Boston College Law School

Digital Commons @ Boston College Law School

Boston College Law School Faculty Papers

4-1-2020

The New Fiduciaries

Natalya Shnitser

Follow this and additional works at: https://lawdigitalcommons.bc.edu/lsfp

Part of the Business Organizations Law Commons, Commercial Law Commons, and the Estates and Trusts Commons

THE NEW FIDUCIARIES

Natalya Shnitser[*]

ABSTRACT

The regulation of employer-sponsored retirement plans in the United States relies on fiduciary standards drawn from donative trust law to regulate the conduct of those with authority or discretion over plan assets. The mismatch between the trust-based fiduciary framework and the rights and interests of employers and employees has contributed to the high cost of pension fund investing and the significant gaps in pension coverage in the private sector. In recent years, state and local governments have stepped in to reduce the retirement coverage gap by creating state-facilitated retirement savings programs for private-sector workers who lack access to employment-based coverage. In 2019, five states—including California, Illinois, Massachusetts, Oregon, and Washington—had programs open to participants.

This Symposium Essay shows that while the five programs vary in the roles and responsibilities imposed on state actors and on the participating employers, there is a notable shift away from traditional fiduciary obligations as the primary constraint on the conduct of plan administrators, particularly with respect to plan fees. In a stark departure from the regulatory regime for plans sponsored by private-sector employers, several states impose explicit caps on total fees that may be charged to plan participants. Furthermore, while in some cases, the fee caps are paired with traditional fiduciary obligations for state administrators, in other cases the statutory provisions make no mention of fiduciary duties. The Essay presents the benefits and the risks of the new regulatory approaches and outlines a research agenda to assess the effectiveness of fee caps as either a complement to or substitute for existing fiduciary-based regulatory frameworks. The findings from the state experiments in retirement plan governance will offer important insights to policymakers seeking to improve retirement security in the United States.

[*]David and Pamela Donohue Assistant Professor, Boston College Law School.

TABLE OF CONTENTS

Introduction 686
I. The Retirement Coverage Gap in the Private Sector 687
II. The Limits of Fiduciary Governance and the Current Regulatory Regime 690
III. State Efforts to Close the Coverage Gap.......................................693
A. State Automatic Enrollment Individual Retirement Accounts (IRAs)..694
1. The California Secure Choice Retirement Savings Program 694
2. Illinois Secure Choice Savings Program.................695
3. Oregon Retirement Savings Plan 696
B. State-Facilitated Marketplace Model 697
1. Washington's Small Business Retirement Marketplace..697
C. State-Administered Multiple-Employer Plan.......................699
1. Massachusetts Defined Contribution CORE Plan...699
IV. Fiduciaries with Fee Caps: Experiments in Plan Governance 700
Conclusion..705

INTRODUCTION

As concerns about the ability of millions of Americans to retire with dignity and financial security continue to grow, state and local governments are stepping in with new programs to facilitate saving by private-sector workers without access to employer-sponsored retirement plans.[1] While each state program has unique features, the new programs collectively signal an important shift in the roles of private employers, employees, and states in the provision of retirement benefits. States are taking increasingly active roles in the provision of retirement plans for

1. *See generally* U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-111SP, THE NATION'S RETIREMENT SYSTEM: A COMPREHENSIVE RE-EVALUATION IS NEEDED TO BETTER PROMOTE FUTURE RETIREMENT SECURITY 3 (2017) [hereinafter "GAO REPORT"], https://www.gao.gov/assets/gao-18-111sp.pdf [https://perma.cc/8SVL-PHPG], (finding that "[t]raditional pensions have become much less common, and individuals are increasingly responsible for planning and managing their own retirement savings accounts, such as 401(k) plans. Yet research shows that many households are ill-equipped for this task and have little or no retirement savings."). The federal government also took steps to address retirement security in 2019. In December of 2019, Congress passed the SECURE Act, which was signed into law on December 20, 2019. Setting Every Community Up for Retirement Enhancement Act (SECURE Act), *incorporated into* Further Consolidated Appropriations Act, Pub. L. No. 116-94. Most notably, the SECURE Act permits, for the first time, the pooling of unrelated employers in "pooled employer plans" that may be sponsored and administered by third-party institutions—including banks, insurance companies, recordkeepers or other commercial enterprises.

Shnitser: The New Fiduciaries

private-sector workers, and in so doing, they are experimenting not only with elements of plan design but also with features of plan governance.[2]

Whereas fiduciary standards are at the core of the regulatory regime for employer-sponsored private-sector retirement plans, this Essay documents the states' embrace of fee rules to address shortcomings of existing plans. The Essay is organized as follows: Part I describes the limitations of the current retirement system that have prompted the state interventions, including the reluctance of smaller businesses to establish retirement plans and the prevalence of high fees among existing employer-sponsored plans. Part II describes the evolution of the regulatory regime under the Employee Retirement Income Security Act of 1974 ("ERISA") and the centrality of fiduciary standards in the regime as it applies to defined-contribution retirement plans. Part III introduces the state programs that aim to expand access to retirement-savings plans. Of the programs currently open to participants, the ones in California, Illinois, and Oregon require employers that do not otherwise sponsor a retirement plan for their employees to automatically enroll the employees in Individual Retirement Accounts ("IRAs") overseen by the states. In contrast, Washington has established a marketplace where smaller employers can select retirement plans that have been pre-screened by the state, while Massachusetts now serves as the plan sponsor of a multiple-employer plan ("MEP") for smaller non-profit organizations. Part IV reviews the key governance provisions for each state program and highlights the significant departures from the existing trust-based ERISA fiduciary framework. Part IV argues that the particular permutations of regulatory features in the new state programs present a unique opportunity to evaluate the effectiveness of fiduciary obligations and fee caps in retirement savings plans. The Essay concludes by considering how the lessons from the new state programs may reshape the U.S. retirement system in the long run.

I. THE RETIREMENT COVERAGE GAP IN THE PRIVATE SECTOR

Only two-thirds of private-sector workers have access to employer-sponsored plans.[3] U.S. law does not require employers to sponsor any

2. *See generally* Kathryn L. Moore, *State Automatic Enrollment IRAs After the Trump Election: Are They Preempted by ERISA?*, 27 ELDER L.J. 51 (2019); Kathryn L. Moore, *Closing the Retirement Savings Gap: Are State Automatic Enrollment IRAs the Answer*?, 24 GEO. MASON L. REV. 35 (2016); Edward A. Zelinsky, *Retirement in the Land of Lincoln: The Illinois Secure Choice Savings Program Act*, 2016 U. ILL. L. REV. 173 (2016); Ctr. for Ret. Initiatives, McCourt Sch. of Pub. Policy, Georgetown Univ., *State Facilitated Retirement Savings Programs: A Snapshot of Plan Design Features*, State Brief-19-03, (Dec. 31, 2019), https://cri.georgetown.edu/wp-content/uploads/2018/12/States_SnapShotPlanDesign6-3-19FINAL.pdf [https://perma.cc/WM9S-2MFV].

