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STATE AUTO-IRAs
THE WRONG ANSWER

U.S. CHAMBER OF COMMERCE

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INTRODUCTION

State auto-IRAs are not the answer to the retirement savings gap.

Though well-intentioned, states considering mandating automatic enrollment payroll deduction Individual Retirement Accounts (IRAs) are likely to hurt the very workers they think they are helping. The reason is simple—state auto-IRAs are a poor substitute for employer-provided plans. Workers are significantly limited in how much they are allowed to contribute; employers are prohibited from contributing at all; fewer small plans will be started; many existing small plans will be terminated, and important worker protections will be lost. Instead of mandating that employers without a plan offer a state IRA, policymakers ought to make it easier for small business to offer retirement plans that best serve workers' needs.

THE ANSWER: Expand access to employer-provided plans.

Employer plans work—we need to make them more available

In the more than 40 years since the Employee Retirement Income Security Act (ERISA)[1] was passed, employer-provided retirement plans have grown successfully. ERISA-covered plans hold more than $7 trillion to provide retirement benefits for Americans of all ages, from the Baby Boomers beginning to withdraw their savings to the Millennials just starting to invest. 401(k) plans alone hold $4.9 trillion and cover more than 50 million people.[2] In addition, trillions of dollars accumulated in employer-provided plans have already been rolled-over into normal IRAs (i.e., not state mandated), making up the vast majority of IRA assets. IRAs are useful for moving tax-qualified retirement money around and for holding retirement assets, but they are not, and have never been, a primary accumulation vehicle for retirement savers.

There are different types of workplace plans with different features and benefits to fit the needs of a variety of companies and workforces, from large

[1] The Employee Retirement Income Security Act of 1974 ("ERISA") is the federal law governing private sector, employer-provided benefit plans, including pension, health, and other welfare plans.

[2] "Defined Contribution Plan Participants' Activities, First Half 2016," Investment Company Institute, October 2016, at 2.

to very small. These plans include traditional pension plans, 401(k) plans, Employer Stock Ownership Plans (ESOPs), profit-sharing plans, and Savings Incentive Match Plans for Employees IRAs (SIMPLE IRAs), to name a few. Making these plans easier for small employers to offer will result in more coverage and better outcomes than state auto-IRAs. A recent study looked at what the savings results of state auto-IRAs might be and concluded that employer-sponsored plans, such as 401(k) plans, would be three times more effective.[3]

Reasons why state auto-IRAs are the wrong answer:

1. ***Significant limits on workers' savings:*** Under state auto-IRA programs, employer contributions are prohibited and the amount employees can personally contribute is about one-third of what is allowed in a 401(k);
2. ***Fewer employer plans, especially among small businesses:*** If a state mandates auto-IRAs, some employers will decide to avoid taking on the work of offering their own plans and let the state take it on instead, resulting in the loss of significant retirement savings opportunities for their workers;
3. ***Lost worker protections:*** States successfully avoided being subject to the strong legal protections in federal law for workers' retirement plans, leaving workers with an uncertain legal environment from state to state;
4. ***States can be poor stewards of pensions:*** Many states have dramatically mismanaged their public employee retirement systems, and it is not clear that they will do a better job when they control the assets of millions of private-sector savers;
5. ***Politicizing pension investments:*** Some state pension funds restrict investments to favor state initiatives, and some states engage in politically motivated investment and divestment schemes rather than investing in the economic interest of the savers;

[3] "What Moves the Retirement Readiness Needle: Quantification of Risk and Evaluation of New Proposals," EBRI Issue Brief Vol. 37 No. 5 (April 2016), at 3. Universal employer-provided DC plans at historical participation rates three times more effective at reducing retirement saving deficits than an auto-IRA scenario based on state proposals.

6 ***Different state standards results in administrative quagmire:*** Each state will have different rules for its program and all employers will have to track them to ensure compliance—different standards for eligibility, notices, and similar matters will affect nearly all employers whether they currently offer a plan or not; and

7 ***Unengaged employers lead to lower retirement savings rates:*** Employers encourage workers to contribute to the employers' plans, where average worker contributions well exceed the common 3% default contribution for state auto-IRAs.

State auto-IRAs are intended to help workers by offering a plan at work. Unfortunately, they are likely to displace the high-quality employer-provided retirement plans that have proven to help workers, while the time and effort devoted to these state programs could most profitably be used to improve the employer-provided system to expand coverage. For example, we could allow small businesses to join together to form a single plan, called a Multiple Employer Plan (MEP), greatly simplifying the regulatory compliance and reducing the expense of offering a plan.

