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A MORE SECURE CHOICE: MINNESOTA'S TWO-PRONGED APPROACH TO STATE LEVEL RETIREMENT SAVINGS PROGRAMS

Chad Burkitt[*]

I. Introduction

In their popular book, *Nudge*, Richard Thaler and Cass Sunstein argue that automatic enrollment in retirement plans is the "obvious answer" to the question of how to get more workers to save more

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for retirement.[1] Improving retirement savings is increasingly important as today's workers are not adequately saving for retirement.[2] The average household in America that is close to a traditional retirement age has essentially no personal assets on which to retire.[3] In recent years, several states have passed "Secure Choice" legislation designed to help private sector workers save for retirement by requiring automatic enrollment in individual retirement accounts (IRAs).[4] In 2017, Minnesota legislators introduced the Minnesota Secure Choice Retirement Program Act (MSCRPA), which includes a requirement that businesses automatically enroll their workers in a state sponsored retirement account.[5]

Like other states' Secure Choice programs, the MSCRPA is intended to increase workers' retirement savings when compared to the status quo.[6] In addition, the Act takes a unique two-pronged approach to encouraging retirement savings by requiring employers to automatically enroll their employees in one of two state sponsored plans.[7] This feature of the MSCRPA is likely to achieve increased retirement savings when compared to other states' Secure Choice programs.

This article describes the retirement savings problem currently facing the United States, provides background on the current retirement policy scheme, and seeks to analyze how the MSCRPA

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1. *See* RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE 107–09 (Yale Univ. Press, 2008).

2. *See* Nari Rhee & Llana Boivie, *The Continuing Retirement Savings Crisis*, NAT'L INST. ON RET. SEC. 1, 10 (2015), http://laborcenter.berkeley.edu/pdf/2015/RetirementSavingsCrisis.pdf [https://perma.cc/Y2C4-EGM6].

3. Among households where the primary worker is between 55 and 64 years old, the median retirement account balance is $14,500. *Id.*

4. *State-Facilitated Retirement Savings Programs for Private Sector Workers*, NAT'L CONFERENCE OF STATE LEGISLATURES (Sept. 26, 2018), http://www.ncsl.org/research/fiscal-policy/state-facilitated-retirement-savings-programs-for-private-sector-workers.aspx [https://perma.cc/BG6Y-S7R9].

5. *See* S.F. 2303, 90th Leg., Reg. Sess., (Minn. 2017).

6. *Id. See generally How States are Responding*, AARP, https://www.aarp.org/ppi/state-retirement-plans/savings-plans [https://perma.cc/3NYQ-Q5DG].

7. *See* Memorandum from the Staff of Leg. Comm'n. on Pensions & Retirement, regarding S.F. 2303 (Pappas); H.F. 2570 (Becker-Finn): Minnesota Secure Choice Retirement Program (Apr. 4, 2017) (on file with author).

(or similarly structured legislation) improves on current retirement public policy and improves on other states' Secure Choice programs.

II. BACKGROUND

A. Is There A Retirement Crisis?

The United States is facing a significant shift in demographics as baby boomers age out of the workforce.[8] Americans are getting older and the aging of the population is projected to continue well after the last baby boomer has retired.[9] Yet despite the broad availability of various retirement savings vehicles,[10] experts agree that the United States is headed for a serious retirement savings shortfall.[11] A 2018 report from the National Institute for Retirement Security showed that fifty-one percent of working households age fifty-five to sixty-five had no retirement savings and another seventeen percent had retirement savings that total less than 100 percent of their annual income.[12] Meanwhile, personal savings have declined precipitously in the last few decades.[13] If this trend

8. Mark Mather, Linda A. Jacobsen & Kelvin M. Pollard, *Aging in the United States*, POPULATION REFERENCE BUREAU 1, 2 (2015), https://assets.prb.org/pdf16/aging-us-population-bulletin.pdf [https://perma.cc/T4SK-5Y2M].

9. *Id.* at 3 (showing at increase in the percentage of the population over age 65 between the years 2030 and 2060).

10. Press Release, United States Department of Labor, Bureau of Labor Statistics, Employee Benefits in the United States – March 2017 1, 1 (July 21, 2017) (available at https://www.bls.gov/news.release/archives/ebs2_07212017.pdf [https://perma.cc/D45E-LEYC]) (showing private sector employee access to retirement benefits at 66%).

11. *See* Vickie L. Bajtelsmit & Anna Rappaport, *Retirement Adequacy in the United States*, SOC'Y OF ACTUARIES 1, 33 (2018) (summarizing several studies and concluding that at least 30 to 40 percent of U.S. households are at risk of not having an adequate retirement).

12. Jennifer E. Brown, Joelle Saad-Lessler, & Diane Oakley, *Retirement in America: Out of Reach for Working Americans*, NAT'L INST. ON RET. SEC. 1, 11 (2018), https://www.nirsonline.org/wp-content/uploads/2018/09/FINAL-Report.pdf [https://perma.cc/U9MK-KXHT].

13. Stephen F. Befort, *The Perfect Storm of Retirement Insecurity: Fixing the Three-Legged Stool of Social Security, Pensions, and Personal Savings*, 91 MINN. L. REV. 938, 945 (2007).

continues, a significant portion of retirees will find themselves relying on Social Security and other social welfare programs to meet their basic needs.[14]

1. The Cost of an Aging Population

As alarming as this data seems, does it really amount to a "retirement savings crisis"?[15] Or, as one writer put it:

> Our social insurance safety net will make sure [retirees] will never go hungry or want for their basic needs, though it may not be their dream retirement. . . . Grandma may have to move to a depressing little condo instead of to the beach, but Grandma will be okay.[16]

However, this view may downplay the seriousness of the problem. The United States is in the midst of one of the most significant demographic shifts in its history.[17] The Population Reference Bureau estimates that by 2060, the percentage of the population over the age of sixty-five (hereinafter, "the elderly") will have grown to twenty-four percent from about fifteen percent, today.[18] Put another way, in 2014 there were four working-aged

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14. Alicia H. Munnell, Wenliang Hou, Anthony Webb & Yinji Li, *How Has the Shift to 401(k) Plans Affected Retirement Income?*, CTR. FOR RETIREMENT RESEARCH 1, 6 (2017), http://crr.bc.edu/wp-content/uploads/2017/03/IB_17-5.pdf [https://perma.cc/Z4HC-8TH2] (stating that "[w]ithout significant changes . . . future retirees will be much more dependent on Social Security than those in the past . . . ."); *see also* Barbara A. Butrica, David B. Cashin & Cori E. Uccello, *Projections of Economic Well-Being for Social Security Beneficiaries in 2022 and 2062*, SOCIAL SECURITY BULL. 1, 12–17 (2005/2006), https://www.ssa.gov/policy/docs/ssb/v66n4/v66n4p1.pdf [https://perma.cc/YXW9-QQGY] (showing projected dependency on social security growing between 2022 and 2062).

15. Many people have described the projected gap in retirement savings as a retirement savings crisis. *See* CHARLES D. FELLIS & ALICIA H. MUNNELL, FALLING SHORT: THE COMING RETIREMENT CRISIS AND WHAT TO DO ABOUT IT (Oxford University Press, 2006); *see also* CHRISTIAN E. WELLER, RETIREMENT ON THE ROCKS: WHY AMERICANS CAN'T GET AHEAD AND HOW NEW SAVINGS POLICIES CAN HELP (Palgrave Macmillan, 2016).