3. GAO REPORT, *supra* note 1, at 23.

Published by University of Cincinnati College of Law Scholarship and Publications, 2019

University of Cincinnati Law Review, Vol. 88 [2019], Iss. 3, Art. 3

retirement savings plans. Many employers—particularly smaller employers—commonly cite the lack of administrative resources and the expenses associated with retirement plans as factors that discourage plan formation.[4]

Among employees who do have access to an employer-sponsored plan, there is significant variation in plan quality. Beyond variation in the magnitude of the employer contributions, plans vary in the amount of administrative fees charged to plan participants, the types of individual investment options available on the plan "menus" and the costs associated with such investment options.[5] High fees and poorly constructed investment menus—both of which have been particularly prevalent in smaller employer plans—can have devastating effects on the ability of plan participants to save for retirement through defined contribution plans.[6] In some cases, researchers have documented that "the additional fees from poorly constructed plan menus have eliminated the preferential tax treatment afforded to 401(k) plans."[7]

In recent years, as defined contribution plans have assumed a central role in the U.S. retirement system, retirement plan fees, expenses, and investment options have garnered the attention of markets participants,

---

4. *Employer Barriers to and Motivations for Offering Retirement Benefits*, PEW CHARITABLE TRUSTS (2017), https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2017/06/employer-barriers-to-and-motivations-for-offering-retirement-benefits [https://perma.cc/7D7N-LT8T] (showing that "[m]ost commonly, employers without plans said that starting a retirement plan is too expensive to set up (37 percent). Another 22 percent cited a lack of administrative resources."); *see also*, GAO REPORT, *supra* note 1, at 23 (noting that workers employed by "smaller firms and in certain industries are less likely to have access" to retirement savings programs).

5. An employer sponsoring a 401(k) retirement plan must navigate and oversee a myriad of fees. The largest component of plan fees is generally associated with managing plan investments. In addition, there are also administrative costs of establishing and operating the plans. These include the provision of recordkeeping (maintaining plan records, processing employee contributions and distributions, and issuing account statements to employees), accounting, reporting, audit, legal, and trustee services. *See generally* DELOITTE CONSULTING, INV. CO. INST., INSIDE THE STRUCTURE OF DEFINED CONTRIBUTION/401(K) PLAN FEES, 2013: A STUDY ASSESSING THE MECHANICS OF THE 'ALL-IN' FEE (2014), https://www.ici.org/pdf/rpt_14_dc_401k_fee_study.pdf [https://perma.cc/6B7Y-HN9B]; SEAN COLLINS ET AL., INV. CO. INST., THE ECONOMICS OF PROVIDING 401(K) PLANS: SERVICES, FEES, AND EXPENSES, 2016, ICI Research Perspective Vol. 23, no. 4 (June 2017), https://www.ici.org/pdf/per23-04.pdf [https://perma.cc/76M3-Z8VE].

6. James Kwak, *Improving Retirement Savings Options for Employees*, 15 U. PA. J. BUS. L. 483 (2013) (describing the problems of problems of "high mutual fund fees and poor fund selection" in retirement plans); *Impact of Plan Size on Workers' Retirement Income Adequacy*, EMP. BENEFITS RES. INST. (Apr. 6, 2018), https://ebriorg.wordpress.com/2018/04/06/impact-of-plan-size-on-workers-retirement-income-adequacy/ [https://perma.cc/6GE6-5MG5] (reporting that "participants can experience significantly greater increases [in retirement income adequacy] by simply benefiting from the economies of scale of large versus small plans").

7. See Ian Ayres & Quinn Curtis, *Beyond Diversification: The Pervasive Problem of Excessive Fees and "Dominated Funds" in 401(k) Plans*, 124 YALE L.J. 1476, 1501 (2015) (noting that "[t]he problem of fees is especially acute in small plans, where there is less competition and fewer resources are likely to be devoted by the plan sponsor to administering the plan.").

the Department of Labor[8] and plaintiffs' attorneys.[9] The fee disparities have precipitated a host of lawsuits claiming that plan sponsors and service providers violated their fiduciary obligations by, for example, offering more expensive actively managed funds instead of index funds,[10] offering more expensive retail class funds instead of institutional class funds,[11] failing to properly monitor record-keeping fees,[12] and including hedge fund, private equity investments,[13] or "proprietary" funds associated with the plan sponsor.[14] While the long-term consequences of the fiduciary litigation are not yet known,[15] the litigation over plan fees has revealed the current system's reliance on trust-based fiduciary obligations as the primary constraint on the conduct of plan sponsors and those with discretion or control over plan assets. The current reliance would surprise the original drafters of ERISA. The next Part explains how

8. Moore, *Closing the Retirement Savings Gap*, *supra* note 2, at 69 (observing that "[b]ecause plan fees can have such a significant impact on retirement savings, 401(k) plan fees has been the subject of considerable scrutiny in recent years. The Department of Labor has issued a series of regulations mandating fee disclosure, and plan participants have filed a host of lawsuits claiming that excessive plan fees violate ERISA's fiduciary provisions.").

9. *See, e.g.*, Anne Tergesen, *The Lawyer on a Quest to Lower Your 401(k) Fees*, WALL ST. J., (June 9, 2017), https://www.wsj.com/articles/the-lawyer-on-a-quest-to-lower-your-401-k-fees-1497000607; Dilroop Sidhu et al., *Plan Sponsor Fee Litigation Cases on the Rise*, WASH. WATCH 18 (2017), https://www.groom.com/wp-content/uploads/2017/12/1888_Washington-Watch_Fall_2017_Final.pdf [https://perma.cc/W9XW-NKGC]; George S. Mellman & Geoffrey T. Sanzenbacher, *401(K) Lawsuits: What Are the Causes and Consequences?*, CTR. FOR RET. RESEARCH BOSTON COLL., Issue in Brief No. 18-8 (May 2018), http://crr.bc.edu/wp-content/uploads/2018/04/IB_18-8.pdf [https://perma.cc/HM5Q-4CKB] (listing 420 ERISA cases on "Inappropriate Investments, Excessive Fees, and/or Self-dealing" filed between 2006 and January of 2018).

10. *See, e.g.*, Taylor v. United Techs. Corp., 354 F. App'x 525 (2d Cir. 2009).

11. *See, e.g.*, Tibble v. Edison Int'l, 575 U.S. 523 (2015); Tussey v. ABB, Inc., 746 F.3d 327 (8th Cir. 2014).

12. *See, e.g.*, *Tibble*, 575 U.S. at 523.

13. *See, e.g.*, Sulyma v. Intel Corp. Inv. Policy Comm., 140 S.Ct. 768 (2020).

14. *See*, *e.g.*, Leber v. Citigroup, Inc., 48 EB Cases (BNA) 2418 (S.D.N.Y. Mar. 16, 2010); Gipson v. Wells Fargo & Co., 563 F. Supp. 2d 149 (D.D.C. 2008); Mehling v. New York Life Ins. Co., 246 F.R.D. 467 (E.D. Pa. Oct. 24, 2007); Dupree v. Prudential Ins. Co. of Am., 42 EB Cases (BNA) 1510 (S.D. Fla. Aug. 7, 2007); Franklin v. First Union Corp., 84 F. Supp. 2d 720 (E.D. Va. 2000).

