

WEST VIRGINIA LEGISLATURE

2024 REGULAR SESSION

Introduced

House Bill 4926

By Delegate Young

[Introduced January 19, 2024; Referred to the
Committee on Pensions and Retirement then
Finance]

1 A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article,
 2 designated §5-32-1, §5-32-2, §5-32-3, §5-32-4, §5-32-5, §5-32-6, §5-32-7, §5-32-8, §5-
 3 32-9, §5-32-10, §5-32-11, §5-32-12, §5-32-13, and §5-32-14, all relating to relating to
 4 retirement; establishing the West Virginia Secure Choice retirement program; providing for
 5 civil penalties; transferring money; and appropriating money.

Be it enacted by the Legislature of West Virginia:

ARTICLE 32. WEST VIRGINIA SECURE CHOICE RETIREMENT PROGRAM.

§5-32-1. Short title.

1 This article shall be known as and may be cited as the "West Virginia Secure Choice
 2 Retirement Program Act."

§5-32-2. Definitions.

1 Applicability. – For purposes of this article, the terms defined in this section have the
 2 meanings given them.

3 "Board" or "board of directors" means the board of directors of the
 4 West Virginia Secure Choice retirement program.

5 "Compensation" means compensation within the meaning of Section 219(f)(1) of the
 6 Internal Revenue Code that is received by a covered employee from, or with respect to service
 7 performed for, a covered employer.

8 "Contribution rate" means the percentage of compensation withheld from a covered
 9 employee's compensation and deposited in an account established for the covered employee
 10 under the program.

11 "Covered employee" means a person who is employed by a covered employer and who
 12 satisfies any other criteria established by the board.

13 Covered employee does not include:

14 (1) A person who, on December 31 of the preceding calendar year, was younger than 18
 15 years of age;

16 (2) A person covered under the federal Railway Labor Act, as amended, United States
17 Code, title 45, sections 151 et seq.;

18 (3) A person on whose behalf an employer makes contributions to a Taft-Hartley
19 multiemployer pension trust fund; or

20 (4) A person employed by the government of the United States, another country, the state
21 of West Virginia, another state, or any subdivision thereof.

22 "Covered employer" means a person or entity:

23 (1) Engaged in a business, industry, profession, trade, or other enterprise in West Virginia,
24 whether for profit or not for profit;

25 (2) That employs five or more covered employees; and

26 (3) That does not sponsor or contribute to and did not in the immediately preceding 12
27 months sponsor or contribute to a retirement savings plan for its employees.

28 Covered employer does not include:

29 (1) An employer that has not engaged in a business, industry, profession, trade, or other
30 enterprise in West Virginia, whether for profit or not for profit, at any time during the
31 immediately preceding 12 months; and

32 (2) A state or federal government or any political subdivision thereof.

33 "Executive director" means the chief executive and administrative head of the program.

34 "Internal Revenue Code" means the Internal Revenue Code of 1986, as amended, United
35 States Code, title 26.

36 "Program" means the Minnesota Secure Choice retirement program.

37 "Retirement savings plan" means a plan or program offered by an employer that permits
38 contributions to be set aside for retirement on a pretax or after-tax basis and permits all employees
39 of the employer to participate except those employees who have not satisfied participation
40 eligibility requirements that are no more restrictive than the eligibility requirements permitted under
41 section 410(b) of the Internal Revenue Code. Retirement savings plan includes but is not limited to

42 a plan described in section 401(a) of the Internal Revenue Code, an annuity plan or annuity
 43 contract described in section 403(a) or 403(b) of the Internal Revenue Code, a plan within the
 44 meaning of section 457(b) of the Internal Revenue Code, a simplified employee pension (SEP)
 45 plan, a savings incentive match plan for employees (SIMPLE) plan, an automatic enrollment
 46 payroll deduction individual retirement account, and a multiemployer pension plan described in
 47 section 414(f) of the Internal Revenue Code.

48 "Secure Choice administrative fund" or "administrative fund" means the fund established
 49 under this article.

