October 2016

Pooled Plans: A Promising Approach to Expand Access to Workplace Retirement Savings

More than 40 million Americans are not covered by a workplace retirement savings plan. Employees of smaller businesses are especially likely to lack access. This coverage gap is, in part, related to the complexity and legal obligations facing employers that wish to offer retirement plans.

To address this problem, many experts have suggested that employers—especially smaller employers—should be able to join larger retirement plans that serve the workers of many businesses. Third-party experts would organize these pooled plans, reducing the legal responsibilities and administrative burdens for the adopting employers. The Employee Retirement Income Security Act of 1974 (ERISA), the federal law that governs employee benefits, currently provides for such multiple-employer retirement plans in a limited way that most businesses cannot use.

On September 21, 2016, the Senate Finance Committee unanimously approved legislation to address this problem. The Retirement Enhancement and Savings Act would allow the formation of *pooled-employer plans,* which would enable businesses in different industries to offer a common retirement savings plan to their workers.[1] Several members of Congress—Republicans and Democrats—and the administration have proposed similar approaches, as has the Bipartisan Policy Center.

This issue brief describes the coverage problem and existing law, then it explains how the Senate Finance Committee legislation and similar proposals to establish pooled plans could help to increase retirement savings.

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The Problem: Lack of Access at Smaller Businesses

About one-third of private-sector workers in the United States—more than 40 million Americans—do not have access to a workplace retirement savings plan, such as a 401(k) plan.[2,3] Since most Americans will need savings or an additional source of income to supplement Social Security in retirement, this access gap is a major threat to retirement security. Smaller businesses are much less likely to offer a workplace retirement savings plan than larger businesses. While 90 percent of workers for the largest employers (500 or more workers) have access to such a plan, only about half of workers for the smallest businesses (fewer than 100 workers) do.[4] **What explains this coverage gap?**

Sponsorship of a workplace retirement savings plan entails a variety of responsibilities, which are set forth in ERISA. This federal law established uniform national regulation of employee-benefit plans with strong consumer protections. Specifically, employers that sponsor plans (known as "plan sponsors") must serve as fiduciaries, which means that they must act in the sole interest of participants (workers who have savings in the plan) and any other beneficiaries.

Plan sponsors must:

- Make many decisions about the design of the plan. (For example: who is eligible to participate? Will the employer contribute? How would such a contribution be structured? Are there investment and distribution options for plan assets?)
- Establish a trust to hold the assets of the plan.
- Hire service providers to operate the plan (for example, hire recordkeeping professionals to track savings and generate quarterly statements, investment managers to select specific mutual funds or other investment options, and trustees to look out for participants) or accept these responsibilities themselves.

Plan sponsors must also pass annual nondiscrimination and top-heavy tests—designed to ensure that the benefits of the plan do not disproportionately accrue to highly compensated employees—unless the plan qualifies for an exemption from testing, which requires adoption of a certain plan design (known as a "safe harbor").

Given the complexity and responsibility involved with offering a 401(k) plan, perhaps it shouldn't be surprising that many smaller employers do not sponsor a plan. Large companies have human resources and finance departments that can handle many of these functions. Additionally, those businesses typically have the resources to hire consultants and service providers to help design and manage their retirement plans. Smaller employers may lack the time and expertise to establish a retirement savings plan, and they might also be discouraged by the fear of potential legal liability should they make a mistake in the process of plan design or operation.[5]

Even small employers that do successfully navigate the system to sponsor a retirement savings plan face disadvantages due to their size. Employers with smaller plans lack bargaining power and typically pay higher fees for recordkeeping, investments, and other services than the bigger employers with large-asset plans do.[6] Many of those fees are passed on to participants and eat into investment returns.

Current Law Imposes Formidable Barriers to Pooled Plans

Many experts have suggested that smaller employers would be more likely to offer retirement savings plans if there were an easier way, perhaps if multiple, smaller employers could be combined into a single, larger plan that was centrally managed by an experienced party.[7] In fact, ERISA provides for multiple-employer plans (known as MEPs)—but with limitations that have prevented their widespread adoption. The U.S. Department of Labor (DOL), which enforces ERISA as it pertains to retirement-plan design and operation, requires that employers in a MEP demonstrate "a commonality of interest," meaning that the businesses must be in the same industry or under the same ownership.[8] For example, a MEP could include restaurants or dry cleaners, but not both.

