

# California Secure Choice Retirement Savings Program Under Development; Employer Input Vital

Signed by Governor Edmund G. Brown Jr. in 2016, SB 1234 (de León; D-Los Angeles; Chapter 804), along with the original SB 1234 (de León; D-Los Angeles; Chapter 734) and SB 923 (de León; D-Los Angeles; Chapter 737) in 2012, creates a framework for the California Secure Choice Retirement Savings Investment Program.

The program is a state-run retirement savings plan mandated for private employees that includes automatic enrollment with an opt-out provision for an estimated 6.3 million California workers whose employers do not currently offer an eligible retirement savings program. Private employers with five or more employees will be required to automatically enroll their employees into and make payroll deductions for their Secure Choice retirement accounts, unless the employee opts out.

Employers that do not offer a retirement plan or do not auto-enroll their employees into Secure Choice would be subject to a penalty; otherwise the program is intended to impose no risk or liability to the employer or to the state. It is intended that employers' responsibility is simply as a pass-through; to deduct and submit contributions from employee wages.

The program will be funded by an automatic 3% to 5% payroll deduction; specific default contribution will be determined by the Secure Choice Investment Board. There is no contribution made by the employer into the retirement account. The 2016–2017 state budget authorized \$1.9 million to the program for start-up costs. As projected by the feasibility study completed in 2016, the estimated cost to fully fund the program and its infrastructure will be \$134 million.

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Once Secure Choice opens its doors, it will be phased in: eligible employers with more than 100 employees will be mandated to enroll employees within 12 months after the program is open for enrollment; employers with more than 50 employees will be mandated to participate within 24 months after the program is open for enrollment; and within 36 months all other eligible employers will be required to participate.

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During the legislative progress of SB 1234 in 2012 and in 2016, a large coalition of employer organizations across many industries expressed significant concerns with the proposed

plan. Although the California Chamber of Commerce and the coalition ultimately removed opposition, they did so because concerns regarding employer liability were addressed to the extent possible and as proposed by the coalition.

The primary concern is the potential employer exposure to liability, especially in regards to the potential applicability to or pre-emption of the program by the federal Employee Retirement Income Security Act of 1974 (ERISA). If ERISA were to apply, employers could be at risk for considerable liability which is unknown because this type of program has never been done before. The coalition attempted to minimize this risk to the extent possible with proposed amendments which the author accepted and incorporated into the legislation.

## Criteria Must Be Met Before Enrollment Can Proceed

Implementation of the program is contingent upon a number of CalChamber- and other business organization-proposed requirements being met, as specified in the legislation establishing the practical and legal conditions for implementing the program. Secure Choice may proceed with enrollment only if the following criteria are met:

- The program must be structured to meet the criteria of the federal Department of Labor (DOL) safe harbor from ERISA.
- Retirement accounts must qualify for the favorable federal tax treatment ordinarily granted Individual Retirement Accounts (IRAs) under the federal Internal Revenue Service (IRS) Code.

- The Board has defined in regulation the roles and responsibilities of employers pursuant to the DOL criteria for the safe harbor.

- The Board has adopted a third-party administrator operational model that shields employers from misplaced liability and

limits administrative burden on employers. This model limits employer interaction with the employee and limits employer administrative responsibilities.

- The state Employment Development Department has developed an employee information packet available in electronic format that includes background information on the program as well as the required disclosures, and an opt-out form for employees.

- Comprehensive outreach and education of employers and employees has been undertaken.

## Worker Participation in Retirement Plans

According to a 2011 report by the University of California,

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Berkeley Center for Labor Research and Education, *Meeting California's Retirement Security Challenge*, 62% of private sector workers in California do not participate in an employer-sponsored retirement plan, compared to 57% nationally. The study notes that 84% of California workers in firms with 25 or fewer employees do not participate in an employer-sponsored plan.

The gap between what U. S. households have saved for retirement and what they should have saved in order to maintain their pre-retirement standard of living is \$6.6 trillion, according to state Treasurer John Chaing ([www.treasurer.ca.gov/scib/](http://www.treasurer.ca.gov/scib/)). Forty-seven percent of California workers are on track to retire with income below 200% of the federal poverty level, a commonly used threshold for economic hardship.