This paper will examine these issues and discuss solutions to improve employer-provided retirement plans.

WHY DO WE NEED UNIFORM FEDERAL RULES FOR RETIREMENT PLANS?

The federal rules for retirement plans solve many problems—they provide strong worker protections, establish important tax benefits for employers and workers, and provide a relatively easy and convenient way to save.

For many employers, an important feature is that the federal rules are the same no matter where you live—they are set up under federal law so that workers in each state can enjoy the same benefit options and companies operating in more than one state do not have to follow 50 different sets of rules. This uniform administration of plans across state lines is one of purposes of ERISA, which also provides essential worker rights and protections to ensure people get the retirement benefits they earned.

Not all workers have access to a retirement plan at work. While there are several reasons for this, a basic problem is that offering a retirement plan, even some of the simplified plans designed for small businesses, is not as simple as it should be. The common 401(k) plan requires the employer sponsoring the plan to perform, or hire other experts to perform, many functions and duties. Small businesses, in particular, do not have as many resources and staff to devote to employee benefits as larger businesses. As a result, large businesses are about three times more likely to offer retirement benefits than small businesses.[4] At the same time, small business owners want to offer good retirement plans, because it is important for attracting and retaining the best and most talented employees.[5] Most small business owners rely on their company retirement plan for themselves and their families as well, uniting their interests with those of their workers.

[4] "Employer-Based Retirement Plans: Access Varies Greatly," The Pew Charitable Trusts, May 27, 2016. Surveys show "…only 22 percent of workers at companies with fewer than 10 employees report having access to workplace retirement plans, compared with 74 percent of workers at businesses with at least 500 employees."

[5] "Why Small Firms Should Consider Setting Up 401(k)s," Charles Passy, *The Wall Street Journal*, September 30, 2013. A 2012 MetLife study showed that behind salary and health & medical benefits, retirement benefits are the third most important factor driving employee loyalty in small businesses.

The issue, then, is how to address the so-called gap in coverage, primarily among very small businesses, where employers do not currently offer plans to their workers. Do we make employer-provided retirement plans, which have a proven track record of providing the best benefits to workers, easier to offer and more accessible? Or do we shift small business workers into personal IRAs, mandated and run by state governments that offer less savings opportunities and fewer benefits? And if we do shift those workers from plans to IRAs, what effect will it have on other small business that do offer plans—will they stop doing the work of offering their own plans and let the state take on the work and risk?

IMPROVING ACCESS TO EMPLOYER PLANS VS. STATE AUTO-IRAs FOR INDIVIDUALS

There are two basic options for improving access to retirement plans for small employers.

1

The first option is to increase the availability of employer-provided plans by reducing red tape, while keeping important worker protections. For example, the MEP is a simple idea that could make a big difference for small plans. MEPs would allow many unrelated employers to join together to be part of one large, professionally-managed 401(k) plan instead of having to sponsor their own, separate, smaller plans. This would provide cost-savings from economies of scale and reduce the administrative burden facing each plan sponsor. There are a number of similar proposals that could make plans more widely available, benefiting workers.

2

The second option is to give up encouraging employer-provided plans, and instead mandate retirement savings for individuals. A number of states are choosing this option. While these state programs are motivated by a desire to help workers, unfortunately the end result is likely to be fewer employer plans, with more workers saving in limited individual savings vehicles that do not best serve their retirement needs.

One concern with the state auto-IRAs is that they could cannibalize employer-provided plans—in other words, small employers making the effort to offer a retirement plan might stop doing so and let the states take over for their workers. As we will discuss below, these state auto-IRAs offer fewer benefits and are less likely to prepare workers for retirement. The public policy question is whether the states' cure (shifting to individual savings) may be worse for small business workers than the disease (current barriers to their employers offering retirement plans).

What are the states doing?

States do not have authority over employer-provided retirement plans. Pension plans, such as 401(k)s, are regulated at the federal level to ensure uniformity in benefits, rules, and worker protections. State laws relating to these plans are generally pre-empted by federal law, meaning that the states cannot pass laws governing employer-provided retirement plans.

States do have authority, however, over payroll laws. Starting a few years ago, some states began to consider whether they could use their payroll laws to mandate that employers who do not offer retirement plans provide payroll deduction IRAs. Five states—California, Illinois, Maryland, Oregon, and Connecticut—have passed laws mandating IRAs. At least ten others are considering such laws.

