RETIREMENT IN THE LAND OF LINCOLN: THE ILLINOIS SECURE CHOICE SAVINGS PROGRAM ACT

*Edward A. Zelinsky**

In 2015, Illinois became the first state to enact a state-mandated and state-operated retirement system for private sector employers: The Illinois Secure Choice Savings Program Act. The Illinois program resembles a system approved by the California legislature—a system that has not yet been enacted since it is conditioned on an additional vote by the legislature. Illinois' program and the one proposed in California have notable differences in that (1) the Illinois retirement accounts will qualify as individual retirement accounts ("IRAs") under the Internal Revenue Code ("Code"); (2) the Illinois IRAs will be Roth IRAs; (3) the California program requires participation by firms with five or more employees, rather than twenty-five or more as mandated by the Illinois law; (4) the Illinois law accepts the status of its private sector retirement plan as governed by the Employee Retirement Income Security Act ("ERISA"), as long as both Illinois employers and the state incur no liability from that status; and (5) the Illinois law does not provide procedures by which employers may supplement employees' contributions to the state-mandated fund.

While the Illinois law will pass legal muster under both ERISA and the Code, it is less clear that its arrangement is sound as a matter of policy. Furthermore, there is great irony in the fact that the legislatures of two states that have failed to properly fund the pensions of their public employees instead choose to address the private sector's retirement challenges. Nevertheless, the Illinois law is superior to the law proposed in California, and it may result in improved private sector savings.

This Article acknowledges the widespread concern that workers are not saving enough for retirement and notes that the Illinois law provides an important first contribution to attempts at remedying the retirement savings problem through a state-mandated program. This Article further encourages widespread experimentation among the

* Morris and Annie Trachman Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University.

states to determine which policies—if any—effectively encourage retirement savings.

TABLE OF CONTENTS

I. INTRODUCTION

Illinois has now become the first state to complete legislative enactment of a state-mandated, state-operated retirement system for private employers.[1] The Illinois General Assembly is not the first state legislature to approve such a system. The California legislature holds that title.[2] The Golden State's legislature, however, conditioned that state's private sector retirement program upon an additional vote of the California legislature which has yet to occur.[3] Thus, Illinois is now the first state to complete the legislative process to authorize a state-run retirement system for private employers.[4]

As it debated, the Illinois General Assembly had before it the bill adopted earlier by California's legislature. The Illinois legislation, as enacted and signed by the governor, bears obvious similarities to the earlier adopted California law. The Illinois statute, however, also makes five notable departures from the California legislation.

First, the Illinois law requires the allocation of investment gains and losses, as well as administrative expenses, to the private sector retirement

1. *See* Illinois Secure Choice Savings Program Act, 820 ILL. COMP. STAT. 80/1–80/95 (2015).

2. *See* California Secure Choice Retirement Savings Trust Act, CAL. GOV'T CODE §§ 100000–100044 (West 2012). For discussion of the California law, see Edward A. Zelinsky, *California Dreaming: The California Secure Choice Retirement Savings Trust Act*, 20 CONN. INS. L.J. 547 (2014).

3. S.B. 923, 2012 Leg., Reg. Sess. (Cal. 2012).

4. While the Illinois Act authorizes the state-operated private sector retirement arrangement, the funds to implement the Illinois arrangement must still be appropriated by the legislature or obtained from other sources. 820 ILL. COMP. STAT. 80/30(m), 93.

savings accounts authorized by the law.[5] Thus, unlike the formula-based, cash-balance accounts established by the California Act,[6] the Illinois accounts will qualify as individual retirement accounts ("IRAs") under the Internal Revenue Code ("Code").[7] Second, the IRAs established under the Illinois program will be Roth IRAs.[8] Third, the Illinois Act requires participation by all Illinois employers with twenty-five or more employees who lack their own retirement savings plans for their employees.[9] The California law, if confirmed by a second legislative vote, would mandate participation by much smaller firms with five or more employees if such firms have no retirement savings plans for their respective workers.[10] Fourth, the Illinois Act—unlike the Golden State's law[11]—accepts the status of the Illinois private sector retirement plan as governed by the Employee Retirement Income Security Act of 1974 ("ERISA")[12] as long as Illinois employers and the state itself incur no liability from that status.[13] Finally, the Illinois Act—in contrast to the California statute[14]—provides no explicit procedures for employers to supplement their employees' contributions to the Illinois fund with employer contributions.[15]

As a legal matter, the Illinois private sector retirement plan will pass muster under both the Code and ERISA. The Illinois accounts will qualify as Roth IRAs under the Code.[16] The Illinois program will not be an ERISA-regulated employee benefit plan but rather will be an IRA payroll deposit arrangement.[17] Even if the Illinois arrangement is an ERISA-governed plan, Illinois employers and the state itself will have no ERISA liability.[18]

---

5. *Id.* § 30(d), (n).

6. *See* CAL. GOV'T CODE § 100002(e).

7. 820 ILL. COMP. STAT. 80/15(a).

8. *Id.* § 5 (defining "IRA").

9. *Id.* (defining "employer"). Employers will not be subject to the Illinois Act until they have "been in business at least 2 years." *Id.*

10. CAL. GOV'T CODE §§ 100000(d), 100032(b)–(d).

11. *Id.* § 100043.

12. ERISA is codified at 29 U.S.C. §§ 1001–1461 (2012). ERISA lawyers generally cite the provisions of the statute while the courts tend to cite the same provisions as codified in Title 29 of the U.S. Code. JOHN H. LANGBEIN ET AL., PENSION AND EMPLOYEE BENEFIT LAW 98 (5th ed. 2010). In the text of this article, I cite the relevant provisions as designated in ERISA and then, in appropriate footnotes, indicate the designation as codified in Title 29.

13. 820 ILL. COMP. STAT. 80/95.

14. CAL. GOV'T CODE § 100012(k) (authorizing the board to "[a]llow participating employers to make their own contributions").

15. Sections 15(a) and 25(3) of the Illinois Act address the possibility that employers will make supplemental contributions to the Illinois fund. 820 ILL. COMP. STAT. 80/15(a), 25(3). Section 25(3) contemplates that the board will manage "contributions paid by employees and employers" in accordance with traditional fiduciary standards while section 15(a) refers to "moneys received from enrollees and participating employers." *Id.* There is currently no explicit statutory authority authorizing employer contributions to the Illinois fund, however.

16. *See infra* note 51 and accompanying text.

17. *See infra* Part IV.A–B.