Tax law imposes other barriers to the broader use of MEPs. Under the tax code, annual nondiscrimination and top-heavy tests apply to each individual employer participating in a MEP, not the plan as a whole, limiting the degree of centralization that can be achieved. Additionally, the violations of one employer participating in a MEP can impact the tax-qualified status of the entire plan (sometimes called the "one bad apple" rule), adding a degree of risk to MEPs that some employers may be unwilling to accept. Losing tax-qualified status is an enormously negative consequence, because one of the primary reasons for an employer to establish a retirement savings plan is to enable workers to benefit from the significantly higher contribution limits compared with Individual Retirement Arrangements (IRAs). Finally, employers that adopt MEPs under current law still retain significant fiduciary responsibilities, which many smaller employers are unprepared or unwilling to shoulder.

Proposals

Current law is poorly suited to employers that do not have the time, expertise, or motivation to jump through legal and administrative hoops to sponsor a retirement savings plan. To address this problem, policymakers have offered a variety of proposals that would open MEPs to unrelated employers from different industries.

POOLED-EMPLOYER PLANS

The Senate Finance Committee unanimously reported bipartisan legislation to create *pooled-employer plans,* which would be defined contribution retirement plans that any employer could adopt. Most administrative and some legal responsibilities would be transferred from the employer to a third-party pooled-plan provider, which would design and operate the plan and take responsibility for all administrative duties to meet the requirements of the tax code and ERISA.

Specifically, the pooled-plan provider would be required to:

- Serve as a fiduciary for the plan.
- Designate one or more trustees to be responsible for collection of contributions and holding assets.
- Register with DOL and the Treasury Department before commencing operations.
- Provide information and disclosures, as requested by the DOL and Treasury (to the agencies and to employers that join the pooled plan).
- Submit to audits by the agencies.
- Ensure that any person handling plan assets is covered by a fidelity bond, which is an insurance contract that protects the plan from losses due to fraud or dishonesty.
- Conduct annual nondiscrimination and top-heavy tests.
- Ensure that participating employers take required actions to administer the plan and to meet requirements of ERISA and the tax code.

Pooled-employer plans would not be subject to disqualification due to the actions of one adopting employer; the "one bad apple" rule would be replaced with new rules that would allow for the expulsion of a noncompliant employer from the plan. The only way that an entire plan could become disqualified would be due to noncompliance on the part of a pooled-plan provider.

Notably, the Senate Finance Committee legislation would retain significant legal responsibilities with employers. Employers that adopt a pooled-employer plan would have fiduciary responsibility for the initial selection and ongoing monitoring of the pooled-plan provider. They would, however, have some help, as the DOL and Treasury could require the pooled-plan providers to make certain disclosures to employers that would assist them in discharging their duties.

OTHER PROPOSALS FROM LAWMAKERS

Similar proposals have been advanced by members of Congress, such as Senators Susan Collins (R-ME), Bill Nelson (D-FL), Claire McCaskill (D-MO), Mike Enzi (R-WY), Elizabeth Warren (D-MA), Bernie Sanders (D-VT), and Tim Scott (R-SC), as well as Representatives Ron Kind (D-WI) and Dave Reichert (R-WA). Some of these proposals were introduced in legislation, while others were discussed in public hearings.

The pooled-employer concept was also a core provision in a July 2015 report by the Senate Finance Committee's Savings and Investment Bipartisan Tax Working Group, co-chaired by Senators Mike Crapo (R-ID) and Sherrod Brown (D-OH).[9] These proposals are generally very similar to the Senate Finance Committee approach, although many would limit adoption of pooled plans to employers with 500 or fewer employees. (The Retirement Enhancement and Savings Act would allow employers of any size to adopt a pooled-employer plan.)