These state laws, and proposals being considered by states that have not yet passed laws, differ in many specific details, but they have core concepts in common. Employers above a certain size that do not offer retirement plans would be required to provide the state program and automatically enroll each worker in a state-run IRA. The mandate applies to employers with five or more employees in some states, but varies by state (e.g., in Illinois, the mandate applies to employers with 25 or more employees).

Automatic enrollment means that workers must affirmatively decline and opt-out of the program or IRAs will be established for them. The employer is required to deduct a state-determined contribution to the IRA from each worker's paycheck (typically 3%). The state decides how these funds will be invested when a worker is automatically enrolled into a default investment. The state also decides what other investments will be available and what the fees and expenses will be.

States seek DOL regulation exempting them from ERISA

As a result of these decisions, differences between state programs will be significant. Where the states all agreed, however, was that they did not want ERISA—the federal law providing essential worker protections that applies to employers sponsoring a plan—to apply to them. In fact, the states were so concerned about this that the California law establishing its version of the concept (called "Secure Choice") directed the state to get an official opinion from the U.S. Department of Labor (DOL) stating that the state would not be subject to ERISA. Without that reassurance, the law said, the program would not move forward.

This is important because the long-established ERISA rules protect workers at each stage, from making contributions to receiving benefits. ERISA rules make sure a plan properly accounts for the money; ERISA rules make sure workers' money gets from payroll withholding to their accounts in a timely fashion; ERISA rules make sure the investments are prudent; ERISA rules make sure the fees are reasonable; ERISA rules hold the plan decision-makers (called fiduciaries) personally accountable for these plan decisions, imposing on them a duty that is among the "highest known to law."[6] In short, ERISA rules are designed to protect workers from having their retirement benefits misused or abused by the those running their plan.

DOL responded to these state concerns by providing a regulatory "safe harbor" stating that a state-mandated payroll deduction IRA meeting certain conditions was not a retirement plan sponsored by the employer, and accordingly, was not an ERISA plan. In addition, DOL is allowing certain county and municipal governments to mandate IRAs if there is no state mandate in place. As a result of this "safe harbor," states have wide latitude to establish and mandate IRA programs which do not provide ERISA protection. Instead, each state can establish its own set of rules, which may or may not provide the same level of protection enjoyed by private sector workers in their retirement plans.

[6] Donovan v. Bierwirth, 680 F.2d 263, 272 (2d Cir. 1982).

What is wrong with state auto-IRAs?

It is important not to confuse normal IRAs with state auto-IRAs. While normal IRAs are used by some individuals to save for retirement, and while they are also used by some employer-provided plans designed for small businesses, the primary use for normal IRAs is to rollover money from employer plans, making retirement savings portable, rather than to directly save money for retirement. Rollovers are not primarily savings vehicles—a study of where the money in IRAs comes from shows that the amount of money going into IRAs due to rollovers was 13 times that of new savings.[7]

A recent study examined state auto-IRAs and concluded that employer-sponsored plans like 401(k) plans would be three times more effective at reducing retirement saving deficits.[8] That is a powerful argument for improving access to employer-provided plans rather than shifting small business workers away from them.

Problems presented by state auto-IRAs

State Auto-IRAs Limit Savings Opportunities Compared to Employer-provided Plans

State auto-IRAs are not as effective as typical employer-provided plans at reducing retirement saving deficits. Two weaknesses are built into the legal structure of state auto-IRAs. First, employers are legally prohibited from contributing to the IRA, preventing any possibility of matching contributions, profit-sharing or other forms of employer assistance. Second, individuals are legally prohibited from contributing as much of their own money as they could to a typical employer plan. A 401(k) plan, for example, allows workers to contribute about three times as much per year as a state auto-IRA. This contribution limit differential was intentionally imposed by Congress to encourage employers to adopt more robust savings plans like the 401(k) plan. Nonetheless, contribution prohibitions and limits can make a large difference in the amount workers save over the course of their careers. Instead of mandating limited savings vehicles—effectively discouraging more robust

[7] "IRA Contribution Flows Dwarfed by Rollovers," Fast Facts #232, June 16, 2013, Employee Benefits Research Institute.
[8] EBRI Issue Brief at 3.

savings options—public policy should help employers offer better savings vehicles.

