



AMERICAN BENEFITS  
COUNCIL

September 12, 2018

*Delivered via postal and electronic mail*

Joint Committee on Administrative Rules  
700 Stratton Office Building  
Springfield, IL 62706  
[jcar@ilga.gov](mailto:jcar@ilga.gov)

**Re: Proposed Regulations under the Illinois Secure Choice Savings Program  
(74 Ill. Adm. Code 721, as Scheduled for JCAR Review on September 18, 2018)**

**Request for Modification to Requirement that is Inconsistent with the Secure  
Choice Statute and Negatively Affects Employers that Sponsor Retirement  
Plans**

Dear Chairmen Harmon and Wheeler, and Members of the Committee:

The American Benefits Council (the “Council”) appreciates the opportunity to submit comments to the Joint Committee on Administrative Rules (the “Committee” or “JCAR”) with respect to the proposed rulemaking under the Illinois Secure Choice Savings Program (the “proposed rule”). The Council previously submitted comments on the proposed rule to the Illinois State Treasurer’s office on July 17, 2018, following the rule’s initial publication.<sup>1</sup>

We are writing to bring the Committee’s attention to an employer reporting requirement under Secure Choice that is unnecessarily and adversely affecting Illinois employers that currently offer a qualified retirement plan (“Plan Sponsors”). In addition, this requirement appears to be inconsistent with the Secure Choice statute,<sup>2</sup>

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<sup>1</sup> The Council’s letter of July 17, 2018, commenting on the proposed rule is attached.

<sup>2</sup> Pub. Act 098-1150.

and it may leave the program especially susceptible to a preemption claim under the federal Employee Retirement Income Security Act (“ERISA”). As described below, the Council respectfully requests that JCAR direct the State Treasurer’s office to take steps, either in the proposed rule or through other guidance, to reduce the impact of Secure Choice on Plan Sponsors in accordance with the intent of the statute. We have suggested below two possible ways to accomplish this.

The Council is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council’s members either directly sponsor or provide services to retirement and health plans that cover more than 100 million Americans. Many of our members are headquartered in Illinois and they, together with companies headquartered elsewhere, have many employees who work in Illinois. The great majority of the Council’s members have operations in multiple states.

Employers with 25 or more employees in Illinois that have been in business for at least two years are generally required to offer Secure Choice to their employees unless an employer has offered a qualified retirement plan in the preceding two years. To help the state identify which employers are subject to Secure Choice, beginning in 2017, the Illinois Withholding Income Tax Return (Form IL-941) has required employers that are exempt from Secure Choice to report their exempt status by checking a new box on the form on a quarterly basis. In the Council’s comments of July 17, 2018, we suggested that Secure Choice reverse this process, so that, instead of requiring Plan Sponsors (and other employers not subject to the program) to fulfill the new reporting requirement, only those employers that are subject to Secure Choice would check the box.

Although we appreciate that checking a box to report one’s exempt status may appear to be a fairly minimal burden, such as for small companies operating within Illinois, that burden quickly grows when multiplied by four calendar quarters, or by 50 states, or by any other number of variations that could conceivably develop within and across state programs such as Secure Choice. And, regardless of the actual burden imposed, such a reporting requirement may leave Secure Choice especially susceptible to an ERISA preemption claim.<sup>3</sup>

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<sup>3</sup> See, e.g., *Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 947 (2016) (finding that ERISA’s preemption clause “requires invalidation of the [state’s] reporting statute as applied to ERISA plans,” as the state statute “imposes duties that are inconsistent with the central design of ERISA, which is to provide a single uniform national scheme for the administration of ERISA plans without interference from laws of the several States”).

In the Treasurer office's response to the Council's request, the office indicated that, in addition to relying on Form IL-941 to determine which employers are exempt from Secure Choice, the program has "removed from the invitation pool" those Plan Sponsors whose EIN can be matched with Plan Sponsor information on the federal Form 5500.<sup>4</sup> Although we applaud the Secure Choice program's efforts to consult with Form 5500 data to help identify which employers are Plan Sponsors, this effort does not reduce the new reporting burden for Plan Sponsors on Form IL-941. In other words, all Plan Sponsors must, on a quarterly basis, report to the state that they offer a retirement plan to employees regardless of whether Secure Choice locates their EIN on a recent Form 5500.

Furthermore, the Secure Choice statute provides that the Department of Revenue "may require employers to report information relevant to their compliance with this Act on returns otherwise due from the employers under Section 704A of the Illinois Income Tax Act."<sup>5</sup> The statute thus permits the program to impose a new reporting requirement on those employers that must comply with the Secure Choice Act – but it does not provide for additional reporting burdens to be imposed on Plan Sponsors and other employers that are exempt from the program. In short, the current reporting requirement is not consistent with the statutory authority that was given to the Illinois Secure Choice Savings Program.

For the reasons described above, we ask that the Committee take steps to ensure that the new requirements imposed under Secure Choice be modestly amended in order to both be consistent with the statute and avoid burdening employers that already offer a retirement savings opportunity to their employees. In this regard, and as an alternative to the Council's suggestion described above (i.e., that the current reporting scheme using Form IL-941 be reversed), we would also suggest that, as an immediate step, the instructions to Form IL-941 be revised to state that the new reporting box for Secure Choice is optional for those Plan Sponsors whose EIN is listed on a Form 5500 that was filed within the preceding 12 months. Although such action would not provide relief for all Plan Sponsors, it would offer relief for a substantial portion of them. We would thereafter encourage Illinois to continue to work toward eliminating the reporting requirement for plan sponsors whose EIN is not currently reported on Form 5500 (because, for example, the Plan Sponsor/employer is a subsidiary of the reporting entity).

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<sup>4</sup> The Form 5500 is a detailed annual report that Plan Sponsors must file each year with the U.S. Department of Labor and that is publicly available on the Department of Labor's website.

<sup>5</sup> Section 85(j).

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Thank you for your consideration of our request. Should you have any questions or wish to discuss our comments further, please contact me via email at [jjacobson@abcstaff.org](mailto:jjacobson@abcstaff.org) or at (202) 289-6700.

Sincerely,

A handwritten signature in black ink, appearing to read "Jan Jacobson". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Jan Jacobson  
Senior Counsel, Retirement Policy  
American Benefits Council

Cc: Secure Choice Board Members

- State Treasurer Michael Frerichs, Chair
- John Gay
- Curt Clemons-Mosby
- Miriam Martinez
- David Marzahl
- David Rappaport
- John Rauschenberger

Courtney Eccles, Director of Secure Choice

Chris Flynn, Assistant General Counsel, Illinois State Treasurer