

The California Secure Choice Retirement Savings Trust Act: California's New State-Mandated Retirement Savings Account Program

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California is the latest state to pass legislation providing for a state-mandated retirement savings program. On September 29, 2016 Governor Jerry Brown signed Senate Bill 1234, known as the California Secure Choice Retirement Savings Trust Act (“***The Secure Choice Act***”). The Secure Choice Act became effective as of January 1, 2017 and is referred to as “the most ambitious push to expand retirement security since the passage of Social Security in the 1930’s.”¹ In the wake of the passage of The Secure Choice Act, many employees and their respective employers have been left to consider what impact the legislation will have when the program becomes fully operational. This letter is intended to offer insight into The Secure Choice Act and provide you with an understanding of how employers may be effected by this new law.

OVERVIEW AND GENERAL INFORMATION

According to information furnished by the California State Treasurer’s Office, roughly 7.5 million California residents work for employers who do not offer their employees any form of retirement savings plan. The majority of these workers are employed by businesses with fewer than 100 employees. In fact, 77%, or roughly 4.5 million, of those employed by businesses with fewer than 100 employees do not have access to a workplace retirement account. Studies show that to produce the income needed to maintain one’s standard of living in retirement, an individual must save approximately 15% of his or her earnings. Yet, more than 50% of America’s households will not have enough retirement income to maintain their standard of living in retirement; and what’s worse, among households age 55 and older, roughly 29% have no retirement savings at all.²

In hopes of stalling the growing number of employees exiting the workforce without any sustainable savings for retirement, the California legislature passed The Secure Choice Act. Under The Secure Choice Act, employees who work for an employer that does not provide an employer-sponsored retirement plan will be automatically enrolled in the State of California’s new retirement savings program known as the California Secure Choice Retirement Savings Program (“***Secure Choice Program***”). The Secure Choice Program will operate analogous to an Individual Retirement Account (“***IRA***”). Contributions will be automatically withdrawn from an employee’s paycheck at a rate of 3% of the employee’s salary and can be adjusted by the employee to a rate as high as 8%. Yearly contribution limits for the Secure Choice Program will be equal to those for IRAs. Contributions from employees will be assessed a fee that will be used to operate the Secure Choice Program. The exact amount of the fee has yet to be determined.

Employees will have the option to not participate in the Secure Choice Program by filling out required forms. Employers with 5 or more employees, however, will not be so lucky. **EMPLOYERS WITH 5 OR MORE EMPLOYEES MUST EITHER PROVIDE THEIR EMPLOYEES WITH AN EMPLOYER-SPONSORED RETIREMENT SAVINGS PLAN**

¹ Quote from the California State Treasurer’s website for Secure Choice Program at: www.treasurer.ca.gov/scrib/

² For references and more statistics on retirement and savings please visit www.treasurer.ca.gov/scrib/facts.asp

OR PARTICIPATE IN THE SECURE CHOICE PROGRAM. Employer compliance will be required over a phased-in period depending on the size of the employer. Employers who participate in the Secure Choice Program will not have any liability for an employee’s decision to participate in, or opt-out of, the Secure Choice Program or for the performance of any investments made by the program.