16. Pete Swisher, *The Retirement System Diaries, Chapter1: The So-Called Retirement Crisis*, J. PENSION BENEFITS: ISSUES IN ADMIN. 49, 51, https://www.pentegra.com/wp-content/uploads/2017/05/The-Retirement-System-Diaries-Chapter-One.pdf [https://perma.cc/3LFN-PDYM].

17. Mather et al., *supra* note 8, at 1.

18. *Id.* at 3.

adults per elderly person.[19] By the year 2060, that number is expected to decrease from four to just over two working-aged adults per elderly person.[20] This means that there will be half as many working adults providing tax revenues, contributing to entitlement programs and providing services for older adults.[21] As a result, spending on entitlements and other social welfare programs for the elderly is projected to increase.[22]

Because of the way that these programs are paid for, the increase in spending on social welfare programs will likely be felt at all levels of government, including state and local.[23] This is likely to result in increased taxes or reduced spending in other government services.[24] Some of this reliance on government services for the elderly could be offset by improved retirement savings by individuals.[25]

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19. *Id.* at 15.

20. *Id.*

21. *Id. See also* Frank Shafroth, *Who Will Cover the Costs of an Aging America?*, VOICES OF THE GOVERNING INST. (Jan. 16, 2014, 11:00 AM), http://www.governing.com/gov-institute/voices/col-aging-population-services-tax-policies-fiscal-gap.html [https://perma.cc/EM4D-95VH] (noting that that the U.S. "soon will see a fairly dramatic drop in the proportion of workers in the population and the taxes they pay, along with a commensurate increase in the number of people who depend on government at all levels for support").

22. *The Nation's Retirement System: A comprehensive Re-evaluation Is Needed to Better Promote Future Retirement Security*, GOV'T ACCOUNTABILITY OFFICE 1, 88–91 (Oct. 2017), https://www.gao.gov/assets/690/687797.pdf [https://perma.cc/9JV3-CWPE].

23. *Id.*

24. *See* Norton Francis & Frank Sammartino, *The Urban Institute, Governing with Tight Budgets: Long Term Trends in State Finances*, URBAN INST. 1, 13–14 (Sept. 2015) https://www.urban.org/sites/default/files/publication/66046/2000376-Long-Term-Trends-in-State-Finances.pdf [https://perma.cc/72X4-844N]; *and* Louise Sheiner, *The Long Term Impact of Aging on the Federal Budget* at 2 (Hutchins Ctr., Working Paper no. 40, 2018), https://www.brookings.edu/wp-content/uploads/2018/01/wp405.pdf [https://perma.cc/VG2K-M5ZQ].

25. "Although population aging will create fiscal challenges, many argue that these challenges can be managed through structural changes to existing entitlement programs, an increase in retirement savings among workers, and by shifting retirement to later ages." Mather et al., *supra* note 8, at 15.

2. Unequal Effect on Women and Minorities

Another reason for policymakers to be concerned about the retirement savings gap is its unequal impact on minorities and women. Despite needing more money in retirement due to longer life expectancies, women have an average of thirty-four percent less in retirement savings than men.[26] In addition, income for women in retirement is lower.[27] The average monthly retirement Social Security benefit paid to men in 2017 was $1,565 compared to $1,244 for women.[28] This is a reduction of twenty-one percent.[29] The result of the disparity in retirement savings benefits is that women over the age of sixty-five are eighty percent more likely to be impoverished than men.[30]

This disparity is more pronounced for minorities. Sixty-two percent of Black and sixty-nine percent of Latino working age households have no assets in a retirement account, compared to thirty-seven percent of White households.[31] This is unsurprising when one considers that employees of color are far less likely to work in a job that offers an employer sponsored retirement plan.[32] The largest disparities can be found at the intersections of race and

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26. Jennifer E. Brown, Nari Rhee, Joelle Saad-Lessler, & Diane Oakley, *Shortchanged in Retirement Continuing Challenges to Women's Financial Future*, NAT'L INST. ON RET. SEC. 1, 2 (Mar. 2016), https://www.nirsonline.org/wp-content/uploads/2017/06/final_shortchanged_retirement_report_2016.pdf [https://perma.cc/MKR7-F7CG].

27. *Id.* at 12 (showing a median income, including retirement, for those over age 65 at $48,280 for men and $35,810 for women).

28. *Fast Facts & Figures About Social Security*, SOC. SEC. ADMIN. 1, 20 (Sept. 2018), https://www.ssa.gov/policy/docs/chartbooks/fast_facts/2018/fast_facts18.pdf [https://perma.cc/CWQ4-S3R5].

29. Calculation by author of SOC. SEC. ADMIN. Data. *Id.*

30. Brown et al., *supra* note 26, at 27.

31. Nari Rhee, *Race and Retirement Insecurity in the United States*, NAT'L INST. OF RET. SEC. 1, 1 (Dec. 2013), https://www.nirsonline.org/wp-content/uploads/2017/07/race_and_retirement_insecurity_final.pdf [https://perma.cc/REE8-FVV5].

32. A 2012 study showed that 62.3% of White employees worked in a job that provided an employer sponsored retirement compared to 53.8% Asian, 54.3% Black, 37.8% Latino. *Id.* at 3.

gender with the median Black woman making $19,520 per year in less in retirement income than the median White man.[33]

Such disparities along race and gender lines result in lower relative retirement security for the affected populations.[34] While the reasons such race and gender disparities exist are complicated and nuanced,[35] the disparities can be reduced through public policy that encourages individual retirement savings.[36]

3. The Personal Cost of Insufficient Retirement Assets

With more than fifty percent of people approaching retirement lacking any retirement savings,[37] it is fair to assume that many will rely solely on Social Security and other social safety nets in retirement. However, U.S. social safety net programs do not prevent people from experiencing devastating hardship as a result of poverty.[38] In 2015, 19.6 percent of people, age sixty-five or older, were near or below the federal poverty line, despite having access to programs like Social Security and Medicare.[39] People in this category are significantly more likely to experience material

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33. Author calculation subtracting $31,320/year for black women from $50,520 for white men. *See* Brown et al., *supra* note 26, at 27.

34. *See generally id.*

35. *See generally* David C. John, *Disparities for Women and Minorities in Retirement Saving*, BROOKINGS INST. (Nov. 28, 2018), https://www.brookings.edu/testimonies/disparities-for-women-and-minorities-in-retirement-saving/#note1 [https://perma.cc/P9YA-RHWM].

36. *See generally* Brown et al., *supra* note 26.

37. *Id.*

38. *See* Jackie Odum, Eliza Schultz, Rebecca Vallas & Christian Weller, *Toward a Dignified Retirement for All*, CTR. FOR AM. PROGRESS 1, 18 (2016), https://cdn.americanprogress.org/content/uploads/2016/11/15043439/SeniorPoverty-report1.pdf [https://perma.cc/FE2U-KJ6V].

39. "Near or below the federal poverty line means less than 150% of the federal poverty rate." *Id.* at 3.

hardship such as housing,[40] shelter,[41] healthcare,[42] or food[43] deficiencies.

Such material hardship leads to alarming outcomes for those over age sixty-five. For example, in 2015, nine percent of households with members age sixty-five or older experienced food insecurity.[44] Those people were fifty-three percent more likely to suffer from a heart attack, fifty-two percent more likely to develop asthma; forty percent more likely to experience congestive heart failure and sixty percent more likely to experience depression than those not facing food insecurity.[45] Despite federal programs designed to address the issue, food insecurity has risen since 2005 and is expected to climb another fifty percent by 2025.[46]

The economic hardship experienced by the elderly often leads to negative consequences for younger generations.[47] In 2010, one in four adults between the ages of forty-five and sixty-four were caring for an aging adult.[48] Such informal care, often performed by women, can result in disruptions to labor force participation for the caregiver.[49] A caregiver may have to reduce hours, accept jobs with less pay, or exit the workforce to care for their loved one.[50] This leads to lower lifetime earnings, as well lower future Social Security and retirement benefits for themselves.[51]

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40. "Housing deficiency" means problems with "pests; leaks; broken windows; exposed electrical wires; nonworking plumbing; holes in walls or ceiling; or holes in floor." *Id.* at 7.