50 "Secure Choice trust" or "trust" means a trust established under this code, to hold
 51 contributions and investment earnings thereon under the program.

52 "Roth IRA" means an individual retirement account established under section 408A of the
 53 Internal Revenue Code to hold and invest after-tax assets.

54 "Traditional IRA" means an individual retirement account established under section 408 of
 55 the Internal Revenue Code to hold and invest pretax assets.

§5-32-3. Secure Choice Retirement Program.

1 (a) Program established.

2 (1) The board must operate an employee retirement savings program whereby employee
 3 payroll deduction contributions are transmitted on an after-tax or pretax basis by covered
 4 employers to individual retirement accounts established under the program.

5 (2) The board must establish procedures for opening a Roth IRA, a traditional IRA, or
 6 both a Roth IRA and a traditional IRA for each covered employee whose covered employer
 7 transmits employee payroll deduction contributions under the program.

8 (3) Contributions must be made on an after-tax (Roth) basis, unless the covered employee
 9 elects to contribute on a pretax basis.

10 (b) Compliance with Internal Revenue Code. – The board must establish and
 11 administer each Roth IRA and traditional IRA opened under the program in compliance

12 with section 408 or 408A of the Internal Revenue Code, as applicable, for the benefit of the
13 covered employee for whom the account was opened.

14 (c) Contributions held in trust. – Each covered employer must transmit employee
15 payroll deduction contributions to an account established for the benefit of the covered
16 employee in a trust established to hold contributions under the program.

17 (d) Contribution rate.

18 (1) The board must establish default, minimum, and maximum employee contribution rates
19 and an escalation schedule to automatically increase each covered employee's contribution rate
20 annually until the contribution rate is equal to the maximum contribution rate.

21 (2) A covered employee must have the right, annually or more frequently as determined
22 by the board, to change the contribution rate, opt out or elect not to contribute, or cease
23 contributions.

24 (e) Vesting. – Covered employees are 100 percent vested in their accounts at all
25 times.

26 (f) Withdrawals and distributions. – The board must establish alternatives permitting
27 covered employees to take a withdrawal of all or a portion of the covered employee's account
28 while employed and one or more distributions following termination of employment. Distribution
29 alternatives must include lifetime income options.

30 (g) Individuals not employed by a covered employer. – The board may allow
31 individuals to open and contribute to an account in the program, in which case the individual
32 shall be considered a covered employee for purposes of this article.

33 (h) Employee leasing companies.

34 (1) For purposes of this chapter, in the case of a taxpaying employer described in this
35 article that contracts with an employee leasing company, professional employer organization, or
36 other similar entity to obtain workers for the taxpaying employer from the entity for a fee, the
37 workers covered by the contract must be treated as employed by the taxpaying employer and not

38 by the entity, except that if the entity provides the workers with a retirement savings plan, the
39 taxpaying employer is not a covered employer.

40 (2) A covered employer that is a taxpaying employer described in this article may
41 contract with an employee leasing company, professional employer organization, or other
42 similar entity to assist the taxpaying employer with the performance of some or all of the
43 taxpaying employer's responsibilities under this chapter.

§5-32-4. Establishment Of Secure Choice Trust and Administrative Fund; Employee

Accounts:

Investments.

1 (a) Secure Choice trust established. – The Secure Choice trust is established
2 as an instrumentality of the state to hold employee payroll deduction contributions and
3 earnings on the contributions. The board must appoint a financial institution to act as trustee
4 or custodian. The trustee or custodian must manage and administer trust assets for the
5 exclusive purposes of providing benefits and defraying reasonable expenses of administering
6 the program.

7 (b) Secure Choice administrative fund established; money appropriated.

8 (1) The Secure Choice administrative fund is established in the state treasury as a fund
9 separate and apart from the Secure Choice trust.

10 (2) The board of directors may assess administrative fees on each covered employee's
11 account to be applied toward the expenses of administering the program. Money in the
12 administrative fund is appropriated to the board to pay administrative expenses of
13 administering the program if fees from the trust are not sufficient to cover expenses. The
14 board must determine which administrative expenses will be paid using money in the
15 administrative fund and which administrative expenses will be paid using money in the trust
16 in the exercise of its fiduciary duty.

