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IRA Mandate for Private Sector Employers in New York State and New York City

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New York State enacted requirements under which certain private sector employers, including not-for-profit organizations, are required to establish automatic enrollment payroll deduction IRAs if a qualified retirement plan is not offered to employees ("Secure Choice IRA"). More than half of private sector employees, including part-time workers, in New York do not have access to an employer-sponsored retirement savings option. The Secure Choice IRA was developed to address the retirement savings crisis. The purpose is to promote greater retirement savings for private-sector employees in a convenient, automatic, low-cost and portable manner. Only certain employers (defined below) are impacted by the new rules and have up to two years to implement the programs.

New York City has enacted similar legislation, Retirement Security for All. However, the New York City law states that the City program's retirement savings board will not implement the City program if "the state establishes a retirement savings program that requires a substantial portion of employers who would otherwise be covered employers to offer to their employees the opportunity to contribute to accounts through payroll deduction or another method of contribution." As the New York State program will likely cover many of the same employers as the New York City program, it is unclear if the City's program will be implemented. Employers should note that the Secure Choice IRA does not distinguish between New York State and New York City, and City and State distinctions discussed below will only apply if both programs are implemented.

Which Employers are Subject to the Secure Choice Savings Program Payroll Deduction IRA?

- Any private sector employer engaged in a business, industry, profession, trade or other enterprise in New York, including private and not-for-profit companies, that has at all times during the prior calendar year without interruption employed at least
  - Ten (10) employees in New York State, or
  - Five (5) employees in New York City,
- Has been in business at least two (2) years, and
- Has not offered, in the preceding two (2) years, a qualified retirement plan such as a 401(k) or 403(b) plan.

An employer that facilitates access for its employees to the Secure Choice IRA program is a participating employer. An employee who is enrolled in the Secure Choice IRA program is an Enrollee.

What Rights do Employees Have?

1. Employees have the right to (a) participate in the Secure Choice IRA and select the contribution level, which may be expressed as a percentage of wages or as a dollar amount up to the IRA annual limit (the limit for 2022 is $6,000, and $7,000 for employees age 50 and older).

2. Employees can affirmatively elect to opt out of the Secure Choice IRA program using the applicable Opt-Out Form.

3. If an employee fails to opt out of participation or make an election to participate with a different level of contributions, the employer will automatically enroll them at the default contribution rate, which is

- Three percent (3%) of wages in New York State, or
- Five percent (5%) in New York City (the “Default Rate”).

4. Enrollees may change their contribution level at any time, subject to rules promulgated by the New York State Secure Choice Savings Board.

5. The Secure Choice IRA is individually owned, which makes it portable—employees can take it with them if and when they change jobs.

What Must an Employer Do?

1. Under the Secure Choice IRA, a participating employer must provide informational materials to its employees. The notice must be provided to new employees at the time of hiring and for existing employees at least one month prior to the participating employer's facilitation of access to the Secure IRA Savings Program. The notice must inform the employees of their election choices; the benefits and risks associated with making contributions to the program; the processes for making contributions, opting out of the program, changing the level of contributions, withdrawing savings, selecting beneficiaries, accessing information on financial literacy programs and obtaining more information; information on how to obtain financial advice from financial advisors (that participating employers are not in a position to provide financial advice and that participating employers are not liable for the investment decisions that employees make); and that the program fund is not guaranteed by New York State.

2. Participating employers must automatically enroll in the Secure Choice IRA each employee who does not opt out of participation using the applicable Opt-Out Form or who has made an election to participate with a level of employee contributions other than three percent (3%) of wages in New York State or five percent (5%) in New York City.

3. Participating employers must withhold and remit payroll deductions to the program by the 30th day after the employee is enrolled in the Secure Choice IRA.

4. Participating employers must maintain records for at least three (3) years.

Note: Employers do not make employer contributions to the Secure Choice IRA on behalf of their employees. Further, employers cannot terminate an existing qualified plan to participate in the Secure Choice IRA.

Does the Employer Bear any Risk?

The program is designed to limit liability for employers. The Secure Choice IRA is not covered by the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), and the participating employer will not be considered to be a fiduciary of the program. Participating employer involvement is limited. Unlike a qualified plan, with the Secure Choice IRA, there are no employer contributions, no annual testing requirements and no annual returns to file. Participating employers will not have liability for an employee's decision regarding whether to participate in, or opt out of, the program or for the investment decisions of the New York State Secure Choice Savings Board or of any enrollee. The Board must select investment options that include a target date life-cycle fund and may also include a conservative principal protection fund, a growth fund, an annuity fund or a secure return fund. In New York City, there are penalties for employers that do not enroll their employees, make deposits or maintain records. The penalties escalate for continued violations ($250 per employee for the first violation, $500 per employee for the second violation within two years and $1,000 per employee for the third and subsequent violations, plus an additional $100 fine per violation for employers that fail to maintain records of compliance for three years).

ERISA Preemption

Similar automatic IRA programs have been adopted in a more than a dozen states, including California, whose program was at issue in the first case challenging whether ERISA preempts a state law that creates a state-run IRA program. The Ninth Circuit upheld the lower court's decision that ERISA preemption does not apply. The panel concluded that ERISA applies to plans that are established or maintained by an employer, but that here "it is the State that has established CalSavers and the State that maintains it—and not eligible employers." On Feb. 28, the U.S. Supreme Court declined to hear the case, leaving in place the Ninth Circuit's ruling that state-sanctioned auto-IRAs can coexist with employer-sponsored employee benefit plans subject to ERISA.

When are the Rules Effective?

Although the New York State and New York City laws are currently in effect, each of the governing boards, which are responsible for the administration and operation of the automatic IRAs, have up to two years to implement the programs. Thus, there is no need for employers to take immediate action. Employers will have nine months after the governing boards open the program for enrollment to begin to make payroll deposits. On Jan. 26, the New York State Secure Choice Program Board held its first meeting and directed the Department of Taxation and Finance to undertake the implementation of the program.

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If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

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