41. Shelter hardship exists in a household that "was not able to pay rent or mortgage in full; was evicted; was unable to pay utilities; or lost utilities because of non-payment." *Id.*

42. A household member "unable to see a doctor or dentist when ill." *Id.* at 8.

43. Food hardship occurs when one has "skipped meals; ate less than needed or was unable to afford balanced meals; did not eat; or had … food perish." Odum et al., *supra* note 38, at 8.

44. *Id.* at 15.

45. *Id.*

46. *Id.*

47. *Id.* at 17.

48. Odum et al., *supra* note 38, at 17.

49. *Id.*

50. *Id.*

51. *Id.*

B. Overview of Retirement Policy in the U.S.

Retirement security has traditionally relied on the "three-legged stool" of retirement: social security, employer sponsored plans, and personal savings.[52] Today the most important and most relied upon of these is Social Security.[53]

1. Social Security

The federal government introduced Social Security in 1935.[54] In addition to the several provisions for general welfare, the Social Security Act established the Federal Old-Age Benefits program.[55] The program was originally designed to protect workers who were aging out of the workforce and thus were no longer able to earn an income.[56] In its original form, the Federal Old-Age Benefits were limited to workers age sixty-five and older, but it has since expanded to cover those with disabilities, spouses and minor children, and some death benefits.[57] In addition to those changes, today's retirement benefits provide a reduced retirement benefit as early as age sixty-two.[58]

By its nature, Social Security retirement benefits provide a consistent income stream in retirement.[59] Social Security benefits are paid monthly and the benefits are linked to the lifetime of the recipient.[60] To be eligible for a retirement benefit, a worker needs to have paid into social security for at least ten years.[61] In addition, retirement benefits are largely protected from the erosion of purchasing power caused by inflation, due to a mechanism known as a cost-of-living allowance (COLA).[62] This means that benefit

52. Befort, *supra* note 13, at 940–41

53. *See id.*; *see also* Butrica, *supra* note 14.

54. *See Historical Background and Development of Social Security*, SOC. SEC. ADMIN., https://www.ssa.gov/history/briefhistory3.html [https://perma.cc/8C4H-YL6P].

55. *See id.*

56. *See id.*

57. *See id.*

58. *See id.*

59 . *See generally Retirement Benefits*, SOC. SEC. ADMIN. (2018), https://www.ssa.gov/benefits/retirement/ [https://perma.cc/WF6R-5TW9].

60. *See id.*

61. *Id.*

62. *See* SOC. SEC. ADMIN., *supra* note 16.

recipients receive a lifetime monthly benefit that is protected against inflation.[63]

While Social Security retirement benefits do provide a secure income stream, the value of the benefits is modest. The dollar value of the monthly retirement benefit is calculated based on a person's lifetime earnings, meaning that higher income earners receive a larger benefit in retirement.[64] However, the amount of annual income subject to the Social Security payroll tax and included in the benefit calculation is capped at a certain amount each year.[65] In 2018 that dollar amount was $128,400.[66] This means that there is a maximum monthly benefit amount, which was $2,788 in 2018.[67] However, the *average* monthly benefit is lower, at $1,404 per month ($16,848 per year) for 2018.[68] By comparison, the federal poverty guideline in 2018 was an annual income of $12,140 for one person.[69]

The retirement program and the funds it requires are massive. The benefits are paid for by payroll contributions from workers and their employers, and by earnings from investing the assets of the Social Security Trust Fund.[70] In 2016 the fund itself had $2.8 trillion in assets, which paid out $776.4 billion in retirement benefits[71] to sixty-one million Americans.[72] One hundred seventy-one million workers paid into social security in 2017.[73]

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63. *Id.*

64. *See Your Retirement Benefit: How It's Figured*, SOC. SEC. ADMIN. 1, 2 (2018), https://www.ssa.gov/pubs/EN-05-10070.pdf [https://perma.cc/GVL8-HD4W].

65. *Fact Sheet: 2018 Social Security Changes*, SOC. SEC. ADMIN. 1, 1 (2018), https://www.ssa.gov/news/press/factsheets/colafacts2018.pdf [https://perma.cc/8DTR-FQHG].

66. *Id.*

67. *Id.* at 2.

68. *Id.*

69. Annual Update of the HHS Poverty Guidelines, 12 Fed. Reg. 2642, 2643 (Jan. 18, 2018).

70. *The 2017 Annual Report of the Board of Tr. of the Fed. Old-Age and Survivors Ins. and Fed. Disability Ins. Trust Funds*, THE BD. OF TR.S FED. OLD-AGE & SURVIVORS INS. & FED. DISABILITY INS. TR. FUNDS 1, 7 (2017), https://www.ssa.gov/oact/TR/2017/tr2017.pdf [https://perma.cc/YB92-YPPF].

71. *Id.*

72. *Id.* at 2.

73. *Id.* at 6.

The Social Security Board of Trustees' 2017 report projected that the annual cost of paying the benefits would exceed the fund's annual income starting in 2022, which is alarming given its size and importance to retirement security.[74] The report further stated that the fund would no longer have sufficient reserves to pay promised benefits by 2034.[75]

Despite this sobering report, there is good reason to believe that any future cuts to Social Security retirement benefits will be modest. There are three reasons to believe this may be the case. First, in 1983, Social Security faced a similarly serious funding crisis.[76] Despite being only months away from insolvency,[77] several relatively painless reforms have kept the fund solvent through today.[78] Second, a significant reduction in benefits is likely not politically feasible.[79] Finally, there are a host of solutions being proffered that could keep social security beneficiaries from facing benefit cuts.[80]

To summarize this section, Social Security retirement benefits are a crucial part of the national retirement scheme. The vast majority of the current workforce will retire with a modest Social Security monthly benefit. Those benefits are likely to remain a fixture of the retirement scheme. As a result, much of the discussion about the sufficiency of retirement benefits and retirement savings

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74. *Id.* at 2.

75. THE BD. OF TR.S FED. OLD-AGE & SURVIVORS INS. & FED. DISABILITY INS. TR. FUNDS, *supra* note 70, at 2.

76. *See* SOC. SEC. ADMIN., *supra* note 59.

77. "The last major Social Security reform (in 1983) was not undertaken until the program's insolvency approached to within a few months." Jagadeesh Gokhale, *Social Security Reform: Does Privatization still make sense?,* 50 HARV. J. ON LEGIS. 169, 170–71 (2013).

78. The reforms included *inter alia* a less than 1% increase in the payroll tax rate for employees, a six-month delay in paying the (COLA), and coverage of some previously not-covered employees. *Summary of P.L. 98021, (H.R. 1900) Social Security Amendments of 1983-Signed on April 20, 1983*, SOC. SEC. ADMIN., https://www.ssa.gov/history/ 1983amend.html [https://perma.cc/4MA2-Z5KS].

79. *E.g.*, Gokhale, *supra* note 77, at 207 (noting that support for privatizing social security appears very unlikely in the near term).