15. The growth of fiduciary litigation has been associated with a downward trend in 401(k) fees, although it is one of multiple factors that has contributed to decreases in certain kinds of plan fees in some plans. *See, e.g.*, Quinn Curtis, *Costs, Conflicts, and College Savings: Evaluating Section 529 Savings Plans* 37 YALE J. ON REG. 116, 132 (2020) (noting that "[c]lass-action lawsuits alleging breaches of fiduciary duty are not uncommon and have had a significant effect on lowering the fees associated with 401(k) plans"), https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1550&context=yjreg [https://perma.cc/9K99-ZDUQ]. While certain fees are lower than they were fifteen years ago, there is concern that the fear of fiduciary litigation may discourage plan formation and stifle experimentation with plan design and features. Mellman & Sanzenbacher, *supra* note 9 (finding that "[o]n the investment side, the average share of assets paid to fees for 401(k) participants in mutual funds has declined over the last 15 years….and these declines have been accompanied by corresponding decreases in 401(k) administrative and recordkeeping costs" but expressing concern that "the fear of litigation prevents the use of creative options that may improve participant outcomes – like investment vehicles designed to provide a lifetime income stream when participants retire.").

a regime so replete with rules at its inception came to rely so heavily on the fiduciary standard to protect participants in employer-sponsored retirement plans.

II. THE LIMITS OF FIDUCIARY GOVERNANCE AND THE CURRENT REGULATORY REGIME

Trust law's central role in the governance of employer-sponsored defined-contribution retirement plans was not intentional. The drafting of ERISA predated the rise of 401(k) plans. At the time of the drafting, defined benefit pension plans were the norm. Employers generally promised monthly pension checks for retired employees, and also bore the risk and responsibility of setting aside and managing the money to pay for such benefits. When the drafters of ERISA borrowed from donative trust law in the 1970s, they did so for the limited purpose of curbing asset mismanagement by insiders with access to pension funds.[16] But trust law was just one piece of ERISA's protective regime. The drafters also imposed extensive vesting, funding, and insurance requirements to regulate employer conduct in the provision and administration of defined benefit pension plans.

Trust law—and particularly the fiduciary regime—assumed a much greater governance role as the pension system changed in the decades after ERISA's passage. As defined contribution plans began to replace defined benefit plans in the private sector, many of ERISA's substantive provisions—particularly those related to funding and insurance—became simply irrelevant to the new plans. At the same time, defined contribution plans increasingly exposed employee participants to risks stemming from the plan administration and investment selection decisions of their employers, risks that did not exist in the same way for participants in defined benefit plans. In the absence of new substantive federal regulation, the trust-based fiduciary regime became the centerpiece of 401(k) plan governance under ERISA. Consequently, current regulation aims to protect U.S. employees primarily by subjecting those who administer private pension plans to trust-based care and loyalty obligations.

As observers have noted, reliance on the fiduciary regime presents several challenges in the context of the non-donative, dual-settlor, dual-beneficiary arrangement that is the modern 401(k) plan.[17] First,

16. Daniel R. Fischel & John H. Langbein, *ERISA's Fundamental Contradiction: The Exclusive Benefit Rule*, 55 U. CHI. L. REV. 1105, 1110 (1988).

17. In the prototypical donative trust, an owner of property, called the settlor, desires to gift the property to one or more beneficiaries. Instead of giving a direct gift to the beneficiary, the settlor desires to have the property managed by a third party trustee. The settlor transfers to the trustee the legal title to

the current fiduciary regime perpetuates ERISA's fiction about the employer's ability to wear and switch between two "hats." The "settlor" hat permits the employer to consider its own interests in establishing, designing, and terminating a plan, and courts have prevented the application of ERISA's fiduciary regime to actions falling within this increasingly broad category.[18] The "fiduciary" hat requires the same employer, when acting as a fiduciary to the plan, to act solely in the interest of plan participants and beneficiaries.[19] The obligations associated with the fiduciary hat arise when employers administer what is a form of employee compensation, even though other forms of compensation place employers and employees in an adversarial position with one another.[20] Although ERISA does not require employers to wear the fiduciary hat when setting plan terms, in practice, the line between settlor and fiduciary decisions is inherently murky.[21] Certain "settlor" design decisions have the same financial effects as "fiduciary" implementation or administration decisions. For example, employers can freely choose to offer less generous contributions or not to pay for certain administrative costs of the plan (settlor decisions). Yet, they may not, under the current fiduciary regime, take employer costs into consideration when selecting service providers or investment menu options for plan participants (fiduciary decisions).

The reliance on the trust-based analogy also has given the courts

---

the property. Consequently, the settlor's rights with respect to the trust property terminate, the trustee obtains legal control, and the beneficiary gets an equitable interest. To safeguard the beneficiary from trustee wrongdoing, trust law subjects the trustees to strict fiduciary obligations of loyalty and prudence. Non-donative trust arrangements—including pension plans—deviate significantly from these characteristics. The traditional settlor, trustee, and beneficiary roles do not map well onto modern defined contribution arrangements; instead, in the current retirement plan context, both employers and employees take on elements of each role. *See* John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 YALE L.J. 165, 169 (1997); John H. Langbein, *The Conundrum of Fiduciary Investing under ERISA*, *in* PENSION RESEARCH COUNCIL, PROXY VOTING OF PENSION PLAN EQUITY SECURITIES 128, 129-32 (Dan M. McGill ed., 1989); Norman Stein, *Trust Law and Pension Plans*, *in* PENSION RESEARCH COUNCIL, PROXY VOTING OF PENSION PLAN EQUITY SECURITIES 1, 52 (Dan M. McGill ed., 1989)*; see also* Natalya Shnitser, *Trusts No More: Rethinking the Regulation of Retirement Savings in the United States*, 2016 B.Y.U. L. REV. 629, 629-30 (2016).

18. Peter J. Wiedenbeck, *Untrustworthy: ERISA's Eroded Fiduciary Law*, 59 WM. & MARY L. REV. 1007, 1011 (2018) (describing how "[t]he settlor function doctrine . . . "restrict[s] the range of application of ERISA's fiduciary regime . . .").

19. Nonneutral trustees must make their decisions "with an eye single to the interests of the participants and beneficiaries" but are not at fault if particular decisions "incidentally" benefit the corporation. *See* Donovan v. Bierwirth, 680 F.2d 263, 271 (2d Cir. 1982).

20. *See, e.g.*, Brendan S. Maher, *Regulating Employment-Based Anything*, 100 MINN. L. REV. 1257, 1296 (2016) (suggesting that "the employer is presumptively the employee's adversary" when negotiating the terms of employee benefits).

