

California Secure Choice Retirement Savings Program Continues Development

Background

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 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 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 2017–2018 state budget authorized \$15 million to be loaned to the program for start-up and administrative 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.

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. It is anticipated that enrollment will begin in late 2018 or later. The board is considering implementing a pilot program before the formal enrollment implementation.

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.

(For further background information, see 2017 Business Issues Guide article “California Secure Choice Retirement Savings Program Under Development; Employer Input Vital.”)

Employer Liability and ERISA

The primary concern for employers remains unresolved—employer exposure to liability, especially in regards to the 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, the extent of which is unknown because this type of program has never been done before.

To allow states to adopt programs like Secure Choice, the federal Department of Labor (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 was subsequently withdrawn by Congress in 2017, leaving open once again the question of ERISA pre-emption. The rule would have provided guidance for states in designing such programs to reduce the risk of ERISA pre-emption. According to the statute that established Secure Choice, California's program is not allowed to proceed if it is subject to ERISA. The Secure Choice Investment Board continues to debate the specifics of the enrollment process as this is key to creating a program that is not pre-empted by or subject to ERISA. Without assurance from the federal government, the application of ERISA remains uncertain, yet the program is proceeding.

The ERISA Industry Committee (ERIC) filed a lawsuit on October 12, 2017 against the Oregon Retirement Savings Board, alleging that a provision of the state's OregonSaves retirement program for private-sector employees obstructs ERISA. The Oregon program is similar to California's Secure Choice. The program requires large employers that already provide a retirement plan to formally request an exemption from OregonSaves, completing paperwork every three years to qualify to be exempt from the state mandate. The complaint notes that reporting on plan activities is a core ERISA function governed exclusively by federal law.

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Anticipated Activity

The Secure Choice staff, along with its consultants and legal counsel, has begun developing regulations to establish the operational aspects of the program. Public workshops were held for comments from the public, and draft regulations were issued late in 2017. Following are just a few of the rules and specifics that must be addressed by regulations:

- Specifically, 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.
- Specifically, the roles of the recordkeeper and the employer. Employer responsibilities must be limited in order to minimize administrative burden and liability exposure.
- Process and procedure for enrollment of employees, including providing the disclosure documents to the employee, and specifying whether by the employer or the recordkeeper. 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 specifically what information along what 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.
- The specific method of determining the number of employees (over a period of time, at once, an average, a snapshot), and 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 continues to be actively engaged in all aspects of the program that have an impact on employers.

CalChamber Position

The Secure Choice program must comply with the principles embodied in California law and with federal statutes by implementing processes and procedures that create confidence for employers that the program is not subject to or pre-empted by ERISA. Regulations must create program guidelines and rules that are fair, and limit liability and 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 to employers regarding their responsibilities and how to obtain assistance take place in a comprehensive manner in advance of the program, and that adequate resources are accessible prior to enrollment and into the future.

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 impacted.

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, and avoid liability and risk for employers.

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

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