Employer-provided Plans Encourage Employees to Save More

Employer-provided plans typically encourage worker participation and contribution rates higher than the default investment in a state auto-IRA. This is not just altruism—tax rules limit the amount owners and other highly compensated workers can contribute to a 401(k) plan if not enough rank and file workers are making contributions. As a result, there is an incentive for an employer to encourage workers to save more in the plan. Employers encourage participation through activities such as automatic enrollment, automatic escalation of contribution amounts, and educational programs. By contrast, while a state may require an employer to offer the auto-IRA along with a brochure or other materials, the worker does not benefit from the additional assistance provided by employer plans.

State Auto-IRAs Are a Disincentive to Small Plan Formation and Retention

Small employers are already three times less likely to offer a plan than large employers because of the costs and obligations involved.[9] If we do not reduce those disincentives but instead offer a state auto-IRA program, many small employer start-ups will no longer want to offer plans. Given the demands of running a small business, letting the state bear the responsibility of managing retirement benefits will be an attractive option for employers. Similarly, small employers currently offering plans may decide that it is easier to terminate their plans and let the state take over. Between the reduction in new plan formation and the potential termination of existing plans, the state auto-IRA could significantly disadvantage those small business workers who would otherwise have had access to a robust retirement plan.

State Auto-IRAs Create a Patchwork of Rules Potentially Entangling All Employers

Each state will make different decisions about required coverage, meaning many employers who already offer plans, and therefore think they would not

[9] Employer-Based Retirement Plans: Access Varies Greatly," The Pew Charitable Trusts, May 27, 2016.

be affected, could still be impacted. For example, a state might decide that all employees who are not eligible for their employer's plan (e.g., part time workers) must be offered the state auto-IRA. Keeping track of which workers in which states have to be part of which programs will be an administrative burden. DOL has exacerbated this burden by allowing municipalities and counties to have their own requirements where a state has not imposed a statewide mandate. This could lead to conflicting requirements for employers whose workforce spans jurisdictional boundaries. For example, what does an employer do if State A says its telecommuting worker must be offered State A's auto-IRA because he or she works at home, but State B says the same worker must be offered State B's plan because of the employer's location?

There may also be administrative problems associated with the payroll withholding. It is not clear what the obligation employers might have with respect to tax rules limiting contributions for some workers. For example, will the employers be called on to address excess contributions or contributions violating certain income limits? There are potential tax and recordkeeping consequences for employers in these scenarios.

Workers May Not Be Adequately Protected Without ERISA Standards

For more than 40 years, ERISA rules have offered significant protections for workers in every aspect of their retirement plans. With the states not being subject to ERISA, will each state do a good job replicating these protections? Who can workers turn to if their savings are lost or mismanaged? These are not minor concerns. ERISA was passed in response to workers suffering significant losses from theft, mismanagement, and employer bankruptcy. Those rules have now been refined over decades. Starting major new programs from scratch is not a minor undertaking.

Some States Have a Poor Track Record of Running Their Plans

It is no secret that some states have done a poor job of managing their retirement plans for their state employees. Many states have failed to provide even the most basic level of funding for their plans. The Pew Charitable Trusts found that state pension plans as a group fell approximately 20% short of making their actuarially required contributions in 2013.[10] Similarly, the Brookings Institution discovered that "even by their own misleading calculations, many states have set aside less than two-thirds of what they need to meet their pension obligations."[11]

Ironically, the three states that are the most outspoken about state-mandated retirement plans—California, Illinois, and Oregon—have significant funding issues:

- As of December 31, 2015, the unfunded actuarial liability in the Oregon Public Employees Retirement Fund was $21.8 billion.[12]
- The California Public Employee Pension Systems (CalPERS) have a $228.2 billion funding shortfall.[13]
- The projected unfunded liabilities of Illinois' five state pension systems are projected to be $114.8 billion at the end of FY 2016.[14]

These numbers might significantly increase if new (and more accurate) accounting standards for public plans recommended by actuaries are adopted. While public pension plans are different from state auto-IRAs, these examples illustrate a basis for concern with regard to how states will make decisions and who will make those decisions. In addition to funding problems, issues involving state-run public employee pension plans illustrate the mistaken nature of DOL's contention that having states administer plans ensures the plans will be operated in accordance with the interests of the citizen-participants. The governance and operational challenges that made those issues, such as those

[10] The Pew Charitable Trusts, The State Pensions Funding Gap: Challenges Persist 2 (July 2015), www.pewtrusts.org/~/media/assets/2015/07/pewstates_statepensiondebtbrief_final.pdf?la=en (noting that "in 2013, state pension contributions totaled $74 billion—$18 billion short of what was needed to meet the [actuarially required contributions]").

