

AUTOMATIC CONTRIBUTION ARRANGEMENT CHARACTERISTICS

	Automatic enrollment (non-statutory ACA)¹	Automatic Contribution Arrangement (ACA)	Eligible Automatic Contribution Arrangement (EACA)	Qualified Automatic Contribution Arrangement (QACA)
Description	Old style “negative election”	Basic PPA automatic enrollment	Automatic enrollment with withdrawals	401(k) safe harbor automatic enrollment
Effective date	N/A	December 24, 2007	January 1, 2008	January 1, 2008
Legal authority	None	ERISA §514(e)	Code §414(w)	Code §401(k)(13)
Regulations	Treas. Reg. §1.401(k)-1(a)(3)(ii)	DOL Reg. 2550.404c-5(f)(1)	Prop. Treas. Reg. 1.414(w)-1	Prop. Treas. Reg. 1.401(k)-3
Plan type	Any deferral plan	Any deferral plan subject to ERISA	401(k), 403(b), governmental 457(b)	401(k), 403(b)
State law preempted²	Yes	Yes	Yes	Yes
Fiduciary protection for default investments	No unless plan follows QDIA rules	Yes	Yes	No unless plan follows QDIA rules
90-day withdrawal³	No	Yes if EACA	Yes	Yes if EACA
6-month ADP correction period without penalty	No	Yes if EACA	Yes	Yes if EACA
Subject to ADP/ACP test⁴	Yes	Yes	Yes	No
Can be top-heavy exempt⁵	No	No	No	Yes
Requires participant direction of investment	No, but can do so	Yes	Yes	No, but can do so
Must follow QDIA rules⁶	No, but can do so	Yes	Yes ⁷	No, but can do so
Can be EACA	No	Yes	N/A	Yes
Uniformity required	No	Yes ⁸	Yes ⁹	Yes ⁹
Can exclude from auto deferral any participant with prior affirmative election¹⁰	Yes	Uncertain	Yes	Yes
Can exclude from auto deferral any participant previously deferring more than default percentage¹¹	Yes	Uncertain	Yes	Yes
Minimum default deferral percentage	No	No	No	Yes ¹²
Maximum default deferral percentage	No	No	No	10%
Employer contribution required	No	No	No	Yes ¹³
Plan provision required¹⁴	Yes	Yes	Yes	Yes
Deadline for plan amendment¹⁵	Last day of plan year	Last day of plan year	Last day of plan year	Prior to start of plan year unless plan uses “maybe” notice ¹⁶
Annual notice required	Arguably, yes ¹⁷	Yes	Yes	Yes
Notice deadline¹⁸	Reasonable time before start of plan year	Reasonable time, at least 30 days before start of plan year	Reasonable time, at least 30 days before start of plan year	Reasonable time before start of plan year, with 30-90 days deemed reasonable
\$1,100/day penalty if notice not given¹⁹	Arguably yes	Yes	Yes	Yes if ACA. Otherwise, arguably yes

¹ A non-statutory ACA refers to an automatic enrollment plan which does not satisfy one or more of the conditions of an automatic contribution arrangement described in ERISA §514(e)(2). Most often, that would happen when a plan chooses not to comply with the QDIA regulations.

² ERISA §514(e) preempts state laws which prohibit or restrict automatic contribution arrangements. DOL Reg. §2550-404c-5(f)(2) expands that protection to all automatic enrollment plans. ERISA preemption applies only to plans subject to ERISA.

³ A EACA can allow participants to withdraw default automatic contributions, plus earnings. The participant must request the distribution no later than the 90th day after the payday of the first automatic deferral.

