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NY State Secure Choice Savings Program Implementation Phase Begins

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Last year, New York State joined an ever growing number of states requiring certain employers to either offer employees a retirement savings plan or enroll in the applicable state program. More specifically, the New York State Secure Choice Savings Program ("NY Secure Choice") provides a retirement savings program in the form of an automatic enrollment payroll deduction IRA (similar to a Roth IRA) that allows employees to opt-out from participation. New York State employers, whether for profit or not for profit, with at least ten employees in the state at all times during the previous calendar year, who have been in business at least two years, and have not offered a qualified retirement plan in the last two years, are subject to the participation requirements of the NY Secure Choice ("Applicable Employers").

Requirements for Applicable Employers to enroll in NY Secure Choice became effective December 31, 2021 without a clear mechanism to do so. Further, it has also been anticipated that official action would be issued to repeal the New York City Retirement Security For All Act – a different law – because it addresses substantially the same portion of employers as the NY Secure Choice program but, that has not yet occurred. Now, implementation of the NY Secure Choice appears to be moving forward.

On January 26, 2022, the Board held its first Meeting, adopted Bylaws and delegated its authority and responsibility for the development and implementation of the program to the Department of Taxation and Finance (the "Department"). The meeting minutes also reflect that the Department will release a request for proposals on the Board's behalf to procure a consultant to assist with program design and the development of future procurements for the NY Secure Choice program administration and investment management. Notably, under the Bylaws, no member, employee or agent of the Board shall be liable for any loss or deficiency resulting from particular investments selected for the program, except for any liability that arises out of a breach of fiduciary duty, and they shall be entitled to defense and indemnification in accordance with section 17 of the Public Officers Law. It is not clear, however, what investments will be selected for the program, or how they will be monitored.

In light of these developments, Applicable Employers should:

- Track when the enrollment period begins. Payroll deposit arrangements to participate in the

program will be required within 9 months of the official guidance opening the program.

- Ensure that they supply employee informational materials and disclosures, that will be developed by the Board or its designee, to their existing employees at least one month prior to an Applicable Employer's facilitation of their employees' access to the program, as well as to new employees at the time of hire.

- Follow potential ERISA preemption legal challenges. A challenge to CalSavers – a similar law –fell short. It remains to be seen whether additional ERISA preemption challenges will ensue asserting that these state programs which may have an indirect influence on an employer's decision to implement an ERISA plan would have sufficient influence to create an impermissible connection to an ERISA plan.

- Consider the pros and cons of various approaches, including sponsoring their own plan, issuing requests for proposals for service providers and investment advisors to assist with managing a plan, or perhaps considering whether a pooled employer plan approach is desirable.

Applicable Employers that take action now will be able to keep pace with the implementation timeline of the NY Secure Choice program and be well-positioned to follow through on a course that is best suited for their organization.

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