The White House showed support for the concept in the president's budget for fiscal year 2017. Unlike the congressional proposals, the administration would limit adoption of pooled plans to employers (of any size) that have not sponsored a retirement plan for the previous three years. The plans would also be open to self-employed workers.[10]

BPC RECOMMENDATION

BPC's Commission on Retirement Security and Personal Savings released its final report in June 2016 and recommended that smaller businesses (with fewer than 500 employees) be allowed to join pooled plans. The commission named its version of this approach *Retirement Security Plans.*

In one major respect, BPC's recommendation is more transformational than other proposals; it would not hold adopting employers responsible for selection and monitoring of pooled-plan providers. Instead, BPC's proposal envisions a new certification process that would be jointly operated by the DOL and Treasury to screen potential pooled-plan organizers. A certification board would review both the proposed design of the plan and the qualifications of the prospective pooled-plan provider according to established criteria; those that are granted permission to operate would undergo recertification every other year.

To help businesses compare available options, the DOL and Treasury would publish basic information about all pooled plans—such as basic plan-design information, investment options, and plan-wide fees—on a central website. While the pooled-plan approach in the Senate Finance Committee legislation will certainly encourage employers to adopt a plan, an even further reduction of the employer's responsibility—in a way that maintains consumer protections—could promote even greater employer adoption.

A Foundation for Increased Retirement Savings

Pooled-employer plans would be an important advance in U.S. retirement policy and will hopefully initiate a series of efforts to expand retirement savings opportunities among Americans.

BPC's commission offered many additional recommendations that would complement this approach, such as:

- A new, safe-harbor alternative to testing that would encourage employers to adopt automatic enrollment and escalation, both of which are features that can improve participation and increase contribution rates.
- A reformed "myRA" program that would be a more-effective savings vehicle for lower earners, part-time employees, and workers who change jobs frequently.
- A nationwide minimum-coverage standard to dramatically expand access to workplace retirement savings and avoid a disjointed patchwork of state-by-state regulation.

A detailed description of BPC's proposal for Retirement Security Plans and additional recommendations to expand retirement savings are available on pages 38 to 55 of *Securing Our Financial Future: Report of the Commission on Retirement Security and Personal Savings,* available at: bipartisanpolicy.org/retirement-security.

Endnotes

[1.] Joint Committee on Taxation. "Description of the Chairman's Modification of the Retirement Enhancement and Savings Act of 2016." JCX-87-16: 9-14. September 2016. Available at: http://www.finance.senate.gov/download/description-of-the-chairmans-modification-of-the-retirement-enhancement-and-savings-act-of-2016.

[2.] Bureau of Labor Statistics. Employee Benefits in the United States—March 2016. Table A. July 2016. Available at: http://www.bls.gov/news.release/pdf/ebs2.pdf.

[3.] Bureau of Labor Statistics. The Employment Situation—July 2016. Table A-8. (Bipartisan Policy Center calculation.) Available at: http://www.bls.gov/news.release/empsit.t08.htm.

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[5.] For results from focus groups of employers discussing their reasons for not offering a plan, including perceived financial costs and difficulty of administration, see: The Pew Charitable Trusts. "Business Owners' Perspectives on Workplace Retirement Plans and State Proposals to Boost Savings" (4-5). 2016. Available at: http://www.pewtrusts.org/~/media/assets/2016/09/business_owners_workplace_retirement_plans.pdf. For survey results of employers not likely to offer a plan, see also: Transamerica Center for Retirement Studies. "The Current State of 401(k)s: The Employer Perspective" (22). 2016. Available at: https://www.transamericacenter.org/docs/default-source/employer-research/tcrs2016_sr_the_current_state_of_401ks_the_employer_perspective.pdf.

[6.] See, BrightScope. "The One Chart that Explains 401(k) Fees." Available at: https://www.brightscope.com/financial-planning/advice/article/15556/The-One-Chart-That-Explains-401K-Fees/.

[7.] See, Joshua Gotbaum. "Yes, the administration is really serious about retirement." The Brookings Institution. 2016. Available at: https://www.brookings.edu/opinions/yes-the-administration-is-really-serious-about-retirement/

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[9.] U.S. Senate Committee on Finance. "The Savings & Investment Bipartisan Tax Working Group Report" (6-8). 2015. Available at: http://www.finance.senate.gov/download/the-savings-and-investment-bipartisan-tax-working-group-report.

[10.] The White House. "FACT SHEET: Building a 21st Century Retirement System." 2016. Available at: https://www.whitehouse.gov/the-press-office/2016/01/26/fact-sheet-building-21st-century-retirement-system.

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