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‘Public-Option’ Workplace IRAs Proceed in Oregon, California

By Kerry Pechter *Thu, Dec 21, 2017*

“The day after President Trump signed the repeal [of the DOL safe harbor ruling], we had a press conference and announced that we were proceeding as planned,” said Katie Selenski, executive director of the California Secure Choice retirement plan.

Oregon and California are moving ahead with their state-sponsored, workplace auto-enrolled Roth IRA programs despite efforts by the financial industry, the Republican Congress and President Trump over the past year to frustrate their implementation.

In interviews, the executive directors of the two programs told *RIJ* that neither the Trump administration’s cancellation of the federal auto-IRA project, known as MyRA, or the revocation of the Obama Department of Labor’s “safe harbor” for state plans from federal labor law will stop them.

“We’ve moved forward and we’re having a good experience,” Lisa Massena (below left) of **OregonSaves** told *RIJ*. “We completed a couple of pilots this year, to make sure the program would work. Now we’re in the process of rolling out ‘wave 1’ to larger employers in the state.” In the future, Oregon expects to offer a traditional IRA in addition to its Roth option.

“[The cancellation of MyRA] was a disappointment for sure,” said Katie Selenski of **California Secure Choice**. “It means we won’t be able to offer MyRA’s low-risk safe asset investment options to our participants. But it’s not slowing us down.” The state expects the program will open with a soft launch in summer or autumn of 2018 and officially open for statewide enrollment in early-2019.

OregonSaves, which has completed two pilot programs and will start formally in just 10 days, is the farthest along of about a dozen proposed state-sponsored plans. The plans are intended to address the fact that, at any given time, tens of millions of American workers, especially minority workers at small companies, have no way to save for retirement at work.

The MyRA plan was the Obama Treasury Department’s answer to that problem, but certain states and large cities moved ahead with their own programs. Those programs differed from state to state. California and Oregon sponsored their own IRA programs. Seattle has just announced the start of a municipal IRA program.

Other states have positioned themselves as facilitators of private-sector solutions to the problem. Washington has set up an exchange where small businesses and low-cost 401(k) plan providers can find each other. Recent legislation in Vermont allows small business owners to join “multi-employer plans” run by major 401(k) providers.

The state-sponsored plans have provoked criticism from conservative legislators and private industry. Financial advisors (represented by the National Association of Insurance and Financial Advisors) who sell 401(k) plans to small companies and asset managers who distribute mutual funds through those advisors to small plan participants objected to the potential competition from a public IRA option.

Some conservative legislators in Congress warned, despite their traditional states’ rights ideology, that a proliferation of individual state-sponsored retirement plans would Balkanize the system and cause headaches for multi-state employers. Others warned that participants in state plans wouldn’t have the protections that federal labor law provides.

But the state plans were getting support from the Obama administration. The Treasury’s MyRA program allowed state plans to use the MyRA program’s investment options until they fully developed their own investment menus. In 2016, DOL deputy secretary Phyllis Borzi issued a legal opinion emphasizing that the DOL wouldn’t try to regulate the state plans.

Those were the tailwinds that President Trump tried to reverse by killing the MyRA program and that Congress tried to frustrate by revoking the Borzi opinion. But lawyers for the Oregon and California plans said they would proceed anyway.

“Our board and the state treasurer’s office decided, on advise of legal counsel, that they were in a good position to move forward,” Massena said. “They knew that without some action on our part that a lot of workers would not get coverage. Some of the states may have stepped back because of the administration’s action. But the original states are all making good progress. We’re seeing some new legislation from the cities. Seattle will probably start working on their plan in earnest in the first quarter of 2018.”

“The day after President Trump signed the repeal [of the DOL safe harbor ruling], we had a press conference and announced that we were proceeding as planned,” Selenski (below right) said. “It would have been nice to have the new safe harbor. It added clarity. But the effort to get a new safe harbor was a belt-and-suspenders move. Secure Choice already qualifies for the existing 1975 safe harbor. We received a legal opinion to that effect from our counsel, K&L Gates, and we’ve been saying ever since that we are on strong legal footing."

Several elements aligned to make Oregon and California likely initiators of the state-sponsored Roth IRA (which involves after-tax contributions, tax-free withdrawals of principal and tax-free withdrawals and gains after five years or in retirement).

Both states have Democratic majorities in both chambers of their legislatures and both have Democratic governors: Jerry Brown in the Golden State and Kate Brown in Oregon. While three states with workplace savings projects—Illinois, Vermont and Maryland—have Republican governors, there are Democratic majorities in both houses of the legislature.

In California, Latinos represent a singularly large percentage of the state population and, importantly, a large percentage of the workforce that lacks a retirement plan at work. Latinos are also a force in the legislature. Kevin de Leon, the president pro tem of the state Senate, championed Secure Choice. In public, he often said that his own aunt's inability to save during her career as a domestic worker inspired his support for the program.

Secure Choice also got organized support in California from UnidosUS, the large Latino advocacy group (formerly called La Raza) and from Service Employees International Union (SEIU), whose largest chapter is in California and which doesn't provide a retirement plan for its members.

In Oregon, Massena pointed out, about one million of the state's 1.8 million workers lack a workplace plan. In California, 7.5 million workers are without workplace plans. Of those Californians, two-thirds are people of color and, of those, half are Latino, according to the plan's official website.

In both states, companies that do not offer retirement plans must start their own 401(k) or adopt the state-sponsored plan. (Lack of an employer mandate crippled the MyRA plan.) In Republican circles, mandates (like the Obamacare mandate) are always unpopular. In the debate over the state-sponsored plans, there was much speculation and disagreement over whether the mandate would help the private 401(k) industry by sparking employers to sponsor a 401(k) plan for the first time or whether employers without plans would be tempted to opt for the state Roth IRA, which entails none of the administrative chores or fiduciary responsibilities of a 401(k) plan.

(The draft regulations in California, as yet unapproved by the Secure Choice board, establish the default setting as Roth and participants will have the option of choosing a traditional IRA. Regulations will come the Board for a vote in January.)

Though more complex to set up and maintain, a 401(k) plan is more attractive than a Roth IRA in several ways. It allows a huge tax deferral for the business owner, it has higher contribution limits for participants, it allows an employer matching contribution, and it can allow loans to participants. The question remains open: Will the mandated state-sponsored IRAs stimulate business for the private-sector or cannibalize it?

"I think OregonSaves has prompted a number of employers to start 401(k) plans," Massena added. "We've provided a catalyst whereby an employer must take action. If you're someone who sells 401(k) plans, we've given you an opportunity to approach employers about starting a plan.

"It would be one thing if we were seeing employers dropping plans. But we're not hearing that at all. What we hear is that small businesses are tough to serve at a good price point. We hear small business owners say, 'Every year I look at the cost of offering a 401(k) plan and every year I find I can't afford it.'"