18. *See infra* Part IV.C.

That the Illinois private sector retirement arrangement qualifies under the Code and ERISA as a matter of law does not mean that this arrangement is sound as a matter of policy. There is widespread agreement that many workers are not saving enough for retirement and that this is cause for concern.[19] There is, however, substantial disagreement about the appropriate response to this problem. The choices made by Illinois' legislators are noteworthy because they represent the choices of the first state to authorize a state-operated, state-mandated private sector retirement program. Those choices are thus an important contribution to a critical national debate, but they will not end that debate. In that debate, I favor widespread experimentation by the states to determine which, if any, policies will effectively and efficiently encourage retirement savings.

II. THE ILLINOIS ACT'S SIMILARITIES TO THE CALIFORNIA STATUTE

As the similarity of its name suggests, the Illinois Secure Choice Savings Program Act[20] tracks in important respects the earlier-adopted California Secure Choice Retirement Savings Trust Act.[21] The board which will administer the Illinois program,[22] like its California counterpart,[23] includes public officials serving *ex officio* as well as gubernatorial appointees.[24] Also like the California Act,[25] the Illinois statute reiterates that the state is not guaranteeing and is not responsible for any amounts contributed by employees to the state-operated retirement fund.[26]

Also emulating the California law,[27] the Illinois statute mandates that each covered employer that does not sponsor a qualified retirement plan must participate in the Illinois retirement program for the private

19. *See, e.g.*, NARI RHEE & ILANA BOIVIE, THE CONTINUING RETIREMENT SAVINGS CRISIS 1 (2015), *available at* http://www.nirsonline.org/storage/nirs/documents/RSC%202015/final_rsc_2015.pdf ("The average working household has virtually no retirement savings."); Scott Cooley, *Illinois Retirement Initiative Could Blaze a Path for Other States*, MORNINGSTAR (Jan. 26, 2015), http://ibd.morningstar.com/article/article.asp?id=681027&CN=brf295,http://ibd.morningstar.com/archive/archive.asp?inputs=days=14;frmtId=12,%20brf295 ("There is an acute need for additional workplace savings programs in this country. An estimated 50% of adult private-sector workers in the United States lack access to an employer-sponsored retirement program, with lower-income workers particularly unlikely to have a plan available."); Eduardo Porter, *Americans Aren't Saving Enough for Retirement, But One Change Could Help*, N.Y. TIMES (Mar. 3, 2015), http://www.nytimes.com/2015/03/04/business/americans-arent-saving-enough-for-retirement-but-one-change-could-help.html?_r=0.

20. 820 ILL. COMP. STAT. 80/1.

21. S.B. 1234, 2012 Leg., Reg. Sess. (Cal. 2012).

22. 820 ILL. COMP. STAT. 80/20.

23. CAL. GOV'T CODE § 100002(a) (West 2012).

24. 820 ILL. COMP. STAT. 80/20. Gubernatorial appointees must be approved by the state treasurer and the state senate. *Id.* § 20(e).

25. CAL. GOV'T CODE §§ 100013, 100014(c)(3), 100036.

26. 820 ILL. COMP. STAT. 80/15(a) (providing that the fund established by the Act is "a trust outside of the State treasury"); *id.* § 15(b) (providing that contributed funds "shall not constitute property of the State" and "the State shall have no claim to or against, or interest in" the funds contributed by employees to their retirement accounts); *id.* § 50 ("The State shall have no liability for the payment of any benefit to any participant in the Program."); *id.* § 55(c)(9) ("[T]he Program Fund is not guaranteed by the State."); *id.* § 70(a) ("The State shall have no duty or liability to any party for the payment of any retirement savings benefits accrued by any individual under the Program.").

27. CAL. GOV'T CODE §§ 100032(b)–(d).

sector.[28] Specifically, each covered Illinois employer must "establish a payroll deposit retirement savings arrangement."[29] Small Illinois employers, i.e., those with fewer than twenty-five employees, may elect to participate in the program[30] just as California employers with fewer than five employees may elect coverage of the California program.[31]

Like the California program,[32] the Illinois preretirement plan utilizes automatic enrollment of employees. If an employer is covered by the Illinois state program (because the employer has twenty-five or more employees but lacks a qualified retirement plan for its employees or because the employer elects coverage in the Illinois program), each of the covered employer's employees will automatically be enrolled in the Illinois program.[33] If such an automatically enrolled employee takes no action, three percent of his or her salary will be withheld by the employer pursuant to the statutorily-mandated "payroll deposit retirement savings arrangement."[34] The employer will remit the compensation withheld to the Illinois state fund to finance a Roth IRA for such employee.[35] Like his or her California counterpart,[36] an Illinois employee will have the right to opt out of the state-sponsored retirement coverage.[37] Illinois employees will also be able to increase or decrease the amount withheld from his or her salary for remission to the employee's IRA in the state-operated private sector retirement system.[38]

Like the state-maintained private retirement plan to be established under the California statute,[39] the Illinois Act conditions the implementation of the Illinois plan upon the qualification of the Illinois accounts as IRAs under the Code.[40]

III. THE ILLINOIS ACT'S FIVE DIFFERENCES FROM THE CALIFORNIA STATUTE

The first difference between the two states' respective laws is that the California statute, if confirmed by a second legislative vote, will mandate participation by smaller employers than will the Illinois law. The Illinois act requires an employer to participate in the state-sponsored program only if the Illinois employer has twenty-five or more

28. 820 ILL. COMP. STAT. 80/60.
29. *Id.* § 60(a).
30. *Id.* § 5 (defining "small employer"); *id.* § 60(b).
31. CAL. GOV'T CODE § 100032(a).
32. *Id.* § 100032(e)(1).
33. 820 ILL. COMP. STAT. 80/60(b).
34. *Id.* § 60(a)–(c).
35. *Id.* § 65.
36. CAL. GOV'T CODE §§ 100014(e), 100032(e)(1).
37. 820 ILL. COMP. STAT. 80/30(i), 55(d), 60(b), (h).
38. *Id.* 80/30(i), 80/55(d), 80/60(c).
39. CAL. GOV'T CODE § 100043.
40. 820 ILL. COMP. STAT. 80/95.

employees and lacks its own qualified retirement plan.[41] In contrast, the California program will require employers with five or more employees to participate in the Golden State's plan if they do not maintain their own qualified retirement savings scheme for their employees.[42]