THE LAW

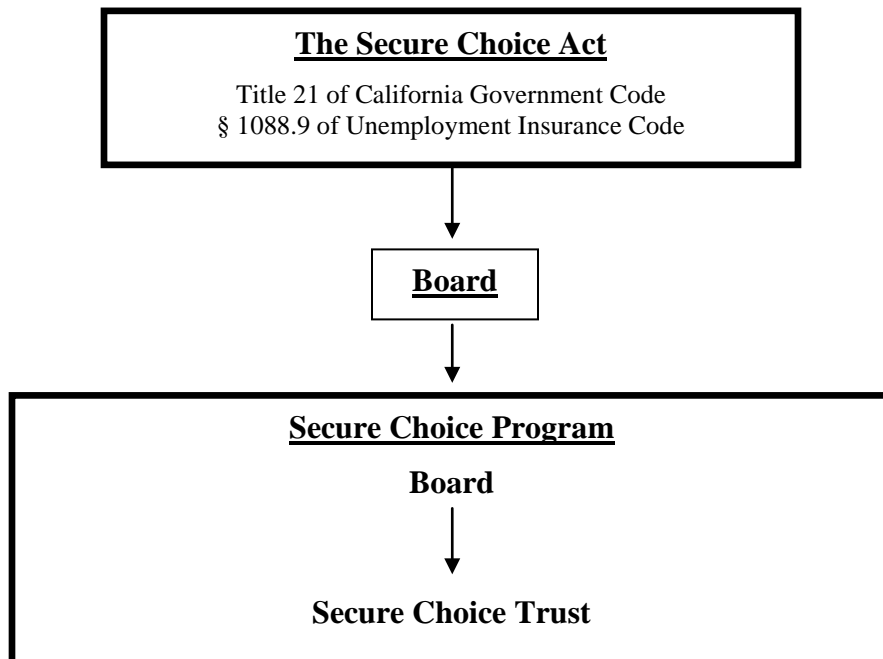
The Secure Choice Act is codified in both Title 21 (commencing with Section 100000) of the California Government Code and § 1088.9 of the Unemployment Insurance Code. The majority of the Secure Choice Act is contained in Title 21 of the Government Code. Section 1088.9 of the Unemployment Insurance Code lays out the procedures for an employer’s compliance with The Secure Choice Act and penalties for failure to comply with the mandate.

ADMINISTRATIVE STRUCTURE

The Secure Choice Act created the California Secure Choice Retirement Savings Investment Board (“**Board**”). The Board consists of 9 members and is to be chaired by the California State Treasurer (currently, John Chiang). Members of the Board are designated by The Secure Choice Act or appointed by the Governor, and are to serve without compensation.

According to The Secure Choice Act, the Board has two major duties: (1) to design and implement the Secure Choice Program; and, once the Secure Choice Program is operational, (2) to oversee procedures relating to the management of funds held in the California Secure Choice Retirement Savings Trust (“**Secure Choice Trust**”).

Below is a chart demonstrating how The Secure Choice Act created the Board pursuant to Title 21 of the California Government Code and § 1088.9 of the Unemployment Insurance Code. Subsequently, the Board, acting in accordance with the provisions of The Secure Choice Act, designed and implemented the Secure Choice Program. Once the Secure Choice Program is operational, the Board will then be responsible for overseeing the Secure Choice Program and administering the Secure Choice Trust. In carrying out their responsibilities, the Board members will discharge their duties as fiduciaries with respect to the Secure Choice Trust. Additionally, the Board will appoint an executive director and hire staff to manage day-to-day operations.



IMPLEMENTATION

The Board is currently working to design and implement the Secure Choice Program which, barring any unforeseen judicial or political delays, is set to open for enrollment in the latter part of 2018 or early 2019. Prior to that time, the Board is required to design and disseminate to employers throughout the State of California, an employee information packet ("**Information Packet**"). The Information Packet will be available in electronic format and be distributed via the Employment Development Department ("**EDD**"). The Information Packet will include materials relating to the benefits and risks of investing, how contributions will be made and how one can opt-out of the program, as well as a number of disclosures.

All eligible employees will automatically be enrolled in the Secure Choice Program unless they opt-out. The Informational Packet will include an opt-out form that employees can sign, indicating their desire not to participate in the Secure Choice Program. At least once every two years after the initial implementation of the Secure Choice Program, an open enrollment period will take place where eligible employees will once again be given the Information Packet and required to either participate or opt-out of the Secure Choice Program. Employees will be able to opt-out of the Secure Choice Program at any time by following directions the Board is yet to establish.

COMPLIANCE & PENALTIES

Once the Secure Choice Program is open for enrollment, employers with 5 or more employees that do not already provide a retirement plan will be required to be in compliance with The Secure Choice Act. To become compliant, employers of 5 or more employees must either **(1)** begin to offer their employees a retirement plan, or **(2)** provide employees with access to the Secure Choice Program. Additionally, all employers not exempt from the Secure Choice Program, with 5 or more employees will be required to provide the Information Packet to their employees, as well as all new hires.

