



# THE ERISA INDUSTRY COMMITTEE

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*Advocating the Benefit and Compensation Interests of America's Major Employers*

## The ERISA Industry Committee's Position on Automatic Enrollment Arrangements

### *The ERISA Industry Committee (ERIC<sup>1</sup>) Applauds Support for Automatic Enrollment Arrangements*

Automatic enrollment arrangements in § 401(k) and other employer-sponsored retirement savings plans increase employee participation and raise retirement savings levels among America's workers. ERIC applauds efforts to support automatic enrollment arrangements and looks forward to working with the Administration and Congress to develop regulations and legislation that (1) facilitate automatic enrollment, (2) provide adequate fiduciary protection to those who manage plans with automatic enrollment features, and (3) supersede state laws that conflict with and hamper employers' ability to offer automatic enrollment programs.

#### **ERIC emphasizes the following points:**

- **Plans with automatic enrollment should be eligible for immediate protection under ERISA § 404(c).**

Many employers will not adopt automatic enrollment arrangements without adequate protection from fiduciary liability under ERISA § 404(c). Therefore, it is essential that Congress provide explicit protection from fiduciary liability under plans providing that contributions made by automatically-enrolled participants will be invested in the default investment option designated by the plan. This protection is both necessary and it is warranted, since automatic enrollment does not undermine the participant control that is the essential element of §404(c) applicability. Accordingly, §404(c) protection should be effective as of the legislation's effective date; the protection should not be contingent on the issuance of future administrative guidance.

- **Lawmakers must allow employers and plan fiduciaries to have the flexibility to select or create the investment options used as default investments in an automatic enrollment arrangement if they so choose.**

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<sup>1</sup> ERIC is a nonprofit association committed to the advancement of the employee benefit plans of America's major employers. ERIC's members' plans are the benchmarks against which industry, third-party providers, consultants, and policy makers measure the design and effectiveness of employee benefit, incentive, and compensation plans. ERIC's members are engaged daily with meeting the demands of both their enterprise and the needs of employees. ERIC, therefore, is vitally concerned with proposals affecting its members' ability to provide employee benefits, incentive, and compensation plans, their costs and effectiveness, and the role of those plans in the American economy.

Although it is appropriate for Congress to set standards that a default investment option must meet or suggest investment vehicles that may be appropriate investment options for automatic enrollment arrangements, Congress must also allow plan sponsors to have the flexibility to create the specific design and investment characteristics of default investment options if they so choose.

- **Congress should clarify that ERISA preempts all state laws relating to automatic enrollment (and automatic contribution increase) arrangements.**

Congress should make clear that ERISA preempts all state laws (whether civil or criminal) relating in any way to automatic enrollment (and automatic contribution increase) arrangements. Without assurance that they will not be accused of violating state laws related to payroll or withholding, many employers will be reluctant to adopt automatic enrollment (and automatic contribution increase) arrangements.

- **Automatic enrollment should be an employer design option. It should not be a mandatory feature of any § 401(k) plan.**

Automatic enrollment should be an option, not a mandate. A mandate that all § 401(k) plans include an automatic enrollment feature will discourage some employers from adopting or continuing § 401(k) plans.

- **Regulations or legislation governing automatic enrollment should apply to all § 401(k) plans, not just safe harbor plans, and should not require any specific design contribution requirements.**

Automatic enrollment should be available to all §401(k) plans, not just to those incorporating the § 401(k) safe harbor design. Because automatic enrollment will expand employee participation in § 401(k) plans and will increase employees' retirement savings, automatic enrollment should be widely available as a design option under all § 401(k) plans. Furthermore, automatic enrollment should not require any specific design contribution requirements, such as mandated employer matching contributions. Such schemes fail to take into consideration other retirement benefits that employers may provide for their employees or the employer's financial condition, and may discourage broad adoption of automatic enrollment features.

