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CLIENT ALERT

The New Illinois Secure Choice Savings Program: Considerations for Employers

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On January 4, 2015, the governor of Illinois signed into law the Illinois Secure Choice Savings Program Act (S.B. 2758). This law—first of its kind in the nation—requires certain employers to provide an automatic payroll deduction for savings in a Roth IRA for employees who are over age 18 and who do not opt out. Employers who are subject to this mandate are those who have 25 or more employees in Illinois, have been in business for at least two years, and have not offered their employees tax-favored retirement benefits in the preceding two years. "Small employers" not otherwise subject to the Act may participate in the Program on an elective basis. The Program will not be activated before 2017, and affected employers must establish a payroll deposit arrangement "at most nine months" after the Program opens for enrollment.

Several interest groups promoted this legislation, and several opposed this ambitious law.

Scope of Program

The Secure Choice Savings Program will require affected employers to automatically enroll eligible employees who do not opt out and to facilitate payroll deductions for those employees. The statute provides that employers will not be treated as fiduciaries "over the Program" or liable for Program investments, design, or benefits. No employer contributions are required.

Open enrollment will occur at least once a year. Affected employers will forward the payroll deductions to a system administered by a seven-member state board that will supervise the investment of the assets, engage investment managers, and perform similar supervisory functions. Employers' activities will also include distributing materials provided by the state board. Penalties for an employer's violation will be $250 per employee per year, with the amount increasing to $500 for violations with respect to employees who continue to be treated as unenrolled in years after the initial assessment.

Enrollees may contribute up to the IRA maximum, with a default level of 3% of wages for those who do not elect a different percentage or amount. Enrollees will have the investment options provided by the state board.

Employers must consider various federal tax obligations. For example, the Program's treatment of contributions to a Roth IRA as a payroll deduction implicates federal income and payroll tax obligations with respect to those funds. Contributions to Program accounts, when combined with an employee's IRA contributions outside of the Program, may not exceed the Tax Code's annual limit. The extent of an employer's responsibility, if any, in connection with an employee's compliance in this context, remains to be developed.

In addition, when disputes arise with respect to an employer's obligations under the Act—for example, Program penalty assessments—contested matters are ultimately appealed under the Illinois Administrative Review Law (ARL) in a 35-day window (like a statute of limitations, only stricter) for challenges to agency decisions (here, the Department of Revenue). As many practitioners know, the ARL process is one that is laden with procedural landmines for parties who challenge agency decisions in state court.

From a different perspective, the Act attempts to restrict the scope of fiduciary obligations—potentially good news for employers and others involved in the Program. However, drawing lessons from the ERISA experience, contributions to 401(k) plans have sometimes resulted in the delay or failure of contributions from financially distressed employers who must forward money deducted from employee paychecks. For ERISA plans, this can result in United States Department of Labor (USDOL) enforcement in court. However, from practical perspective, the Illinois Secure Choice Savings Program raises questions as to how such non-ERISA violations will be treated.

The law specifically requires the state board to request an opinion from the USDOL regarding ERISA's applicability to the Program. Also, the state board may not implement the Program if the Program's IRAs fail to qualify for favorable federal tax treatment normally accorded to IRAs, or if it is determined that the Program is an employee benefit plan, or if any "employer liability is established" under ERISA. In addition, the Program may not be implemented unless there is adequate funding for its operation. Delay in satisfying these various conditions could push the start date to a later time.

Although the Act strives to create a "non-ERISA environment" in which no Program activity will constitute an ERISA *plan*, the fact that 50 different states may create various programs with rules different from the Illinois rules suggests that the USDOL may scrutinize not only the definition of a "plan" but also the *Act* itself for adequate avoidance of the patchwork of rules from which ERISA was enacted to spare multi-state employers.

The recently inaugurated federal *My*RA (my retirement account) program bears some analogy to the Illinois Program; for example, its reliance on Roth IRAs. However, there are several important differences in the two models. Although the USDOL recently gave assurance that *My*RAs would not constitute ERISA plans, the specter of numerous state programs could well give federal regulators pause. ERISA preemption does not extend to federal laws, but many non-federal programs promoting retirement benefits could be viewed as requiring close and time-consuming review. Assuming federal authorities conclude that ERISA is not implicated by the Illinois Program, that conclusion may be slow in coming if DOL regulators see a need to deal comprehensively with future programs of other states. On the other hand, Illinois authorities may have already coordinated informally with the USDOL, and the Program's clearance might be fast-tracked in Washington.

Start-up of the Program will also entail definitional clarifications of certain terms used in the Act, particularly those used to define the scope of the Program.

Much commentary on this law is possible—from regulatory, fiscal, procedural, and other perspectives. But given the two-year wait, the required clearances from federal agencies, the possibility that some changes in the law may occur, and the potential challenges in Illinois for funding the Program's operations, we will defer detailed commentary to a later date.

What Should Employers in Illinois Do Now?

Given the long period of at least two years before the Act's implementation, and given that the law directs Illinois regulators to deal with federal agencies and secure adequate funding for Program operations, employers should monitor developments relating to the Program.

Employers who clearly or arguably employ 25 or more employees should determine whether any Illinois employees are not covered by a tax-favored retirement plan. Close questions will have to be reviewed in light of interpretations of the statute. A single eligible employee who does not opt out may require the employer's compliance.

Effect on Employers Based in Other States

If the new law takes effect in Illinois as presently contemplated—and even if it doesn't—other states may soon be seen enacting similar laws intended to mandate the enrollment of employees not covered by an employer's retirement plan. Those jurisdictions should also be monitored for legislative moves like the Illinois Secure Choice Savings Program Act because the Illinois Act could be a harbinger of similar laws in other states.

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