

NEW YORK STATE AND CITY EMPLOYERS SHOULD PREPARE TO PROVIDE RETIREMENT PLAN OPTIONS FOR THEIR EMPLOYEES

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New York State Employers

In October 2021, New York State (“NYS”) passed legislation, [Senate Bill S5395A](#), amending the New York State Secure Choice Savings Program (the “Program”), a retirement savings plan. The amendment requires the automatic enrollment of employees in the Program by employers who do not provide employer-sponsored retirement plan options.

The stated goal of the Program is to promote greater retirement savings for private sector and non-profit employees in a convenient, low cost manner. The Program is a state-run, payroll deduction based individual retirement account (“Secure Choice IRA”) administered by the Secure Choice Savings Program Board (the “Board”), which is responsible for designing and implementing the Program.

Coverage and Obligations

Employers, engaged in a business, industry, profession, trade or other enterprise including private and not-for-profit companies, must provide a retirement plan to their employees if they: (1) employ at least 10 employees (full-time or part-time) in the State of New York during the prior calendar year; (2) have been in business for at least two years; and (3) do not offer employees, in the preceding two years, a qualified retirement plan such as a 401(k) or 403(b) plan. Employers may choose to provide an employer-sponsored retirement plan or access to the state run Program. Employers that elect to facilitate access for their employees to the Program are known as “participating employers.” The participating employer:

- Provides the Program’s informational materials, including the Opt-Out Form, to new employees at the time of hiring or existing employees at least one month prior to enrollment in the Program;
- Sets up the Secure Choice IRA to allow employees to participate in the Program within nine (9) months of the Board opening the enrollment period;

- Manages employees' contributions to the Secure Choice IRA who have elected to participate at a level other than the default 3% of their after-tax income; and
- Withholds and remits the payroll deductions to the Program by the 30th day after the employee is enrolled in Secure Choice IRA.

Unlike the Board who serves a fiduciary role and makes investment decisions, a participating employer's role is purely administrative. They do not establish or maintain the Program, make any employer contributions to the Secure Choice IRA, or file annual returns. Because it is a state run program, it does not qualify as an Employee Retirement Income Security Act of 1974, as amended ("ERISA") plan and is designed to limit liability for employers. (**Note:** Employers who currently offer a qualified retirement plan are prohibited from terminating their plan in order to join the state-run Program.)

Employee Rights

Employees enrolled in the Program are referred to as "enrollees." Enrollees have the right to opt out of the Program at any time, change the contribution level (which may be expressed as percentage of wages or as a fixed dollar amount up to the IRA annual limit), and take their Secure Choice IRA with them if or when they change jobs.

Next Steps

Although Senate Bill S5395A went into effect immediately, the Board has up to two (2) years to design and implement the Program. The Board held its first and only meeting, in January 2022, and adopted (1) bylaws to govern the development, implementation and administration of the Program, and (2) a resolution delegating its authority and responsibility for the development and implementation of the Program to the NYS Department of Taxation and Finance (the "Tax Department"). While we have yet to hear from the Board or the Tax Department about when the Program will open for enrollment, employers should familiarize themselves with details about the Program and look out for regulations that may be issued.

New York City Employers

The [Savings Access New York Retirement Program](#) ("NYC Retirement Program"), which was enacted on May 11, 2021 by New York City ("NYC") further covers NYC employers. The NYC Retirement Program creates a retirement saving program with mandatory auto-enrollment, payroll deduction individual retirement accounts for employees of private sector employers who do not offer a retirement plan. While the NYC Retirement Program is similar to the NYS Program, the key differences from the NYS Program are that the default payroll deduction is 5%, which can be adjusted by the employee, and it applies to employers with five or more employees. To date, the Savings Access New York Retirement Program Board has not implemented the program. It is unclear whether this is because the NYC Retirement Program directs the Board not to implement the

program if: (1) “the state establishes a retirement savings program that requires a substantial portion of employers [...] to offer to their employees the opportunity to contribute to accounts through payroll deduction” or (2) “there is a substantial likelihood that such program conflicts with, or is preempted by” state law.

We will continue to monitor developments in both the state and city’s retirement savings programs, and provide updates.

Bryan Cave Leighton Paisner LLP has a team of knowledgeable employment lawyers and other professionals. If you or your organization would like more information on this or any other employment issue, please contact any attorney in our [New York City office](#) or the [Employment and Labor practice group](#).

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