



AMERICAN BENEFITS COUNCIL

July 17, 2018

Delivered via electronic mail

Chris Flynn
Assistant General Counsel
Illinois State Treasurer
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Re: Request for Revisions to the Illinois Secure Choice Proposed Rules and Processes that Create Burdens and Uncertainty for Plan Sponsors

Dear Mr. Flynn:

The American Benefits Council (the “Council”) appreciates the opportunity to provide comments on the rules that were proposed for the Illinois Secure Choice Savings Program (the “Program” or “Secure Choice”) and other aspects of the Program that affect employers that currently offer a retirement plan to employees (“Plan Sponsors”). As described below, there are a few small but critical changes we urge the Illinois Secure Choice Savings Board (“Board”) to make to help ensure the Program does not create unnecessary burdens and uncertainty for Plan Sponsors. These changes would also support the ability of these sponsors to provide consistent benefits across state lines. We believe our suggested changes would help ensure that Secure Choice is not in conflict with, and therefore not preempted by, the Employee Retirement Income Security Act (“ERISA”) by reason of the Program’s imposition of requirements on Plan Sponsors covered by ERISA.

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.

Additionally, and particularly relevant to the concerns we raise, the great majority of our members have operations in multiple states. Therefore, the failure to recognize ERISA's role in promoting the uniform design and operation of employee benefit plans could impose inconsistent requirements on national employers and unnecessarily make Secure Choice vulnerable to a legal challenge pursuant to ERISA. Inconsistent requirements from state to state could be confusing for participants, for example if they live and work in different states, and may result in anomalies that would best be avoided by uniformity in the applicable rules.

The Council and its members have long supported both public and private efforts to expand access to retirement savings opportunities for workers. Due to the voluntary nature of the United States' employment-based retirement system, we have worked closely with Congress and federal agencies over the years to reduce the administrative burdens and costs of sponsoring a pension plan. This helps encourage employers to offer (and to continue to offer) retirement plans to their employees.

As successful as the employment-based retirement system has been for millions of workers, it does not cover all workers at all times. Although we strongly believe that retirement plan coverage can be broadened more effectively by eliminating regulatory burdens on Plan Sponsors and providing greater incentives for employers to offer a retirement plan, we nevertheless understand the concerns that led Illinois to enact a state-run program targeting private-sector workers without access to a retirement savings plan at work. However, *it is critical that any such state-run program not disrupt the existing employer-provided retirement plans that, in the vast majority of cases, provide for employer contributions, higher contributions limits, and more participant protections than those available under programs such as Secure Choice.*

In this regard, and as described in more detail below, we request that the Board make the following changes to better ensure that Secure Choice does not negatively impact Plan Sponsors and plan participants:

1. The rules should clarify that employers are exempt if they offer a Qualified Retirement Plan¹ to some or all employees. In addition, an employer should be exempt if it offers a payroll deduction IRA program.
2. The process that Illinois uses to identify which employers are required to participate in the Program should require self-identification only by such employers instead of imposing a reporting burden on Plan Sponsors.

¹ Terms not described herein have the definition ascribed to them in the proposed rules, unless otherwise specified.

3. The rules should clarify that exempt employers, including Plan Sponsors, are not required to allow employees who enroll in the Program on an individual basis to make contributions to their Account through payroll deduction.

1. AVAILABILITY OF EMPLOYER EXEMPTION

a. Plan Sponsors that Offer a Qualified Retirement Plan to “Some or All” Employees

The most important change to the proposed rules that we urge the Board to make is to clarify that employers are exempt from Secure Choice if they offer a Qualified Retirement Plan to some or all of their employees. Although the current rules may very well intend for that result as they are currently drafted, we believe that additional clarity would be very helpful to eliminate any doubt with respect to the availability of the exemption to Plan Sponsors if one or more employees are not eligible for the employer’s retirement plan at any particular point in time.

