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From the Editor

The First State Auto IRA Is Up, Running, and Working—So Why Do Some Business Groups Want These Plans to Fail?

As we go to press, a leading business trade group, backed by faulty legal "advice," is aiming to kill state automatic individual retirement accounts (IRAs). Their immediate target is OregonSaves, which launched the first such pilot program this summer, with similar programs in development in Illinois, California, Maryland, and Connecticut. (Full disclosure, my firm is working with a number of these states.)

In a nutshell, auto IRAs are a way for in-state employees at some private sector companies that don't offer a 401(k) or other retirement plan to contribute a portion of their pay to a Roth or traditional IRA curated (but not operated) by a state-appointed board. In the Oregon program now operating, 5 percent of eligible workers' pay is automatically directed into the savings program—although workers can opt out entirely, choose a different savings rate, or withdraw their savings at any time, without penalty on the principal. (Depending on circumstances, there may be a federal tax penalty on the early withdrawal of investment earnings.) Although Oregon is the steward supervising the program and the employers serve as a conduit for fund contributions, the auto IRAs themselves are administrated entirely by a team of a private sector and professional recordkeeper, trustee, custodian, and money manager.

The results so far? Oregon's first two pilot programs have enabled 1,000 employees in mostly micro and small businesses to set aside

$200,000 in retirement savings in just a couple of months. The employee opt-out rate is around 30 percent; low enough to show the program is being well-received but high enough to show that those not wishing to save have had no trouble disengaging. As the program officially took effect statewide on November 15 for businesses with 100 or more employees and no retirement plan, thousands more are benefiting. That isn't surprising; a decade of experience with 401(k) plans, along with research by numerous behavioral economists, including 2017 Nobel Laureate Richard Thaler, clearly demonstrates that auto enrollment and payroll withholding are extremely effective tools for nudging people to act in their own interest, while also fully protecting their right to make their own decisions.

Until now, critics have tried to argue that state auto IRAs are really ERISA-regulated pension plans and, thus, subject to complex reporting, disclosure, and fiduciary rules. They also claim that mandating certain employers to make the program available amounts to unlawful state interference with federal retirement policy set out in the Employee Retirement Income Security Act (ERISA). However, a 1975 US Department of Labor (DOL) safe harbor provides that a payroll deduction IRA is not an ERISA plan, as long as employee participation is completely voluntary and the company does not contribute to, endorse, or get kickbacks from the program. Every state auto IRA is designed to comply with this safe harbor.

The latest legal attack is easily brushed aside: OregonSaves IRAs are not "real" IRAs under Internal Revenue Code Section 408 requirements and, thus, do not qualify for the DOL safe harbor. That would be true only if the IRA monies were held by the state, because by law only an insurance company, bank, or approved non-bank custodian can maintain an IRA. In fact, Oregon's role is as a facilitator. The IRAs themselves are maintained and trusteed by Ascensus, and all assets are held by The Bank of New York Mellon in custody—both qualified and well-respected independent financial institutions—and fully compliant with tax code rules.

Among the other legal objections around the DOL safe harbor is that automatic enrollment in any payroll withholding IRA, even with advance notice and an easy opt-out, is merely voluntary but not "completely voluntary" for the employee, as required by the 1975 DOL safe harbor. Even if there was a semantic distinction, the clear and simple process for employees to opt-out, withdraw their savings, or change their rate of deduction at any time without penalty is as voluntary, completely or otherwise, as an affirmative election.

Granted, the DOL in 2016 did state that auto enrollment IRA contributions were not "completely voluntary" and, accordingly, added a layer of safe harbor protection extended specifically to state-based IRA payroll withholding programs. However, that ruling became moot when Congress subsequently revoked the new safe harbor under the Congressional Review Act. By law, the safe harbor issue is now considered a complete "do-over"—as if the 2016 DOL guidance on the voluntariness of auto enrollment never happened.

It should be noted that the DOL had misconstrued a well-established benefit enrollment technique and that no case law has found automatic enrollment *not* to be voluntary, completely or otherwise. (Opponents to the Oregon program have cited a court case involving an opt-out approach for parents to choose whether to enroll their children in a same sex or coed public school, but to apply it to payroll withholding is absurd.)

The latest legal attack also alleges that employers have too much control and involvement in Oregon's auto IRAs to satisfy the 1975 DOL safe harbor. In fact, Oregon employers have *zero* say in the program's default contribution rate, the type of IRA (Roth or traditional), the plan investments, selecting service providers, or the withdrawal and distribution rules, to name a few. Rather, the employer's only responsibility is withholding and delivering its employees' payroll contributions to the outside professional IRA administrator. (Ironically, private employers have significantly *more* decision-making power in a regular, non-ERISA payroll program, because the employer must decide to offer the program, choose the vendor, and establish an enrollment process.)

The 55 million employees nationwide who currently lack access to any savings vehicle at work, and their employers, deserve better than to have the only simple, inexpensive, and workable program currently available stymied by factually inaccurate and incorrect legal reasoning.

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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