80. *See, e.g.*, *id.* at 176 (noting that a payroll tax rate increases of 3.1 percentage points would generate a surplus) *see also* Jasmine V. Tucker et al., *Strengthening Social Security: What do Americans want?*, 12 NAT'L ACADEMY OF SOC. INS. (2013) (advocating for an increase in the maximum salary eligible for a payroll contribution).

is about whether workers and retirees have sufficient retirement assets in addition to Social Security.

2. Employer-Sponsored Plans

There are many types of employer-sponsored retirement plans. This section focuses on the two main groupings of these plans: defined contribution plans and defined benefit plans. Employer-sponsored plans rose to prominence as a benefit offered by employers following World War II.[81] Pension plans, more accurately called a "defined benefit plan", provide a specific, usually periodic, pre-established benefit for the employee upon retirement.[82] Often, these benefits are paid monthly as lifetime benefits and are based on some combination of an average salary and a formula for the number of years worked for the employer.[83] In practice, they look very similar to a Social Security benefit but are provided by an employer rather than a government entitlement.

Perhaps the most important feature of a defined benefit plan is that the employer, rather than the employee, takes on the risk of investing.[84] The employer also takes on the job of ensuring that the plan is adequately funded during the career and retirement of the workers.[85] Thus, the obligation to pay the benefit becomes a liability of the business.[86] These defined benefit pension plans were popular during much of the twentieth century but are increasingly being replaced by defined contribution accounts like the ubiquitous 401(k).[87]

A defined contribution plan allows the employer and employee to contribute funds to a retirement account that is held in trust on

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81. Befort, *supra* note 13, at 947.
82. Sharon Reece, *Enron: The Final Straw & How to Build Pensions of Brick*, 41 DUQ. L. REV. 69, 77 (2002).
83. Befort, *supra* note 13, at 946; see also T. Leigh Anenson & Karen Eilers Lahey, *The Crisis in Corporate America: Private Pension Liability and Proposals for Reform*, 9 U. PA. J. LAB. & EMP. L. 495, 500 (2007).
84. Anenson & Lahey, *supra* note 83, at 500–01.
85. *Id.*
86. *See id.*
87. Befort, *supra* note 13, at 947. *See generally* THE 401(K) HANDBOOK (Martha P. Patterson ed., Business & Legal Resources 2018); *see also* I.R.C. § 401(k) (2018).

behalf of the employee.[88] This account can then be distributed as a lump sum or the plan can allow the account to be annuitized or simply drawn on periodically in retirement.[89] Rather than agreeing to pay a fixed benefit for life as with a defined benefit plan, the employer offering a defined contribution plan agrees to pay a fixed amount—usually as a percentage of the employees pay—into the employees retirement account.[90] While this arrangement has advantages and disadvantages for both employees and employers, it results in a retirement benefit in which the worker takes on the investment risk and longevity risk.[91]

The most well-known defined contribution plan type is the ubiquitous 401(k).[92] 401(k) plans first appeared in the 1980s and have since soared.[93] They have largely supplanted defined benefit pension plans.[94] The number of employees covered by a defined benefit plan fell twenty-five percent between the years 1980 and 2000.[95] During the same period, the number participating in defined contribution plans increased 250 percent.[96] By 2005, twice as many American workers were covered by defined contribution plans as compared to defined benefit plans.[97] Today, outside of the public sector, defined benefit plans are rare for new employees. A 2016 study showed that only five percent of newly hired Fortune 500 company employees were covered by a traditional defined benefit plan while eighty percent were covered by only a defined contribution plan.[98] The shift in preference by employers from defined benefit plans to defined contributions plans has contributed

88. *See* THE 401(K) HANDBOOK, *supra* note 87, at 100 fig.100-A (Table showing the difference between defined benefit and defined contribution plans).
89. *Id.*
90. *Id.*
91. *See* Anenson & Lahey, *supra* note 83, at 501 (explaining that an employee takes on the investment risk and the risk that they may outlive their retirement account balance).
92. I.R.C. § 401(k), lays out the requirements to be qualified for favorable tax treatment.
93. THE 401(K) HANDBOOK, *supra* note 87, at 100.
94. Befort, *supra* note 13, at 948.
95. *Id.*
96. *Id.*
97. *Id.*
98. Brendan McFarland, *A Continuing Shift in Retirement Offerings in the Fortune 500*, 26 INSIDER NO. 2, 2 (2016).

to a reduction in retirement security as employees take on liability for any investment shortfalls and for outliving their savings.[99]

One somewhat recent innovation in the 401(k) plan has been the automatic enrollment.[100] Studies showed that there was significant improvement in the participation rates of employees if required to opt out of participating in a 401(k) instead of requiring to opt in.[101] The Pension Protection Act of 2006 put in place incentives for employers to offer automatic enrollment.[102] Those incentives function by allowing an employer to avoid having to prove that it meets the non-discrimination requirements referenced above if the employer makes either of two types of contributions and the plan uses automatic enrollment and automatic contribution escalation.[103] This incentive program appears to be increasing both the number of plans being offered with an automatic enrollment feature and the number of eligible employees who participate.[104] Despite this improvement, PEW reported in 2017 only seventy-two percent of workers offered a defined contribution plan actually participated in it.[105]

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99. Rhee & Boivie, *supra* note 2, at 5.

100. Alicia H. Munnell, et al., *An Analysis of Retirement Models to Improve Portability and Coverage*, CTR. FOR RET. RESEARCH AT BOS. COLL. 1, 35 (Mar. 2018), https://crr.bc.edu/wp-content/uploads/2018/03/Portability-and-coverage_Special-report.pdf [https://perma.cc/LBM7-R9XZ].

101. *Id.*

102. *See* Pension Protection Act of 2006, Pub. L. No. 109-280, 29 U.S.C., § 902, 120 Stat. 780 (2006).

103. *Id.*

104. The Defined Contribution Institutional Investment Association reports that over 60% of plans have adopted an auto enrollment feature, and while only 11% of plans that have not implemented an auto enrollment feature have a participation rate exceeding 90%; for plans with an automatic enrollment feature, the percentage of plans with a participation rate greater than 90% is 46%. Josh Cohen et al., *DCIIA Fourth Biennial Plan Sponsor Survey: Auto Features Continue to Grow in Popularity*, DEFINED CONTRIBUTION INSTITUTIONAL INV. ASS'N 1, 3 (Dec. 2017), https://c.ymcdn.com/sites/dciia.site-ym.com/resource/collection/23D6FA15-31A6-4ABA-826B-A8718DC03E59/DCIIA_Fourth_Biennial_Plan_sponsor_survey_8._FINAL.11.30.17.pdf [https://perma.cc/AG5C-F5GK].

105. *Retirement Plan Access and Participation Across Generations: How Younger Workers in the Private Sector Differ From Older Colleagues*, THE PEW CHARITABLE TRUSTS 1, 4 (Feb. 2017), https://www.pewtrusts.org/-/media/assets/2017/02/ret_retirement_plan_access_and_participation_across_generations.pdf [https://perma.cc/CLN2-QRU8].

3. Personal Savings

The remaining leg of the retirement security stool is personal savings.[106] Traditionally, this category has been defined by looking at individuals' unexpended disposable income.[107] However, some studies include both financial and non-financial assets such as houses to determine savings.[108] With such a broad definition for personal savings, there is no end to the impact that various policies can have. However, there are some policies specifically designed to affect personal savings for retirement.[109] The most well-known is the Individual Retirement Account (IRA).[110] The IRA is similar to a 401(k) except, most notably, it has a much lower annual contribution limit and is not sponsored by an employer.[111]

There are a host of ways for policymakers to address retirement reform for today's workers including immigration reform, social security expansion, and labor market reform.[112] However, the remainder of this article will focus on the use of public policy to get individuals to save more for their own retirement, specifically through state-sponsored retirement programs.