Second, the Illinois Act was drafted with greater sensitivity to the Code's definition of an individual account than was the California law. The California statute, if confirmed by a second legislative vote without amendment, will require the Golden State's private sector retirement savings program to utilize cash-balance-style accounts which do not qualify as IRAs under the Code.[43] These notional accounts will utilize a defined-benefit-type formula based on an assumed interest rate selected by the board.[44] These formula-based, cash-balance accounts will not qualify as IRAs since investment gains and losses and administrative expenses will not be allocated directly to such cash balance accounts.[45]

On the other hand, the Illinois Act specifies that the board running the Illinois fund shall "[e]stablish the process by which interest, investment earnings, and investment losses are allocated to individual program accounts" under the plan.[46] The Illinois Act also requires that administrative expenses be allocated to individual accounts "on a pro rata basis."[47] Such allocation of investment gains, investment losses, and administrative expenses is the hallmark of an individual account under the Code and ERISA.[48] Reinforcing the status of the Illinois program accounts as IRAs is the participants' ability to direct the investment of their respective accounts from among options selected by the board.[49] Such self-directed investing is also emblematic of an individual account[50] rather than the kind of defined-benefit-style notional account established by the California Act.

Third, the Illinois law specifies that the IRAs established under that state's private sector retirement plan will all be Roth IRAs.[51] Fourth, California's Act provides that, if the U.S. Department of Labor ("DOL") concludes that the California program would be an ERISA-governed employee benefit plan, the program is to be abandoned.[52] In a subtle and

41. *Id.* § 5 (defining "employer"). In addition, an Illinois employer is covered by the Act only if it "has been in business at least 2 years." *Id.*

42. CAL. GOV'T CODE §§ 100000(d), 100032(d).

43. Zelinksy, *supra* note 2, at 567–68.

44. *Id.* at 568.

45. *Id.* at 567–68.

46. 820 ILL. COMP. STAT. 80/30(d); *see also id.* 80/50.

47. *Id.* § 30(n).

48. ERISA § 3(34), 29 U.S.C. § 1002(34) (2012); I.R.C. § 414(i) (2012). These statutory provisions are discussed below.

49. *See* 820 ILL. COMP. STAT. 80/45(a), 60(d).

50. ERISA § 404(c), 29 U.S.C. § 1104(5)(A). Self-directed accounts are discussed below. On self-directed accounts, see LAWRENCE A. FROLIK & KATHRYN L. MOORE, LAW OF EMPLOYEE PENSION AND WELFARE BENEFITS 42–43 (3d ed. 2012); LANGBEIN ET AL., *supra* note 12, at 670–78.

51. 820 ILL. COMP. STAT. 80/5 (providing that for purposes of the statute, "'IRA' means a Roth IRA (individual retirement account) under Section 408A of the Internal Revenue Code.") (parenthetical in original).

52. CAL. GOV'T CODE § 100043 (West 2012).

important difference, the Illinois Act acknowledges the possibility that the Illinois private sector retirement plan might be an ERISA-covered employee benefit plan.[53] Nevertheless, the board can proceed with the Illinois private sector retirement program if—notwithstanding the status of that program as an ERISA-regulated employee benefit plan—neither the state nor any Illinois employer has liability under ERISA.[54]

Finally, the Illinois Act—in contrast to the California statute[55]—does not explicitly authorize any means by which employers may contribute to the state-operated retirement fund on behalf of their respective employees.[56]

IV. THREE LEGAL ISSUES POSED BY THE ILLINOIS ACT

In light of the foregoing, the Illinois Act poses three important legal questions: First, will the retirement accounts established by the Illinois private sector retirement program qualify as IRAs for purposes of the Code? Second, will the Illinois program be an employee benefit plan for ERISA purposes? Third, if the Illinois program is an ERISA-governed employee benefit plan, will either the State of Illinois or Illinois employers have ERISA-based liability under that program?

A. Will the Illinois Private Sector Retirement Accounts Qualify as IRAs Under the Code?

Neither the Code nor ERISA explicitly defines an individual retirement account as such. Both statutes, however, outline the factors which make for a defined-contribution "account," as opposed to a defined-benefit pension. In particular, both the Code and ERISA specify that for retirement purposes, the term "individual account plan" or "defined contribution plan" means a "plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account."[57]

The drafters of the Illinois statute embraced this definition, providing for the allocation of investment gains and losses to each account in

53. 820 ILL. COMP. STAT. 80/95.

54. *Id.*

55. CAL. GOV'T CODE § 100012(k).

56. Section 25(3) of the Illinois Act contemplates that the board will manage "contributions paid by employees and employers" in accordance with traditional fiduciary standards. 820 ILL. COMP. STAT. 80/25(3); *see also id.* § 15(a) ("Moneys in the Fund shall consist of moneys received from enrollees and participating employers . . . ."). The Act in its current form, however, provides no means for such employer contributions. The best understanding of Sections 15(a) and 25(3) is that the Act establishes that if employer contributions are authorized in the future, such employer contributions will be managed under the same fiduciary standards as apply to employees' contributions.

57. ERISA § 3(34), 29 U.S.C. § 1002(34) (2012); *see also* I.R.C. § 414(i) (2012). The Code's version of this definition is identical to the ERISA version except that the tax law exclusively uses the term "defined contribution plan." *Id.*

the Illinois program. In particular, under the Illinois Act, the board administering the state-sponsored program must "[e]stablish the process by which interest, investment earnings, and investment losses are allocated to individual program accounts on a pro rata basis and are computed at the interest rate on the balance of an individual's account."[58]

The drafters of the Illinois Act also provided for the pro rata allocation of administrative fees to individual accounts[59] and authorized individual participants to direct the investment of the funds in their own accounts.[60] Such self-directed participant investing—like the allocation of gains, losses, and expenses—is the hallmark of an individual account.[61]

These defined contribution features of the Illinois Act contrast with the cash-balance-style formula required by the California statute in lieu of the direct allocation of investment gains and losses to individual accounts.[62] The notional defined-benefit accounts of the California program, credited with assumed rates of return and unreduced for investment losses, will not qualify as IRAs.[63] The individual accounts of the Illinois program, however, will so qualify since investment gains and losses, as well as expenses, will be allocated directly to these accounts.

B. Will the Illinois Program Be an Employee Benefit Plan for ERISA Purposes?

Most of the legal controversy to date about the Illinois program has revolved around the question of whether that program will be an ERISA-regulated employee benefit plan.[64] The Illinois program will not be an employee benefit plan for ERISA purposes but will instead qualify as an IRA payroll deposit arrangement.

