Lawyers Alliance FOR NEW YORK

Connecting Lawyers, Nonprofits, and Communities

November 17, 2021

Recent New York City and New York State Retirement Program Legislation

Small nonprofit corporations should take note of New York's recently passed legislation related to retirement programs. In New York State the recently-passed "Secure Choice Savings Program" (A03213)[1], requires private employers who do not already sponsor retirement plans to participate in the state-run, payroll-deduction Roth individual retirement account ("IRA") program. In New York City, Bill Nos. 888-A[2] and 901-A,[3] collectively known as the "Retirement Security for All Act" require private employers with five or more employees to establish a retirement savings program for their employees under certain conditions.

<u>New York State Secure Choice Savings Program</u>

New York State's Secure Choice Savings Program requires private employers who: (1) have not offered a qualified retirement plan, such as a qualified defined benefit plan, 401(K), or 403(B)) plan in the past two years; (2) have had at least 10 employees in the state at all times in the previous year;[4] and (3) has been in business for at least two years, to participate in the state-run, payroll-deduction Roth IRA program.[5] Employers' duties will be limited to distributing state-provided information and remitting payroll deductions.[6] Employees must be age 18 or older to be eligible for the program, and will be automatically enrolled (but may choose to opt out at any time). Employers must have a payroll deposit retirement savings arrangement no later than nine months after the New York State Secure Choice Savings board opens the program for enrollment.[7] The law requires employers to provide informational materials to existing employees at least one month prior to facilitation of access to the Program and to new

[1] https://assembly.state.ny.us/leg/?default_fld=&leg_video=&bn=A03213&term=&Text=Y
[2] https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3498476&GUID=6E78D2BB-A4BA-4FD8-8C03-ABA62C914AEB&Options=&Search=
[3] https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3498509&GUID=5A6075EC-42D4-47DC-B077-DF126CCFF8AD
[4] This requirement may be complicated by remote work. Employers should consult counsel if they are near this threshold.
[5] The program was originally voluntary when enacted in 2018. *Id. See: https://www.osc.state.ny.us/files/reports/budget/pdf/budget-executive-2018-19.pdf at p. 60 for reference to 2018 law.*
[6] In an effort 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.
[7] See: https://www.hodgsonruss.com/newsroom-publications-13585.html "The legislation became effective immediately, but it calls for enrollment of employees to begin no later than December 31, 2021. Additionally, participating employers must setup their payroll deposit arrangements within 9 months of the program opening for enrollment. However, the board (more on them below) may delay implementation of the program by up to 12 months if they determine it is necessary. All of this is to say that it's currently unclear exactly when employers will have to enter the program."

employees at the time of hiring. Employee informational materials must include a disclosure form and a form for new and existing employees to note their decision to opt out of program participation.

Employers are not required to contribute to the retirement plans. The default employee contribution rate will be 3% but will allow employees to opt out or adjust the rate as they deem fit, up to an annual IRA maximum of $6,000 (or $7,000 for those age 50 or above).[8] Savings are portable and can be transferred if an employee takes a position with another company.

Employers who fail to enroll their employees are subject to penalties. Employers will be fined $250 per employee for each year during which the employee was not enrolled and had not opted out. Those fines could double if left unpaid or if the business fails to enroll its employees.

Lastly, employers who already offer a qualified retirement plan (as described above) may not terminate such plan for the purpose of participating in the program.[9]

New York City Retirement Security for All Act

It is possible that the New York State law will make the similar New York City law discussed below obsolete. Small nonprofits should nonetheless be aware of both laws.

New York City's Retirement Security for All Act creates a mandatory auto-enrollment payroll deduction IRA program for employees of private sector employers who (1) employ five or more employees (whose regular duties occur in New York City); (2) have employed no fewer than five such employees without interruption for the previous calendar year; (3) have been in continuous operation for at least two years; and (4) have not offered or maintained in the preceding two years a retirement plan, such as a 401(K), 403(B), or a defined benefit pension plan. Employers are required to enroll employees who are age 21 or over and work at least 20 hours a week.

Employers are not required to contribute to the retirement plans. The default employee contribution rate will be 5% but will allow employees to opt out or adjust the rate as they deem fit, up to an annual IRA maximum of $6,000 (or $7,000 for those age 50 or above). The plan will be portable, enabling employees to continue contributing to the plan or roll it over into other retirement savings plans in the event that they change jobs. Similar to the requirements under the Employee Retirement Income Security Act of 1974 (ERISA), employers must remit funds deducted from the earnings of each eligible employee for deposit into the program on the earliest practicable date, consistent with applicable rules, and distribute information about the program to their employees.[10] Furthermore, the program will not constitute an employee benefit under ERISA and will automatically terminate if the City's Corporation Counsel "deems it likely that the law conflicts with or is preempted by ERISA."

Employers will be required to retain annual records documenting their compliance with the program for a period of three years, and the law grants government the power to access such records upon request.

---

[8] These rates are tied to the federal maximum IRA contribution amount.
[9] https://legislation.nysenate.gov/pdf/bills/2021/A3213A
[10] https://www.crowell.com/NewsEvents/AlertsNewsletters/all/New-York-City-Establishes-Auto-Deduction-Retirement-Security-Program-for-Certain-Private-Sector-Employees

The law states that the Mayor shall designate a government office or agency to enforce the program, and creates a procedure that enables eligible employees to submit complaints of violations of the program to such enforcement office or agency within one year of the date such employee learned "or should have learned" of the alleged violation. Employers will be subject to certain penalties for violation of the law, beginning with a fine of up to $250 for an initial violation and a fine of up to $500 for a second violation within two years of the prior violation. The penalty increases to a fine of up to $1,000 for any subsequent violations within that two-year window.

This alert is meant to provide general information only, not legal advice. Please contact Rafi Stern at rstern@lawyersalliance.org or visit our website www.lawyersalliance.org for further information or with specific questions. For his assistance in preparing this Legal Alert, Lawyers Alliance would like to thank Richard Wang of Cornell Law School.

Lawyers Alliance for New York is the leading provider of business and transactional legal services for nonprofit organizations and social enterprises that are improving the quality of life in New York City neighborhoods. Our network of pro bono lawyers from law firms and corporations and staff of experienced attorneys collaborate to deliver expert corporate, tax, real estate, employment, intellectual property, and other legal services to community organizations. By connecting lawyers, nonprofits, and communities, Lawyers Alliance for New York helps nonprofits to provide housing, stimulate economic opportunity, improve urban health and education, promote community arts, and operate and advocate for vital programs that benefit low-income New Yorkers of all ages.