17 (3) The board may receive and deposit into the administrative fund any gifts, grants,
18 donations, loans, appropriations, or other moneys designated for the administrative fund

19 from the state, any unit of federal or local government, any other entity, or any person.

20 (4) Any interest or investment earnings that are attributable to money in the administrative
21 fund must be deposited into the administrative fund.

22 (c) Individual accounts established. – The trustee or custodian, as applicable, must
23 maintain an account for employee payroll deduction contributions with respect to each
24 covered employee. Interest and earnings on the amount in the account are credited to the
25 account and losses are deducted.

26 (d) Investments. – The board must make available for investment a diversified array
27 of investment funds selected by the State Board of Investment. Members of the board, the
28 executive director and members of the State Board of Investment, and all other fiduciaries
29 are relieved of fiduciary responsibility for investment losses resulting from a covered
30 employee's investment directions. Each covered employee is entitled to direct the investment
31 of the contributions credited to the covered employee's account in the trust and earnings on
32 the contributions into the array of investment funds selected by the State Board of Investment.

33 (e) Default investment fund. – The board must designate a default investment fund
34 that is diversified to minimize the risk of large losses and consists of target date funds, a
35 balanced fund, a capital preservation fund, or any combination of the foregoing funds.
36 Accounts for which no investment direction has been given by the covered employee must
37 be invested in the default investment fund. Members of the board, the executive director of
38 the State Board of Investment, and all other fiduciaries are relieved of fiduciary duty with
39 regard to investment of assets in the default investment fund.

40 (f) Inalienability of accounts. – No account under the program is subject to assignment or
41 alienation, either voluntarily or involuntarily, or to the claims of creditors, except as provided in this
42 article.

43 (g) Accounts not property of the state or covered employers. – The assets of the Secure
44 Choice trust shall be preserved, invested, and expended solely for the purposes of the trust and no

45 property rights in the trust assets shall exist in favor of the state or any covered employer. The
46 assets of the Secure Choice trust shall not be transferred or used by the state for any purpose
47 other than the purposes of the trust, including reasonable administrative expenses of the program.
48 Amounts deposited in the trust shall not constitute property of the state and shall not be
49 commingled with state funds, and the state shall have no claim to or against, or interest in, the
50 assets of the Secure Choice trust.

§5-32-5. Responsibilities of covered employers.

1 (a) Requirement to enroll employees. – Each covered employer must enroll its covered
2 employees in the program and withhold payroll deduction contributions from each covered
3 employee's paycheck, unless the covered employee has elected not to contribute.

4 (b) Remitting contributions. – A covered employer must timely remit contributions
5 as required by the board.

6 (c) Distribution of information. – Covered employers must provide information prepared by
7 the board to all covered employees regarding the program. The information must be provided to
8 each covered employee at least 30 days prior to the date of the first paycheck from which
9 employee contributions could be deducted for transmittal to the program, if the covered employee
10 does not elect to opt out of the program.

11 (d) No fiduciary responsibility. – Except for the responsibilities described in subdivisions 1
12 to 3, a covered employer has no obligations to covered employees and is not a fiduciary for any
13 purpose under the program or in connection with the Secure Choice trust. Covered employers are
14 not responsible for the administration, investment performance, plan design, or benefits paid to
15 covered employees.

16 (e) Employer liability. – A covered employer is not liable to a covered employee
17 for damages alleged to have resulted from a covered employee's participation in or failure
18 to participate in the program.

19 (f) Enforcement.

20 (1) The board may impose statutory civil penalties against any covered employer that fails
21 to comply with this article.

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

26 (3) The board must provide covered employers with written warnings for the first year
27 of noncompliance before assessing penalties.

§5-32-6. Secure Choice Retirement Program Board of Directors.