Mandated compliance with The Secure Choice Act will be phased-in over an extended period of time dependent on the size of the employer. **EMPLOYERS WITH 100 OR MORE EMPLOYEES WILL NEED TO BE IN COMPLIANCE WITHIN 12 MONTHS AFTER THE PROGRAM IS OPEN FOR ENROLLMENT, EMPLOYERS WITH MORE THAN 50 EMPLOYEES WITHIN 24 MONTHS AFTER THE PROGRAM IS OPEN FOR ENROLLMENT, AND ALL OTHER EMPLOYERS WILL NEED TO BE COMPLIANT WITHIN 36 MONTHS AFTER THE PROGRAM IS OPEN FOR ENROLLMENT.**

The EDD is responsible for administering the enforcement of employer compliance with The Secure Choice Act. In executing this task, the EDD will enforce penalties against employers who fail to allow their employees to participate in the Secure Choice Program. Pursuant to § 1088.9(c) of the Unemployment Insurance Code, the EDD may assess a penalty against an eligible employer of \$250 per eligible employee for noncompliance with The Secure Choice Act 90 days after service of notice. Further, if non-compliance continues 180 days after service of process, the EDD will assess **A PENALTY OF \$500 PER ELIGIBLE EMPLOYEE AGAINST THE EMPLOYER.** There is no indication whether the penalty will be reassessed again at each open enrollment period or annually, or if the noncompliant employer will only have to pay the penalty for each employee one time. It is likely that any confusion regarding

reassessment penalties will be resolved as the Board continues to craft the Secure Choice Program.

LEGAL ISSUES POTENTIALLY HINDERING SECURE CHOICE

Retirement plans are almost always subject to the rules set forth by Congress pursuant to the Employee Retirement Income Security Act (“**ERISA**”). ERISA was originally passed in 1974 and created the original form of IRA. In 2016, during the Obama administration, the Employee Benefits Security Administration of the Department of Labor (“**DOL**”), issued two separate rulings that essentially exempted state-based retirement plans, like the one contemplated by The Secure Choice Act, from having to comply with ERISA. As of the date of this letter, however, the House of Representatives have passed two resolutions, Joint Resolutions 66 and 67, to repeal the rulings made by the Department of Labor in 2016. Should the Senate subsequently affirm these Joint Resolutions, there may be a long drawn out court battle before The Secure Choice Act is operational.

In addition to ERISA, retirement accounts are typically subject to laws regulating what are known as “securities.” Securities are essentially certificates or other financial instruments that represent a valued interest or right in something else and can be traded, such as notes, treasury stocks, bonds and so forth.³ Investment companies are required to register with the Securities and Exchange Commission unless an appropriate exemption applies. There is a strong likelihood courts will end up deciding whether The Secure Choice Act created an investment company, and whether The Secure Choice Act is exempt from federal securities laws as an instrumentality of the State of California.

SUMMARY

While the Secure Choice Program is yet to be operational, the implications to employers from this new program may be significant. Proper employment, business, tax and other legal planning may help employers to navigate this new law in a manner best suited to the company and its employees. Legal advice should be sought from competent legal counsel before implementing compliance for the Secure Choice Program.

Should you need additional information concerning the Secure Choice Program or wish to discuss what this legislation or other laws may mean for you, your family, or your business please do not hesitate to call us to schedule an appointment.

DISCLAIMER

The information contained in this letter is intended solely for the individual listed above. While deemed reliable, the information contained herein is not guaranteed and is purely for informational purposes. Readers should not act on the information contained in this letter without first consulting competent legal counsel.

³ A “Security” according to Section 2(a)(36) of the Securities and Exchange Act of 1940 is: “any note, stock, treasury stock, security future, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security (including a certificate of deposit) or on any group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a “security”, or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.”