

## Illinois Secure Choice Retirement Savings Program No Longer Mandatory?

By Joy M. Napier-Joyce

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The future of the Illinois Secure Choice Savings Program Act (Secure Choice) is uncertain following Governor Bruce Rauner's amendatory veto that could make employer participation in the Secure Choice program optional.

The legislation, as enacted, makes participation in the Secure Choice program mandatory for covered employers that do not offer employees a qualified retirement plan. These employers are required to automatically withhold five percent of an employee's compensation (up to the IRS annual maximum allowed for IRA contributions each year), unless the employee elects a different amount or opts out of the program entirely. Employers then remit those contributions to the Secure Choice program. The program is set to roll out in November 2018.

On August 14, 2018, Governor Rauner issued an amendatory veto to a bill that makes several technical changes to the program. The veto makes the Secure Choice program permissive, rather than mandatory. It is unclear whether the veto will stand or whether a majority of the Illinois Legislature will override it. A vote by the Legislature may not occur until November, when the body is scheduled to be in session next.

The Governor noted in his veto message his concerns with the Secure Choice program. These include worries that:

- Fewer small employers will sponsor retirement plans;
- Small employers may terminate their existing company-sponsored plans;
- Federal guidance has changed regarding the relationship of programs like Secure Choice with the Employee Retirement Income Security Act of 1974 (ERISA); and
- The program has a history of delays and poor implementation.

The Governor's concern regarding ERISA may be based, in part, on possible federal preemption. A 2016 U.S. Department of Labor (DOL) rule that expressly exempted certain state-run retirement programs from ERISA was repealed in 2017 after President Donald Trump signed into law a Congressional joint resolution disapproving the rule.

However, the Illinois State Treasurer's materials on the program provide that employers who participate in Secure Choice are not subject to ERISA. (The Treasurer's office has been charged with administering Secure Choice by the program's governing Board, and the Treasurer serves as the Chair of that Board.) Program implementation continues, taking into account the statutory language enacting Secure Choice clearly provides that the program cannot be implemented if it is determined to be subject to ERISA.

To date, no court has ruled on whether Secure Choice is preempted by ERISA, and the DOL has not formally opined on the subject. Preemption challenges may be brought, and it is unpredictable what position a court or the DOL will take on the issue. Further, a possible challenge to the legality of Secure Choice adds uncertainty to the program's future.

We will continue to monitor the situation and report developments. If you have any questions or would like assistance in understanding your company's obligations under Illinois Secure Choice, please contact your Jackson Lewis attorney.

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