1 (a) Membership. – The policy-making function of the program is vested in a board of
2 directors consisting of seven members as follows:

3 (1) The executive director of the West Virginia State Retirement System or the executive
4 director's designee;

5 (2) The executive director of the State Board of Investment or the executive director's
6 designee;

7 (3) Three members chosen by the Legislative Commission on Pensions and Retirement,
8 one from each of the following experience categories:

9 (A) Executive or operations manager with substantial experience in record keeping 401(k)
10 plans;

11 (B) Executive or operations manager with substantial experience in individual retirement
12 accounts; and

13 (C) Executive or other professional with substantial experience in retirement plan
14 investments;

15 (4) A human resources or retirement benefits executive from a private company with
16 substantial experience in administering the company's 401(k) plan, appointed by the governor;
17 and

18 (5) A small business owner or executive appointed by the governor.

19 (b) Appointment. – Members appointed by the governor must be appointed as
20 provided in this article.

21 (c) Membership terms.

22 (1) Board members serve for two-year terms, except for the executive directors of the West
23 Virginia State Retirement System and the State Board of Investment, who serve indefinitely.

24 (2) Board members' terms may be renewed, but no member may serve more than two
25 consecutive terms.

26 (d) Resignation; removal; vacancies.

27 (1) A board member may resign at any time by giving written notice to the board.

28 (2) A board member may be removed by the appointing authority and a majority vote of the
29 board following notice and hearing before the board. For purposes of this subdivision, the chair
30 may invite the appointing authority or a designee of the appointing authority to serve as a voting
31 member of the board if necessary to constitute a quorum.

32 (3) If a vacancy occurs, the Legislative Commission on Pensions and Retirement or the
33 governor, as applicable, shall appoint a new member within 90 days.

34 (e) Compensation. – Public members are compensated and expenses reimbursed as
35 provided under this article.

36 (f) Chair. – The board shall select a chair from among its members. The chair shall
37 serve a two-year term. The board may select other officers as necessary to assist the board
38 in performing the board's duties.

39 (g) Executive director; staff. – The board must appoint an executive director,
40 determine the duties of the director, and set the compensation of the executive director. The
41 board may also hire staff as necessary to support the board in performing its duties.

42 (h) Duties. – In addition to the duties set forth elsewhere in this chapter, the board
43 has the following duties:

- 44 (1) To establish secure processes for enrolling covered employees in the program and for
45 transmitting employee and employer contributions to accounts in the trust;
- 46 (2) To prepare a budget and establish procedures for the payment of costs of administering
47 and operating the program;
- 48 (3) To lease or otherwise procure equipment necessary to administer the program;
- 49 (4) To procure insurance in connection with the property of the program and the activities of
50 the board, executive director, and other staff;
- 51 (5) To determine the following:
- 52 (A) Any criteria for a covered employee other than employment with a covered employer
53 under this article;
- 54 (B) Contribution rates and an escalation schedule under this article;
- 55 (C) Withdrawal and distribution options under this article; and
- 56 (D) The default investment fund under this article;
- 57 (6) to keep annual administrative fees, costs, and expenses as low as possible:
- 58 (A) except that any administrative fee assessed against the accounts of covered
59 employees may not exceed a reasonable amount relative to the fees charged by auto-IRA or
60 defined contribution programs of similar size in the state of West Virginia or another state; and
- 61 (B) the fee may be asset-based, flat fee, or a hybrid combination of asset-based and flat
62 fee;
- 63 (7) To determine the eligibility of an employer, employee, or other individual to participate in
64 the program and review and decide claims for benefits and make factual determinations;
- 65 (8) To prepare information regarding the program that is clear and concise for
66 dissemination to all covered employees and includes the following:
- 67 (A) The benefits and risks associated with participating in the program;
- 68 (B) Procedures for enrolling in the program and opting out of the program, electing a
69 different or zero percent employee contribution rate, making investment elections, applying for a

70 distribution of employee accounts, and making a claim for benefits;

71 (C) The federal and state income tax consequences of participating in the program, which
72 may consist of or include the disclosure statement required to be distributed by retirement
73 plan trustees or custodians under the Internal Revenue Code and the Treasury Regulations
74 thereunder;

