MN SECURE CHOICE RETIREMENT PROGRAM

To: MN Secure Choice Board of Directors

From: Dave Bergstrom, Interim Executive Director

Subject: Mn Secure Choice Compliance Policy (Agenda Item 4)

The Secure Choice Retirement Act (Minnesota Statutes, Chapter 187) requires private employers with five or more employees, and who do not offer a retirement plan, to enroll in the retirement savings program established by the MN Secure Choice Board. The premise of the program is to make it easy for employees to save for retirement.

To facilitate compliance with the law, Minnesota Statutes allows the Board to set penalties if employers do not participate. The law does not require the Board to assess penalties. Minnesota Statutes 187.07, Subdivision 6 reads as follows:

"Subd. 6 Enforcement. "(a) The board **may** (emphasis added) impose statutory civil penalties against any covered employer that fails to comply with Subdivision 1, 2, and 3". (Minnesota Statutes 187.07 Subdivision 1 requires employers to "enroll its covered employees in the program and withhold payroll deduction contributions for each covered employee's paycheck, unless the covered employee has elected not to contribute". Subdivision 2 requires that "a covered employer must timely remit contributions as required by the board". Subdivision 3 states that "covered employers must provide information prepared by the board to all covered employees regarding the program.")

(b) At the request of the Board, the attorney general shall enforce the penalties imposed by the Board against a covered employer. Proceeds of such penalties, after deducting enforcement expenses, must be deposited in the Secure Choice administrative fund, and are appropriated to the program.

(c) The board must provide covered employers with written warnings for the first year of noncompliance before assessing penalties"

When does the Board have to make its recommendations?

The Board is required to make its recommendations regarding penalties to the Legislative Commission on Pensions and Retirement by December 31, 2024. Laws of Minnesota 2023, Chapter 46, Section 12 is shown on the next page:

Section 12. BOARD TO RECOMMEND PENALTIES TO THE LEGISLATIVE COMMISSION ON PENSIONS AND RETIREMENT.

"No later than December 31, 2024, the board of directors of the Minnesota Secure Choice retirement program **must** (emphasis added) recommend to the Legislative Commission on Pensions and Retirement penalties for failure by covered employers to comply with Minnesota Statutes, section 187.07, subdivisions 1, 2, and 3. The penalties for failure to comply with Minnesota Statutes, section 187.07, subdivision 2 (employer requirement to remit contributions), must be commensurate with penalties for failure to withhold and remit state payroll taxes. For any other compliance failures (not distributing information about the program to employees, not withholding deductions, or not enrolling in the program altogether), the penalty is to be commensurate with penalties imposed by similar programs in other states. The Legislative Commission on Pensions and Retirement must accept or modify the recommendation and recommend legislation for passage during the 2025 legislative session."

Why impose noncompliance penalties?

The MN Secure Choice Program was created to increase retirement savings for employees without access to an employer sponsored retirement plan. While penalties seem harsh, they do motivate people to follow the law. If you look at the states offering programs like MN Secure Choice that impose penalties, they tend to show a higher participation rate than programs without penalties. For example, Colorado, which imposes penalties, and Maryland, which offers a $300 waiver of a business filing fee, started their plans about the same time (2022). Colorado has 142,000 small employers and has 15,000 employers enrolled in the program. Maryland has 107,500 small employers and 4,000 employers have enrolled.

There is a practical reason to impose penalties. I have talked to one record keeper who provides record keeping services for similar programs and to states belonging to a consortium, and they both indicated that they are more willing to enter a business partnership if penalties are imposed. The other record keeper is willing to proceed without penalties, but the price is likely going to be higher.

To date, there are only two record keepers who offer similar programs in other states. They have invested considerable money in establishing the record keeping service and it is expensive to add new states to their record keeping platforms. When a new state starts, the record keeper must spend considerable time working with the state to be able to handle records, prepare communication materials and develop an outreach campaign, host a website for the new program, and to reach out to thousands of employers to set up the payroll interfaces to submit contributions, etc. The record keeping companies are in business to make money and offering a start-up plan carries considerable risk. Having noncompliance penalties helps mitigate that risk by increasing the likelihood that employers will enroll more quickly in the program.

What other states are doing?

It is important to look at other states' noncompliance policies because the law requires that some of the penalties are to be commensurate with penalties imposed in other states. The penalties for noncompliance are relatively inconsistent. The stiffest penalties are imposed by California and Illinois, which impose a penalty of $250 per employee the first year of noncompliance and $500 each year of continued noncompliance. One state, Maryland, does not have penalties but rather offers a waiver of a $300 business filing fee.

I have attached a paper from the Georgetown University, Center for Retirement Initiatives which details the compliance policies from each state currently offering similar programs.

Staff recommendations

The law suggests two different penalties be imposed for noncompliance. They are broken out below:

Situation 1: Employers don't enroll in the program or withhold contributions; or employers who fail to distribute information to the employee in a timely manner. The penalties for these types of noncompliance are to be commensurate with penalties in other states.