401(k) Plans

- 4 A 401(k) plan is subject to the ADP test unless it complies with one of three safe harbors: SIMPLE 401(k) under Code §401(k)(11), classic safe harbor under Code §401(k)(12), or QACA under Code §401(k)(13). Any plan with matching contributions is subject to the ACP test unless it is a SIMPLE 401(k) or it complies with the ACP safe harbor (see Code §401(m)(11) and (12)) and either the classic safe harbor or the QACA rules. Any 401(k) automatic enrollment plan could qualify for any of these safe harbors, but the safe harbor provisions are built in to the QACA rules.
- 5 A SIMPLE 401(k) is exempt from top-heavy under Code §416(g)(4)(G). A classic safe harbor 401(k) or a QACA are exempt from top-heavy under Code §416(g)(4)(H) if the plan consists solely of exempt elective deferrals, required employer contributions, and matching contributions which satisfy the ACP safe harbor. Any 401(k) automatic enrollment plan could qualify for the exemption by using one of these safe harbors, but the top-heavy exemption potential is built in to a QACA.
- 6 QDIA refers to the qualified default investment alternative rules under DOL Reg. §2550-404c-5(a)-(e).
- 7 A technical corrections bill currently before Congress would eliminate the requirement that EACAs follow the QDIA rules. If this bill becomes law, then several issues relating to EACAs would change, including the requirement of participant direction of investments and fiduciary protection of investments.
- 8 DOL Reg. §2550.404c-5(f)(1) requires that an ACA provide for a uniform default deferral percentage. The regulations do not state any exceptions to the uniformity requirement.
- 9 Both the EACA and the QACA proposed regulations require a uniform default deferral percentage. The regulations provide three exceptions to uniformity, other than those listed in the table relating to participants subject to the default deferrals: (1) the percentage can vary based on the number of years of participation in the automatic enrollment arrangement; (2) the deferrals will not violate the 401(a)(17), 402(g), or 415 limits; and (3) the plan can enforce the prohibition on deferrals during 6 months following a hardship distribution under Treas. Reg. §1.401(k)-1(d)(3)(iv)(E)(2).
- 10 Prop. Treas. Reg. §1.401(k)-3(j)(1)(iii) allows a QACA to exclude from automatic deferrals employees who have a prior affirmative election, including an election to defer nothing or to defer a lesser amount than the QACA default percentage. There is no such exclusion for EACAs, but see the next endnote.
- 11 Prop. Treas. Reg. §1.401(k)-3(j)(2)(iii) allows a QACA to exclude from automatic deferrals employees who are deferring more than the default percentage. Prop. Treas. Reg. §1.414(w)-1(b)(2) provides this option to EACAs.
- 12 The default deferral percentage cannot be less than 3% during the first two plan years of participation, 4% during the 3rd year, 5% during the 4th year, or 6% thereafter.
- 13 The must make a nonelective contribution of at least 3% or a scripted matching contribution. A match of 100% of elective deferrals up to 1% of compensation, plus 50% between 1% and 6% is acceptable as is an "enhanced" match. The contributions are subject to 401(k) withdrawal restrictions and are not available for hardship distributions. The plan may apply a 2-year cliff vesting schedule to these contributions.
- 14 Any automatic contribution arrangement, including the default deferral percentage, must be in the plan document. All conditions and plan choices relating to a QACA must be in the plan document. Prop. Treas. Reg. §1.401(k)-3(e)(1). If a EACA will allow 90-day withdrawal privileges, then the conditions of the withdrawal (and presumably the provisions relating to the EACA itself) must be in the document. Prop. Treas. Reg. §1.414(w)-1(c)(1).
- 15 PPA §1107 allows plans to wait until the last day of the 2009 plan year to adopt amendments related to PPA provisions. This should include provisions implementing ACAs, EACAs, and QACAs. The preamble to the automatic enrollment regulations, in discussing the deadline to adopt QACA amendments, specifically references the PPA provision.
- 16 QACAs are subject to the same plan amendment rules as classic safe harbor plans. Prop. Treas. Reg. §1.401(k)-3(e)(1). This requires that the plan language implementing the QACA be in the document by the start of the plan year and remain in the document throughout the plan year unless an exception applies. Such an exception is the Treas. Reg. §1.401(k)-3(f) contingent ("maybe") notice for a nonelective contribution safe harbor. Thus, the maybe notice rules apply to QACAs.
- 17 Because of the DOL's interpretation of state law preemption under ERISA §514(e) as applying to all automatic enrollment arrangements, it is possible that the DOL may interpret the required notice of ERISA §514(e)(3) as similarly applying to all automatic enrollment arrangements. If so, then a plan which failed to provide the notice a reasonable time before the start of the plan year is potentially subject to an \$1,100 per day penalty under ERISA §502(c)(4). Accordingly a conservative practitioner will provide the notice, which should explain (1) the participant's right to make a contrary election, and (2) how automatic deferrals will be invested in the absence of a participant investment election (if permitted).
- 18 The notice must also be provided early enough that the participant has a reasonable time to make a contrary election. For both the QACA and EACA, that requirement is deemed satisfied if the plan gives the notice 30-90 days prior to the start of the plan year, or, in the case of a newly eligible participant, within the 90 days prior to and including the date of eligibility. However, to comply with the QDIA rules, the EACA must provide the notice at least 30 days prior to the start of the plan year.
- 19 The \$1,100 per day penalty of ERISA §502(c)(4) explicitly applies to all ACAs subject to ERISA, and therefore applies to all EACAs (and to QACAs which are EACAs) subject to ERISA. Because of the DOL's interpretation of state law preemption under ERISA §514(e) as applying to all automatic enrollment arrangements, it is possible that the DOL may interpret the required notice of ERISA §514(e)(3) as similarly applying to all automatic enrollment arrangements. If so, then a plan which failed to provide the notice a reasonable time before the start of the plan year is potentially subject to an \$1,100 per day penalty under ERISA §502(c)(4).