Because of the discouraging lack of savings, and lack of voluntary participation in retirement savings programs, the supporters of the Secure Choice Program believe that California employees need a state-run program to ensure that workers accumulate the savings they need for a secure retirement.

In addition to California, seven states (and a growing number) have enacted legislation to create retirement savings programs for private sector workers. Most of those laws require employers that do not offer workplace savings arrangements to automatically enroll their employees in payroll deduction IRAs administered by the states, while other state laws create a marketplace of retirement savings options geared toward employers that do not offer workplace plans. It is anticipated that Oregon will be the first state to implement a program, which is set to launch in July 2017.

To allow states to adopt programs like Secure Choice, the DOL issued regulations on August 25, 2016, as instructed by President Barack Obama, to set forth a safe harbor for employers under ERISA. The rule provides guidance for states in designing such programs so as to reduce the risk of ERISA pre-emption. The proposed DOL rule is intended to guide states as they create state legislation necessary to establish programs to meet the requirements of the safe harbor established in the new federal rules. The objective is to reduce the risk of such state programs being pre-empted by ERISA if they were ever challenged. The DOL acknowledged, however, that such a risk cannot be eliminated.

### Anticipated Action by Secure Choice Investment Board in 2017

The board will have a full array of tasks to complete before beginning enrollment in the program, starting with the appointment of an executive director early in 2017. Board staff is organizing stakeholders, including employer representatives, to gear up for the years-long effort to establish the necessary infrastructure requirements to support Secure Choice. CalChamber will be an active member of the business stakeholder advisory group.

The board has opted to hire several consultants to assist in getting the program ready for enrollment. Requests for

Proposals (RFPs) must first be developed in hopes of hiring the consultants later in the year. The three functions to be assigned to consultants are regulation development, recordkeeping services consultation, and investment management.

The board will need to make various decisions regarding operations and investments early in 2017 in order to begin rulemaking in the same year. Following are just a few of the rules and specifics that must be addressed:

- How outreach will be designed for employers before enrollment, including materials. The measurement of when outreach has been accomplished. The process of reaching employers, especially small employers, and how to ensure that employers know their roles and responsibilities, and the dangers of exceeding them.
- The roles of the recordkeeper and the employer. Employer responsibilities must be limited in order to minimize administrative burden and exposure to liability.
- Process and procedure for providing the disclosure documents to the employee, and specifying whether by the employer or the recordkeeper.
- Development and distribution of disclosure documents for employees. This is important in that those documents will include information for employees that protects employers and informs the employees.
- Process for employers and payroll processors to transmit information and payroll deductions to the recordkeeper, including specifying information and timelines.
- The specifics of the open enrollment process that occurs every two years and determining if it is to be conducted by the employer or the recordkeeper. CalChamber supports this as a function of the recordkeeper.
- Rules for employers whose employee count drops below the mandated participation number of 5 employees.
- The specifics of enforcement—which agencies will enforce what through what process, and the appeal process.

The processes, procedures, and roles and responsibilities of the various participants in the program will be very impactful to employers. It is important for the business community to play an active role in the development of regulations as well as other important aspects of the program in order to be best protected from onerous administrative burdens, exposure to enforcement action and potential liability.

### CalChamber Position

The Secure Choice program must comply with the principles embodied in California law, and in the federal Department of Labor rules. Regulations must create program guidelines and rules that are fair and maintain the limited liability and limited administrative participation for employers.

The program must be easy for employees and employers to understand, easy to implement and easy to comply with its requirements. It is critical that education and outreach take place in a comprehensive manner in advance of the program,

## RETIREMENT SAVINGS

and that adequate resources are accessible before enrollment and into the future, and known to employers so they can seek assistance in implementing the program in their workplaces.

The rulemaking process must be transparent and include adequate and real employer participation in order to address employer concerns and their operations that will be affected.

It is estimated that more than 6 million employees will be eligible for Secure Choice. That is an enormous number of individuals to educate and enroll. Equally huge is the corresponding education and support for employers to ensure an orderly, smooth enrollment process, and avoidance of liability and risk for employers.

Employers must be educated regarding their responsibility for withholding and directing contributions, and for opting employees in and out. Administrative provisions must be established and effectively communicated to both employees and employers.

CalChamber will continue to actively engage in rulemaking, closely monitor the activities of the Secure Choice Investment Board and provide input as appropriate regarding program design and employer risk.



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