[11] Richard M. Johnson et. al., Are Public Pensions Keeping Up with the Times?, The Brookings Institution 2 (June 2013), www.brookings.edu/research/reports/2013/06/12-public-pensions-johnson-chingos-whitehurst.

[12] Public Employees Retirement System *PERS: By The Numbers*, September 2016, https://www.oregon.gov/pers/docs/pers_by_the_numbers_9-2016.pdf.

[13] Stanford Institute for Economic Policy Research, *California Pension Tracker*, http://www.pensiontracker.org/.

[14] Commission on Government Forecasting and Accountability, *Illinois State Retirement Systems, Financial Condition as of June 30, 2015*, March 2016, http://cgfa.ilga.gov/Upload/FinConditionILStateRetirementSysMar2016.pdf.

listed below, possible at state-administered pension plans should not be ignored. Many aspects of the operating environment that allowed the illegitimate activity at a number of public pension funds, as well as the underfunding crisis facing many state-run pension plans, have yet to be addressed. Shortcomings also remain in the operational, governance, and regulatory structures associated with state-run plans. Many of these shortcomings are issues DOL would not tolerate in ERISA-governed plans.

- A 2011 report CalPERS commissioned on its pay-to-play scandal discussed changes necessary to prevent future abuses of the plan. One recommendation was that "[t]here must be increased vigilance on the part of CalPERS as to those portions of its investment portfolio-like private equity, real estate, and hedge funds-that have not traditionally been subject to as great a degree of public scrutiny as other types of investments."[15] Despite this 2011 warning, the CalPERS Board of Trustees rejected a 2015 proposal to require private equity firms dealing with the fund to disclose "all types of fees, carry, discounts, and rebates" charged to the funds participants.[16] CalPERS rejected greater transparency after publicly acknowledging that "the state does not know the total amount in fees pensioners are now paying to firms in its $28 billion private equity portfolio."[17]
- In 2016, CalPERS' management practices once again raised red flags about the integrity and stability of public pension funds in America with the revelation that it kept "two sets of books" with remarkably divergent numbers on the plans it administered, but only made one set showing higher funding levels publicly available.[18] This revelation raised serious

[15] Andrew S. Ross, *CalPERS scandal detailed in report*, SFGATE.COM (March 20, 2011), www.sfgate.com/business/bottomline/article/CalPERS-scandal-detailed-in-report-2388431.php (quoting the 75-page report of attorney, Philip Khinda, who CalPERS retained to undertake a 17-month investigation of the pay-to-play scandal and to make recommendations of changes to prevent a recurrence).
[16] David Sirota and Andrew Perez, *California Pension Won't Force Wall Street to Disclose All Fees Charged to Retirees*, INT'L BUSINESS TIMES (Dec. 21, 2015), www.ibtimes.com/political-capital/california-pension-wont-force-wall-street-disclose-all-fees-charged-retirees.
[17] *Id.*
[18] Mary Williams Walsh, *A Sour Surprise for Public Pensions: Two Sets of Books*, NEW YORK TIMES (Sept. 27, 2016) at: http://www.nytimes.com/2016/09/18/business/dealbook/a-sour-surprise-for-public-pensions-two-sets-of-books.html?_r=0. This practice came to light when a tiny pension fund for the six-employee California Citrus Pest Control District Number 2, which is administered by CalPERS, decided to convert to a 401(k) plan. CalPERS had consistently informed the plan that it was fully-

alarm over public pension funds' assertions regarding their funding status and revived a long-running debate among actuaries about whether the actuarial standards used by public pension plans are "fundamentally flawed, causing systemic under-funding and setting up a slow-moving train wreck when baby boomers retired."[19]

- In 2011, the *Chicago Tribune* exposed an Illinois pension scam where teacher union lobbyists who substitute taught for one day collected nearly $1 million in state teacher retirement pensions.[20] Legislation was passed to stop the abuse in 2012. However, in 2014, *Forbes* provided evidence that the scam continued despite the reforms enacted by the legislature.[21]
- As recently as last year, New York State's pension fund experienced scandal. A former portfolio manager of the pension fund stands accused of steering more than $2 billion in business to two brokerage firms in exchange for various bribes.[22] This scandal follows a similar one in the same pension fund that occurred in 2010.