21. *See* Dana Muir & Norman Stein, *Two Hats, One Head, No Heart: The Anatomy of the ERISA Settlor/Fiduciary Distinction*, 93 N.C. L. REV. 459 (2015) (providing a comprehensive analysis of the settlor/fiduciary doctrine).

considerable latitude to determine the scope of prudent and loyal conduct by plan fiduciaries.[22] Courts have grappled with the reality that employers may terminate existing plans or hesitate to form new ones if they believe that the compliance costs or litigation risks are too high.[23] The reach of fiduciary obligations in the context of retirement plans has been constrained by employer threats to cease offering plans to their employees.[24] In applying the trust analogy, courts have emphasized the employers' role as trust settlors, affording them significant deference in setting the scope of "trustee" authority to administer the trust and interpret its terms.[25] Over time, "uncoordinated, low-visibility judicial decisions" have "radically pruned back" both "the scope and the intensity of fiduciary oversight."[26]

Finally, ERISA's fiduciary-centric regime may have had the perverse result of decreasing participants' monitoring of plan sponsors. By imposing the "fiduciary" label on employers, ERISA may, in effect, mask the employers' conflicts of interest and lack of expertise.[27] At the same time, even if employees were more vigilant, their enforcement options are limited because litigation is itself costly

22. *See, e.g.*, Tibble v. Edison Int'l, 575 U.S. 523, 135 S. Ct. 1823, 1828 (2015) (finding that the court has "often noted that an ERISA fiduciary's duty is 'derived from the common law of trusts.'") (quoting Central States, Southeast & Southwest Areas Pension Fund v. Central Transp., Inc., 472 U.S. 559, 570 (1985)).

23. *See, e.g.*, Edward A. Zelinsky, *The Defined Contribution Paradigm*, 114 YALE L.J. 451, 524 (2004) (stating that "employers' decisions to maintain and establish defined contribution plans are voluntary; if the costs of such plans outweigh the perceived benefits, employers will abandon such plans or will not establish them in the first place.").

24. *See, e.g.*, Varity Corp. v. Howe, 516 U.S. 489, 497 (1996) (finding that "courts may have to take account of competing congressional purposes, such as Congress' desire to offer employees enhanced protection for their benefits, on the one hand, and, on the other, its desire not to create a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering welfare benefit plans in the first place.").

25. The Supreme Court has held that "[p]rinciples of the law of trusts . . . establish that a denial of benefits . . . must be reviewed under a de novo standard *unless the benefit plan expressly gives the plan administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the plan's terms*, in which cases a deferential standard of review is appropriate." Firestone Tire & Rubber Co. v. Bruch 489 U.S. 101, 102 (1989) (emphasis added). Plans' sponsors have guaranteed the deferential standard of review by granting the required discretion to the plan administrators. *See generally* John H. Langbein, *The Supreme Court Flunks Trusts*, 1990 SUP. CT. REV. 207 (1991).

26. Wiedenbeck, *supra* note 18, at 1007. ("The trust law analogy has come to dominate judicial thinking about employee benefit plans. Yet despite its rise to rhetorical prominence, ERISA fiduciary law has been dramatically transformed by a series of uncoordinated, low-visibility judicial decisions on multiple fronts. These apparently unconnected case law developments reveal a startling pattern of mutually reinforcing restrictions on ERISA's protection of pension and welfare benefits. . . . Both the scope and the intensity of fiduciary oversight have been radically pruned back in the courts.").

27. *See, e.g.*, Larry E. Ribstein, *Fencing Fiduciary Duties*, 91 B.U. L. REV. 899, 900 (2011) (warning that an overbroad application of fiduciary duties "could unnecessarily constrain parties from self-protection in contractual relationships, impose excessive litigation costs, provide an unsuitable basis for contracting, and impede developing fiduciary norms of behavior.").

Shnitser: The New Fiduciaries

and requires employees to overcome significant free-rider and coordination problems.[28] Apart from employee litigation or agency oversight, retirement plan participants have no meaningful recourse. As the trust "beneficiaries," they are effectively locked in to their employer plans and unable to access alternative investment options without losing the tax benefits associated with employer-sponsored plans.[29] Meanwhile, as described in Part I, because many private U.S. employers do not offer any retirement benefits to their employees, some forty million workers are without access to an employer-sponsored plan.[30]

III. STATE EFFORTS TO CLOSE THE COVERAGE GAP

Over the last decade, numerous states have begun to explore and implement programs to expand access to retirement savings benefits for private-sector employees. Because the state programs depend on employer intermediaries, they have had to grapple with the issue of ERISA preemption.[31] Although the Department of Labor created a safe harbor for such programs in 2016,[32] Congress used the Congressional Review Act to overturn the agency rule in 2017. President Trump signed

---

28. The class action and contingent fee mechanisms, though used against certain large employers, may not be as effective for smaller employers where aggregate recoveries would be smaller. *See* Robert Sitkoff, *An Agency Costs Theory of Trust Law,* 89 Cornell L. Rev. 621, 679 (2004) (observing that "[w]hen liability rules are the chief check on agency costs, there is a practical limit to the number of residual claimants that the organization can support. The greater the number, the more serious the collective action dynamic that will weaken any individual's incentive to monitor and, if cost justified, to litigate.").

29. *See, e.g.,* Liam Pleven, *How to Lobby for a Better 401(k)*, WALL ST. J. (Feb. 20, 2015), http://www.wsj.com/articles/how-to-lobby-for-a-better-401-k-1424459507 (observing that while "many plans are hobbled by high fees and inadequate choices . . . . Few people want to question the judgment of people who sign their paycheck and control promotions and raises.").

30. *51 Percent of Private Industry Workers Had Access to Only Defined Contribution Retirement Plans*, BUREAU OF LABOR STATISTICS: ECON. DAILY (Oct. 2, 2018), https://www.bls.gov/opub/ted/2018/51-percent-of-private-industry-workers-had-access-to-only-defined-contribution-retirement-plans-march-2018.htm [https://perma.cc/C4SG-FYU7] (reporting that as of "March 2018, 51 percent of private industry workers had access to only defined contribution retirement plans through their employer").

31. Section 514(a) of ERISA preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . ." 29 U.S.C. § 1144(a). Section 4(a) of ERISA provides that ERISA generally applies to any "employee benefit plan" established or maintained by an employer "engaged in commerce or in any industry or activity affecting commerce" or any plan established or maintained by unions representing employees engaged in commerce. 29 U.S.C. § 1003(a). If any state program is found to establish employee benefit plans for purposes of ERISA, ERISA would preempt the state law creating the program.

32. Interpretive Bulletin Relating to State Savings Programs That Sponsor or Facilitate Plans Covered by the Employee Retirement Income Security Act of 1974, 80 Fed. Reg. 71936-02 (U.S. Dep't of Labor Nov. 18, 2015) (codified at 29 C.F.R. pt. 2509). Under the final regulation, state automatic enrollment IRAs would not have constituted employee benefit plans for purposes of ERISA if they met eleven stated requirements.