Situation 2: Employers withhold contributions but fail to remit them. The penalties for this infraction must be commensurate with penalties for not withholding and remitting state income taxes.

Situation 1: The employer fails to enroll in the program or doesn't deduct contributions, unless the employee has elected not to be covered; or fails to distribute materials in a timely fashion to employees.

These are going to be the most typical infractions. The authors and supporters of the bill likely anticipated that fees for noncompliance be charged, but the Board has the discretion not to impose noncompliance fees. It is reasonable to assume that imposing noncompliance penalties will increase participation rates. The compelling reason for imposing noncompliance penalties is that record keepers or consortiums of other states may not respond to a Request for Proposal (RFP) from Minnesota.

Staff Recommendation for Situation 1: Proposed noncompliance penalties

Based on the possibility that a record keeper or consortium will not respond to a Request for Proposal to administer the Mn Secure Choice Program and that participation rates will be higher with noncompliance penalties, staff recommends that noncompliance penalties be established. The penalties should not be overly punitive and phased in slowly. As stated above, the penalties must be commensurate with other state programs. By law, employers must be given a written warning for the first year of noncompliance before assessing a penalty. I am recommending the following penalties which are commensurate with some states but are imposed slightly more slowly than most states. The penalties get harsher for continued noncompliance.

Proposed Compliance timeline and penalties

Months 1- 6	Employer is notified about there open enrollment window
Months 7 to 18	Written notices of noncompliance to employer – no penalty
Months 19 to 24	Contact employer and send out two certified letters explaining that penalty will be imposed after the 24-month period.

Impose Penalty of $100/employee with a maximum penalty of $4,000

Months 25 to 36 Continue to contact employer and warn employer of upcoming penalty.

Impose penalty of $200/employee with a maximum penalty of $6,000

Months 37 to 48 Continue to contact employer and warn employer of upcoming penalty.

Impose penalty of $300/employee with no maximum penalty.

Each ongoing year Continue to contact employer and warn employer of upcoming penalty.

Impose penalty of $500/employee with no maximum penalty.

Notes:

1. The timing of the noncompliance policy will start on the first date of the beginning of the phased applicable to each employer's phase in schedule (See Agenda # 3).

2. An employer who has not engaged in a business, industry, profession, trade, or other enterprise in Minnesota whether for profit or not for profit at any time during the preceding 12 months are not required to participate in the program.

3. On a continuous basis, employers will reach the five-employee threshold or cross the point where they have been in business, profession, trade, or other enterprise for longer than 12

months. The Board should establish a time each year to contact these newly eligible employers and the noncompliance penalty policy will start when these employers are contacted regarding their required participation.

Situation 2: Employers withhold contributions but fail to remit them.

Employers withholding contributions but failing to remit them in a timely manner will create several serious problems. Contributions will not be invested on time and employees will not realize the investment gains and losses. Also, employees will be unable to withdraw funds that have been deducted from their check, but not yet remitted. Rectifying the problem will become an extra burden on the record keeper and the program staff. Employee confidence in the program will deteriorate. It is likely rare that this issue will arise, and staff should make every effort to make sure employers can properly remit the withholdings.

Under the law, the Board must provide employers with written warnings for the first year of noncompliance before assessing penalties. After the year, the penalty must be commensurate with the penalties for not withholding and remitting Minnesota income taxes. Under Minnesota law, the penalty for not remitting taxes in a timely manner is 5% of the taxes required to be withheld, 5% for each additional 30-day delay. Over time, the penalty may increase to 15% and additional penalties may be applied for repeated instances.

A 5% penalty for not remitting contributions would be quite minimal. For example, an employee making $20 an hour working for 40 hours would earn $800. If the contribution rate is 5%, the contribution would be $40. A 5% penalty imposed on an employer would be $2.00. A 15% penalty would amount to $6.00.

The U.S. Department of Labor (DOL) specifies that contributions should be posted as quickly as reasonably possible but must be deposited no later than the 15th business day of the month immediately following the month in which the contribution is received or withheld.

Staff Recommendation 2: In cases where employers withhold contributions but fail to remit them, the law should be changed so the penalty for noncompliance should not be waived for the first year. If the employer is having technical trouble submitting payrolls, staff should work with them to resolve any issue they may have. If the employer isn't making a good faith effort to submit the contributions properly, staff should report them to the U.S. Department of Labor (DOL) to impose any penalties. The DOL requires that participants be made whole – any investment gains that should have accrued to the participants account must be added. Instead of imposing a penalty on top of what the DOL imposes, the MN Secure Choice Plan should require reimbursement for the cost of making the participant whole, including reimbursement of the cost to the record keeper, program staff and any lost investment earnings. The record keeper will have to collect the contributions that were withheld, put them in each participant's

account, calculate the investment gains and losses, collect any amount due and then add any missed gains to the participant's account.

Future Board Discussion: Enforcement of Penalties

By law, the Attorney General's office is required to enforce noncompliance penalties. However, the Board may want to establish a plan to collect penalties prior to turning things over to the Attorney General. This decision can be made later as the earliest a penalty will be charged is at least 2 years after the program is operational.