

EMPLOYEE BENEFITS LAW INFORMATION MEMO

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New York State Enacts Secure Choice Savings Plan – New Savings Opportunities for Employees, and New Obligations For Employers Without Retirement Plans

On Oct. 21, 2021, Gov. Hochul signed new legislation requiring private employers who do not sponsor a retirement plan to automatically enroll their employees into the State's new program. The New York State Secure Choice Savings Plan (Program) is essentially an automatic IRA program funded with employee payroll deferrals. The Program is intended to provide financial benefits in retirement to those individuals without an employer-sponsored retirement vehicle by maximizing retirement participation and savings, while embodying sound investment practices. Plans are "portable" and move with employees, so when employees switch jobs they can continue to contribute or roll over their accounts into other retirement savings plans.

The new law amends prior legislation which made this program optional for small employers. The Program shall be overseen by a nine-member board known as the "New York State Secure Choice Savings Board" (Board).

Eligible Employers

The Program covers employers who have employed at least 10 employees in New York State *at all times* during the previous calendar year, that have been in business at least two years, and have not sponsored a qualified retirement plan for their employees in the preceding two years. Employers include all persons or entities engaged in a business, industry, profession, trade or other enterprise in New York state – including both for profit and nonprofit organizations.

Employers are prohibited from terminating their own retirement plan in order to join the Program, and, to this end, the Program specifically excludes employers who have offered a qualified retirement plan in the prior two years.

Eligible Employees

Eligible employees will be automatically enrolled into the Program, with a deferral rate of 3%, and may change this rate at any time (subject to rules set by the Board). Participating employees will be able to make elective deferrals up to the maximum limits under Internal Revenue Code (Code) Section 219 (\$6,000 + \$1,000 catch up – although catch up contributions are not mentioned in the statute). Employees who opt out may re-enroll again during an open enrollment period (at least once per year).

Program Highlights

- Investment Options – The Program will contain various types of investment options intended to offer returns on employee contributions, with the long-term goal of utilizing these account balances to secure retirement income without incurring debt or liabilities to New York State.
 - *Default Investment Option.* The Program will employ a default investment option that will take into account various factors, including cost, risk, benefit level and ease of enrollment.

- Other investment options under consideration include: a conservative principal protection fund; a growth fund; a secure return fund; an annuity fund; a growth and income fund; and a life cycle fund with a target date based upon factors determined by the Board.
- Use of Third-Party Service Providers. The Program will contract with necessary service providers to offer retirement benefits, including investment managers, financial organizations, other financial service providers, consultants, actuaries, counsel, auditors, third-party administrators and other professionals as necessary.
- Performance Reviews. Financial organizations' performance will be periodically reviewed, including reviews of returns, fees and customer service, with reviews posted to the Program's website.
- Plan Administration Reviews. The Program's enrollment process will be monitored, including such aspects as employee opt-in procedures, setting contribution rates, selecting investment options and termination of participation in the Program.
- Financial Education. The Program will facilitate education and outreach for both employers and employees.
- Disclosures. The Board will design and disseminate informational materials, which shall include background information on the Program as well as necessary disclosures as required by law.
- In-Service Withdrawals. The Board will also consider withdrawal provisions (i.e., economic hardships, plan loans, portability, leakage). However, no such provisions will be available at inception.
- Program Fees and Expenses. Program fees will initially come from New York State funds, but ultimately be paid out of future employee contributions.

Fiduciary Duties

Although not intended to be covered by the Employee Retirement Income Security Act of 1974, as amended (ERISA), the Program maintains certain fiduciary duties which are strikingly similar to those found under ERISA. In sum, the Program:

- has been established for the exclusive purposes of providing benefits to enrollees and beneficiaries and defraying reasonable expenses of administering the Program;
- to invest with the care, skill, prudence and diligence under the prevailing circumstances that a prudent person acting in a like capacity and familiar with those matters would use in the conduct of an enterprise of a like character and with like aims; and
- to use any contributions paid by employees, and employers remitting employees' own contributions, exclusively for the purpose of paying benefits to the enrollees of the Program, for the cost of administration of the Program, and for investments made for the benefit of the Program.

Required Disclosures

Employers must provide employees with informational materials, including a disclosure form explaining many facets of the program, addressing:

- the benefits and risks associated with making contributions to the Program;

- the process for making contributions to the Program;
- how to opt-out of the Program at any time;
- the process by which an employee can change the contribution rate from 3%;
- that employees are not required to participate in the Program or contribute more than 3%;
- the process for withdrawal of retirement savings;
- the process for selecting beneficiaries of their retirement account;
- how to obtain additional information about the Program;
- an advisory informing employees to contact financial advisors for financial advice, as employers are not liable for investment decisions;
- information on how to access any available financial literacy programs; and
- a notice that the Program fund is not guaranteed by the State.

Employers must also provide a form to employees allowing them to elect to either opt-out or select a deferral rate other than 3%.

As a matter of first impression, these forms and disclosures appear to be similar to those associated with qualified retirement plans, such as a summary plan description. The Board will develop informational materials for use by employers.

NYS Secure Choice Savings Plan vs. NYC Retirement Security for All Act

Earlier in 2021, Mayor DeBlasio enacted the New York City Retirement Security For All Act (NYC Act), which contained similar provisions to the Program, but was limited to New York City employers. Some of the key differences between the two legislative packages are:

NYS Secure Choice	NYC Retirement for All
Applies to employers who at all times during the previous calendar year employed at least 10 employees in New York State, and have been in business at least two years	Applies to employers with at least five employees in NYC
Covered employees include those 18 years of age or older, employed by a NY employer, earning wages in New York State	Covered employees include those working 20+ hours per week, age 21+, with regular work duties in NYC
Automatically enroll eligible employees at 3%	Automatically enroll eligible employees at 5%
No penalties listed	Penalties for noncompliance

The NYC Act specifically provides that the NYC retirement plan would be discontinued if New York State established a retirement savings program that requires “a substantial portion of employers who would otherwise be covered” by the NYC plan to offer to their employees a savings program through payroll deduction or other method of contribution. Now that the Program is mandatory and will likely cover many of the same employers as the NYC plan, the City may halt efforts to implement its retirement plan. The NYC Board has up to two years from Aug. 9, 2021 to provide further details.

Even though the Act was effective immediately, the Program is not yet operational. Employers should monitor for developments to confirm required next steps. Once the Board opens the Program for enrollment, each participating employer will have nine months to set up payroll deferrals.

In addition, employers in NYC should also pay close attention for new guidance on the NYC Act to see if it will be repealed in light of the adoption of the Program or to ensure compliance with both laws.

If you have any questions, please contact [Lawrence J. Finnell](#), any attorney in our [Employee Benefits and Executive Compensation practice](#) or the attorney at the firm with whom you are regularly in contact.