Published by University of Cincinnati College of Law Scholarship and Publications, 2019

University of Cincinnati Law Review, Vol. 88 [2019], Iss. 3, Art. 3

the Congressional resolution into law on May 17, 2017, and the Department of Labor withdrew the regulatory safe harbor a month later.[33] Despite the ongoing questions and litigation over ERISA preemption, state and local governments have moved forward with new programs. By 2019, the five programs described below were all open to participants.[34] In March 2020, a federal district court in California ruled that California's Secure Choice Retirement Savings Program is not preempted by ERISA.[35] The decision supports the states' position on preemption and is expected to accelerate the growth of additional state-sponsored retirement programs for private-sector employees.[36]

A. State Automatic Enrollment Individual Retirement Accounts (IRAs)

1. The California Secure Choice Retirement Savings Program

In 2012, the California Secure Choice Retirement Savings Trust Act[37] created the mandate and the institutional body to study the feasibility of an automatic enrollment program for California. After the feasibility analysis was completed in January of 2016, legislation was approved to begin developing the program. The CalSavers Retirement Savings Program was piloted in 2018, and then launched it statewide in July of 2019.[38] As stated in the program materials, the "CalSavers Retirement Savings Program was designed to give employers an easy way to help their employees save for retirement, with no employer fees, no fiduciary responsibility, and minimal ongoing responsibilities."[39]

Pursuant to the law, California employers who do not already offer a "qualified" employer-sponsored retirement plan and who have five or

33. Moore, *State Automatic Enrollment IRAs*, *supra* note 2, at 53, 63-64.

34. Experts have disagreed whether, in the absence of the safe-harbor initially promulgated by the Department of Labor the state programs in California, Illinois and Oregon are preempted by ERISA. Several lawsuits have been filed claiming preemption and the litigation is ongoing. *Id.* at 66-67.

35. Howard Jarvis Taxpayers Ass'n v. Cal. Secure Choice Ret. Sav. Program, 2020 BL 89150 (E.D. Cal. Mar. 10, 2020) (finding that "CalSavers is neither an employee benefit plan nor does it relate to an ERISA plan" and thus it is not preempted by ERISA).

36. *See, e.g.,* Hazel Bradford, *More States Jumping onto Secure Choice Bandwagon*, PENS. & INV., Mar. 23, 2020.

37. California Secure Choice Retirement Savings Trust Act, CAL GOV'T CODE §§ 100000-100044 (West 2018).

38. CAL. GOV'T CODE § 100004 (West 2018)("There is hereby established a retirement savings trust known as the California Secure Choice Retirement Savings Trust to be administered by the board for the purpose of promoting greater retirement savings for California private employees in a convenient, voluntary, low-cost, and portable manner. After sufficient funds are made available for this title to be operative, the California Secure Choice Retirement Savings Trust, as a self-sustaining trust, shall pay all costs of administration only out of moneys on deposit therein.").

39. *Help your employees save for retirement*, CALSAVERS, https://employer.calsavers.com/ [https://perma.cc/2CT2-7AZQ].

https://scholarship.law.uc.edu/uclr/vol88/iss3/3

more employees must either sponsor a retirement plan or participate in the CalSavers program.[40] Under CalSavers, the role of the employer is to facilitate payroll contributions into their employees' Roth IRA accounts. Employees are automatically enrolled in the program with a current default savings rate of 5% of gross pay.[41] Employees can change the savings rate and opt out of (and back into) the program at any time.[42] Employers cannot make contributions to employee accounts.[43]

The California Secure Choice Retirement Savings Investment Board implements and oversees the program and selects investment options available to individual participants.[44] The nine-member board, which is chaired by the State Treasurer, includes the Treasurer, the Director of Finance, the Controller, an individual with retirement savings and investment expertise appointed by the Senate Committee on Rules, an employee representative appointed by the Speaker of the Assembly, a small business representative appointed by the Governor, a public member appointed by the Governor, and two additional members appointed by the Governor.[45] Day-to-day program operations are currently handled by Ascensus College Savings Recordkeeping Services, LLC ("ACSR"). The statute states explicitly that the "program is a state-administered program, not an employer-sponsored program," that "employers shall not have any liability" for any employee participation or investment decisions, and that "employers shall not be a fiduciary, or considered to be a fiduciary" over the program.[46]

2. Illinois Secure Choice Savings Program

The Illinois plan and the California plan have many similar features. The Illinois Secure Choice Savings Program Act established the state's program to help employees who do not have access to a retirement savings plan through work save for retirement through Roth IRAs.[47] The

40. CAL. GOV'T CODE § 100032 (West 2018).

41. Although the statutory provision set the default contribution rate at 3% of wages, it authorized the California Investment Board to adjust the default rate to between 2% and 5%. CAL. GOV'T CODE § 100032(i), (j) (West 2018). Subsequent regulations set the initial default contribution rate to 5% with automatic escalation of 1% each year until it reaches 8%. CAL. CODE REGS. tit. 10, § 10005 (2018).

42. CAL. GOV'T CODE § 100032(f) (West 2018).

43. CAL. GOV'T CODE § 100032 (West 2018).

44. CAL. GOV'T CODE § 100002 (West 2018).

45. *Id.*

46. CAL. GOV'T CODE § 100034 (West 2018).

47. Illinois Secure Choice Savings Program Act, 820 ILL. COMP. STAT. 80/1-95 (2018); ILL. ADMIN. CODE tit. 74, § 721.100 (2018) ("The Illinois Secure Choice Savings Program is a retirement savings program in the form of an automatic enrollment payroll deduction IRA for the purpose of promoting greater retirement savings for private-sector employees in a convenient, low-cost, and portable manner.").

Illinois Secure Choice Savings Program requires employers who have twenty-five or more employees, have been in operation for at least two years, and do not offer an employer-sponsored retirement plan to facilitate Illinois Secure Choice.[48] In their facilitator role, employers provide the information to establish payroll deductions; they do not incur any fees or make any contributions to the accounts of participating employers. The statute disavows any fiduciary obligations for participating employers.[49] As in the California program, the current default savings rate is 5% of gross pay and employees can opt out (or back in) at any time.[50]

The Illinois Secure Choice Savings Board implements and oversees the program, selects the investment options available to individual participants, and serves as the trustee of the Illinois Secure Choice Savings Program Fund.[51] The Illinois Secure Choice Board has seven members: the State Treasurer; the State Comptroller; the Director of the Governor's Office of Management and Budget; two public representatives with expertise in retirement savings plan administration or investment, or both, appointed by the Governor; a representative of participating employers, appointed by the Governor; and a representative of enrollees, appointed by the Governor.[52] Ascensus College Savings Recordkeeping Services, LLC ("ACSR") currently serves as the program administrator. ACSR and its affiliates are responsible for day-to-day program operations.[53]

3. Oregon Retirement Savings Plan

In 2015, Oregon established the Oregon Retirement Savings Board and

48. ILL. ADMIN. CODE tit. 74, § 721.200 (2018) (establishing that "employer" for purposes of the Illinois Secure Choice program is defined as "a person or entity engaged in a business, industry, profession, trade, or other enterprise in Illinois, whether for profit or not for profit, that: has at no time during the previous calendar year employed fewer than 25 employees in the State; has been in business at least 2 years; and has not offered a qualified retirement plan in the preceding 2 years.").

49. 820 ILL. COMP. STAT. ANN. 80/75 (2018) (stating that "[p]articipating employers shall not have any liability for an employee's decision to participate in, or opt out of, the Program or for the investment decisions of the Board or of any enrollee" and further clarifying that "[a] participating employer shall not be a fiduciary, or considered to be a fiduciary, over the Program. A participating employer shall not bear responsibility for the administration, investment, or investment performance of the Program. A participating employer shall not be liable with regard to investment returns, Program design, and benefits paid to Program participants.").

