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State-Mandated Retirement Plans – Coming to a State Near You?

With approximately 30% of all private-sector employees not having access to a workplace retirement plan, some states and some bigger cities have decided that our current system, which lets employers decide whether they want to adopt a retirement plan for their employees, is not working well. In response, at least 12 states (e.g., California, New York, Oregon) and three cities (e.g., Seattle) have developed some form of private employer workplace retirement plan, with some of these plans mandatory for certain private employers.

Common terms of these mandatory government plans include the following:

- The employer does not currently sponsor a workplace retirement plan. The state/city rules generally do not require that all of an employer's employees participate in an employer's workplace retirement plan as long as the employer plan is a plan qualified under the Internal Revenue Code (g., 401(k) Plan, 403(b) plan).
- Employers with as few as five employees are required to participate in the government plan. There are deadlines for employers registering for or opting out of a mandated plan.
- All employees over age 18 earning wages in the state (or city) must be allowed to participate.
- Plans require an employee-only contribution to a 401(k)-type Roth IRA arrangement made by payroll deduction, which is remitted to the plan unless the employee opts out. Employees can make contributions to the IRA up to the IRS limit, and employees retain control and ownership of the IRA even if they terminate employment with the employer.
- The employee default contribution rate typically starts at 3% to 6% with automatic annual 1% increases up to as much as 10%, though employees can increase or decrease the contribution percentage or opt out completely.

- Employees are allowed to select any investment available through the mandated plan, though the IRA will be invested in a default investment fund selected by the government if the employee fails to select an available investment alternative.
- No employer contributions to the plan are allowed or required.
- Participating employers are not responsible for plan administration other than determining who is eligible, enrolling those individuals, providing certain enrollment information to the city or state and handling payroll deduction and remittance.
- Employers are not subject to retirement plan testing and reporting and disclosure obligations otherwise required of a plan subject to the Employee Retirement Income Security Act (ERISA) and are not subject to fiduciary liability or responsible for investment losses suffered by an employee.
- An employer cannot terminate its existing employer retirement plan so it can participate in the mandated plan.
- Some but not all of the mandated plans impose penalties on employers for noncompliance with the government's requirements.

Some of these state- or city-sponsored plans have reported employee opt-out levels of approximately 30%, and some plans have experienced withdrawals of as much as 35% of contributed sums.

As you might expect, especially these days, some employers don't like mandates. One particular California employer, which happens to be a taxpayer rights association and does not sponsor an employee retirement plan, challenged the State of California's employer retirement plan mandate in federal court. The employer lost that challenge in a California U.S. District Court and lost again in an appeal to the Ninth Circuit Court of Appeals in a decision issued in May 2021 (*Howard Jarvis Taxpayers Association v. California Secure Choice Retirement Savings Program*, 997 F.3rd 848).

Under the Trump administration, the U.S. Department of Labor supported the employer's position before the lower courts. But in 2021, before the Ninth Circuit ruled on the matter, the Biden

administration withdrew such support and indicated it “does not support either side.” The employer filed a petition with the U.S. Supreme Court in October 2021 requesting the Supreme Court review the issue, but the Supreme Court declined to review the case in March 2022, leaving the Ninth Circuit Court of Appeals’ decision in place. It is possible the Supreme Court could later review this issue if another federal appeals court rules differently than the Ninth Circuit did and prevents another state from mandating employers to implement a worker retirement plan.

The Ninth Circuit Court held that the California mandated plan (called “CalSavers”) was not an ERISA plan—*i.e.*, wasn’t subject to plan requirements under ERISA—because it was established and maintained by the State of California (not by any employer), did not require any employer to operate their own ERISA plan, did not “relate to” an ERISA plan (which would otherwise result in the mandate being unenforceable), and did not interfere with ERISA’s core purposes. As a result, the Ninth Circuit held that ERISA did not “preempt” the California law that created the CalSavers program, which is generally the fate of state laws if they otherwise “relate to” an ERISA-covered retirement or welfare plan.

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