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# ERISA Challenges to the Illinois Secure Choice Savings Program Act

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# Background

- Illinois Secure Choice Savings Program enacted by statute to provide retirement benefits for individuals whose employees do not offer retirement programs
- Provides IRA-style investments through payroll deductions from employers
- Does not include any contributions from employers
- Requires employers to facilitate enrollment, forward money to the state, and distribute program literature

# ERISA Preemption

- ERISA preempts any state laws that "relate to any employee benefit plan." 29 U.S.C. § 1144(a).
- The U.S. Supreme Court has interpreted ERISA preemption to be extremely expansive
- If the Secure Choice Program is deemed to be an ERISA plan, it is preempted by ERISA
- Ultimate Risk
  - ERISA could nullify Secure Choice and all of its benefits to employees

# The Short-Lived Safe Harbor

- Secure Choice was designed to comply with the Department of Labor’s regulation excluding state-run savings plans for non-governmental employees. 29 C.F.R. § 2510.3-2(h)
- Regulation promulgated by the Obama Administration’s DOL
- Potentially would have provided cover for Secure Choice to avoid issues of ERISA preemption
- On June 28, the Trump Administration rescinded that rule under the Congressional Review Act
- The DOL can no longer be counted on to support that Secure Choice is exempt from ERISA
  – Courts unlikely to defer to this position because no notice and comment rulemaking
  – DOL may still take hostile position in litigation

# Is Secure Choice Preempted by ERISA?

- ERISA plans are those “established or maintained” by employers. 29 U.S.C. § 1003(a)
- Critical question: whether Secure Choice was established or maintained by an employer
- Courts have been notoriously inconsistent on this issue and employer involvement may be minimal
- For example, ERISA plan found where:
  – Employer contributed to monthly insurance premiums and collected the rest through payroll withholding, but performed no other administrative function

# Is Secure Choice Preempted by ERISA?

- A challenge to Secure Choice could argue the program requires an employer to “maintain” a plan by, for example:
  - Setting up payroll withholding
  - Forwarding money to the state
  - Distributing program literature to employees

- Our counterarguments:
  - Secure Choice is established and administered entirely by the state
  - Employer involvement is purely ministerial
  - No contributions from employers

# Likely Challengers

- Employers covered by the program (*i.e.*, those who don't currently provide retirement plans to employees)
- Industry organizations (such as restaurant associations)
- Chambers of commerce or groups that represent business generally
- Any challenger will likely be well funded and willing to engage in expensive and protracted litigation, including appeals

# Potential Forms of Challenges

- Preemptive lawsuit for declaratory and/or injunctive relief
  - Filed in a federal court in Illinois
  - Likely filed as case seeking preliminary injunction
  - Any ruling would be immediately appealable to the Seventh Circuit
  - More likely scenario
- Action to enforce
  - Employer refuses to comply with Secure Choice
  - Illinois Department of Revenue assess a penalty
  - Subject to review under the Illinois Administrative Review Law
  - Lawsuit filed in one of several Illinois Circuit Courts

# Conclusion

- ERISA preemption poses a threat to Secure Choice
- Moderately strong arguments exist that Secure Choice is not preempted
- There is significant uncertainty as to the outcome