50. 820 ILL. COMP. STAT. ANN. 80/55 (2018). Illinois law charges the Illinois Board with selecting a default contribution rate between 3% and 6% of wages. 820 ILL. COMP. STAT. ANN. 80/30 (2018). The default contribution was set at 5%. *See* Contributions, ILL. SECURE CHOICE, https://saver.ilsecurechoice.com/home/savers/contributions.html [https://perma.cc/C9UF-ABDX].

51. 820 ILL. COMP. STAT. ANN. 80/30 (2018).

52. 820 ILL. COMP. STAT. ANN. 80/20 (2018).

53. *A New Choice for Retirement Savings*, ILL. SECURE CHOICE, https://www.ilsecurechoice.com/ (last visited Sept. 1, 2019).

charged it with developing the Oregon Retirement Savings Plan for Oregon employees.[54] The program, which went into effect in 2017, requires all employers to participate unless they certify to the state that they offer an alternative qualified retirement plan.[55] As in California and Illinois, employers in Oregon serve only to facilitate contributions via payroll deductions, which are then deposited into employees' Roth IRA or IRA accounts.[56] The Oregon Retirement Savings Board has set the default contribution rate at 5% with auto-escalation at the rate of an additional 1% each year until a maximum contribution of 10% is reached.[57]

The Oregon Retirement Savings Board oversees the program and selects the investment options available to individual participants.[58] The Board has seven members: the State Treasurer; four members appointed by the Governor, including a representative of employers, a representative with experience in investments, a representative of an association representing employees, and a member of the public who is retired; a member of the Oregon House of Representatives; and a member of the Oregon Senate.[59] Ascensus College Savings Recordkeeping Services, LLC is the program administrator responsible for day-to-day program operations.[60]

B. State-Facilitated Marketplace Model

1. Washington's Small Business Retirement Marketplace

Washington's Small Business Retirement Marketplace is built on the premise that "small businesses, which employ more than forty percent of private-sector employees in Washington, often choose not to offer retirement plans to employees due to concerns about costs, administrative burdens, and potential liability that they believe such plans would place

54. OR. REV. STAT. §§ 178.200-178.245 (West 2018).

55. Or. Admin. R. 170-080-0015. Notably, the program explicitly aims to "[k]eep administration fees in the plan low" and will "[n]ot impose any duties under the [ERISA] . . . on employers." OR. REV. STAT. § 178.210 (2018).

56. OR. ADMIN. R. 170-080-0035. For further analysis of how employers have carried out their roles, see Anek Belbase, Laura D. Quinby & Geoffrey T. Sanzenbacher, *Auto-IRA Rollout Gradually Speeding Up,* B.C. CTR. FOR RETIREMENT RES. 20-5 (2020), *available at* https://crr.bc.edu/wp-content/uploads/2020/03/IB_20-5..pdf.

57. OR. ADMIN. R. 170-080-0035 (2018).

58. OR. REV. STAT. ANN. § 178.205 (West 2018).

59. OR. REV. STAT. ANN. § 178.200 (West 2018).

60. *OregonSaves is open to everyone*, OREGONSAVES, https://www.oregonsaves.com [https://perma.cc/RC6W-VSXV].

on their business."[61] Legislation enacting the program was passed in 2015, and the marketplace formally opened in March of 2018.[62] In effect, the Retirement Marketplace is a website where individuals and employers "can comparison shop for state-verified, low-cost retirement savings plans."[63] Participation in the Retirement Marketplace is entirely voluntary for both employers and employees. The plans offered through the website, which can include various IRAs, 401(k)s, and certain life insurance products designed for retirement purposes, must be first verified and approved by Washington State officials at the Department of Financial Institutions or the Office of the Insurance Commissioner to ensure they comply with Retirement Marketplace requirements.[64] The plans on the marketplace cannot charge administrative fees to employers and, subject to limited exceptions, they cannot charge enrollees more than 1% in total annual administrative fees.[65] Furthermore, the plans must go through an annual renewal process to ensure the plan and provider remain in good standing.[66]

The marketplace currently offers a profit-sharing plan and four types of 401(k) plans from Saturna Trust Company, as well as a Roth and a traditional IRA option from Finhabits.[67] Because the marketplace merely lists plan options, the state has no ERISA liability and does not assume any of the employer's legal responsibilities. Employers, meanwhile, retain any ERISA obligations that would normally apply, albeit with the benefit of having the plans pre-screened and monitored by state agencies.[68] The marketplace enables employers to decide which type of

---

61. WASH. REV. CODE ANN. § 43.330.730 (West 2018).

62. Washington Small Business Retirement Marketplace Act, WASH. REV. CODE ANN. § 43.330.730-750 (West 2018).

63. *The Marketplace*, RET. MARKETPLACE, https://retirement-marketplace.com/the-marketplace/ [https://perma.cc/78VA-K7NX]. Per the statute, the "'Washington small business retirement marketplace' or 'marketplace' means the retirement savings program created to connect eligible employers and their employees with approved plans to increase retirement savings." WASH. REV. CODE ANN. § 43.330.732 (West 2018).

64. WASH. REV. CODE ANN. § 43.330.735 (West 2018).

65. *Id.* Notably, as set forth in the applicable regulations, "a financial services firm may charge retirement plan enrollees a de minimis fee for new and/or low balance accounts in excess of one hundred basis points in total annual fees only if the department of commerce and the financial services firm negotiate and agree upon the amount of the de minimis fee prior to the issuance of the verification letter." WASH. ADMIN. CODE 208-710-030.

66. WASH. ADMIN. CODE 208-710-060 (2018) (setting forth the annual renewal application procedure).

67. *Available Plans*, RETIREMENT MARKETPLACE, https://retirement-marketplace.com/available-plans/ [https://perma.cc/C5EE-RJDJ].

68. The statute provides that "The department shall not expose the state of Washington as an employer or through administration of the marketplace to any potential liability under the federal employee retirement income [security] act of 1974." WASH. REV. CODE ANN. § 43.330.742 (West 2018). At the same time, the statute emphasizes the benefits of ERISA protections. WASH. REV. CODE ANN. § 43.330.730 (West 2018) ("The marketplace furthers greater retirement plan access for the residents of

plan best meets their and their employees' needs, including whether they prefer an ERISA-covered plan.

C. State-Administered Multiple-Employer Plan

1. Massachusetts Defined Contribution CORE Plan

In 2012, Massachusetts created the Connecting Organizations to Retirement (CORE) Plan, which aims to help Massachusetts nonprofit employees save and invest for a financially secure retirement.[69] The program, which launched in 2017, is a voluntary 401(k) multiple employer plan that smaller non-profits may choose to adopt. [70] The Office of the State Treasurer and Receiver General is the sponsor of the CORE Plan and assumes most administrative and investment responsibilities, thus reducing the burden on participating not-for-profit employers.[71] Plan materials indicate that for employers, the CORE Plan "relieves much of the fiduciary responsibility" that the employer would otherwise have by utilizing an outside plan.[72]

The plan currently provides for a default employee contribution of 6% with annual auto-escalation of 1% or 2%, based on the employer election, until a maximum contribution 12%.[73] The employer may elect to make contributions.[74] The state, as the plan sponsor, has outsourced various elements of plan administration. For example, Empower Retirement serves as the plan's recordkeeper;[75] Aon Hewitt serves as the Investment Manager, and is tasked with developing and monitoring the investment structure of the CORE Plan;[76] and Northeast Professional Planning Group Fiduciary Services (NPPG-FS) is the Plan Administrator that performs administrative fiduciary services to ensure operational and administrative

Washington while ensuring that individuals participating in these retirement plans will have all the protections offered by the employee retirement income security act.").