Municipal pension plans have also engaged in similar practices that hurt beneficiaries and would be less likely to happen in plans regulated under

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funded under "officially-stated numbers." Remarkably, however, after the plan elected to convert to a defined contribution model, CalPERS produced numbers showing that the plan faced a $48 million shortage and sent a letter demanding full payment of this underfunding. The public pension fund management explained that the underfunding was based on non-public "market-value" figures of the plan's assets rather than the rosier published "actuarial" valuation.

[19] *Id.*

[20] Chicago Tribune**,** *2 teachers union lobbyists teach for a day to qualify for hefty pensions***,** by Ray Long and Jason Grotto, October 22, 2011. http://articles.chicagotribune.com/2011-10-22/news/ct-met-pensions-teacher-perk-20111023_1_preckwinkle-and-piccioli-steven-preckwinkle-david-piccioli

[21] In Illinois, Substitute Teaching For One Day Reaped Nearly $1 Million in Taxpayer-Funded Pension Money, by Adam Andrzejewski, October 14, 2014 http://www.forbes.com/sites/adamandrzejewski/2014/10/14/one-day-sub-nearly-1-million-in-teacher-pension/#390464b05a51

[22] Wall Street Journal, Former Official at New York State Pension Fund, Two Brokers Charged in Bribery Scheme, by Corinne Ramey, Dec. 22, 2016, http://www.wsj.com/articles/former-official-at-new-york-state-pension-fund-two-brokers-charged-in-bribery-scheme-1482360980. Bloomberg, *N.Y. Pay-to-Play Plot Fueled by Bribes, U.S. Says,* by *Bob Van Voris and Chris Dolmetsch, December 21, 2016,* *https://www.bloomberg.com/news/articles/2016-12-21/n-y-pension-pay-to-play-plot-fueled-by-cash-hookers-u-s-says*.

ERISA. For example, Detroit's bankruptcy revealed that the city's municipal pension funds had "questionable interest rates applied to annuities."[23] Investigators also found that "Detroit's municipal pensions exceeded their legal limits in real-estate investments," and awarded retirees in some years more than a 20% return on their annuities even as the funds lost value."[24] A report concluded that the "abuse of discretion was most egregious" when the general retirement fund lost 24% of the value of its assets, but the trustees nevertheless credited annuity savings-plan accounts for current employees with an investment return of 7.5% by utilizing assets that were supposed to be going to fund retiree pensions.[25]

More recently, Jacksonville, Florida realized that incompetence and dishonesty had caused a "$1.6 billion debt" in its police and fire pension fund requiring taxpayers "to pay $153 million into it."[26] As the expert that the city hired to evaluate the fund noted, as a public pension fund, "it was not subject ERISA's comprehensive, heightened standards—only patchwork, weaker state and local standards."[27] Although the fund told investors that it operated consistent with the highest standards of ERISA, the Introduction to its Statement of Investment Policy posted on its website stated that "the Board of Trustees acknowledges that the Employee Retirement Income Security Act of 1974, as amended ('ERISA'), does not apply to the Fund as a governmental retirement plan."[28] According to the experts who reviewed the fund's operation and governance, "the Board not only failed to meet higher ERISA standards, it failed to meet even the lower state and local standards."[29] The Board allowed the fund's executive director to create a special, extra retirement fund for

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[23] Matthew Dolan, Report Faults Detroit Pension Funds Payouts, WALL ST. J. (Sept. 26, 2013), www.wsj.com/articles/SB10001424052702303796404579099524149455810.
[24] *Id.*
[25] *Id.*
[26] Ron Littlepage, *The Anger Over the Pension Scandal Will Only Continue to Rise*, FLA. TIMES-UNION (Oct. 29, 2015), www.jacksonville.com/opinion/ron-littlepage/2015-10-29/story/ron-littlepage-anger-over-pension-scandal-will-only-continue
[27] Edward Siedle, *Jacksonville Pension's Failed Adoption of the Highest Federal (ERISA) Safety Standards*, FORBES (Oct. 30, 2015), www.forbes.com/sites/edwardsiedle/2015/10/30/jacksonville-pensions-failed-adoption-of-highest-federal-erisa-safety-standards/#fe216adfb0d4.
[28] *Id.*
[29] *Id.*

himself and the fund's senior staff.[30] This special fund received priority funding such that it was overfunded "even as the pension fund for police officers and firefighters was precariously underfunded" to the point that there are currently only about 46 cents available for every dollar promised to rank and file officers and firefighters.[31] Even more shocking, the mishandling of the Jacksonville police and fire fund continued for years after watchdogs raised concerns in 2008 over the plans' approximately $798 million in underfunding.[32]

