



# Delaware Law Expands Access to Retirement Plans

By Leah Shepherd

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**D**elaware is joining a growing list of states that require employers to automatically enroll their workers in a state-sponsored retirement savings plan, unless the employer already provides retirement benefits.

The state is taking steps to implement the new law (<https://legis.delaware.gov/BillDetail/78751>), which Gov. John Carney signed in August. Covered employees can begin to participate and make contributions on Jan. 1, 2025.

The law establishes the Expanding Access for Retirement and Necessary Saving (EARNs) Program to allow workers to voluntarily put money in a portable Roth individual retirement account (IRA). This is a state-sponsored savings plan funded by employees, facilitated by employers and overseen by the state.

California, Connecticut, Illinois, Maryland, Massachusetts, New Jersey, New York, Oregon and Washington have similar laws on the books. Programs in Colorado and Virginia are set to start in 2023.

"Each state administers their programs a little differently, and some require employers to certify that they are in compliance," said Michael Kreps, an attorney with Groom Law Group in Washington, D.C. "Employers [in Delaware] should be on the lookout for more information as the program gets closer to going live."

## New Requirements

Private employers are subject to the Delaware law's provisions if they have five or more employees, have been in business in Delaware for at least six months, and don't offer retirement benefits.

Covered employers must:

- Register with the program and provide the relevant information about their employees.
- Offer all covered employees the choice to contribute to the IRA or opt out of the program.
- Provide educational materials and disclosures to employees.
- Timely remit employees' contributions.

Employers will not be considered fiduciaries or liable for program design, educational materials or disclosures.

Employers that don't comply with the law could be fined up to \$250 per employee per year with a maximum total penalty of \$5,000 per year.

Employees who do not opt out will be automatically enrolled in the program at the default rate (between 3 percent and 6 percent of compensation). Alternatively, employees may specify the amount they prefer. Employees have the right to modify their contribution rate or terminate their participation in the program at any time. Employees may change investments for future contributions, existing balances or both.

Workers don't qualify for the EARNs Program if:

- They work for the federal government, state or a county in Delaware.
- They are covered under the federal Railway Labor Act.
- They make contributions to a Taft-Hartley multiemployer pension plan.
- They are under the age of 18.

"The biggest challenge with the existing programs in other states has been making sure employers are aware of the new requirements and understand how to comply," Kreps said. "For the smallest employers, it can sometimes be a bit of a challenge to determine whether they are subject to the requirement, as the five-employee threshold isn't always as clear as it sounds. Delaware will eventually have to establish rules specifically addressing part-time and out-of-state employees. That will probably take a year or two."

What about employees who are working remotely in Delaware for an employer based in another state? "That will likely depend on the manner in which the [Delaware EARNs] Program Board interprets the terms 'covered employer' and 'covered employee,'" said Marcia Wagner, an attorney with Wagner Law Group in Boston. The board will need to determine "whether an entity is engaged in business within Delaware if its only connection with Delaware is that it has at least five of its employees working remotely in Delaware," she added.

#### **Lack of Retirement Savings**

Many Americans work for small employers that don't offer retirement benefits. Forty-seven percent of private industry workers participated in a defined-contribution retirement plan in 2021, according to the Employee Benefits Research Institute.

More than one-third of workers in Delaware (38 percent) do not have access to employer-sponsored retirement benefits, and 54 percent of employers within the state do not offer retirement plans, according to the new legislation.

"Because there are documented wealth gaps in Delaware, disproportionately impacting women and people of color, a state-facilitated savings plan aims to alleviate barriers small employers face in offering options, close the wealth gap among low- to modest-wage earners and keep Delaware competitive with neighboring states by attracting talented workers to Delaware," the legislation stated.

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