The Illinois program[65]—like the California program[66]—is intended to constitute a payroll-deduction IRA arrangement. DOL regulations provide that such an IRA payroll arrangement is not an ERISA-governed employee benefit plan if four criteria are met. First, there can be no employer contributions under a payroll-deduction IRA arrange-

58. 820 ILL. COMP. STAT. 80/30(d); *see also id.* §§ 45, 50.
59. *Id.* § 30(n).
60. *Id.* §§ 45(a), 60(d).
61. *See supra* note 48 and accompanying text.
62. *See* Zelinsky, *supra* note 2, at 558–59, 567–82.
63. *Id.* at 567–70.
64. *See, e.g.*, Joni Andrioff & Eric G. Serron, *Preemption Questions for Ill. Payroll Deduction IRA Plan*, LAW 360 (Jan. 22, 2015) ("There is a substantial question whether the Act on its face requires employers to establish an 'employee pension benefit plan' within the meaning of ERISA or whether the program in operation may result in employers being deemed to have established such a plan."); Derek B. Dorn et al., *States Dive Headfirst into Retirement Coverage Debate – But Will Their Initiatives Run Afoul of Federal Law?*, BLOOMBERG BNA PENSION & BENEFITS DAILY (Feb. 2, 2015) ("Each of the state proposals raise a series of related questions about how it would be treated under ERISA . . . .").
65. 820 ILL. COMP. STAT. 80/5 (defining "[p]ayroll deposit retirement savings arrangement"); *id.* § 10.
66. CAL. GOV'T CODE § 100008(a) (West 2012).

ment.[67] Second, "participation" must be "completely voluntary for employees" participating in the arrangement.[68] Third, the employer's role in a payroll-deduction IRA arrangement must be limited to specified ministerial functions. These ministerial functions consist of the employer "without endorsement . . . permit[ting] the sponsor to publicize the program to employees," the employer's "collect[ion of] contributions through payroll deductions," and the employer's "remi[ssion]" of these employee contributions "to the sponsor" for investment in each employee's IRA.[69] Finally, under an IRA payroll-deduction arrangement, the employer can "receive[] no consideration in the form of cash or otherwise."[70]

In discussion to date about the applicability of this regulation to the Illinois Act, the contentious issue has been whether employees' participation in the Illinois program is "completely voluntary."[71] The employees of covered Illinois employers are automatically enrolled in the Illinois private sector retirement program, but they can affirmatively opt out of such participation or can elect higher or lower contributions than the statutory default rate of three percent.[72] A straightforward reading of the relevant DOL regulation[73] indicates that employees' participation in the Illinois plan is "completely voluntarily" since employees may readily and without penalty leave the Illinois plan or may modify their respective contribution levels.[74] Thus, the Illinois plan qualifies as an IRA payroll deposit arrangement rather than an employee benefit plan.

The DOL came to a similar conclusion in Field Assistance Bulletin ("FAB") No. 2006-02 concerning an employer-created health savings account ("HSA").[75] In FAB 2006-02, the DOL's Employee Benefits Security Administration opined that "the establishment of an HSA by an employee [is] 'completely voluntary'" when an employer creates and funds an HSA as long as the employee "may move the funds to another HSA or otherwise withdraw the funds."[76] While this informal expression of

67. 29 C.F.R. § 2510.3-2(d)(1)(i) (2015). The Illinois Act provides no explicit procedure for employers to supplement their employees' contributions to the Illinois fund. The sponsor for these purposes is best understood as the board, the "committee" which would administer the Illinois plan—though ERISA's definition of a plan "sponsor" does not fit easily upon a state-operated private sector retirement plan. *See* ERISA § 3(16)(B)(iii), 29 U.S.C. § 1002(16)(B)(iii) (2012).

68. 29 C.F.R. § 2510.3-2(d)(1)(ii).

69. *Id.* § 2510.3-2(d)(1)(iii).

70. *Id.* § 2510.3-2(d)(1)(iv). Employers can, under an IRA payroll-deduction arrangement, receive "reasonable compensation for services actually rendered in connection with payroll deductions." *Id.*

71. *See infra* notes 85–90 and accompanying text.

72. 820 ILL. COMP. STAT. 80/30(i), 55(d), 60(b)–(c), (h) (2015).

73. 29 C.F.R. § 2510.3-2(d)(ii).

74. 820 ILL. COMP. STAT. 80/30(i), 55(d), 60(b)–(c), (h).

75. Robert J. Doyle, *Health Savings Accounts – ERISA Q&As*, FIELD ASSISTANCE BULL. NO. 2006-02, Employee Benefits Security Administration, U.S. Dep't of Labor (Oct. 27, 2006), http://www.dol.gov/ebsa/regs/fab_2006-2.html.

76. *Id.*

administrative views is not entitled to strong deference,[77] it is a reasonable interpretation of the Department's own regulation and of the concept of voluntariness in the context of employer-sponsored accounts.

Much discussion of the Illinois program has focused on the DOL's subsequent letter to the Department of the Treasury ("Treasury") concerning the Obama Administration's myRA program.[78] Under this program, the Treasury will establish Roth IRAs to be invested in special savings bonds.[79] These IRAs will be funded by payroll savings deductions, withheld by employers and remitted to the Treasury on behalf of the employers' employees.[80] Such withholding will occur only if an employee makes an affirmative election to authorize his employer to deduct from the employee's salary to fund a myRA for the employee.[81] There will be no employer contributions to myRA Roth accounts. Only the employee will contribute to his myRA through the salary withheld and remitted by his employer upon the employee's affirmative election to contribute.[82]

In its letter to the Treasury, the DOL concluded that the employer who withholds for its employees' myRA accounts will "not be establishing or maintaining an 'employee pension benefit plan'" for ERISA purposes.[83] Among the factors buttressing the DOL's conclusion are the myRA program's "voluntary nature."[84]

Some commentators have interpreted the DOL myRA letter as suggesting that—contrary to the teaching of FAB No. 2006-02—the Illinois program is not "completely voluntary" for purposes of the DOL's regulations.[85] An Illinois employee of a covered employer is automatically enrolled in the Illinois private sector retirement plan and must affirmatively opt out of the program.[86] This, these commentators suggest, makes

77. Wos v. E.M.A. *ex rel.* Johnson, 133 S. Ct. 1391, 1402 (2013) ("[O]pinion letters [are] not regulations with the force of law. We have held that interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference. These documents are entitled to respect in proportion to their power to persuade.") (internal citations and quotation marks omitted).

