

Forbes



Robb Mandelbaum Contributor

I cover entrepreneurs and the politics and policies that affect them.

Opinions expressed by Forbes Contributors are their own.

ENTREPRENEURS 5/14/2017 @ 8:30AM | 264 views

Business As Unusual: GOP Backs Investor Rights And More Rules, Just This Once



(Photo by Shutterstock)

Who would have imagined the day when Republicans would emerge as champions of investors' rights? And not only that, but also strongly oppose easing labor regulations? Not to mention choose federal supremacy over states' rights? Well, that day came a couple weeks ago, when the Senate [voted nearly along party lines](#) to repeal an Obama regulation that would have made it easier for states to create mass retirement accounts without running afoul of federal rules. The vote, wrapped in a smock of hypocrisy, dealt a setback to small-business owners actually committed to helping their employees. And those entrepreneurs can blame it at least in part on many of the groups that claim to lobby on their behalf in Washington.

I covered the backstory in my [last post](#): most small businesses don't offer retirement plans to their employees, and experts have concluded that the best way to help them save is to set up programs in which employers enroll workers in programs with individual retirement accounts, funded by automatic deductions from their paychecks. Workers can drop out at any time, but studies

show that few do. And companies have really no obligation after the initial set-up — and they do not make any contribution to the IRA.

Five states have set up such auto-IRA programs, and last year the Labor Department tried to clear the decks for those states and the many others that are considering similar programs. They carved out an exemption for these programs from the expansive federal benefits law known as the [Employee Retirement Income Security Act](#), which imposes a host of rules on businesses that set up retirement plans and blocks states from interfering in the plans it regulates. It issued separate guidance for [states](#) as well as for [cities](#) contemplating these programs.

The guidance drew the opposition of the [Security Industry and Financial Markets Association](#) — no surprise there. But the [U.S. Chamber of Commerce](#) also lined up against it, [stitching together a coalition](#) with 21 other trade groups to support repeal, including the [National Federation of Independent Business](#), the [Small Business & Entrepreneurship Council](#), the [Small Business Council of America](#), and the [Small Business Legislative Council](#) (which is itself a coalition of [trade groups](#)). Both the Chamber and the financial industry group highlighted their concern over lost worker protections. “The DOL regulation that this resolution would undo circumvents Congress’ authority and undermines critical protections for the retirement savings of private sector workers,” the Chamber [declared](#) in a letter to senators in advance of their vote. “Private sector employees in these plans will have less worker protections and safeguards than their counterparts covered by employer retirement plans.”

Let’s pause here for a moment to let the irony sink in. Remember, these are the same groups that have fought the existence of the [Consumer Financial Protection Bureau](#), and its every decision, [at every turn](#). And when they’re not championing investors’ rights when it comes to state-run retirement accounts, they’re pushing the Trump administration to retract the new [Fiduciary Rule](#), which [requires](#) financial advisers to work in the best interest of their clients. Here’s what the Chamber [had to say](#) about that: “The Fiduciary Rule is making it harder for retirement investors to get the advice they need. In fact, the people who most need help—beginning savers, small businesses and small-balance retirement investors—are the most likely to be denied access to investment advice by the Fiduciary Rule.”

Others have detected ulterior motives in the financial and business lobbies' opposition. Dennis Kelleher, president and CEO of the Wall Street accountability group [Better Markets](#), told [NPR](#) that the state programs' lower costs may squeeze profits for retirement advisors. (The White House seemed to acknowledge this when it [vowed](#) to sign the resolutions of disapproval: the Labor Department's rules "would give a competitive advantage to these public plans.")

[Spencer Walters](#), an employee benefits lawyer at Ivins, Phillips & Barker in Washington, suspects that business groups' main concern was the one at the bottom of their list: the Labor Department's insistence that to avoid ERISA regulation, the state programs had to be mandatory — all businesses over a certain size that don't offer a retirement benefit must participate. "I think there's more work involved in any new mandate, even if it sounds simple or the function is similar to payroll tax withholding," Walters says. "So it requires systems updates and new administration."