69. Qualified defined contribution plan for employees of not-for-profit employer, MASS. GEN. LAWS ANN. ch. 29, § 64E (West 2018).

70. *Id.* ("In order to participate in the plan, a not-for-profit employer shall execute a participation agreement, agree to the terms of the plan and operate the plan in compliance with the Code and ERISA.").

71. 960 MASS. CODE REGS. 6.02 (2018) ("The State Treasurer shall be the MEP Sponsor unless otherwise specified.").

72. Professional Oversight, CORE, https://www.empower-retirement.com/client/mass/employer/professional-oversight.html [https://perma.cc/9QNR-CBQE].

73. *Plan overview*, CORE 1, https://www.empower-retirement.com/client/mass/employer/resources/pdf/CORE-Plan-Adoption-Brochure.pdf [https://perma.cc/DV9B-LPSU].

74. *Id.* at 2 (The employer may choose to make either a "Safe Harbor Employer-Matching Contribution" or a "Safe Harbor Non-Elective Contribution.").

75. *Id.* at 3, 5.

76. *Id.* at 3.

University of Cincinnati Law Review, Vol. 88 [2019], Iss. 3, Art. 3

compliance.[77] At present, program materials indicate that there is a sixty-five dollar annual fee for participation in the CORE Plan that is automatically deducted from each participant's account. Furthermore, there are certain elective plan features that may have additional fees, and "each investment option has an administrative, advisory and investment management fee that varies by investment option."[78]

IV. FIDUCIARIES WITH FEE CAPS: EXPERIMENTS IN PLAN GOVERNANCE

The new state programs respond directly to the coverage and fee challenges in the current system. Each seeks to expand access to lower-cost retirement savings options, particularly for workers employed by smaller employers who are otherwise unlikely to take on the risk and responsibility of establishing and administering employer-sponsored plans. Beyond the common goal, however, the five state programs currently open to participants vary in the degree of responsibility assigned to the state and the employer, and in the approach to controlling plan fees.[79] Table 1 below summarizes the key fiduciary provisions for state actors and for the participating employers under each plan. It also tracks any statutory or regulatory ceilings or restrictions on plan fees. Following the description of the key fiduciary and fee provisions in each state, this Part creates a typology of regulatory approaches embodied in the five programs, and the lessons that can be gleaned by comparing different sets of programs to one another.

77. *Id.*

78. *Id.* at 5.

79. As observers have acknowledged, there is no guarantee that the state programs themselves will not suffer governance or oversight challenges. *See, e.g.,* Moore, *State Automatic Enrollment IRAs, supra* note 2 at 93 (stating that "[o]f course, there is a risk of mismanagement by the entities charged with managing and administering the programs"); Moore, *Closing the Retirement Savings Gap*, *supra* note 2 at 69 (noting that in "recent years, plan fees paid by public sector pension funds have come under increasing scrutiny").

Table 1: Fiduciary & Fee Provisions Across State-Administered Retirement Savings Programs for Private-Sector Employees

State	Fiduciary Provisions, If Any, for State Actors	Fiduciary Provisions, If Any, for Participating Employers	Fee Provisions, If Any
CA	"The board and the program administrator and staff, including contracted administrators and consultants, shall discharge their duties as fiduciaries with respect to the trust solely in the interest of the program participants as follows: (1) For the exclusive purposes of providing benefits to program participants and defraying reasonable expenses of administering the program. (2) By investing 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 a like character and with like aims." CAL. GOV'T CODE § 100002 (d) (West 2018).	No fiduciary obligations for participating employers. CAL. GOV'T CODE § 100034 (West 2018).	"On and after six years from the date the program is implemented, on an annual basis, expenditures from the administrative fund shall not exceed more than 1 percent of the total program fund." CAL. GOV'T CODE § 100004 (West 2018).

IL	"Fiduciary Duty. The Board, the individual members of the Board, the trustee appointed under subsection (b) of Section 30, any other agents appointed or engaged by the Board, and all persons serving as Program staff shall discharge their duties with respect to the Program solely in the interest of the Program's enrollees and beneficiaries as follows: (1) for the exclusive purposes of providing benefits to enrollees and beneficiaries and defraying reasonable expenses of administering the Program; (2) by investing with the care, skill, prudence, and diligence under the prevailing circumstances that a prudent person acting in a like capacity and familiar with those matters would use in the conduct of an enterprise of a like character and with like aims; and (3) by using any contributions paid by employees and employers into the trust exclusively for the purpose of paying benefits to the enrollees of the Program, for the cost of administration of the Program, and for investments made for the benefit of the Program." 820 ILL. COMP. STAT. ANN. 80/25 (West 2018).	No fiduciary obligations for participating employers. 820 ILL. COMP. STAT. ANN. 80/75 (West 2018).	"The Board shall keep total annual expenses as low as possible, but in no event shall they exceed 0.75% of the total trust balance." 820 ILL. COMP. STAT. ANN. 80/30 (West 2018).
OR	No reference to fiduciary obligations.	No reference to fiduciary obligations for participating employers.	"The Board will charge each IRA a Program administrative fee not to exceed the rate of 1.05% per annum, to defray the costs of operating the Program, including internal and external administration, and operational and investment costs, including for professional investment

			management services." OR. ADMIN. R. 170-080-0045 (2018).
WA	No fiduciary obligations for state agencies. WASH. REV. CODE ANN. § 43.330.730 (West 2018).	Traditional ERISA obligations apply to any ERISA-covered plans. WASH. REV. CODE ANN. § 43.330.730 (West 2018).	"Financial services firms … may not charge the participating employer an administrative fee and may not charge enrollees more than one hundred basis points in total annual fees…." WASH. REV. CODE ANN. § 43.330.735 (West 2018).
MA	As the plan sponsor, the State Treasurer assumes ERISA fiduciary obligations. "The Plan is created and maintained and shall be administered pursuant to the applicable sections of the ERISA…."960 MASS. CODE REGS. 6.03 (2018).	No specific guidance in the statute or regulations, but under ERISA, participating employers in multiple-employer plans retain fiduciary responsibility for selecting and monitoring the MEP provider.[80]	No fee caps set forth in applicable statute or regulations.

The programs described in Table 1 vary along three primary governance dimensions: (1) whether fiduciary obligations are explicitly imposed on the state either as a matter of state law or federal law; (2) whether participating employers are subject to fiduciary obligations either

80. *See generally* Colleen E. Medill, *Regulating ERISA Fiduciary Outsourcing*, 102 IOWA L. REV. 505 (2017).

as a matter of state or federal law;[81] and (3) whether the statutory framework for the state program imposes any kind of fee caps or ceilings on administrative, investment, or total fees.