78. Information Letter from John J. Canary, Dir. of Regulations & Interpretations, U.S. Dep't of Labor, to J. Mark Iwry, Senior Advisor to the Sec'y & Deputy Assistant Sec'y for Ret. & Health Policy, U.S. Dep't of Treasury (Dec. 15, 2014), *available at* http://www.dol.gov/ebsa/regs/ILs/il121514.html.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *See, e.g.*, Andrioff & Serron, *supra* note 64 ("The myRA Letter suggests that the Illinois program may not satisfy the Safe Harbor requirement that a payroll deduction IRA be 'completely voluntary for employees.'"); Dorn et al., *supra* note 64 (myRA "does not involve automatic enrollment. And this difference could be key."); Shaun Terrill, *Is The Illinois Secure Choice Savings Program Act Really That Secure From the Confines Of ERISA?*, BLOOMBERG BNA FEDERAL TAX BLOG (Feb. 25, 2015) (discussing the myRA letter and providing that "there is still an involuntary element present where an employee fails to take action and automatically must make contributions equal to 3% of wages"). *Cf.* October Three Consulting, LLC, *The Illinois Secure Choice Savings Program and the DOL myRA letter*, OCTOBER THREE (Feb. 10, 2015), https://www.octoberthree.com/news/article/The-Illinois-Secure-Choice-Savings-Program-and-the-DOL-myRA-letter ("[T]he letter is interesting for its implications for programs like the Illinois Secure Choice Savings Program.").

86. 820 ILL. COMP. STAT. 80/10, 30(i), 60(b) (2015).

the Illinois program different from the myRA program which requires the employee to affirmatively opt into the program. For these commentators, the automatic enrollment feature of the Illinois program makes employees' participation in that program less than fully voluntary since employees must elect out of the program.[87]

This reading of the DOL's recent myRA letter stretches that letter inordinately since the DOL in this letter does not discuss an automatic enrollment program like the Illinois—or California—private sector retirement plan. But even if the DOL's recent myRA letter implies that the Illinois automatic enrollment feature makes the Illinois plan less than "completely voluntary," that is not a persuasive construction of the relevant regulation.

"[A]s many a curbstone philosopher has observed,"[88] nothing is ever completely anything. An employee contributing to a myRA has been exhorted to make that contribution by no less a personage than the President of the United States.[89] It is nevertheless plausible to conclude that an employee's contribution to his myRA is "completely voluntary" within the meaning of the DOL's regulations defining an IRA payroll-deduction program.[90]

So too an employee's decision to remain enrolled in the Illinois private sector retirement plan is a "completely voluntarily" decision. Like the HSA participant in FAB 2006-02, an Illinois employee who wants to leave the state-sponsored retirement program or change his contribution level can readily and without penalty do so.[91] Thus, the Illinois plan should—as its drafters intended—qualify as a voluntary IRA payroll-deduction arrangement and not be an ERISA-governed employee benefit plan. The minimal burden of opting out of coverage does not make an employee's decision to stay in the Illinois program less than "completely voluntary."[92]

87. *See supra* note 85 and accompanying text.

88. Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., 519 U.S. 316, 335 (1997) (Scalia, J., concurring).

89. *See* Barack Obama, U.S. President, President Barack Obama's State of the Union Address (Jan. 28, 2014) ("I will direct the Treasury to create a new way for working Americans to start their own retirement savings: MyRA.").

90. 29 C.F.R. § 2510.3-2(d)(ii) (2015).

91. 820 ILL. COMP. STAT. 80/10, 30(i), 55(d).

92. Other commentators have cited the DOL's myRA letter for the proposition that government-sponsored programs are, by their very nature, not subject to ERISA. *See, e.g.*, October Three, LLC, *supra* note 85 (discussing whether "DOL's reasoning—that, because the myRA is a federal government program, ERISA does not apply—also appl[ies] to programs created and operated by states"). There is indeed language in the myRA letter which can be read as supporting this position. *See* Information Letter, *supra* note 78 ("[W]e do not believe Congress intended in enacting ERISA that a federal government retirement savings program created and operated by the U.S. Department of the Treasury would be subject to the extensive reporting, disclosure, fiduciary duty, or other requirements of ERISA . . . .").

ERISA, however, explicitly defines a "governmental plan," immune from ERISA regulation, as a plan maintained by the federal government or by a state or local government "for its employees." ERISA §3(32), 29 U.S.C. § 1002(39) (2012); *see also* ERISA § 4(b)(1), 29 U.S.C. § 1003(b)(1) (providing that ERISA does not apply to "a governmental plan").

C. If the Illinois Program Is Governed by ERISA, Will Either the State of Illinois or Illinois Employers Be Liable under ERISA?

But let us assume that because of its automatic enrollment feature, the Illinois program will be an ERISA-governed employee benefit plan rather than a voluntary IRA payroll-deduction arrangement.

At this point, there is an important difference between the California Act and the Illinois statute. Under the California law—assuming that it is confirmed by a second legislative vote—the California board is required to abandon the Golden State's private sector retirement program if that program is an ERISA-governed employee benefit plan.[93] In contrast, the Illinois board is to proceed with the Illinois plan, even if that plan is ERISA-regulated, unless the board also concludes that "[s]tate or employer liability is established under" ERISA.[94]

ERISA's fiduciary liability scheme applies to "a person . . . to the extent" that such person "exercises any discretionary authority or discretionary control respecting management of" an ERISA-governed plan or "exercises any authority or control respecting management or disposition of [such a plan's] assets."[95] Alternatively, "a person" is a fiduciary for ERISA purposes if such person "has any discretionary authority or discretionary responsibility in the administration of such plan."[96]

The prospect of employer liability under ERISA can readily be dismissed. Under the Illinois Act, employers will play only a ministerial role in implementing the Illinois private sector retirement plan. Employers will distribute to their employees information packets developed by the board administering the Illinois program.[97] Employers will also withhold funds from the salaries of employees enrolled in the program.[98] Employers will accept enrollment forms from employees who currently want to participate in the program but who have previously declined such participation.[99] Illinois employers covered by the program will remit to the state-operated fund the monies withheld from their employees.[100] At no time will any Illinois employer exercise any "discretionary" authority or

The Illinois and California plans will cover private sector employees, not public employees. In light of ERISA's definition of an ERISA-exempt governmental plan as one covering governmental employees, there is no basis for inferring that the state's sponsorship of a private sector plan is, by virtue of such government sponsorship, inherently immune from ERISA regulation. Suppose, for example, that a state-sponsored retirement plan gave each employer the right to determine the investments available to plan participants. It would be anomalous to hold such a plan immune from ERISA because of the state's sponsorship. In short, the Illinois program is not ERISA-governed because that program qualifies as an IRA payroll deposit plan, not because the state sponsors that program.