75 (D) How to obtain additional information on the program; and

76 (E) Disclaimers of covered employer and state responsibility, including the following
77 statements:

78 (i) Covered employees seeking financial, investment, or tax advice should contact their
79 own advisors;

80 (ii) Neither a covered employer nor the state of West Virginia are liable for decisions
81 covered employees make regarding their account in the program;

82 (iii) Neither a covered employer nor the state of West Virginia guarantees the accounts in
83 the program or any particular investment rate of return; and

84 (iv) Neither a covered employer nor the state of West Virginia monitors or has an obligation
85 to monitor any covered employee's eligibility under the Internal Revenue Code to make
86 contributions to an account in the program, or whether the covered employee's contributions
87 to an account in the program exceed the maximum permissible contribution under the
88 Internal Revenue Code;

89 (9) To publish an annual financial report, prepared according to generally accepted
90 accounting principles, on the operations of the program, which must include but not be
91 limited to costs attributable to the use of outside consultants, independent contractors, and
92 other persons who are not state employees and deliver the report to the chairs and ranking
93 minority members of the legislative committees with jurisdiction over jobs and economic
94 development and state government finance, the executive directors of the State Board of
95 Investment and the Legislative Commission on Pensions and Retirement, and the Legislative

96 Reference Library;

97 (10) To publish an annual report regarding plan outcomes, progress toward savings goals
98 established by the board, statistics on the number of participants, participating employers,
99 and covered employees who have opted out of participation, plan expenses, estimated impact
100 of the program on social safety net programs, and penalties and violations, and disciplinary
101 actions for enforcement, and deliver the report to the chairs and ranking minority members
102 of the legislative committees with jurisdiction over jobs and economic development and
103 state government finance, the executive directors of the State Board of Investment and the
104 Legislative Commission on Pensions and Retirement, and the Legislative Reference Library;

105 (11) To file all reports required under the Internal Revenue Code or chapter 290;

106 (12) To, at the board's discretion, seek and accept gifts, grants, and donations to be used
107 for the program, unless such gifts, grants, or donations would result in a conflict of interest
108 relating to the solicitation of service provider for program administration, and deposit such
109 gifts, grants, or donations in the Secure Choice administrative fund;

110 (13) To, at the board's discretion, seek and accept appropriations from the state or loans
111 from the state or any agency of the state;

112 (14) To assess the feasibility of partnering with another state or a governmental subdivision
113 of another state to administer the program through shared administrative resources and, if
114 determined beneficial, enter into contracts, agreements, memoranda of understanding, or other
115 arrangements with any other state or an agency or subdivision of any other state to administer,
116 operate, or manage any part of the program, which may include combining resources,
117 investments, or administrative functions;

118 (15) To hire, retain, and terminate third-party service providers as the board deems
119 necessary or desirable for the program, including but not limited to the trustees, consultants,
120 investment managers or advisors, custodians, insurance companies, recordkeepers,
121 administrators, consultants, actuaries, legal counsel, auditors, and other professionals,

122 provided that each service provider is authorized to do business in the state;

123 (16) To interpret the program's governing documents and this chapter and make all other
124 decisions necessary to administer the program;

125 (17) To conduct comprehensive employer and worker education and outreach regarding
126 the program that reflect the cultures and languages of the state's diverse workforce population,
127 which may, in the board's discretion, include collaboration with state and local government
128 agencies, community-based and nonprofit organizations, foundations, vendors, and other
129 entities deemed appropriate to develop and secure ongoing resources; and

130 (18) To prepare notices for delivery to covered employees regarding the escalation
131 schedule and to each covered employee before the covered employee is subject to an
132 automatic contribution increase.

133 (i) Rules. – The board of directors is authorized to adopt rules as necessary to
134 implement this chapter.

135 (j) Conflict of interest; economic interest statement. – No member of the board
136 may participate in deliberations or vote on any matter before the board that will or is likely
137 to result in direct, measurable economic gain to the member or the member's family. Members
138 of the board shall file with the Campaign Finance and Public Disclosure Board an economic
139 interest statement in a manner as prescribed by this article.

