

NEW YORK STATE ENACTS MANDATORY AUTO-IRA LAW

Hodgson Russ Employee Benefits Alert
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On October 21, New York joined the ranks of states mandating that certain employers either offer a qualified retirement plan or join a state-facilitated retirement savings program. New York passed legislation in 2018 outlining a voluntary version of this now mandatory program, but the voluntary plan never got running. Below is a description of many of the key features of the New York State Secure Choice Savings Program.

Which employers does this apply to?

This Secure Choice Savings plan applies to for-profit and non-profit employers in New York state that meet the following requirements:

- the employer had at all times during the previous calendar year at least ten employees in the state,
- the employer has been in business for at least two years, and
- the employer does not offer a qualified retirement plan such as a 401(k) or 403(b).

All three of these requirements have to be met in order for an employer's participation in the program to be mandatory. This means if an employer had less than 10 employees at any point during the previous year, participation in the program isn't compelled. Likewise, if an employer has been in business for more than two years and has at least ten employees, participation isn't required if the employer already offers a qualified retirement plan to its employees. A "qualified retirement plan" most often comes in the form of a 401(k) or 403(b), but the definition includes other types of retirement plans too.

The legislation contains a provision prohibiting an employer from terminating the employer sponsored retirement plan for purposes of participating in the Secure Choice Savings plan.

What must participating employers do?

A participating employer's duties under the program are designed to be purely administrative. As such, participating employers must:

- set up a payroll deposit retirement savings arrangement,

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NEW YORK STATE ENACTS MANDATORY AUTO-IRA LAW

- automatically enroll each employee who does not opt out of the program,
- withhold and remit employee contributions to the program, and
- disseminate the state's employee informational materials.

This program is designed with the intention of not creating an employer-sponsored retirement plan subject to ERISA. Thus, unlike with a 401(k) plan, for example, participating employers will not have to perform nondiscrimination testing or the like.

When must participating employers join the program?

The legislation became effective immediately, but it calls for enrollment of employees to begin no later than December 31, 2021. Additionally, participating employers must setup their payroll deposit arrangements within 9 months of the program opening for enrollment. However, the board (more on them below) may delay implementation of the program by up to 12 months if they determine it is necessary. All of this is to say that it's currently unclear exactly when employers will have to enter the program.

Is there a penalty for employers who do not comply?

The legislation itself does not identify a penalty for noncompliance. Nonetheless, regulations will be issued to implement this program and it is likely these regulations will address penalties for noncompliance. So, stay tuned.

So who are the employees that must be enrolled?

This program covers all employees in the state who are at least 18 years old and who earned wages working for an employer in the state. Interestingly, the program does not distinguish between part-time and full-time employees, so all must be included. Nonetheless, employees can opt out of participation in the program at any time.

Who is running this program?

The program is to be run by the seven member New York Secure Choice Savings Program Board. This Board is a fiduciary of the program and they are tasked with designing and operating the program. The implementing legislation provides just a general framework for the board to work within and leaves the Board to make many important decisions such as the investment options offered to the participants.

It should be noted that participating employers are not fiduciaries under this program. This means they will face no liability with regard to investment returns, program design, and benefits paid to program participants.

Where are employee contributions invested and how much is permitted?

As mentioned above, the Board is tasked with selecting the investment options in the program. At this point these investment options aren't known, but multiple options will be available and they will differ in terms of cost and risk profile to appeal to a broad range of savers.

NEW YORK STATE ENACTS MANDATORY AUTO-IRA LAW

For employees who do not elect a deferral amount, the default election will be 3% of wages. Additionally, the individual retirement accounts created under this program will be Roth which means they will be after tax contributions. As such, the federal contribution limits for Roth IRAs will apply (\$6,000 in 2021 and 2022) as well as the catch-up contribution rules for employees 50 years old and older. Pre-tax contributions are not permitted.

Who is paying for this?

The legislation allows the state to pay administrative costs associated with the creation and management of the program until the program has sufficient assets to cover these costs itself. At that point, costs associated with the program—including any repayment of start-up funds provided by the state—must be paid out of money deposited in the program.

Why is New York state doing this?

There is a retirement savings crisis in the US, and this is especially severe among employees of small employers. This program is designed to make retirement saving easier for employees who do not already have access to an employer sponsored retirement savings program.

Will this impact the NYC auto-IRA law?

This is unclear, but it seems likely. Earlier this year, New York City (NYC) became just the second city to enact a mandatory auto-IRA law. See our article about this here. The NYC legislation, however, provides that if the state enacts 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” the NYC program will be discontinued.

The uncertainty stems from the fact that the NYC program applies to employers with 5 or more employees in NYC while the state program applies to employers with 10 or more employees in the state. Despite this difference, it seems likely the NYC program will be discontinued in light of the new mandatory state program because the state program applies to most employers covered by the NYC program.

To discuss these developments in greater depth and how they may affect you, please contact [Josh Gmerek](#) (716.848.1481), [Mike Flanagan](#) (716.848.1480), or any member of our [Employee Benefits](#) practice.