There is no reason to believe that states and cities that have mismanaged the assets of their own employees will be more prudent in handling the retirement assets of private sector workers. Indeed, while many have reached the reasonable conclusion that the state pension systems have become structures "with which state lawmakers cannot be trusted,"[33] DOL's safe harbor would extend the reach of the very same officials and lawmakers that have become the symbol of misleading accounting standards, unrealistic promises, and opaque investment strategies.

State Auto-IRA Programs Give States an Unfair Advantage over Private Employers

DOL has instituted rules that give states an unfair advantage over private-employers in providing retirement benefits to private workers. States can auto-enroll private workers into IRAs without being subject to ERISA's requirements, while private employers are not provided that same option. In other guidance, DOL allows a state to form an open MEP, while private employers are prohibited. The private sector should not be put in the position of having to compete with state governments to provide retirement benefits. Furthermore, state actions could have the unintended consequence of reducing

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[30] Eileen Kelly, *City sues Keane and pension fund board over special pension, seeks repayments,* FLA. TIMES-UNION (Nov. 23, 2015), www.jacksonville.com/news/metro/2015-11-23/story/city-sues-keane-and-pension-fund-board-over-special-pension-seeks
[31] *Id.*
[32] Edward Siedle, *Long-Awaited Forensic Investigation of City of Jacksonville Police and Fire Pension Fund*, FORBES.COM (October 27, 2015),
[33] Ted Nesi, *Lawmakers Cannot Be Trusted with Today's Pension System*, WPRI.COM (May 25, 2011), wpri.com/blog/2011/05/27/lawmakers-cannot-be-trusted-with-todays-pension-system (quoting *New York Times* columnist Josh Barro).

economies of scale for national providers which would make it more difficult to offer plans to small employers.

ALTERNATIVES FOR IMPROVING ACCESS TO EMPLOYER-PROVIDED RETIREMENT PLANS

The good news is that there are concrete steps we could take through Congressional action and federal regulation that would make it easier to offer a retirement plan while preserving vital worker protections. These are a few of the ideas that the U.S. Chamber of Commerce has endorsed to help our members offer quality retirement benefits to their workers:

- ✓ **Multiple Employer Plans**—MEPs are a simple way to let small businesses "join" a plan rather than having to offer one all by themselves. This lets them access professionally managed plans with good benefits and features for lower costs and with fewer responsibilities. Because MEPs are subject to ERISA and the full panoply of federal rules, workers enjoy full protection under the law. A state auto-IRA would offer fewer benefits and fewer protections.

- ✓ **Small Businesses Tax Credits**—expand the small business tax credit for employer-plan startup costs by broadening it and making it refundable. The state auto-IRA plans are going to be expensive to administer. Directing that expense to improve access to better plans is a more efficient outcome.

- ✓ **Simplified Compliance Testing**—create new optional non-discrimination testing and eliminate or relax top-heavy rules to encourage greater implementation and maintenance of 401(k) plans.

- ✓ **Streamline Notice Requirements**—over the years, new notices were created for specific issues without material coordination with existing requirements. As a result, plan administrators face unnecessary complexity and duplication. Streamlining these notices would save workers money in plan expenses and reduce the difficulty of administering plans.

- ✓ **Default Electronic Disclosure**—DOL does not permit electronic communication as a default for most plans. Allowing people to request paper notices and statements, but otherwise providing such information electronically would save workers money in unnecessary paper mailings.

- ✓ **Encourage ESOPs**—promote the benefits of ESOPs and protect them from frivolous litigation and excessive regulation.

CONCLUSION

While the states may have good motives for establishing state auto-IRAs, the unintended consequences make these plans a bad deal for workers. Policy makers should instead direct their attention to improving access to employer-provided retirement plans. Employer-provided plans help workers save more, encourage workers to be active participants in their retirement, and offer better protections from potential problems. State auto-IRAs will shift workers out of plans and into individual accounts that will have less protection, less savings opportunities, and a patchwork of state laws tripping up employers trying to navigate the system.

U.S. CHAMBER OF COMMERCE

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