As very brief background, when an employer creates a retirement plan, the plan is generally available to most employees. The various nondiscrimination rules in the Internal Revenue Code require that the plan’s eligibility and benefit rules do not favor highly compensated employees, and such rules impose restrictions on eligibility conditions in the plan. But, consistent with these restrictions, it is unusual for a qualified retirement plan to be offered to 100% of all employees at all times, starting from the date of hire. Oftentimes, an employee who is not currently eligible for participation in the plan will become eligible in the future, either due to meeting the plan’s service requirement or due to moving from an ineligible position to a position eligible for participation.

Section 721.200 of the proposed rules would define the term “Employer” in part as a person or entity that “has not offered a qualified retirement plan in the preceding 2 years.” Although we believe that this definition is best interpreted as exempting from Secure Choice all Plan Sponsors that have offered a qualified retirement plan in the preceding 2 years, we are concerned that an argument could also be made that such definition should be applied separately with respect to each particular employee of an employer. Under the latter view, it could thus be argued that a Plan Sponsor is not exempt if it has not offered a qualified retirement plan in the preceding 2 years *to a specific employee*.

Requested change: In order to clarify what we believe was likely intended under the proposal, and to avoid the severe disruption to Plan Sponsors that would result if a Plan Sponsor were required to enroll its employees who are not currently eligible for the employer’s plan in Secure Choice, we ask that the Board revise the definition of “Employer” in section 721.200 as follows:

“Employer” means a person or entity engaged in a business, industry, profession, trade, or other enterprise in Illinois, whether for profit or not for profit, that:

has at no time during the previous calendar year employed fewer than 25 employees in the State;

has been in business at least 2 years; and

*has not offered a qualified retirement plan **to some or all of its employees** in the preceding 2 years.*

The suggested addition, “to some or all of its employees,” would be consistent with the phrasing used to describe a similar employer exemption available under OregonSaves. Plan Sponsors have found Oregon’s rule very helpful in providing the clarity necessary to help ensure that Plan Sponsors are not unnecessarily burdened by the program’s participation requirement in this regard.²

b. Employers that Offer a Payroll Deduction IRA Program

We also request that the Board reconsider the exclusion of payroll deduction IRA programs from the definition of “Qualified Retirement Plan” under the proposed rules, regardless of whether the payroll deduction IRA uses automatic enrollment or is subject to ERISA.

Employers that currently offer a payroll deduction IRA should not be forced to choose between (1) administering both the payroll deduction IRA and Secure Choice (especially with respect to the same employee) and (2) terminating their payroll deduction IRA and replacing it with Secure Choice. Both the payroll deduction IRA and Secure Choice would present nearly identical savings opportunities for employees. The fact that Secure Choice requires automatic enrollment does not justify excluding employers with a payroll deduction IRA from the employer exemption because employers who offer a Qualified Retirement Plan (as defined in the proposal) without automatic enrollment are nevertheless eligible for the exemption.

The Secure Choice statute provides that employers “shall retain the option at all times” to offer an automatic enrollment payroll deduction IRA instead of allowing employees to participate in the Program.³ Thus, at a minimum, the statute indicates that

² OR. ADMIN. R. 170-080-0020(1).

³820 ILCA 80/60(g). *See also* 820 ILCS 80/5 (defining “Employer” in part as a person or entity that “has not offered a qualified retirement plan, *including, but not limited to*, a plan qualified under Section 401(a), Section 401(k), Section 403(a), Section 403(b), Section 408(k), Section 408(p), or Section 457(b) of the Internal Revenue Code of 1986 in the preceding 2 years” (emphasis added)); 820 ILCS 80/85(o) (requiring that employers receive notice that, “rather than enrolling employees in the Program under this Act,

the term “Qualified Retirement Plan” should include automatic enrollment payroll deduction IRAs. But for the reasons stated above, we believe that the option for employers to provide an alternative to Secure Choice should also be available to those employers with a payroll deduction IRA that does not use automatic enrollment.