106. Befort, *supra* note 13, at 940–41.

107. *See, e.g.*, Befort, *supra* note 13, at 960 (noting a survey by the Bureau of Economic Analysis tracking personal savings and providing a definition).

108. *See, e.g.*, Rhee & Boivie, *supra* note 2, at 13 (including home value, personal property, and professional property).

109. *See generally* Befort, *supra* note 13, at 960–62.

110. The IRS refers to IRAs as "Individual Retirement Arrangements." *See Individual Retirement Arrangements (IRAs)*, INTERNAL REVENUE. SERV., https://www.irs.gov/retirement-plans/individual-retirement-arrangements-iras [https://perma.cc/88MC-59V].

111. *See Retirement Topics – IRA Contribution Limits*, INTERNAL REVENUE SERV., https://www.irs.gov/retirement-plans/plan-participant-employee/retirement-topics-ira-contribution-limits [https://perma.cc/N8PX-XJTC] (limiting annual contributions to an IRA to $5,500 or $6,000 if age 50 or older).

112. *See generally* Sheiner, *supra* note 24, at 9; *see also The Nation's Retirement System: A Comprehensive Re-evaluation Is Needed to Better Promote Future Retirement Security*, GOV'T ACCOUNTABILITY OFFICE 1, 94–111 (Oct. 2017), https://www.gao.gov/assets/690/687797.pdf [https://perma.cc/V4BQ-YDH5].

C. States Create Retirement Savings Policy

Despite the concern that retirement savings are insufficient, Congress has failed to take any significant action to expand individual retirement savings beyond the programs above.[113] In the absence of congressional leadership, states—the laboratories of democracy—have stepped up to the retirement-savings plate.[114] Since the 1970s, regulation of these retirement plans has been almost exclusively the purview of the federal government as a result of ERISA's preemption of state law.[115] Until recently, state action in this area has been limited to the regulation of insurance products[116] and the development of public sector retirement plans.[117] Conversely, these plans are almost entirely free from federal regulation and are specifically exempt from ERISA.[118]

ERISA "supersede[s] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . ."[119] The Supreme Court has interpreted "relate to any employee benefit plan" very broadly.[120] Thus, states were concerned that any program they promulgated through state law that imposed requirements other than those in ERISA might not be enforceable.[121] However, the Department of Labor has long provided regulatory safe harbors exempting certain types of arrangements from the definition of an

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113. *See* Derek B. Dorn et al., *States Dive Headfirst Into Retirement Coverage Debate – But Will Their Initiatives Run Afoul of Federal Law?*, 21 PENSION & BENEFITS DAILY 1, 2 (Feb. 2, 2015).

114. *Id.* at 1.

115. *See* Richard Hinz, *Overview of the United States Private Pension System*, *in* PRIVATE PENSION SYSTEMS & POLICY ISSUES 23, 33 (2000).

116. *Id.* at 34.

117. Phillip C. Aka, Chidera V. Oku & Murna Habila, *Promoting Retirement Security of Low-income Workers in Illinois: An analysis and Lessons for Other States*, 51 AKRON L. REV. 367, 385 (2017).

118. *Id.*

119. 29 U.S.C. § 1144(a) (2018).

120. *See* Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96–97 (1983) (defining "relates to" as having "a connection with or reference to [an employee benefit] plan.").

121. *See State of Minnesota, State-Administered Private Sector Employee Retirement Savings Study*, DELOITTE CONSULTING LLP 1, 19 (Jan. 13, 2017), https://www.leg.state.mn.us/docs/2017/mandated/170601.pdf [https://perma.cc/65MA-JRSD].

"employee benefit plan" under ERISA.[122] In 2016, the Department of Labor issued a final rule that created a safe harbor that made it easier for states to set up automatic enrollment IRAs and require employers enroll their employees without being subject to ERISA's preemption of state law.[123] This freed states to pursue their own retirement programs as long as they remain within the safe harbor.

Unfortunately for the states considering changes, within months of the 2016 election, Congress used its authority under the Congressional Review Act[124] to overturn the safe harbor rules exempting states laws from preemption by ERISA. This has led to uncertainty for state's automatic enrollment IRA programs.[125] However, many states have forged ahead despite the changes in the Department of Labor policy.[126]

Several states are pursuing a number of new plans and concepts.[127] The four basic approaches are: the automatic enrollment IRA;[128] the creation of a marketplace or exchange (similar to the Affordable Care Act exchanges); the Multiple Employer Plan (MEP) approach; and the voluntary payroll deductions IRA.[129] California, Connecticut, Illinois, Maryland, and Oregon have all adopted automatic enrollment IRA plans (Secure

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122. Kathryn L. Moore, *Closing the Retirement Savings Gap: Are State Automatic Enrollment IRAs the Answer?*, 24 GEO. MASON L. REV. 35, 47 (2016).

123. *See* 29 C.F.R. § 2510.3-2 (2019); *see also* Savings Arrangements Established by States for Non-Governmental Employees, 81 FR 59464-01; *see generally* Moore, *supra* note **Error! Bookmark not defined.**, at 48–54 for an overview of the establishment of the safe harbor and the specific requirements.

124. 5 U.S.C § 801 et seq. (2018) (giving Congress the authority to overturn by joint resolution signed by the President any administrative rule promulgated by an agency within 30 congressional days).

125. *Secure Choice 2.0: States Blazing a Path to Retirement Security for All*, NAT'L CONFERENCE ON PUB. EMP. RET. SYS. 1, 14 (2017), https://www.ncpers.org/files/2017_SecureChoice2%200_final(1).pdf [https://perma.cc/2GGD-DQAL].

126. *See id.* at 17.

127. *See* Moore, *supra* note 122, at 47.

128. *Id.* at 38.

129. *See Driving Change to Improve Retirement Outcomes*, GEORGETOWN UNIV. CTR. FOR RETIREMENT INITIATIVES 1, 30 n.7 (June 19, 2018), https://cri.georgetown.edu/wp-content/uploads/2019/02/CRI-Policy-Forum-Report-2-28-19.pdf [https://perma.cc/C3VD-X8XR]; *see also Interpretive Bulletin Relating to State Savings Programs that Sponsor or Facilitate Plans Covered by the Employee Retirement Income Security Act of 1974*, U.S. DEP'T OF LABOR (Nov. 18, 2015) 80 FR 71936-02, 2015 WL 7253603.

Choice programs) that require employers of a certain size or larger to participate by automatically enrolling their employees in the state sponsored plan.[130] Of the states that have adopted a Secure Choice program, Oregon's plan—"OregonSaves"—is the furthest along in implementation.[131] As of November 30, 2018, OregonSaves had 22,000 participants and more than $10 million in assets.[132]

D. Minnesota's Approach

Minnesota suffers from the same retirement security issues as the rest of the country. Its residents have insufficient retirement savings and inadequate usage of employer-sponsored retirement plans.[133] Forty percent of working Minnesotans do not currently have a retirement savings plan.[134] Those who do, have saved an average of $38,000 dollars, a fraction of the amount needed to retire.[135] These problems are exacerbated by Minnesotans having one of the longest average-life-expectancies of any state in the nation; a full six years longer than bottom-ranked Mississippi.[136] Indeed, the Minnesota State Demographic Center predicts a $2.7 billion increase by 2040 in annual spending on the elderly through state medical assistance.[137] These challenges coupled with continued political gridlock in Congress have prompted Minnesota's state lawmakers to address these issues.[138]

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130. NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 4.