- **Plans with automatic enrollment should be subject to the same participation, coverage, nondiscrimination, and vesting requirements that apply to other plans, and should not be subject to additional participation, coverage, nondiscrimination, or vesting requirements.**

§401(k) plans with automatic enrollment features should not be subjected to additional testing beyond that which is required for §401(k) plans that do not have that feature. It will be counter-productive to make automatic enrollment available only to plans meeting stringent new requirements. Imposing such requirements will: (1) make the cost of administering those plans

unaffordable for employers, (2) discourage employers from using automatic enrollment and (3) fail to expand employee participation.

Moreover, large employers will find it impossible to meet stringent new participation requirements. Even with an automatic enrollment arrangement, employers with large, complex workforces or with multiple plans covering various segments of its workforce or covering separate lines of business will not be able to sponsor a plan that meets a stringent new participation requirement.

- **Plans should have flexibility regarding automatic enrollment start dates.**

Employers who may experience high employment turnover in one or more sectors of their workforce need the flexibility to bring workers into their plans under an automatic enrollment arrangement that best suits their workforce. Plans with automatic enrollment should be subject to the same participation requirements and have the same flexibility as other plans. If they are not, employers will be discouraged from adopting automatic enrollment features.

- **Plans should be permitted, but not required, to provide for automatic increases in employee contribution rates.**

For a variety of reasons, including inertia, many participants fail to increase their contribution rates over time, even though they have the means to do so. Automatic enrollment arrangements often provide for automatic increases in contribution rates for employees who do not affirmatively elect to contribute or increase contributions to the plan. Automatic increases in participant contribution rates should be an optional feature of all plans, including both plans with automatic enrollment features and plans without them and should be available both for participants who are automatically enrolled and for participants who affirmatively elect to participate. Employers should have the flexibility to provide for automatic increases in contribution rates separate from any automatic enrollment feature.

- **The Government should not mandate the design of automatic contribution increase features.**

Mandatory increases in employee contribution rates, particularly if linked with mandatory matching employer contributions, will make automatic enrollment cost-prohibitive for many employers. In order to encourage employers to adopt automatic enrollment arrangements, Congress should not mandate increases in employee contribution rates. Employers should instead have the flexibility to design automatic contribution increase features to fit their budgets, the terms of their plans, and the needs of their employees.

- **Plans with automatic enrollment should not be required to include “unwind” provisions, but should be allowed (but not required) to include early, penalty-free distribution provisions for employees who wish to opt out of the plan during a brief period after the first contribution is made on their behalf.**

Mandatory unwind distributions will create severe administrative burdens for many employers. Employers will be obligated to create costly administrative systems to accurately compute earnings on distributions and calculate retroactive withholding. Furthermore, unwind distributions may be subject to redemption fees that cannot be waived by the employer. With adequate notice and a reasonable time to opt out of the plan before contributions begin, unwind distributions will not be necessary. Therefore, ERIC members urge legislators to create optional, rather than mandatory, early distribution provisions in automatic enrollment legislation. Such provisions would give an employee who has been automatically enrolled a chance to make a withdrawal from the plan, free of any tax-penalty, within a short period (of no more than 30 days) after the employee has been notified that the first contribution has been withheld from the employee's pay, (i.e., 30 days after the employee receives his pay stub). This provision should permit automatically-enrolled participants to withdraw only their initial contributions, not any future contributions that result from automatic increases in their contribution rates (if the plan provides for automatic increases in employee contribution rates).

- **Employee automatic enrollment notices should be deliverable via electronic communication**

Any automatic enrollment legislation should clearly provide that any required employee notices can be given electronically. The standards that have already been established by the Department of Labor for the determination of the appropriateness of electronic dissemination of participant communications should also be applied to the distribution of electronic notices related to automatic enrollment.

- **Automatic enrollment should be permissible under a Roth § 401(k) plan as well as a traditional § 401(k) plan.**

Automatic enrollment legislation should make clear that automatic enrollment arrangements can be implemented for Roth 401(k) plans as well as 401(k) plans.