93. CAL. GOV'T CODE § 100043 (West 2012).

94. 820 ILL. COMP. STAT. 80/95.

95. ERISA § 3(21)(A)(i), 29 U.S.C. § 1002(21)(A)(i).

96. ERISA § 3(21)(A)(iii), 29 U.S.C. § 1002(21)(A)(iii). ERISA also defines as a "fiduciary" certain investment advisors. ERISA § 3(21)(A)(ii), 29 U.S.C. § 1002(21)(A)(ii). This definition has no applicability to the state of Illinois or any employer since neither will be providing investment advice.

97. 820 ILL. COMP. STAT. 80/55(e).

98. *Id.* § 60(a)–(b).

99. *Id.* § 60(e).

100. *Id.* § 65.

control over assets or plan administration which would trigger fiduciary status—and consequent liability—under ERISA.

The conclusion is the same for the state of Illinois—no ERISA liability—but getting there is more complicated. In the first instance, an ERISA fiduciary must be a "person," and a state is not a "person" for ERISA purposes.[101]

Moreover, as the U.S. Supreme Court has observed, ERISA distinguishes between "settlor" functions and "fiduciary" functions.[102] Illinois acts as the "settlor" of its private sector retirement plan when it decides upon "the composition or design of the plan."[103] While "the administration of the plan's assets"[104] is a fiduciary function, determining "the form or structure of the [p]lan" is not.[105]

Thus, by establishing the plan and its terms—such as automatic employee enrollment,[106] the twenty-five employee threshold for employer coverage,[107] the three percent default contribution rate,[108] the right of enrolled employees to increase or decrease that rate[109]—Illinois acts as a "settlor," not a fiduciary. Illinois, while it is the "settlor" for ERISA purposes, has no fiduciary liability under ERISA since Illinois is not a "person" which administers plan assets in a discretionary fashion or which engages in discretionary acts of plan management.[110]

In addition, in the context of a defined contribution/individual account plan, there is no fiduciary liability when a participant "exercises control over the assets in his account."[111] The Illinois Act is drafted to comply with this limit on fiduciary liability. Participants will invest their own accounts' funds from among a menu of investment options, designed to comport with ERISA.[112] If participants do not select from among these options, the amounts in their respective Roth IRAs in the Illinois fund will automatically be invested in a life cycle/target date default option also intended to comply with ERISA.[113]

101. *Compare* ERISA § 3(9), 29 U.S.C. § 1002(9) (defining "person" but not including "State"), *with* ERISA § 3(10), 29 U.S.C. § 1002(10) (defining "State").

102. Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 444 (1999).

103. *Id.*

104. *Id.*

105. *Id.*

106. 820 ILL. COMP. STAT. 80/55(d), 60(b) (2015).

107. *Id.* § 5 (defining "employer").

108. *Id.* §§ 30(i), 60(c).

109. *Id.*

110. *See supra* notes 102–05 and accompanying text.

111. ERISA § 404(c)(1), 29 U.S.C. § 1104(c)(1) (2012).

112. *Compare* 29 C.F.R. § 2550.404c-1(b)(3)(i)(B) (2015) (requiring self-directed plans to offer "at least three investment alternatives . . . [e]ach of which is diversified [and] . . . has materially different risk and return characteristics"), *with* 820 ILL. COMP. STAT. 80/45(b) (providing for "a conservative principal protection fund," "a growth fund," "a secure return fund," and "an annuity fund").

113. *Compare* 29 C.F.R. § 2550.404c-5(e)(4)(i) (providing that a qualified default investment "may be a 'life-cycle' or 'targeted-retirement-date' fund or account"), *with* 820 ILL. COMP. STAT. 80/45(a) (providing that the default investment option shall be "a life-cycle fund with a target date based upon the age of the enrollee").

Finally, the Illinois Act designates the board as the group which administers the plan and acts as the plan's fiduciary.[114]

These provisions collectively eliminate the possibility of the state having direct liability under ERISA since the state would, for ERISA purposes, not be a fiduciary—"a person" possessing or exercising discretionary control or authority in the administration of the plan or its assets.

At first blush, the composition of the board established by the Illinois Act potentially creates indirect liability for the state since, as a matter of state law, Illinois reimburses its agents and employees for claims against them.[115] On a closer look, however, the State of Illinois will have no indirect liability since ERISA would preempt the operation of the Illinois reimbursement statute insofar as that statute would otherwise require the state to reimburse the members of the board administering the state's private sector retirement plan.

Three members of the board administering the Illinois private sector retirement plan will serve *ex officio*—namely, Illinois's treasurer (who is chairman of the board),[116] Illinois's comptroller,[117] and the director of the state Office of Management and Budget.[118] These board members are agents and officers of the state and will serve on the board on behalf of the state. The governor of Illinois will select the four remaining board members.[119] This selection of board members will be a discretionary act in the administration of the plan by an agent of the state, i.e., the governor, and will thus potentially give rise to liability for the state.[120] As a matter of state law, Illinois is obligated to reimburse its employees and agents for damages asserted against them in the performance of their official duties.[121]

Suppose, for example, that a gubernatorial appointee to the Illinois board engages in a classic fiduciary lapse. Assume, for instance, that this board member arranges for an unsuitable investment to be included in the menu of investment options available to participants because the board member receives kickbacks from the promoters of this investment. Suppose further that the governor fails to monitor the performance of

114. *See* 820 ILL. COMP. STAT. 80/15(a) (establishing the board as the plan's "trustee"). Moreover, the Illinois Act imposes upon the board and its individual members fiduciary duties which track the fiduciary duties of an ERISA fiduciary. *Compare* 820 ILL. COMP. STAT. 80/25, *with* ERISA § 404(a), 29 U.S.C. § 1104(a).

115. 5 ILL. COMP. STAT. 350/2(d) (2015) (providing that the state reimburses state officers, employees, or agents unless their behavior constituted "intentional, wilful[,] or wanton misconduct").