131. *Id.*

132. Marlene Satter, *OregonSaves Auto-IRA off to Promising Start*, BENEFITS PRO (Dec. 19, 2018, 11:30 AM), https://www.benefitspro.com/2018/12/19/oregonsaves-auto-ira-off-to-promising-start/?slreturn=20190013203304 [https://perma.cc/M5ES-U5GX].

133. DELOITTE CONSULTING LLP, *supra* note 121, at 5.

134. *Id.*

135. *Id.*

136. *The State of US Health, 1990-2016: Burden of Diseases, Injuries and Risk Factors Among US States*, JAMA 1444, 1452 (Apr. 10, 2018), available at https://jamanetwork.com/journals/jama/fullarticle/2678018 [https://perma.cc/7E7F-YZ43] (showing Minnesota is ranked 4th in the nation in life expectancy and 1st in the nation in healthy life expectancy; Mississippi is ranked last in life expectancy and 49th in healthy life expectancy).

137. MINN. STATE DEMOGRAPHIC CTR., *supra* note 4.

138. *See generally*, Doug Grow, *Minnesotans' retirement savings coming up short: What to do?*, MINNPOST (Apr. 6, 2017), https://www.minnpost.com/politics-policy/2017/04/minnesotans-retirement-savings-coming-short-what-do/ [https://perma.cc/Q64S-GPUN].

A 2017 study overseen by Minnesota Management and Budget[139] indicated that a well-designed state sponsored IRA could increase employee participation in saving for retirement and thus increase retirement savings for Minnesota workers.[140] The Minnesota Legislature has already taken steps towards implementation of a state-sponsored IRA plan. Following the Minnesota Management and Budget study, the MSCRPA was introduced in bills in both the Minnesota House and Senate.[141] Neither the house nor senate bill passed during the 2017–2018 biennium.[142] The bill was reintroduced during the 2019–2020 biennium for further consideration.[143]

1. The Two-Pronged Approach.

The Minnesota Secure Choice Retirement Program Act provides for a new governmental board to run two different retirement programs.[144] Each program represents a prong in the two-pronged approach. The first program is an automatic enrollment IRA plan or IRAP.[145] The IRAP, would require every eligible employer[146] 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.[147] The worker is free to opt out of the program at any time but initially the employer must

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139. DELOITTE CONSULTING LLP, *supra* note 121, at 7 (discussing Minnesota Management and Budget's role in the study).

140. *See* H.F. 2570, 90th Leg., Reg. Sess. (Minn. 2017); *see also* S.F. 2303, 90th Leg., Reg. Sess. (Minn. 2017).

141. *Id.*

142. The Minnesota office of the Revisor of Statutes maintains information on the status of past bills. *See* H.F. 2570, 90th Leg., Reg. Sess. (Minn. 2017); *see also* S.F. 2303, 90th Leg., Reg. Sess. (Minn. 2017). Note that the House File and Senate File are identical and only the Senate File will be referred to hereafter.

143. The bill was reintroduced during the editing for this article. *See* H.F. 472, 91st Leg., Reg. Sess. (Minn. 2019); *see also* S.F. 636, 91st Leg., Reg. Sess. (Minn. 2019).

144. S.F. 2303 § 8.

145. *Id.* at § 5.

146. An eligible employer is one who does not currently contribute to a retirement savings plan on behalf of its employees. S.F. 2303 § 3, subdiv. 4, 90th Leg., Reg. Sess. (Minn. 2017).

147. *Id.* at § 5.

automatically enroll the worker and remit payment unless the worker opts out.[148]

However, an employer can avoid the requirement of enrolling in the IRAP by instead establishing its own retirement plan or enrolling in the second program, the multi-employer plan (MEP).[149] The MEP is an ERISA compliant[150] qualified 401(k)-type defined contribution plan.[151] This provides several advantages for employers and employees. Mainly that the employer could contribute to the plan, and the employee's voluntary contributions are subject to the $19,000 annual cap[152] rather than the $5,500[153] for an IRA.

This two-pronged approach creates a "carrot and stick" dynamic to the program.[154] On the one hand it creates a requirement that employers must offer a retirement plan or participate in the IRAP.[155] Presumably this requirement comes with some cost, if only the minimal cost of time it takes to sign up and add an additional deduction to the payroll processing. On the other hand, the employer could volunteer to join the MEP which would allow it to offer significantly improved benefits. While the act may not address the entire retirement savings shortfall,[156] it would allow nearly 900,000

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148. *Id.*

149. *Id.* at § 7.

150. *Id.* at § 4, subdiv. 2 (requiring that the plan comply with ERISA and sections of the IRC).

151 . The actual section of the IRC that would govern tax-preferred qualification is not specified in the legislation but is left up to the board to design. *See* S.F. 2303 § 7, 90th Leg., Reg. Sess. (Minn. 2017).

152 . *Notice 2018-83*, INTERNAL REVENUE SERV. 1, 1 (2019), https://www.irs.gov/pub/irs-drop/n-18-83.pdf [https://perma.cc/Z5D6-4GLW] (noting contribution limit for 2019 is 19,000).

153. *See Retirement Topics – IRA Contribution Limits,* INTERNAL REVENUE SERV. (Nov. 2, 2018), https://www.irs.gov/retirement-plans/plan-participant-employee/retirement-topics-ira-contribution-limits [https://perma.cc/9DXJ-EVH5] (limiting annual contributions in to an IRA to $5,500 or $6,000 if age 50 or older).

154. *The Multiple Employer 401(k) Plan: A supplemental ERISA Program to Permit Greater Retirement Savings*, STAFF OF LEG. COMM'N. ON PENSIONS AND RET. (Mar. 15, 2017), https://www.leg.state.mn.us/docs/2017/mandated/170601.pdf [https://perma.cc/YV8U-U99N] (describing the MEP as the carrot and the IRAP as the stick).

155. S.F. 2303 § 7.

156. *Compare* S.F. 2303 § 2 (claiming savings of $125 million over ten years in medical assistance spending), *with Demographic Considerations for Long-*

workers who do not currently have access to an employer sponsored plan, the ability to set aside money for retirement in an investment-vehicle.[157] This investment vehicle would be free from taxes and it would be portable, for our increasingly mobile workforce.[158] Furthermore, although an employee is automatically enrolled, he or she is free to opt out at any time.

III. ANALYSIS

A. Benefits of the MSCRPA

1. Requiring Businesses to Participate

Requiring businesses to participate in a retirement plan addresses one of the major barriers employees face while saving for retirement, which is lack of access to a plan. Currently, the main policy tool for incentivizing employers to sponsor retirement plans for their employees is tax breaks for both the company and the employee combined with the requirement that the retirement plan does not discriminate between high-income earners and other employees.[159] In other words, if an employee offers the plan to its managers and executives it must also offer the plan to its regular employees. The rationale is that executive employees will use their increased bargaining power to negotiate for benefits from their companies and the non-discrimination requirement ensures that non-managerial employees receive the same benefit.[160]

Unfortunately, these policy mechanisms have failed to extend employer sponsored retirement savings plans to a significant number of American Workers.[161] In 2013, a mere 51.3 percent of employees in the United States had access to an employer-

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Range & Strategic Planning, MINN. STATE DEMOGRAPHIC CTR. 1, 4–5 (Mar. 2016), https://mn.gov/admin/assets/demographic-considerations-planning-for-mn-leaders-msdc-march2016_tcm36-219453.pdf [https://perma.cc/SA5L-CYMB] (projecting an increase in medical assistance spending of $2.7 billion).