§5-32-7. Fiduciary duty; standard of care.

1 (a) The members of the board, the executive director of the program, the executive director
2 and members of the State Board of Investment, and any person who controls the disposition or
3 investment of the assets of the Secure Choice trust:

4 (1) Owe a fiduciary duty to the covered employees who participate in the program and
5 their beneficiaries;

6 (2) Must administer the program solely for the exclusive benefit of such covered
7 employees and their beneficiaries, and for the exclusive purpose of providing benefits and

8 paying reasonable plan expenses;

9 (3) Are subject to the standard of care established in this article and

10 (4) Are indemnified and held harmless by the state of West Virginia for the reasonable
11 costs, expenses, or liability incurred as a result of any actual or threatened litigation or
12 administrative proceeding arising out of the performance of the person's duties.

13 (b) Except as otherwise established in this chapter, the fiduciaries under paragraph (a)
14 owe no other duty to covered employees, express or implied, in common law or otherwise.

§5-32-8. No state liability.

1 The state has no liability for the payment of, the amount of, or losses to any benefit to
2 any participant in the program.

§5-32-9. Other state agencies to provide assistance.

1 (a) The board may enter into intergovernmental agreements with the commissioner of
2 revenue, the commissioner of labor and industry, and any other state agency that the board
3 deems necessary or appropriate to provide outreach, technical assistance, or compliance
4 services. An agency that enters into an intergovernmental agreement with the board pursuant
5 to this section must collaborate and cooperate with the board to provide the outreach,
6 technical assistance, or compliance services under any such agreement.

7 (b) The commissioner of administration must provide office space in the Capitol complex
8 for the executive director and staff of the program.

§5-32-10. West Virginia Secure Choice Retirement Program; Start of Operations.

1 (a) Program start; phasing.

2 (1) The board of directors of the West Virginia Secure Choice retirement program must
3 begin operation of the secure choice retirement program under this article no earlier than January
4 1, 2025.

5 (2) The board of directors must open the program in phases, and the last phase must be
6 opened no later than two years after the opening of the first phase.

7 (b) Board appointments; first meeting. – Appointing authorities must make appointments to
 8 the board of directors under this article. The Legislative Commission on Pensions and Retirement
 9 must designate one member of the board to convene the first meeting of the board of directors,
 10 which must occur by March 1, 2024. At the first meeting, the board shall elect a chair.

§5-32-11. Board support until appointment of executive director.

1 With the assistance of the Legislative Coordinating Commission, the executive director
 2 of the Legislative Commission on Pensions and Retirement must:

3 (1) Provide notice to members of the board regarding the first meeting of the board and
 4 work with the member designated under this article to determine the agenda and provide meeting
 5 support; and

6 (2) Serve as the interim executive director to assist the board until the board completes
 7 the search, recruitment, and interview process and appoints the executive director under
 8 this article.

§5-32-12. Board To Recommend Penalties to the Legislative Commission on Pensions and Retirement.

1 No later than December 31, 2024, the board of directors of the West Virginia Secure
 2 Choice retirement program must recommend to the Legislative Commission on Pensions and
 3 Retirement penalties for failure by covered employers to comply with this article. The penalties for
 4 a failure to comply with this article must be commensurate with penalties for failure to remit state
 5 payroll taxes and, for any other compliance failure, commensurate with penalties under similar
 6 programs in other states. The Legislative Commission on Pensions and Retirement must accept
 7 or modify the recommendation and recommend legislation for passage during the 2025 legislative
 8 session.

§5-32-13. Transfer.

1 \$5,000,000 in fiscal year 2024 is transferred from the Legislature's General Revenue fund
 2 to the Secure Choice administrative fund established under this article to establish and administer

3 the Secure Choice retirement program.

§5-32-14. _____ **Effective** _____ **date.**

1 This article shall be effective upon enactment.

NOTE: The purpose of this bill is to establish the West Virginia Secure Choice retirement program. The bill provides for civil penalties. The bill transfers money. Finally, the bill appropriates money.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.