

The assets of the Trust shall at all times be held separate and apart from the assets of the State. None of the State, the

Program, the Board, any Board member nor any Employer shall guaranty any investment, rate of return, or interest on amounts held in the Trust, an Investment Fund, or any IRA. None of the State, the Program, the Board, any Board member or any Employer shall be liable for any losses incurred by Trust investments or otherwise by any Covered Employee or other person as a result of participating in the Program.

The provisions of the [*Name of State Blue Sky Statute*] shall not apply to the Trust, any Investment Fund, or any interest held by an IRA in the Trust or such Investment Fund.

The Trust and each Investment Fund shall not be subject to taxation under the [*Name of State Tax Law, if any*].

[Add cross references and modifications to State wage hour, privacy, trust and other laws as needed or appropriate.]

If the Board determines to exercise its discretion under Section 4(m) to establish the program by using another state's auto-IRA program, establishing a joint program or a consortium with one or more other states, then the trust may be established by adopting the trust established under such other state's program or as a master trust or similar arrangement with such other state[s], provided that such trust, master trust or similar arrangement otherwise satisfies the requirements of this section 8.

*Section 9. Construction.* This Act shall be construed liberally in order to effectuate its legislative intent. The purposes of this Act and all of its provisions with respect to powers granted shall be interpreted broadly to effectuate the Act's intent and purposes.

*Section 10. Effective Date of the Program.* The Board shall establish the Program so that Covered Employees may begin making contributions by [*date*]. The Board may establish a pilot Program for certain Covered Employers and/or may provide for a staggered rollout of the Program so that Covered Employers are initially required to offer the Program to Covered Employees in stages based on employee headcount or other criteria established by the Board.

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