157. An estimated 873,076 workers in Minnesota did not have access to an employer sponsored plan. DELOITTE CONSULTING LLP, *supra* note 121, at 41.

158. *See* S.F. 2303 at § 5.

159. WELLER, *supra* note 15, at 104.

160. *Id.* at 104–05.

161. *Id.* at 105–06.

sponsored retirement plan at work.[162] Perhaps more concerning is that access to employer-sponsored retirement plans has declined since 2000, indicating that the percentage of covered employees is on the decline.[163]

The MSCRPA addresses this policy failure by requiring every eligible employer[164] operating in the state to offer a retirement plan.[165] Employers who already sponsor a plan have no additional obligation under the Act. However, employers who do not yet offer a retirement savings plan would have three options: (1) they can set up their own qualifying retirement plan;[166] (2) they can opt to participate in the state sponsored MEP;[167] or (3) if they fail to do either of those they must offer the state sponsored IRAP to their employees.[168] Furthermore, the MSCRPA requires employers to cover any employee who works more than five-hundred hours in a calendar year.[169] The result of such a broad requirement is that nearly all employees in the state would then have access to a retirement plan.[170]

2. Mandating Automatic Enrollment

Unlike the current federal retirement regime, which encourages but does not mandate automatic enrollment, the MSCRPA mandates automatic enrollment for participants. The incentives put in place by the Pension Protection Act of 2006 appears to be increasing both the number of plans being offered with an automatic enrollment

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162. *Id.* at 106.
163. *Id.* at 105.
164. "Eligible employer" means a person or entity engaged in a business, industry profession, trade or other enterprise in the state, whether for profit or not for profit, that does not sponsor or contribute to, on behalf of its employees, a retirement savings plan. Eligible employer does not include an employer that has not been in business at any time during the immediately preceding calendar year. S.F. 2303 § 3, subdiv. 4, 90th Leg., Reg. Sess. (Minn. 2017).
165. S.F. 2303 § 7, subdiv. 1.
166. *Id.* at § 3, subdiv. 4.
167. *Id.* at § 7, subdiv. 1.
168. *Id*.
169. Once a person has 500 or more hours of work in a calendar year, the person continues to be an eligible employee even if the person has fewer than 500 hours in the current or any future calendar year *Id.* at § 3, subdiv. 3.

feature and the number of eligible employees participating.[171] Despite this improvement, PEW reported in 2017 that only seventy-two percent of workers offered a defined contribution plan actually participated in it.[172]

The MSCRPA incorporates the success of automatic enrollment plans and builds on the federal incentive program by offering plans which use automatic enrollment. Employers may avoid automatic enrollment by setting up their own plan or continuing an existing plan. However an employer electing to provide the IRAP must automatically enroll any employees.[173] The MEP is more complicated because the MSCRPA gives wide latitude to the program's governing board as to how to set up the contribution rates.[174] However, the program board has authority to require that enrollments for workers covered by the MEP be automatic.[175] The result of using automatic enrollment for the IRAP and the MEP will almost certainly mean an increase in participation rates for employees.

3. How the MSCRPA Improves On Other States' Secure Choice Programs

The MSCRPA also improves upon other states' attempts at increasing retirement savings. Of the ten states that have enacted statewide retirement savings legislation, six have created IRAPs and two others have created MEPs.[176] Of the six IRAPs only California, Illinois, Maryland, and Oregon mandate that businesses enroll their employees unless they offer a qualified alternative.[177]

171. *See* Cohen, *supra* note 104.
172. *Id.* at 4.
173. S.F. 2303 § 7, subdiv. 1 (stating that an employer shall enroll eligible employees in the IRAP).
174. The MSCPRA requires the program's board to establish a menu of terms and conditions that employers can select from to meet their individual needs. S.F. 2303 § 4.
175. Section 401(k) if the IRC requires that employees "elect" to have the employer make contributions. Section 401(a) has no such requirement. *Compare* I.R.C § 401(a) *with* § 401(k).
176. Massachusetts and Vermont have adopted MEPs. *See* GEORGETOWN UNIV. CTR. FOR RETIREMENT INITIATIVES, *supra* note 129.
177. *Id.*

Employees of small businesses and nonprofits along with independent contractors are the most likely not to be covered by an employer-sponsored plan.[178] This is because small businesses, nonprofits, and independent contractors often lack the resources to set up and contribute to a plan. The process can be time intensive and contributions can be expensive.

Imagine a small employer, Jane. Jane wants to set up 401(k) plan for herself and her ten employees. Her best bet is to purchase a pre-designed plan from a vendor who will do the record-keeping.[179] But Jane is facing considerable upfront set-up costs as well as asset-based and per-person fees. Those fees can exceed three percent of assets or as much as $750 per month per person.[180] In addition, Jane faces dozens of hours of additional work ensuring compliance with federal regulations and figuring out and communicating the benefits to her staff. Since the business only has ten employees, the costs of time and money will be spread among the small staff, which lowers the attractiveness of the benefit. In the end, Jane decides she doesn't have the time and resources to offer the 401(k). This kind of calculus has resulted in two-thirds of businesses with fewer than fifty employees choosing not to offer a retirement savings plan, nationwide.[181]

The MSCRPA addresses this problem through the mandate to use the IRAP. Now Jane's calculus has changed. The cost is likely to be considerably lower,[182] since there will be little or no up-front cost and the administrative cost would be shared by thousands of employees rather than ten. If this was all the MSCRPA did, it would be an important improvement over the status quo. States like California, Illinois, Maryland, and Oregon have already done as much. However, the IRAP has two serious drawbacks: employers

178. WELLER, *supra* note 15, at 114–15.

179. *See generally* Shimon Brathwaite, *Offering a 401(k) Plan? Tips for Small Business Owners*, BUSINESS NEWS DAILY (Jan. 9, 2019, 7:10 PM), https://www.businessnewsdaily.com/6293-small-business-401k-plan.html [https://perma.cc/E4XC-HVJC].

180. Liz Sheffield, *How Much Does a 401(k) Cost Employers?*, HUMAN INTEREST BLOG (May 31, 2016), https://humaninterest.com/blog/how-much-does-a-401k-cost-employers/ [https://perma.cc/CPN3-45WP].

181. WELLER, *supra* note 15, at 114–15.

182. The MSCRPA prohibits the program's board from charging more than one percent of assets in administrative fees. S.F. 2303 § 8, subdiv. 8, 90th Leg., Reg. Sess. (Minn. 2017).

cannot contribute to their employee's accounts and the annual contribution amount is limited to $5,500 per year.[183] This is where the MEP steps in.

As Jane's business continues to grow, she may decide that she would like to contribute some money to her employee's retirement accounts. The MEP offers a way for her to do that. Under the MEP, employers can contribute up to $56,000 per year to the retirement savings account. Of that $56,000, employees can elect to defer up to of their compensation.[184] The MEP is inexpensive for the same reasons that the IRAP is: the administrative costs are spread among thousands of employees and employers. What is more, Jane does not need to worry about taking on fiduciary risks, or deciding which investments to offer because the program, because the plan is designed for the state to take on those liabilities.[185]

If executed well, the marginal cost in time and navigating bureaucracy for using the MEP should be minimal. Jane has a few elections to make up front, and then her company simply continues to make payroll contributions to the new plan. The ease of participating in the MEP is difficult to measure. If offered by itself, the MEP is likely to be simply another retirement savings option in the growing sea of retirement savings vehicles being marketed to businesses. But when offered as an alternative to the IRAP, the MEP takes advantage of the mandatory participation of the IRAP to create a situation where businesses are forced to make a decision, and the marginal cost of participating is made very low by the requirement to participate in the IRAP. This is the truly innovative feature of the MSCRPA. The intent seems to be a shift in the incentives around participating in an employer-sponsored retirement savings plan for small businesses.