116. 820 ILL. COMP. STAT. 80/20(a)(1). The treasurer can designate another individual to sit on the board in his or her place. *Id.*

117. *Id.* § 20(a)(2). The comptroller can designate another individual to sit on the board in his or her place. *Id.*

118. *Id.* § 20(a)(3). The director can designate another individual to sit on the board in his or her place. *Id.*

119. *Id.* § 20(a)(4)–(6). The governor's appointees must satisfy certain criteria and be confirmed by the state treasurer and the state senate. *Id.* § 20(e).

120. *See* 5 ILL. COMP. STAT. 350/2(d).

121. *Id.*

this board member and thus allows the kickback scheme to continue for an extended period of time.

If the Illinois private sector retirement plan is an ERISA-governed arrangement, the governor might have personal fiduciary liability for his failure to monitor his appointee's kickback scheme—a failure of discretionary plan management on the governor's part.[122] To the extent participants select this inappropriate investment and consequently experience losses, the governor might be liable for his failure to oversee the performance of the individual he placed on the plan's board. Since the governor has a claim for state reimbursement of these damages,[123] this appears at first glance to be a scenario in which the state, though not itself an ERISA fiduciary, potentially has indirect liability to reimburse its employee's ERISA-based obligations.

Or assume that the treasurer of Illinois, while not deliberately mismanaging the affairs of the fund, does not meet ERISA's fiduciary standard of care. Suppose, for example, that he fails to have investment options properly vetted and, as a result, some employees lose money in their Roth accounts.

Again, if the treasurer is required to pay damages as an ERISA fiduciary for his failure to exercise properly his discretionary authority over plan investments,[124] the state may be required to reimburse the treasurer for those damages.[125] In this scenario also, the State of Illinois potentially winds up with indirect ERISA-based liability because of the state's statutory obligation to reimburse its agents and employees.

In these and similar cases, however, ERISA preempts the Illinois reimbursement statute insofar as that statute would command the state to pay any damages the governor or treasurer might owe for his respective failure to perform adequately as an ERISA fiduciary. ERISA section 410(a) declares as "void against public policy . . . any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under" ERISA.[126] This ERISA section prevents the Illinois reimbursement statute from making whole the governor, the treasurer, or any other board member for any damages arising from the failure to satisfy ERISA's standard of fiduciary behavior. Moreover, ERISA's preemption clause, section 514(a), provides that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" governed by ERISA.[127] While the scope of ERISA preemption has

122. ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) (2012).

123. *See supra* note 115 and accompanying text.

124. DiFelice v. U.S. Airways, Inc., 497 F.3d 410, 418 (4th Cir. 2007) ("[A] fiduciary of a defined contribution, participant-driven, 401(k) plan created to provide retirement income for employees who is given discretion to select and maintain specific investment options for participants . . . must exercise prudence in selecting and retaining available investment options.").

125. 5 ILL. COMP. STAT. 350/2(d).

126. ERISA § 410(a), 29 U.S.C. § 1110(a).

127. ERISA § 514(a), 29 U.S.C. § 1144(a).

been controversial,[128] section 514(a) buttresses the conclusion that ERISA precludes Illinois from reimbursing its officers and agents for any claims against them based on their duties as fiduciaries of an ERISA plan.[129]

In short, if the Illinois private sector retirement program is an ERISA-governed employee benefit plan because the automatic enrollment feature is deemed less than "completely voluntary," neither Illinois employers nor the state itself will have direct or indirect liability under ERISA.

V. GOING FORWARD

In light of the foregoing, the Illinois Act passes muster under the Code and ERISA. Unlike the formula-based, cash-balance-style accounts of the California Act, the state-mandated savings accounts to be created under the Illinois statute will qualify as Roth IRAs under the Code since investment losses and earnings, as well as administrative expenses, will be allocated to those accounts. The Illinois program will not be an ERISA-regulated employee benefit plan. The program will instead be an IRA payroll deposit arrangement because employees' participation in that program will be voluntary. Even if the Illinois program is an ERISA-governed plan, Illinois employers and the state itself will have no ERISA liability because, inter alia, neither will have or will exercise discretionary authority or control over the plan or its assets.

That the Illinois Act is legally compliant with the Code and ERISA does not mean that the Act is sound as a matter of fiscal or retirement policy. Critics can properly note that Illinois and California have some of the most ill-funded public pension plans in the country.[130] This observation can fuel the criticism that the money contributed to these states' private sector retirement plans is destined to bail out these states' underfunded public employee pension plans.

The drafters and sponsors of the Illinois Act can credibly retort that they have guarded against this possibility. Like the California Act,[131] the Illinois Act emphasizes the separation between the funds contributed by

---

128. FROLIK & MOORE, *supra* note 50, at 195–258; LANGBEIN ET AL., *supra* note 12, at 818–905. For some of my ruminations on ERISA preemption, see Edward A. Zelinsky, Egelhoff*, ERISA Preemption, and the Conundrum of the 'Relate To' Clause*, 91 TAX NOTES 1917 (2001); Edward Zelinksy, Gobeille v. Liberty Mutual*: An Opportunity to Correct the Problems of ERISA Preemption*, 101 CORNELL L. REV. ONLINE 24 (2015); Edward A. Zelinsky, Travelers, *Reasoned Textualism, and the New Jurisprudence of ERISA Preemption*, 21 CARDOZO L. REV. 807 (1999).

129. *See supra* note 127 and accompanying text.

130. *See, e.g.*, Melody Petersen, *California Public Workers May Be at Risk of Losing Promised Pensions*, L.A. TIMES (Mar. 17, 2015, 4:00 AM) ("Californians now owe nearly $200 billion for pensions promised to state and local government workers . . . ."); John O'Connor, *Illinois Justices Press State's Lawyer on Pension Overhaul*, WASH. POST (Mar. 11, 2015), http://www.washingtontimes.com/news/2015/mar/11/illinois-supreme-court-set-to-hear-states-pension-/?page=all (noting "a $111 billion deficit" in pension funding).

131. CAL. GOV'T CODE § 100032(b)–(d) (West 2012).

private sector employees to the state-operated fund and the state itself.[132] Moreover, the Illinois law goes beyond these statutory guarantees—which are subject to revision or revocation by a future legislature—by creating bona fide IRAs. Employees participating in the Illinois plan will routinely be told their IRA account balances and will have a sense of ownership in those account balances.[133] It will be politically implausible for Illinois's public officials to divert funds from these state-sponsored Roth IRAs and thereby diminish the disclosed account balances of Illinois voters—account balances perceived by them as their vested property rights.

More persuasively, critics of laws like the California and Illinois Acts score points when they argue that the states should solve their own pension funding problems before they look for other retirement problems to solve.[134] There is indeed great irony when state legislatures which have failed to properly fund the pensions of public employees choose instead to address the private sector's (quite real) retirement challenges.

