



# NY state mandates Secure Choice, putting NYC plan's fate in doubt

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New York state's Secure Choice Savings Program will become mandatory under new [legislation](#) (A03213) passed June 7 and awaiting the governor's signature. Under the law, private-sector employers in the state of New York that don't sponsor retirement plans will have to participate in the state-run, payroll-deduction Roth IRA program. When enacted in 2018, the program was voluntary for employers. The amendment making the program mandatory likely signals the demise of the recently enacted Savings Access New York Retirement Program, a program for employees in New York City that won't proceed if the state mandates a similar program. The new law also adds an auto-enrollment feature to the state's program and exempts certain small and new employers from participating.

## Changes from the 2018 law

The 2021 amendments to the Secure Choice program make participation mandatory for covered employers and requires them to automatically enroll employees who don't opt out. The amendments also make a few other substantive changes:

- Employers are eligible only if they had at least 10 employees in the state in the previous year and have been in business for at least two years
- Participating employers will need to have a payroll-deposit retirement savings arrangement in place within nine months after the program opens.
- Payroll deductions won't start until 30 days after an employee has enrolled.
- Employers sponsoring qualified retirement plans may not terminate those plans to participate in the new program.

## Key features

**Eligible employers.** The program will be mandatory for private-sector employers — both for-profit and nonprofit — in New York state meeting the following conditions:

- The employer hasn't offered a "qualified retirement plan" (e.g., a qualified defined benefit pension plan, 401(k) plan or 403(b) plan) in the past two years.

- The employer had at least 10 employees in the state at all times in the previous year.
- The employer has been in business for at least two years.

Employers' duties will be limited to distributing state-provided information and remitting payroll deductions. To minimize participating employers' liability exposure, the law states that participating employers aren't establishing or maintaining the program's payroll-deduction IRA, aren't fiduciaries, and aren't responsible for program design, administration, investments, investment performance or benefits paid to participants. But that language may not shield participating employers from all potential liability (for example, for mishandling payroll deductions or failing to distribute required information).

**Eligible employees.** Employees who are at least age 18 and have New York state wages from a participating employer are eligible for the program. They will be automatically enrolled but may opt out at any time.

**Contributions.** The program sets a 3% default contribution rate, but eligible employees can select a different rate. The board may permit (or require) auto-escalation. Contributions are capped at the federal IRA limits. The program will use only Roth IRAs.

**Investments.** The program's board will develop the investment lineup, which will encompass a range of risk and return opportunities. The board will also designate a default investment option for enrollees who fail to select any investment options. The board must annually adopt a written investment policy (after consideration at a public hearing).

**Participant communications.** The board will develop informational materials (including basic financial literacy education) that participating employers must distribute to eligible employees.

**Fees.** The state will lend the program funds to cover start-up and administrative costs, which must eventually be repaid from total program funds. The program must become self-sustaining and pay all administrative costs from the total program fund. Enrollees will be assessed administrative fees on a pro rata basis.

**Fiduciary standard of conduct.** In conducting business and oversight functions, the board, its staff and any vendors hired must adhere to fiduciary standards of care that are substantially similar to ERISA's fiduciary standards.

**ERISA exemption.** As originally enacted — without an auto-enrollment feature — the program appeared to meet the long-standing ERISA exemption for "completely voluntary" employer-facilitated payroll-deduction IRA programs. Although the 2021 amendments have added auto-enrollment to the program, they don't include any specific language exempting the program from ERISA. However, whether such language is necessary or would provide any protection against lawsuits is unclear. In a recent case involving California's CalSavers program, the 9th US Circuit Court of Appeals held that CalSavers was exempt from ERISA on other grounds, leaving unresolved the question of whether an auto-enrollment feature with an opt-out right qualifies for the exemption ([Howard Jarvis Taxpayers Ass'n v. CA Secure Choice Ret. Svgs. Program](#), No. 20-15591 (9th Cir. May 6, 2021)).

## Fate of New York City program

In May, New York City enacted legislation (2021 Chs. [51](#) and [52](#)) to create the Savings Access New York Retirement Program for employees with regular duties in the city. Like the state's Secure Choice program, the city program is an auto-enrollment payroll-deduction savings program that covers for-profit and nonprofit private-sector

employers. Although some details of the two programs differ (for example, the city program only covers employees age 21 or older, whereas the state program is open for employees who are at least age 18), they are similar in scope and design.

Neither the state program nor the city program is yet running. However, the legislation enacting the city program provides that the city will discontinue its program if the state establishes a retirement savings program that requires "a substantial portion of employers who would otherwise be covered" by the city program to offer to their employees a savings program through payroll deduction or other method of contribution. Now that the state program is mandatory and will likely cover many of the same employers as the city program, the city may halt efforts to implement its program.

## Related resources

### Non-Mercer resources

- [A03213](#) (New York Senate, June 7, 2021)
- [Howard Jarvis Taxpayers Ass'n v. CA Secure Choice Ret. Svgs. Program](#), No. 20-15591 (9th Cir. May 6, 2021)
- [2021 Ch. 51](#) (New York City Council, May 11, 2021)
- [2021 Ch. 52](#) (New York City Council, May 11, 2021)
- [2018 Ch. 55](#) (New York Senate, April 12, 2018)

### Mercer Law & Policy resources

- [Resources for tracking state and city retirement initiatives](#) (May 18, 2021)
- [Judge finds CalSavers not preempted by ERISA](#) (April 2, 2019)

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