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183. *See* INTERNAL REVENUE SERV., *supra* note 111.

184. For the year 2019, employers are limited to contributing $56,000 or 100% of a participant's compensation for the year and employees are limited to $19,000 or $25,000 if over the age of 50., INTERNAL REVENUE SERV., *supra* note 152.

185. "A participating employer has no obligations to employees and is not a fiduciary regarding the secure choice retirement savings trust or program. Participating employers do not bear responsibility for the administration, investment performance, plan design or benefits paid to plan participants." S.F. 2303 § 7, subdiv. 4, 90th Leg., Reg. Sess. (Minn. 2017).

B. Concerns Raised by the MSCRPA

While the MSCRPA has potential to reduce the retirement savings gap, there are some concerns with implementing it. Perhaps the two most significant concerns are the changing federal regulatory landscape and the potential for competition with private sector plans.

1. The Changing Regulatory Landscape.

As mentioned above, the current federal regulatory requirement for these plans is uncertain.[186] This could mean that the mandatory participation requirement passed in California, Oregon, Illinois, Maryland, Connecticut and found in the MSCPRA may not be enforceable. As of this writing, no final ruling has been issued by a court regarding the mandatory participation requirement. However, two cases have tested the preemption of the mandatory participation requirement. The first was a suit against Oregon's IRAP program.[187] OregonSaves, was sued by an ERISA industry group alleging that the reporting aspects of Oregon's program are preempted by ERISA.[188] The case settled with OregonSaves continuing to mandate participation by qualifying employers and continuing to require reporting by employers with ERISA covered plans to ensure compliance with the Oregon law.[189]

The second case is ongoing as of this writing and comes out of California where a taxpayers association sued the California Secure Choice program ("CalSavers"). In that case the court had been asked to rule on whether "… a state-mandated auto-enrollment retirement savings program, creates an 'employee benefit plan,'

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186. Dorn, *supra* note 125.
187. *Id.* at 17.
188. *See* Complaint, ERISA Indus. Comm. v. Read (D. Or. 2018) (No. 3:17-CV-01605), https://www.cohenmilstein.com/sites/default/files/ERIC%20v%20Oregon%20Retirement%20Savings%20Board%20Complaint.pdf?fbclid=IwAR2eAk_fEwKLno3fH9ufq3aXP20EyVCQOsGc5c3jlhp7N0xhbpY2luBuoP0 [https://perma.cc/9N5X-F573].
189. *ERIC Strikes a Deal with Oregon on OregonSaves Reporting Requirement*, NAT'L ASS'N OF PLAN ADM'RS (Mar. 29, 2018), https://www.napa-net.org/news/technical-competence/state-auto-ira-plans/eric-strikes-deal-oregon-oregonsaves-reporting-requirement/ [https://perma.cc/K2TR-3834].

such that it is preempted by ERISA."[190] In the court's initial ruling it found that because CalSavers' mandatory participation requirement only applied to employers who did not have an ERISA governed plan, "no ERISA plans are 'governed' or 'interfered' with because of [the California] statute.[191] The court held that there was no preemption.[192] However, the order allowed twenty days for plaintiffs to file an amended complaint which they did on April 11, 2019.[193]

Several states passed their mandatory participation IRAP legislation before the safe harbor rules were enacted under the theory that payroll withholding programs are clearly exempt from ERISA, provided that the employer has little control or decision-making power, does not contribute to the money to plan, and does not profit from offering the program.[194] Those states appear to be moving forward with the implementation of their programs.[195]

While the changes in the federal legal landscape are concerning, they are not yet fatal to the mandatory participation requirement in the MSCRPA. It should also be noted that none of the changes to the Safe Harbor rules affect the MEP because the MEP is assumed to be an ERISA covered plan.

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190. Memorandum & Order, Howard Jarvis Taxpayers Ass'n v. California Secure Choice Ret. Sav. Program, 2019 WL 1430113 at *2 (E.D. Cal. Mar. 29, 2018) (No. 2:18-cv-01584-MCE-KJN).

191. *Id.* at 14.

192. *Id.*

193. *See* First Amended Complaint for Declaratory and Injunctive Relief, Howard Jarvis Taxpayers Ass'n v. California Secure Choice Retirement Savings Program, No. 2:18-cv-01584-MCE-KJN, 2 (D. Cal filed April 11, 2019).

194. *Secure Choice 2.0: States Blazing a Path to Retirement Security for All*, NAT'L CONFERENCE ON PUBLIC EMP. RET. SYS. 1, 14 (2017), https://www.ncpers.org/files/2017_SecureChoice2%200_final.pdf [https://perma.cc/G33T-V44V].

195. The governor of Illinois issued an amendatory veto changing their IRAP program from mandatory enrollment to voluntary enrollment. At the time of this writing it is unclear whether the veto will stand as it requires action by the Illinois Legislature. *See* Meghan Kilroy, *Illinois governor proposes making Secure Choice retirement program optional for employers*, PENSIONS&INVESTMENTS (Aug. 15, 2018, 3:00 PM), https://www.pionline.com/article/20180815/ONLINE/180819944/illinois-governor-proposes-making-secure-choice-retirement-program-optional-for-employers [https://perma.cc/LG8E-G73F].

2. Private Sector Already Provides the Same Services.

One concern certain to be raised is that the MSCRPA will create programs that compete with the private sector 401(k) and 403(b) providers. And it is true that there may be some competition to enroll new employers. However, the reason for the MSCRPA (and legislation like it) is the fact that most small employers do not currently offer any retirement savings plans to their employees.[196] This is because current private sector retirement plan providers are not succeeding in offering viable plans to a majority of small employers.

In addition, it may be that this program will create additional market share for plan providers. Put simply, if an employer's choice is between doing nothing or offering a retirement plan, it may be easiest for the employer to do nothing. But, if the choice is between offering the IRAP or offering another retirement plan, more employers may choose to find a plan that best meets their specific needs. This may mean that many small employers would suddenly be in the market for a retirement plan where previously that decision was simply not on the radar.

IV. CONCLUSION

The concerns with the MSCRPA and other Secure Choice programs should not be ignored. If state policymakers continue to move forward with Secure Choice legislation, then Congress and the Department of Labor should be pressured to pass regulations that removes any doubt about whether these plans may be preempted by ERISA. In addition, legislators and administrators should work with private sector plan providers to see if there are partnerships available that can leverage private sector products, services, and experience to limit rollout costs and improve services for the public.

The MSCRPA provides a plan that through automatic enrollment and required participation by employers is likely to improve retirement savings for up to 900,000 Minnesota workers through the IRAP.[197] By offering the MEP as an alternative to the IRAP, the MSCRPA improves upon other states' plans by increasing the likelihood that more workers will be covered by a

196. WELLER, *supra* note 15, at 114–15.
197. DELOITTE CONSULTING LLP, *supra* note 121, at 41.

superior employer sponsored plan. These programs are untested and policy makers cannot be certain that they will achieve improved retirement savings without experiencing hiccups along the way. However, the continued failure of national retirement policy to yield adequate retirement savings should encourage state policy makers to take action to secure our financial future.