On the other hand, the Illinois statute is, as a legal matter and policy matter, better drafted than the California Act on which it is based. The Illinois program's accounts will both qualify under the Code as IRAs and will make politically credible the statute's assurances that funds will not be diverted.[135] Participants in the Illinois program—having their account balances disclosed to them—will have a sense of ownership in those balances and will not look kindly upon public officials who divert funds from those balances.

Both the California and the Illinois laws could give rise to unintended consequences. The providers of private sector retirement plans might use the Illinois (and possible California) state mandate as a marketing tool to sell their plans as better alternatives to the state-operated arrangements. Some proponents of the Illinois and California acts might view that possibility as acceptable, even desirable. If the prospect of mandated participation in the state-operated funds causes private sector employers in Illinois or California to instead establish their own qualified plans or IRA payroll deposit arrangements, the argument might go, the state programs will have served their purpose of expanding private sector

---

132. 820 ILL. COMP. STAT. 80/15(a) (2015) (providing that the fund established by the Act is "a trust outside of the State treasury"); *id.* § 15(b) (providing that contributed funds "shall not constitute property of the State" and "the State shall have no claim to or against, or interest in" the funds contributed by employees to their retirement accounts); *id.* § 50 ("The State shall have no liability for the payment of any benefit to any participant in the Program."); *id.* § 55(c)(9) ("[T]he Program Fund is not guaranteed by the State."); *id.* § 70(a) ("The State shall have no duty or liability to any party for the payment of any retirement savings benefits accrued by any individual under the Program.").

133. *See* EDWARD A. ZELINSKY, THE ORIGINS OF THE OWNERSHIP SOCIETY: HOW THE DEFINED CONTRIBUTION PARADIGM CHANGED AMERICA 97–101, 127–28 (2007).

134. *See, e.g.*, Andrew S. Williams, *Illinois Secure Choice Savings Program?*, RETIREMENT PLAN BLOG (Feb. 12, 2015), http://www.retirementplanblog.com/401k-plans/illinois-secure-choice-savings-program/ ("[T]his is Illinois, . . . a state with its own funding liability for state sponsored retirement benefits measured in tens of billions of dollars.").

135. *See supra* Part IV.A.

retirement savings by prodding employers to adopt 401(k) and other employer-sponsored savings plans.

This possibility raises an alternative approach that other states could pursue: a state could, without establishing a state-run retirement fund for private sector employers, instead just mandate employers to establish their own retirement or IRA payroll plans. This is the approach which the Obama Administration has favored—namely, to mandate IRA coverage without requiring government-run IRAs.[136] Mandating employer-sponsored retirement savings arrangements would undoubtedly receive strong political support from the providers of private sector retirement services.

Some proponents of state laws like the Illinois and California acts would counter that state-run IRA investment plans could serve a Tennessee Valley Authority ("TVA")-like function. Proponents of TVA argued that a publicly-owned utility serves as a transparent example, demonstrating efficiencies in the provision of electrical services and passing consequent price reductions onto utility-using consumers.[137]

Proponents of arrangements like the Illinois and California private sector programs could, in a similar vein, tout the ability of public-run investment programs to control advisory fees and other costs. Such cost control would serve the interests both of the participants in these state-sponsored programs—assessed lower rates for administrative and investment advisory services on their retirement savings—as well as the customers of private investment providers, as such providers will be forced to match the lower costs of public programs.

Another potential analogy to state-run private sector retirement plans is the defined contribution Section 529 program today ubiquitously sponsored by states for college savings.[138] The states have largely outsourced the investment of section 529 funds to private managers who compete for the business of managing such funds.[139] In a similar fashion, the board running the Illinois fund can foster competition among investment managers for the right to invest the amounts contributed to the fund.[140]

The strongest argument for the California and Illinois state-run retirement funds is the benefit of experimentation. A strength of our fed-

136. Dorn et al., *supra* note 64 ("[T]he Automatic IRA has been the centerpiece of his administration's retirement policy and has been included in every annual budget proposal that he has sent to Congress."). The authors of the mandatory IRA proposal have recently discussed the choices states confront as they design state retirement savings programs. David C. John & William G. Gale, Structuring State Retirement Savings Plans: A Guide to Policy Design and Management Issues (Sept. 2015) (unpublished manuscript) (on file with the Brookings Institution).

137. MARGUERITE OWEN, THE TENNESSEE VALLEY AUTHORITY 10–13 (1973) (discussing Senator George Norris' argument that publicly-owned Ontario Hydro produced substantially cheaper electricity than U.S. private utilities).

138. On 529 programs, see ZELINSKY, *supra* note 133, at 64–70.

139. *Id.* at 67.

140. 820 ILL. COMP. STAT. 80/40(a) (2015) (describing the "open bid process" to select investment managers "to reduce the Program's administrative expenses").

eral system is that one or more states can pioneer models of public policy and thereby generate useful information and experience for the other states and the national government.

The desirability of state-by-state experimentation suggests that different states, rather than emulating the California and Illinois models, should adopt alternative approaches to the problem of inadequate retirement savings. Among the other possibilities are state income tax credits to firms establishing their own retirement savings arrangements as well as state income tax credits to low income individuals who save through 401(k) plans or IRAs.[141] Yet another possible approach in the spirit of experimentation is for states to refrain from any affirmative encouragement of private sector retirement savings and to instead view such encouragement as the province of the federal government.

VI. CONCLUSION

In legal terms, the Illinois private sector retirement plan will pass muster under both the Code and ERISA. The Illinois accounts will qualify as Roth IRAs under the Code since investment gains and losses, as well as administrative expenses, will be allocated directly to these accounts. The Illinois program will not be an ERISA-regulated employee benefit plan but will instead be an IRA payroll deposit arrangement. If the Illinois arrangement is an employee benefit plan for ERISA purposes, Illinois employers and the state itself will have no liability under ERISA.

That the Illinois private sector retirement arrangement qualifies under the Code and ERISA does not mean that this arrangement is sound as a matter of policy. The choices made by Illinois' legislators are significant because they represent the choices of the first state to authorize a state-operated, state-mandated private sector retirement program. Those choices are thus an important contribution to a vital national debate, but they will not end that debate. In that debate, I favor widespread experimentation by the states to determine which, if any, policies will effectively and efficiently encourage retirement savings.

141. Zelinsky, *supra* note 2, at 592–98.