Raymond J. Keating, chief economist for the Small Business & Entrepreneurship Council, echoes this view, drawing on a deep well of suspicion toward government initiatives. "Government's first step into areas rarely is its last," he said by email. "State governments have not exactly been stellar in their records of running public pensions, so why would we want to expand their ability to suck in private pensions? Finally, the economics of giving more political control over retirement savings — that is, how dollars are invested — in the hands of politicians and/or their appointees does not bode well for those dollars being invested wisely, with resulting negative effects for the economy in general."

Keating prefers expanding private options, and so do business owners [surveyed](#) by the Pew Charitable Trusts. Eighty-two percent of them supported auto-IRAs sponsored by mutual funds, but support dropped nearly in half, to 44 percent, for state-run programs. Only 41 percent supported federally run programs.

Of course, you have to weigh the possible consequences of state control against those dollars not getting invested at all. But at root these objections are really more philosophical than practical. States won't be "running" an auto-IRA program the way they run their pension plans; rather they'll facilitate an individual's

contributions to an investment of his or her choosing, curated and managed by a third-party investment adviser. “There is no connection between these auto-IRA products and public pensions,” says David John, of the [AARP Public Policy Institute](#), who helped develop auto-IRAs. “There is a connection or similarity between these programs and [529 programs](#) — investment vehicles to finance college education — “ and we have not had that kind of problem, for the simple reason that the investment is contracted out to a private provider.”

And that faith in private enterprise may be misplaced: financial firms have been [scrutinized](#) for peddling expensive retirement funds with fees that cut down on returns for savers — that’s why the scorned Fiduciary Rule was created in the first place. Meanwhile, the state programs tend to have rules to keep investment fees and other expenses as low as possible to maximize returns.

The U.S. Chamber’s opposition to the federal guidance came even after the California Chamber of Commerce dropped its opposition to the auto-IRA legislation in that state. “You have the feeling that they’re arguing about something that’s not really in the legislation, or in the proposal,” says [William Gale](#), an economist at the [Brookings Institution](#) and director of its [Retirement Security Project](#). Companies “already deduct state taxes, and federal taxes, and payroll taxes, and funnel them off to the government. So all we’re talking about is adding one more deduction. It’s all done electronically. It’s a tiny, tiny speed bump for employers.”

John, for his part, has no problem with privately run programs. But, he and Gale both say, employer participation must be mandatory, otherwise companies simply won’t bother signing workers up. “Empirically it just doesn’t happen,” says Gale. “Employers are not doing it because employees are not demanding it, or they’re not in a position to demand it. And employees are not demanding it because they’re not thinking about it. But the evidence is that when you put this in front of people and say you’re automatically enrolled, they say, ‘Good, thank you.’ ”

It’s unclear whether employees will ever find themselves in that position of gratitude. The [House resolution](#) disapproving the Labor Department’s guidance for states awaits President Trump’s signature. Congress [dispatched](#) the guidance to local governments in April. But

Republican disapproval appears not to have deterred the states that have already passed these programs, and, says Walters, won't likely stop others from forging ahead.

Those states can expect lawsuits from businesses opposed to participating arguing that these programs are in fact ERISA plans prohibited by the federal law. But that was bound to happen anyway. "The DOL guidance would have been a helpful shield for states — and courts would have deferred to the DOL's interpretation of what constitutes an ERISA pension plan," Walters says. "But states were pursuing these types of arrangements before the DOL guidance, the DOL guidance provided just one safe harbor approach, and I think states will have some good arguments, even with the guidance retracted, that the arrangements are not subject to ERISA."

RECOMMENDED BY FORBES

[States Want To Help Small Business Workers Save For Retirement, Washington Says...](#)

[Senate Kills State-Sponsored Retirement Plans For Private Sector Workers](#)

[DOL Officially Delays Fiduciary Rule Until June 9, At Least](#)

[The \\$83,000 Question: How Much Do Regulations Really Cost Small Businesses?](#)

[The Richest Person In Every State](#)

[Apple May Announce Immediately Outdated MacBooks Next Month At WWDC](#)

[The 10 Most Dangerous U.S. Cities](#)

[Why You Should Open A Roth IRA Today](#)

This article is available online at:

2017 Forbes.com LLC™ All Rights Reserved