California and Illinois have embraced a model where the state serves as a facilitator of the automatic enrollment programs. Both states explicitly impose fiduciary obligations on the state agencies and administrators tasked with implementing and overseeing the plans. Both states likewise make clear that the programs do not impose fiduciary obligations on the participating employers. And both embrace explicit fee caps. The Oregon program offers the same kind of automatic enrollment IRA and also imposes fee caps, but the state statutes lack any explicit references to fiduciary obligations for state administrators of the program. Washington state explicitly disavows fiduciary obligations for the state agencies that oversee the certification and review of plans for Washington's marketplace. Several of the plans available on the marketplace, however, are traditional 401(k) plans that, if adopted, would subject participating employers to all obligations under ERISA. In addition to the traditional fiduciary obligations, however, the Washington program imposes a fee cap for all plans that wish to be included on the marketplace. Finally, the state of Massachusetts plan places the state Treasurer's office in the role of plan sponsor under ERISA. Pursuant to the Massachusetts arrangement, participating non-profit employers would retain some fiduciary responsibility for the selection and oversight of the plan sponsor.

As states continue to experiment with ways to promote retirement security,[82] the new programs will pave the way for important empirical analyses of the different models, all of which depart from the traditional

81. Ultimately, the research findings on the impact of fiduciary obligations in state-administered retirement programs will have implications for the governance of other state-administered programs, most notably 529 College Savings Plans. *See, e.g.*, Curtis, *supra* note 15, at 133 ("In short, as compared with 401(k), plans and IRAs, college savings plans promise a best-of-both-worlds approach. With college savings plans, investors benefit from curated menus, economies of scale, disinterested boards, and a competitive marketplace in which investors have outside options. All that is missing is a serious fiduciary liability regime in the style of ERISA.").

82. For a description of different programs, *see generally* Ctr. for Ret. Initiatives, McCourt Sch. of Pub. Policy, Georgetown Univ., *State Facilitated Retirement Savings Programs*, *supra* note 2. States like Minnesota, for example, are experimenting with a "carrot and stick" approach that combines an automatic enrollment IRA plan ("IRAP") with a state-sponsored multiple-employer plan (MEP). As in Illinois, "IRAP would require every eligible employer in the state to automatically deduct a percentage of payroll from worker's paychecks and remit it to an individual account held in trust by the plan. The worker is free to opt out of the program at any time but initially the employer must automatically enroll the worker and remit payment unless the worker opts out." Employers could avoid the requirement to enroll in IRAP by either establishing their own employer-sponsored plans or by enrolling the state's MEP. As in Massachusetts, the MEP "is an ERISA compliant qualified 401(k)-type defined contribution plan" *See, e.g.,* Chad Burkitt, *A More Secure Choice: Minnesota's Two-Pronged Approach to State Level Retirement Savings Programs*, 40 MITCHELL HAMLINE L.J. PUB. POL'Y & PRAC. 183, 201–03 (2019).

ERISA framework by introducing a role for the states in the provision of retirement savings plans for U.S. workers in the private sector.[83] Will the states be better suited to carry out the oversight and administrative functions than individual employers? Will they be more vigilant if faced with fiduciary obligations? And how will any fiduciary standards interact with fee rules? Will such rules serve as the ceiling on plan fees, or as both a ceiling and a floor?

A comparison of enrollment rates and total plan fees will help shed light on such challenging questions in the coming years.[84] In particular, the comparison of California and Illinois plans with the Oregon plan will offer first insights on the effectiveness of state statutory provisions that explicitly impose fiduciary obligations on state actors. The comparison of traditional employer-sponsored plans (outside any state-administered system) to those in the Washington marketplace will provide information on the effectiveness of fee caps and state certification in determining the total plan fees for employer-sponsored plans. A comparison of terms of the 401(k) plans available through the Washington marketplace with those of the multiple-employer plan sponsored by Massachusetts will shed light on the effectiveness of the state (versus private sector employers) as the plan sponsors under an ERISA fiduciary regime, and on the role of explicit fee caps in controlling total all-in fees.

CONCLUSION

Forty-five years have passed since the historic passage of ERISA. Since that time, the very nature of retirement savings in the U.S. has evolved. Defined contribution plans have taken the place of traditional pensions and are now a core component of the retirement system. Yet the ERISA regulatory framework was not designed for such plans. Many of its rules have simply become irrelevant over time, and much of the governance burden has fallen on the statute's trust-based fiduciary

83. Scholars have noted that there is, at present, considerable uncertainty and debate over the effectiveness of the regulatory approaches adopted by the states. Moore, *Closing the Retirement Savings Gap*, *supra* note 2, at 70 (arguing that "[w]hether the states' rules/cap-based approach to fees is likely to be more effective than the standards-based approach currently used in private and public-sector pensions is an empirical question with no ready answer. Moreover, whether administrative fees can, in fact, be kept low depends on a host of factors such the size of the program, the structure of the program, and who administers the program."); *see also* Nari Rhee, *Lessons from California, Connecticut, and Oregon: How Plan Design Considerations Shape the Financial Feasibility of State Auto-IRAs*," State Brief 16-03, Ctr. for Ret. Initiatives, McCourt Sch. of Pub. Policy, Georgetown Univ. (2016), https://cri.georgetown.edu/wp-content/uploads/2016/12/Policy-Brief-16-3.pdf [https://perma.cc/VW6L-PK2P] (identifying the critical drivers of plan costs and providing long-term fee projections).

84. Of course, the variation in the fiduciary and fee provisions described here is only part of the story. Success of the new programs – at least as measured by participation rates and plan fees – will also depend on program design, plan size, and board composition.

University of Cincinnati Law Review, Vol. 88 [2019], Iss. 3, Art. 3

standards. The shortcomings of the current regime have manifested both in the proliferation of suboptimal employer-sponsored plans, and in the lack of access to any employer-sponsored plans for some forty million U.S. workers.

In recent years and with increasing speed, state governments have stepped in to fill gaps in retirement plan access for private-sector employees.[85] The state programs in California, Illinois, Oregon, Washington, and Massachusetts represent the range of new experiments in plan governance, with states currently embracing fee caps as either a complement to or substitute for fiduciary obligations for plan administrators. This Essay situates the new programs in the historical context and provides a typology of the state approaches to retirement plan governance. Measuring the effectiveness of such state programs over the coming years will offer scholars and policymakers important insights on the ideal role of federal, state, and local governments in the U.S. retirement system, and on the combination of rules and standards most likely to ensure retirement security for U.S. workers.

85. *See* Bradford, *More States Jumping onto Secure Choice Bandwagon*, *supra* note 36 (observing that "[s]ince 2012, 43 states have either considered or enacted legislation to study or begin implementing state-facilitated retirement savings programs for their private-sector workers not already covered," with 2019 "busier than ever" and with 2020 beginning with "legislative activity in 17 states and at least seven states actively studying how to implement a program").

https://scholarship.law.uc.edu/uclr/vol88/iss3/3