

# BENEFITS LAW JOURNAL

From the Editor

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## Negative Elections Are Positive for Workers

People save significantly more if it is effortless. Because the easiest thing to do is nothing, a workplace savings program that automatically deducts and invests a portion of each employee's paycheck unless she otherwise elects is incredibly successful in getting non-savers to save, and savers to save more. Yet, in a misguided effort to "protect" American workers from themselves and overzealous employers and program administrators, some regulators and lobbying groups wish to stymie negative elections in savings program.

Exhibit A is the (unsuccessful) attack on state-run auto-IRA savings programs. The claim is that, despite easily understood advance notice and user-friendly opt-out procedures, an employee's automatic payroll savings are somehow not completely voluntary. (Note, an IRA funded solely with payroll withholdings may lose Department of Labor ERISA safe harbor protection if the workers' contribution elections are not "completely voluntary.") No court has ruled that auto-savings are involuntary or otherwise inappropriate. Yet, it has been argued that a district court injunction against enrolling children in a single sex middle school because of a deeply flawed election process was not completely voluntary somehow extends to IRAs. Really?! A better approach to automatic savings is to examine whether: a do-over is possible; the consequences of inaction; the ease of communicating the choice; and how people make decisions.

First, the cost of a "do-over" of unwanted saving in a Roth IRA ranges from low to nothing. The contribution can be quickly returned

tax-free by the worker's requesting a withdrawal, typically via the web or a phone call. Of course, any investment income – likely to be slight – would be taxable and possibly subject to a 10 percent penalty tax on certain early distributions. Importantly, the tax hit is on income that would not have been earned but for the savings. There also may be a slight account charge during the short time it took to undo the contributions, although programs typically do not charge a fee on these short-term accounts.

Second, is the long-term cost/benefit of inaction. Someone who does nothing and is thereby auto-enrolled in a retirement program experiences lower current spending and a growing pool of money readily accessible for retirement or other financial needs. With an opt-in program, the cost of inaction is reaching retirement age, when the person does not want to or physically cannot work and yet does not have enough other income and resources to get by. The cost of inaction is much higher in an opt-in a savings program.

The third consideration is ease of communication. With automatic savings, the message is simple: “We will withhold X percent of your pay starting next month and invest it in an IRA in your name, unless and until you click, call or write to tell us otherwise.” Even someone who ignores the message will be put on notice with the first paycheck deduction. If saving is not right for that person, he or she can quickly arrange for a do-over. Indeed, roughly 32 percent of participants opt-out of contributing to the three operating auto-IRAs in Oregon, Illinois, and California, showing that the communication and enrollment process is effective in making participation completely voluntary.

Finally, consider that most people want the auto-enrollment savings nudge. The when, where, and how much of the savings decision is hard for many people (except economists), especially with the siren song of instant spending gratification. Tough decisions get postponed. Proof is company 401k plans and auto-IRAs that use auto-enrollment: most folks stay with the program and save at the default contribution rate, while only a minority opt-out. (The participation rate is higher in 401ks than auto-IRAs due to the former typically matching employee contributions and the higher income level/job security of the workforce.)

Doing nothing is a choice that automatic enrollment can turn into a positive step towards financial security.

*The views set forth herein are the personal views of the author and do not necessarily reflect those of the law firm with which he is associated.*

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