Requested change: We request that the Board revise the definition of “Qualified Retirement Plan” in section 721.200 as follows:

“Qualified Retirement Plan” includes a plan qualified under sections 401(a), 401(k), 403(a), 403(b), 408(k) or 408(p) of the Internal Revenue Code. The term also includes an eligible governmental plan under section 457(b) of the Internal Revenue Code, as well as Simplified Employee Pension (SEP) plans, and Savings Incentive Match Plan for Employees (SIMPLE) plans, and payroll deduction IRA programs. Payroll deduction IRA programs are not qualified retirement plans.

2. PROCESS FOR IDENTIFYING EMPLOYERS SUBJECT TO SECURE CHOICE

The process that Illinois uses to identify which employers are required to participate in Secure Choice should require self-identification only by those employers that are subject to the participation requirement. The process should not require Plan Sponsors to report their exempt status to the state.

As we understand it, the Program intends to identify which employers are exempt from Secure Choice (including Plan Sponsors) by instructing such employers to check a box on Form IL-941, the Illinois Withholding Income Tax Return. Such method, regardless of the actual burden imposed, constitutes an unnecessary state-imposed reporting requirement on Plan Sponsors and may leave the Program especially susceptible to an ERISA preemption claim.⁴

We appreciate that from the perspective of one state, reporting exempt status appears a fairly minimal burden. Our members, however, already file a detailed annual report with the Department of Labor (called the Form 5500) every year with respect to their retirement plans. And many of our members have employees in *every* state. The burden of having to file 50 different forms, with 50 different requirements, under 50

employers may sponsor an alternative arrangement, *including, but not limited to*, a defined benefit plan, 401(k) plan, a Simplified Employee Pension (SEP) plan, a Savings Incentive Match Plan for Employees (SIMPLE) plan, or an automatic payroll deduction IRA offered through a private provider” (emphasis added)).

⁴See, 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”).

different criteria and on 50 different schedules, imposes both a burden and probability of inadvertent errors. Even a minimal burden related to plan administration quickly becomes a major burden when multiplied by 50, which is why ERISA's preemption provision is so important. And the reporting proposed by Secure Choice is unnecessary because an employer's Form 5500 filing is publicly available⁵ and can be checked by Secure Choice at any time.

Requested change: Instead of requiring Plan Sponsors to report their offer of a retirement plan on Form IL-941, we urge the Board to consider reversing the current reporting requirement so that (1) only those employers that are required to participate in Secure Choice would self-identify by checking the box on Form IL-941, and (2) employers that are exempt, including Plan Sponsors, would not be required to take any reporting action.

3. NO PAYROLL DEDUCTION REQUIREMENT FOR EXEMPT EMPLOYERS

The rules should clarify that exempt employers are not required to allow employees who enroll in the Program on an individual basis to make contributions to their Account through payroll deduction.

Section 721.420(e) of the proposed rules provides that the Board may allow individuals who do not work for a participating employer to enroll in Secure Choice, and that the Account Administrator would be responsible for developing a process that allows those individuals to "make contributions separate from an employer payroll system." We read this language as saying that exempt employers, including Plan Sponsors, would not be *required* to allow an employee who participates in the Program on an individual basis to make Account contributions through payroll deduction. If that is correct, we support that approach. However, we recommend that, to the extent necessary, this point be clarified in section 721.400(d).

* * * * *

Thank you for your consideration of our requests. We would like to schedule a telephone call or meeting to discuss our requests and how the actual and potential burdens imposed on plan sponsors under Secure Choice could be reduced or eliminated without compromising the goals and purpose of the Program. We will reach out to schedule that discussion. If you have any questions or would like to discuss these comments further, please contact me at 202-289-6700 or by email to jjacobson@abcstaff.org.

⁵ <https://www.efast.dol.gov/portal/app/disseminatePublic?execution=e2s1>.

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: Michael Frerichs, State Treasurer and Chair of the Secure Choice Board
Courtney Eccles, Director of Secure Choice